IN THE SUPREME COURT OF IOWA
Supreme Court No. 18–0564

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LAMAR CHEYEENE WILSON,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR JOHNSON COUNTY
THE HON. PAUL D. MILLER, JUDGE

APPELLEE'S BRIEF

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Iowa Code section 704.13 grants "immunity from criminal or civil liability for damages incurred by the aggressor" to anyone who is justified in using force in self-defense. It does not state that it grants immunity from criminal prosecution. Does section 704.13 entitle Wilson to a pretrial evidentiary hearing on immunity?

If it does, does the failure to hold that pretrial hearing become harmless error if the State ultimately proves lack of justification beyond a reasonable doubt at trial?

Authorities

Weaver v. Massachusetts, 137 S.Ct. 1899 (2017)
Dennis v. State, 51 So.3d 456 (Fla. 2010)
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Iowa Code § 815.10(1)(b)
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Matt Gertz, *ALEC Has Pushed the NRA's "Stand Your Ground" Law Across the Nation*, Media Matters (Mar. 21, 2012) https://www.mediamatters.org/blog/2012/03/21/alec-has-pushed-the-nras-stand-your-ground-law/186459
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II. Wilson fired five times at a group of men as they fled. Did the court err in overruling Wilson's motion for judgment of acquittal on lack-of-justification elements?

Authorities

Lamasters v. State, 821 N.W.2d 856 (Iowa 2012)
State v. Coffman, 562 N.W.2d 766 (Iowa Ct. App. 1997)
State v. Gay, 526 N.W.2d 294 (Iowa 1995)
State v. Hennings, 791 N.W.2d 828 (Iowa 2010)
State v. Hickman, 623 N.W.2d 847 (Iowa 2001)
State v. Richards, 879 N.W.2d 140 (Iowa 2016)
State v. Rubino, 602 N.W.2d 558 (Iowa 1999)
State v. Sanford, 814 N.W.2d 611 (Iowa 2012)
State v. Thornton, 498 N.W.2d 670 (Iowa 1993)
State v. Weston, 67 N.W. 84 (Iowa 1896)
State v. Wilson, 878 N.W.2d 203 (Iowa 2016)
State v. Wimbush, 150 N.W.2d 653 (Iowa 1967)
Iowa Code § 704.1(1)
Iowa Code § 704.2B
Iowa Code §§ 704.1(1), 704.6(2)
McCormick on Evidence § 248, at 532-33 (1st ed. 1953)

III. The jury found, beyond a reasonable doubt, that Wilson's use of force was not justified. Did the trial court err in determining that Wilson had not proven he was justified by a preponderance of the evidence?

Authorities

DeVoss v. State, 648 N.W.2d 56 (Iowa 2002)
Lamasters v. State, 821 N.W.2d 856 (Iowa 2012)
State v. Hallum, 606 N.W.2d 351 (Iowa 2000)
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Iowa Code § 704.13
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Iowa Code § 704.1(1)
Iowa Code § 704.2(2)
Iowa Code §§ 704.1(1), 704.2(2)

IV. The court overruled Wilson's weight-of-the-evidence challenge and remarked that his justification defense was foreclosed by evidence showing that he had fired "indiscriminately" into a rival group. Did the court find that Wilson lacked specific intent to injure any individual members of that rival group?

Authorities

Duren v. Missouri, 439 U.S. 357 (1979)
Lamasters v. State, 821 N.W.2d 856 (Iowa 2012)
Noel v. Noel, 334 N.W.2d 146 (Iowa 1983)
Schark v. Gorski, 421 N.W.2d 527 (Iowa 1988)

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State v. Reeves, 670 N.W.2d 199 (Iowa 2003)
State v. Willis, 218 N.W.2d 921 (Iowa 1974)

V. Wilson offered no theory of systematic exclusion. Did the court err in overruling his *Duren*/*Plain* challenge?

Authorities

Barber v. Ponte, 772 F.2d 982 (1st Cir. 1985)
Berghuis v. Smith, 559 U.S. 314 (2010)
Castaneda v. Partida, 430 U.S. 482 (1977)
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United States v. Ovalle, 136 F.3d 1092 (6th Cir. 1998)
United States v. Rodriguez, 581 F.3d 775 (8th Cir. 2009)
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People v. Burgener, 62 P.3d 1 (Cal. 2003)
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WolframAlpha, "4 successes in 96 trials with p=.084", https://www.wolframalpha.com/input/?i=4+successes+in+96+trials+with+p%3D.084

VI. Wilson did not object to the inclusion of a recommendation in his PSI report. Was it improper for the sentencing court to read and reference that recommendation at Wilson's sentencing hearing?

Authorities

State v. Gordon, 921 N.W.2d 19 (Iowa 2018)
State v. Grandberry, 619 N.W.2d 399 (Iowa 2000)
State v. Guise, 921 N.W.2d 26 (Iowa 2018)
State v. Hopkins, 860 N.W.2d 550 (Iowa 2015)
State v. Keller, 760 N.W.2d 451 (Iowa 2009)
Iowa Code §§ 901.2(1), 901.2(4)

ROUTING STATEMENT

Wilson characterizes his claims about Iowa Code section 704.13 as issues of first impression and broad public importance, warranting retention. *See* Def's Br. at 17–18. But any error in this case is harmless because the jury found lack of justification, beyond a reasonable doubt. Therefore, transfer is appropriate. *See* Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

This is Lamar Cheyeene Wilson's direct appeal. He fired shots at members of a rival group during a confrontation on August 17, 2017, in downtown Iowa City. He was charged with first-degree murder for killing Kaleek Jones, two counts of attempted murder for shooting D'Andre Hicks and Xavier Hicks, and intimidation with a dangerous weapon with intent. Wilson's defense was justification—he claimed that he used reasonable force in response to a threat of deadly force. The jury was instructed on justification under chapter 704, and lack of justification was included as an element of every offense charged.

The jury rejected Wilson's justification defense on all charges and convicted Wilson of voluntary manslaughter, a Class C felony, in violation of Iowa Code section 707.4 (2017), for killing Kaleek Jones;

two separate counts of assault with intent to inflict serious injury, an aggravated misdemeanor, in violation of Iowa Code section 708.2(1), for shooting D'Andre Hicks and Xavier Hicks; and intimidation with a dangerous weapon with intent, a Class C felony, in violation of Iowa Code section 708.6. The sentencing court imposed four terms of incarceration to run consecutively, producing a 24-year prison term with a 5-year minimum before parole. *See* Order (3/30/18); App. 121.

On appeal, Wilson argues: **(1)** the trial court erred by denying his request for a pretrial evidentiary hearing on stand-your-ground immunity under section 704.13, and by resolving the issue post-trial; **(2)** the trial court erred when it denied his motion for judgment of acquittal on the lack-of-justification element of all charged offenses; **(3)** the court erred in its post-trial ruling when it found that Wilson's use of force was not justified and that he was not entitled to immunity under section 704.13; **(4)** the court erred by denying his challenge to the weight of the evidence in his motion for new trial; **(5)** the court erred by overruling his *Plain*/*Duren* challenges, which alleged that the jury panel did not represent a fair cross-section of the community; and **(6)** the sentencing court erred or his trial counsel was ineffective because the PSI report contained a sentencing recommendation.

Course of Proceedings

The State generally accepts Wilson's description of the relevant course of proceedings. Def's Br. at 18–23; Iowa R. App. P. 6.903(3).

Statement of Facts

Wilson was part of an Iowa City group known as ABK that, on August 26, 2017, was mourning Daquan Jefferson, a.k.a. "Cutthroat." *See* TrialTr.V6 131:20–22; TrialTr.V7 111:7–15. That Iowa City group had a long-standing feud with a Cedar Rapids group, which included Donte Taylor—who made Facebook posts with derogatory statements about Cutthroat. *See* TrialTr.V6 8:12–9:3. That night, Taylor and Kaleek Jones went to Maxwell Woods's house in Cedar Rapids to watch a boxing match. They were joined by Donte Blair, Shaquez (AKA "Tall Folks"), D'Andre Hicks, Xavier Hicks, and Kaleek Jones. After the fight, they went to the pedestrian mall in Iowa City.

A group of girls approached and asked them whether they had disrespected Cutthroat. *See* TrialTr.V5 136:15–138:7; TrialTr.V6 41:21–42:24. They seemed "hostile"—but Kaleek "stepped in" and defused tensions. *See* TrialTr.V5 68:5–70:11. The girls went to talk to another group, near the breezeway tunnel—which included Wilson. *See* TrialTr.V5 138:24–139:10; TrialTr.V6 42:17–44:7.

Later, as their group walked through the breezeway tunnel, they walked past a group at the entrance. Wilson was there, along with the girls who approached them earlier. *See* TrialTr.V5 71:14–72:9. Wilson called out to them after they passed and asked them if they had said "Fuck Cutthroat." *See* TrialTr.V5 72:16–74:7; TrialTr.V6 44:16–45:9. D'Andre replied; he said that he did not know who Cutthroat was. *See* TrialTr.V5 140:17–142:14; TrialTr.V6 45:10–13. Xavier recalled that, "in the middle of the conversation," Wilson pulled a gun from his coat and "[a]s soon as it was revealed, he started firing." *See* TrialTr.V5 74:11–75:14; TrialTr.V5 114:18–115:6. D'Andre testified that Wilson "reached his hand in one part of his jacket and pulled a gun out," and immediately started shooting at them. *See* TrialTr.V5 143:1–144:6. Woods described a single continuous action: Wilson simply "reach[ed] into his jacket and pull[ed] out a black gun . . . and started shooting into our crowd." *See* TrialTr.V6 46:3–8. Everyone from Cedar Rapids tried to run away. Wilson fired at them five times. D'Andre was shot three times. Xavier was shot once, in the chest. Both barely survived. Kaleek was shot once, through the back—but the bullet lodged in his brain stem, and no medical treatment could save him. *See* TrialTr.V7 52:21–54:9; TrialTr.V7 71:16–72:21.

Kaleek was found "halfway through the breezeway." He was unconscious. There was no gun on his person or anywhere nearby. *See* TrialTr.V6 30:18–33:14. Xavier had run towards a parking ramp on the other end of the breezeway, before police intercepted him and summoned an ambulance. *See* TrialTr.V5 75:15–76:20. Xavier had a collapsed lung—but prompt medical intervention saved his life. *See* TrialTr.V7 7:25–10:13; TrialTr.V7 44:4–47:2.

D'Andre tried to run away; he made it into the parking ramp before he "collapsed" onto the ground. *See* TrialTr.V5 149:16–151:3. D'Andre had three bullet wounds. *See* TrialTr.V7 47:12–51:9. Bullet trajectories went through him "diagonally from the side to the back." *See* TrialTr.V7 57:19–58:12. Luckily, they missed his internal organs.

Only Taylor, Woods, and Blair had been armed. *See* TrialTr.V5 157:4–158:4. While Woods was running away from Wilson, he turned around and fired two shots—he was "just trying to scare them," so he fired "up high." *See* TrialTr.V6 46:9–23; TrialTr.V6 58:16–23. When Woods made it back to his vehicle, he put his gun in the trunk, then he drove back to where D'Andre had collapsed—Woods had intended to take D'Andre to the hospital, but police had arrived and D'Andre was already receiving medical attention. *See* TrialTr.V6 46:24–48:8.

As Woods was leaving, he was stopped by an officer who asked to search the car. Woods consented to that search, which uncovered another gun in Woods's bookbag. *See* TrialTr.V6 70:25–73:18. Woods did not own that gun and had not known it was there. *See* TrialTr.V6 48:2–50:4. When Woods had stopped to check on D'Andre, Shaquez was there too—he gave Woods the keys to Kaleek's car. *See* TrialTr.V6 47:23–48:18. Woods denied that Shaquez gave him a gun or reached into his bookbag. *See* TrialTr.V6 54:18–57:7. The officer who tended to D'Andre said it would have been "pretty hard" for Shaquez to hide a gun throughout their interactions—Shaquez was in close proximity and was "trying to assist" with D'Andre. *See* TrialTr.V6 98:23–99:23. During the trial, no witness testified that D'Andre had a gun.

Taylor and Blair had run into the parking ramp. When police found them, Blair surrendered. *See* TrialTr.V6 117:25–120:10. Taylor ran from the police. *See* TrialTr.V6 105:9–107:20. He tried to dispose of his gun and tried to disclaim it because, as a felon, Taylor knew he "had a lot to lose if [he] got caught with it." *See* TrialTr.V5 206:25–208:9; TrialTr.V6 35:4–14. Taylor received no benefit in exchange for his trial testimony, which included his confession to possessing a gun as a felon. *See* TrialTr.V6 29:5–30:22; TrialTr.V6 33:23–34:7.

Animosity between Donte Taylor's family and Cutthroat's group extended back to an incident where Cutthroat posted a video with a song about Taylor's cousin (who had been shot and killed), in which he sang that "he wished that he could bring her back and kill her the same way that she died." *See* TrialTr.V5 185:3–188:7. When Taylor heard that Cutthroat died in a car chase, Taylor was unsympathetic and made provocative posts about it on Facebook. *See* TrialTr.V5 188:19–192:7; TrialTr.V6 8:12–9:6. Taylor had the gun with him all evening; he said he carried the gun because he was nervous about the fights on Facebook—and more generally, "[d]ue to the circumstances of just being in America" and "stuff going on in the black community," he was "in fear for [his] life." *See* TrialTr.V5 196:5–197:24.

After the interaction with the group of girls, Taylor "noticed that [Cutthroat's sister] was pointing [him] out to a specific person." *See* TrialTr.V5 185:16–186:1; TrialTr.V5 199:19–201:9. They sensed "a negative vibe"—so they "decided that it's time to go." *See* TrialTr.V5 199:19–201:9. As they passed Wilson's group, Wilson said to Taylor: "Aren't you the guy that said fuck my dead homie." *See* TrialTr.V5 202:11–204:2. At that point, Wilson "withdrew his weapon" from "[h]is inner jacket" and pointed it at Taylor. *See* TrialTr.V5 204:3–10.

Nobody else had drawn a gun, and Taylor's was still in his waistband. *See* TrialTr.V5 204:11–205:3. Taylor "feared for [his] life" and kept moving into the breezeway tunnel "to try to move away from the area." *See* TrialTr.V5 205:6–16. Taylor turned to keep his eyes on Wilson, and Taylor drew the gun from his own waistband—but Taylor kept it pointed at the ground. *See* TrialTr.V6 31:17–32:24. Then, Taylor saw Wilson firing. *See* TrialTr.V5 205:17–206:24. Taylor had not fired and had not pointed his gun at anyone. Wilson was the only person Taylor saw wielding a gun. *See* TrialTr.V5 208:10–209:6; TrialTr.V6 26:16–20; TrialTr.V6 33:3–7. Only Wilson and Woods fired shots.

Nathanial Whirl belonged to neither group. He was standing "[b]y the taco cart" in the pedestrian mall when he heard gunshots. *See* TrialTr.V5 46:10–25. Just before he heard gunshots, Whirl could see into the breezeway. He could see people there and he heard them arguing. *See* TrialTr.V5 48:2–18. Whirl saw Wilson taking part in the argument, and Whirl saw Wilson firing a gun into the breezeway. *See* TrialTr.V5 48:19–49:23; TrialTr.V5 53:25–55:2; TrialTr.V5 56:7–58:13. Then, Whirl saw Wilson run away. *See* TrialTr.V5 54:22–55:2. Whirl could see other people in the breezeway during the argument, but he did not see anyone else with a gun. *See* TrialTr.V5 54:17–19.

Most witnesses heard five shots, then two shots. Police arrived as people fled, and they ordered a particular group to stop—but that group "continued to jog southbound on the sidewalk." *See* TrialTr.V6 138:13–139:13. Officers issued multiple commands before stopping them at gunpoint. TrialTr.V6 139:8–140:7; TrialTr.V6 151:11–156:11. Wilson was with that group. TrialTr.V6 156:12–157:10. A gun was found near Wilson. *See* TrialTr.V6 158:25–159:17. Wilson saw and heard officers find the gun, but he said nothing and did not claim it. TrialTr.V6 160:7–13; TrialTr.V8 71:22–73:11. Later, he demanded to know why officers were "letting other people go and not him," and he accused them of being racist. *See* TrialTr.V6 161:12–162:19. Several minutes later, Wilson admitted it was his gun. TrialTr.V6 167:16–20; TrialTr.V8 74:1–75:20; *see* Exhibit 5. That gun had fired five shots, including the bullet that killed Kaleek. *See* TrialTr.V7 187:22–196:19.

During an ensuing interview, Wilson admitted to firing at the Cedar Rapids group. He said they were walking backwards with their hands on guns in their pockets, or with guns pointed at the ground—so Wilson shot preemptively, when they "ain't expecting." *See* Exhibit 4 at 9:20–9:50, at 12:55–13:38, at 23:54–25:14, and at 51:12–51:52.

Additional facts will be discussed when relevant.

ARGUMENT

I. Section 704.13 does not create a right to a pre-trial immunity hearing. Wilson received a fair trial.

Preservation of Error

Wilson moved for a pretrial determination of justification and immunity. The court denied his motions and reserved issues under section 704.13 for post-trial determination. *See* Ruling (11/3/17); App. 54. Thus, error was preserved to argue that section 704.13 required a pretrial determination on immunity and justification. *See Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012).

Wilson argued that he should be allowed to present evidence at a post-trial determination on immunity and justification; the court let Wilson submit new evidence. *See* HearingTr. (2/22/18) 12:8–25:3. But Wilson did not argue that such a procedure deprived him of any right to fair trial; the claim that Wilson outlines in Division I.C(3)(a) was not raised or ruled upon below. *See* Def's Br. at 49–55. Although Wilson alternatively frames it as an ineffective-assistance claim, the record on direct appeal is inadequate to enable determinations about what might have changed if Wilson presented justification evidence in a pre-trial hearing—which means "[t]he record concerning potential prejudice has not been fully developed." *See State v. Shorter*, 893

N.W.2d 65, 83 (Iowa 2017). The State will address Wilson's argument alleging structural error, but any version of his claim that requires a showing of *Strickland* prejudice must be preserved for PCR actions. *See*, *e.g.*, *State v. Shanahan*, 712 N.W.2d 121, 142–43 (Iowa 2006).

Standard of Review

Rulings on questions of statutory construction are reviewed for errors at law. *See State v. Coleman*, 907 N.W.2d 124, 134 (Iowa 2018).

Constitutional claims, including ineffective assistance of counsel, receive *de novo* review. *See*, *e.g.*, *Lamasters*, 821 N.W.2d at 856.

Merits

Section 704.13 and accompanying revisions to chapter 704 materialized after passage of House File 517, which aimed to enable "stand your ground" justification defenses in Iowa. *See* H.F. 517, 87th G.A., § 41 (enacted 2017). Wilson raised that defense, and the jury rejected it. *See* Jury Instr. 40–43; App. 87–90; TrialTr.V4 97:6–12; TrialTr.V10 30:7–45:7; TrialTr.V11 2:8–4:19. All four convictions specifically required findings, beyond a reasonable doubt, that Wilson "did not act with justification." *See* Jury Instr. 23, 29, 32, 34; App. 83–86. And the court found those verdicts were not against the weight of the evidence. Sent.Tr. 20:8–22:13; Ruling (3/27/18); App. 110.

Wilson's argument is that he was entitled to a pre-trial finding that his use of deadly force was reasonable and justified, and that he was immune from criminal prosecution. *See* Def's Br. at 35–46. But section 704.13 only provides immunity from liability upon a finding of justification, not immunity from prosecutions where such defenses must be raised and litigated. Moreover, even if Wilson were correct, that cannot establish reversible error: Wilson's claim of justification cannot survive the preclusive effect of multiple jury verdicts finding, beyond a reasonable doubt, that his use of force was not justified.

A. The Iowa legislature chose not to use language that grants immunity from criminal prosecution. That deliberate choice must be given effect.

Section 704.13 states: "A person who is justified in using reasonable force against an aggressor in defense . . . is immune from criminal or civil liability for all damages incurred by the aggressor pursuant to the application of reasonable force." Iowa Code § 704.13. Wilson argues that other states employ pretrial evidentiary hearings on the stand-your-ground justification defense "absent explicit guidance from their legislatures." *See* Def's Br. at 42–46. But those states have statutes that provide immunity from "criminal prosecution"—which is phrasing that section 704.13 conspicuously and deliberately omits.

- In *People v. Guenther*, 740 P.2d 971 (Colo. 1987), the Colorado Supreme Court construed C.R.S. § 18–1–704.5 (1986), which made anyone using force in self-defense within their own home "immune from criminal prosecution for the use of such force." It held that the plain meaning of the term "prosecution" meant that "the statute was intended to bar criminal proceedings"—unlike other statutes that created affirmative defenses for use *at trial* by describing situations where defendants were "not responsible" or "not criminally responsible." *See Guenther*, 740 P.2d at 975–76.

- In *Fair v. State*, 664 S.E.2d 227 (Ga. 2008), the Georgia Supreme Court construed OCGA § 16–3–24.2, which made people who use reasonable force in self-defense "immune from criminal prosecution." It held that statutory language granting immunity from *prosecution* specifically meant immunity from all criminal proceedings "for the purpose of determining the guilt or innocence"—so lower courts had to determine whether to grant immunity *before* subjecting the defendant to procedures resembling criminal prosecutions. *Fair*, 664 S.E.2d at 166 (quotation omitted).

- In *Dennis v. State*, 51 So.3d 456 (Fla. 2010), the Florida Supreme Court construed Fla. Stat. § 776.032 (2006). Under Florida's stand-your-ground laws, anyone whose use of force was justified "is immune from criminal prosecution and civil action for the use of such force"—and the statute specifies that "[a]s used in this subsection, the term 'criminal prosecution' includes arresting, detaining in custody, and charging or prosecuting the defendant." The *Dennis* court held that a pretrial hearing on immunity was required because the law "expressly grants defendants a substantive right to not be arrested, detained, charged, or prosecuted as a result of the use of legally justified force." *Dennis*, 51 So.3d at 460–63.

- In *State v. Duncan*, 709 S.E.2d 662 (S.C. 2011), the South Carolina Supreme Court construed S.C. Code Ann. § 16–11–450 (2010), which provided that defendants who comply with stand-your-ground laws are "immune from criminal prosecution and civil action for the use of deadly force."

South Carolina's legislature had used plain language creating "a bar to prosecution" and specifying that the purpose of its stand-your-ground enactment was to enable citizens "to protect themselves . . . without fear of prosecution"—which led the *Duncan* court to hold that "the legislature intended defendants be shielded from trial." *See Duncan*, 709 S.E.2d at 663–65. *Duncan* also relied on decisions that construed "similar statutory immunity provisions"—*Fair* and *Dennis*—and referenced their discussions of the plain meaning of the word "prosecution" in those stand-your-ground statutes. *Id.* at 664–65 (discussing *Fair*, 664 S.E.2d at 230, and *Dennis*, 51 So.3d at 462).

- In *Harrison v. State*, 203 So.3d 126 (Ala. Ct. Crim. App. 2015), the Alabama Court of Criminal Appeals construed Ala. Code. § 13–3–23(d), which states that any person who uses force "as justified and permitted" under Alabama self-defense law "is immune from criminal prosecution and civil action for the use of such force." It pointed to the definition of the term "prosecution" as clear legislative guidance that people using justified force should be "exempt from trial"—which meant "a determination must be made, prior to the commencement of trial, as to whether a defendant's conduct was justified or whether it was unlawful." *Harrison*, 203 So.3d at 128–30.

- In *Rodgers v. Commonwealth*, 285 S.W.3d 740 (Ky. 2009), the Kentucky Supreme Court construed a statute that, in all relevant regards, was identical to the Florida law in *Dennis*: KRS 503.085 provided that a person who was justified in forcible self-defense "is immune from criminal prosecution and civil action for the use of such force," and it also defined criminal prosecution to cover "arresting, detaining in custody, and charging or prosecuting the defendant." Just like *Dennis*, *Rodgers* held that "by prohibiting prosecution of one who has justifiably defended himself," that language "creates a new exception to the general rule that trial courts may not dismiss indictments prior to trial." *See Rodgers*, 285 S.W.3d at 753. That "immunity from criminal prosecution" was "meant to provide not merely a defense against liability, but protection against the burdens of prosecution and trial as well." *See id.*

- Kansas law mirrors the Florida statute construed in *Dennis*: K.S.A. 21–5231 makes a person who is justified in using force "immune from criminal prosecution and civil action," and it defines criminal prosecution to include "arrest, detention in custody and charging or prosecution of the defendant." The Kansas Supreme Court emphasized the importance of that dispositive language that Iowa Code section 704.13 lacks: "because [the Kansas statute] grants immunity from arrest and prosecution rather than a mere defense to liability, 'it is effectively lost if a case is erroneously permitted to go to trial.'" *State v. Hardy*, 390 P.3d 30, 37–38 (Kan. 2017) (quoting *State v. Evans*, 360 P.3d 1086, 1098 (Kan. Ct. App. 2015) (Arnold-Burger, J., dissenting), *majority opinion reversed by State v. Evans*, 389 P.3d 1278 (Kan. 2017)).

- Even the Wisconsin case that Wilson cites—which cites some of those stand-your-ground cases—found that a Wisconsin drug-overdose statute required a pretrial immunity hearing because it provided that any person who provides aid in response to an overdose is "immune from prosecution." *See State v. Williams*, 888 N.W.2d 1, 3–5 (Wis. Ct. App. 2016) (discussing Wis. Stat. § 961.443); *see also* Def's Br. at 44.

Wilson argues: "[G]iven that these court decisions predate the passage of HF517, it is likely this procedure is precisely the sort contemplated by the legislature." *See* Def's Br. at 46. But the legislature chose to omit the single operative word that had compelled those courts to require pretrial determinations of justification-related immunity. Instead of using "immunity from criminal prosecution" language that would have compelled Iowa courts to reach the same conclusion, the Iowa legislature granted immunity from criminal and civil *liability*. *See* Iowa Code § 704.13. It contemplated that procedure—and rejected it.

Unlike Iowa, most of those states have immunity provisions that mirror Florida's. That is no coincidence—after Florida's version was enacted, the American Legislative Exchange Council (ALEC) and the NRA pushed "virtually identical" bills in state legislatures across the country.[1] South Carolina, Kansas, Kentucky, and others enacted identical language granting immunity from criminal prosecution.[2]

Iowa, too, saw proposed legislation that mirrored Florida's and would have granted similar immunity from criminal prosecution. *E.g.*, H.F. 2215, 84th G.A., § 5 (2012 legislation); S.F. 2224, 85th G.A., § 5 (2014 legislation); H.F. 92, 86th G.A., § 5 (2015 legislation). But Iowa legislators passed a very different version: they chose not to include any broadly defined grant of immunity from all criminal prosecution. *See* H.F. 517, 87th G.A., § 41 (2017 legislation), *enacted and codified at* Iowa Code § 704.13. The Iowa legislature's deliberate rejection of that model language forecloses Wilson's preferred reading.

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[1] *See* Matt Gertz, *ALEC Has Pushed the NRA's "Stand Your Ground" Law Across the Nation*, MEDIA MATTERS (Mar. 21, 2012), https://www.mediamatters.org/blog/2012/03/21/alec-has-pushed-the-nras-stand-your-ground-law/186459.

[2] *See* Ryan Sibley, *10 States Copied Florida's "Stand Your Ground" Law*, SUNLIGHT FOUNDATION (Mar. 28, 2012), https://sunlightfoundation.com/2012/03/28/10-states-copied-floridas-stand-your-ground-law/.

Videos from legislative debates are available—although these statements are not binding on all legislators and never determinative, they establish that key legislators shared the State's understanding of section 704.13. Both the proponent of H.F. 517 (Rep. Windschitl) and the author of the language that became section 704.13 (Rep. Wolfe) agreed that section 704.13 would provide immunity from civil action and preclude conviction for any crime, but would not create a pretrial remedy for criminal defendants—and they agreed that anyone who was "arrested and charged with a crime" would be unaffected by this language until it impacted their substantive criminal liability at trial. *See* House Video on H.F. 517, 87th G.A., 1st Sess. (Mar. 7, 2017), https://www.legis.iowa.gov/dashboard?view=video&chamber=H&clip=H20170307124009459&dt=2017-03-07&offset=1793&bill=HF%20517, at 1:52:30–1:56:05; *see also id.* at 1:22:01–1:23:30, 1:27:35–1:28:55. Both legislators recognized that language enacted in section 704.13 would not require any pretrial evidentiary hearing on immunity and would only take effect *after* trial, following a finding that use of force was justified (and would have the effect described in the next section). And no legislator, upon hearing that explanation, made any attempt to amend the language to change its effect.

"[L]egislative intent is expressed by omission as well as by inclusion, and the express mention of one thing implies the exclusion of others not so mentioned." *See Staff Mgmt. v. Jimenez*, 839 N.W.2d 640, 649 (Iowa 2013) (quoting *Meinders v. Dunkerton Cmty. Sch. Dist.*, 645 N.W.2d 632, 637 (Iowa 2002)). The legislature crafted section 704.13 to omit ALEC-standard language that would have granted broad immunity from criminal prosecution and required pretrial immunity hearings. Key legislators on both sides agreed that section 704.13 would not have the effect Wilson ascribes to it, and that language was enacted without further alteration or amendment. This Court should give force and effect to that deliberate omission by rejecting Wilson's demand for pretrial immunity hearings that would mirror those states with distinguishable stand-your-ground laws that grant immunity from *prosecution*, rather than from liability.

B. Section 704.13 provides immunity from liability for damages. This changes the effects of proving a justification defense. It does not create or change procedures for raising or litigating such defenses.

In its post-trial ruling, the trial court ruled on the merits of Wilson's immunity claim under section 704.13—but it also held that language in section 704.13 was too vague and amorphous to create new pre-trial procedures. *See* Ruling (3/27/18) at 5–8; App. 114–17.

The trial court was correct that section 704.13 does not contain language creating any pretrial procedures, and any attempt to infer intent to prescribe such procedures would be hopelessly speculative. The procedure for raising and litigating justification defenses at trial is still governed by Rule 2.11. *See* Iowa R. Crim. P. 2.11(11)(c). Nothing in section 704.13 provides sufficient guidance to enable trial courts to implement uniform procedures for pretrial evidentiary hearings, and any attempt to enforce reasonable constraints during such hearings would inevitably be met with unresolvable challenges.

Wilson's concern is that denying pretrial immunity hearings "renders the section superfluous." *See* Def's Br. at 40–41. However, any interpretation that would grant open-ended immunity from all prosecution would fail to give effect to modifying language that limits the scope of immunity to "criminal or civil liability for all damages incurred by the aggressor pursuant to the application of reasonable force." *See* Iowa Code § 704.13; *accord State v. Iowa Dist. Ct. for Scott Cnty.*, 889 N.W.2d 467, 474 (Iowa 2017) (rejecting broad reading of provision due to modifying terms that, if no limitation was intended, "would have been more logical to omit"). Wilson's approach gives no effect to that limiting language, which must be given force.

The term "criminal liability for damages" means restitution. Restitution is ordered for "pecuniary damages" whenever a defendant is convicted, if there is "a causal connection between the established criminal act and the injuries to the victim." *See State v. Roache*, 920 N.W.2d 93, 100–01 (Iowa 2018); Iowa Code §§ 910.1(3)–(4), 910.2(1). Section 704.13 immunizes defendants from liability for restitution for any damages that aggressors might incur as a result of reasonable and justified uses of force, even if the defendant committed other offenses that would trigger liability for the aggressor's damages. For example, assume jurors found Walt was justified when he shot and killed Mike in self-defense, but convicted Walt of being a felon in possession of the firearm he used to defend himself. Walt would enjoy immunity from liability for $150,000 in restitution. Although Walt's possession of a firearm was a felony that "caused the death of another person," section 704.13 would still grant immunity from liability for "damages incurred by the aggressor." *See* Iowa Code §§ 704.13, 910.3B(1). And if Mike had survived, Walt would also be immunized against claims for pecuniary damages related to Mike's injuries. Iowa Code § 910.1(3). True, Walt's criminal possession of a firearm caused Mike's injuries in a way that was reasonably foreseeable for scope-of-liability purposes—

the risk that felons who kept firearms would shoot and injure (or kill) someone was within the range of foreseeable harms that prompted the legislature to enact section 724.26 and bar them from possessing guns. *See Roache*, 920 N.W.2d at 101–03; *cf.* Iowa Code § 724.26; *State v. Deng Ken Tong*, 805 N.W.2d 599, 602 (Iowa 2011) (citing *State v. Buchanan*, 604 N.W.2d 667, 669 (Iowa 2000)). That legal causation would become even stronger if Walt and Mike were rival drug dealers, and if Walt had carried the gun for protection while trafficking drugs. *See State v. Reed*, 618 N.W.2d 327, 333–34 (Iowa 2000) (concluding that chapter 706A, criminalizing ongoing criminal conduct, reaches "unlawful activity beyond core offenses in criminal networks and enterprises such as narcotics trafficking" and targets "preparatory" offenses in furtherance of criminal enterprises "such as violence"). Violence between Walt and Mike would be reasonably foreseeable and Mike's injuries would be causally traceable to Walt's crimes—but section 704.13 would still immunize Walt from liability for restitution for Mike's injuries (or his death), as long as Walt was justified in using reasonable force in self-defense. *See* Iowa Code § 704.13. This reading gives effect to section 704.13 by eliminating criminal and civil liability *for damages*, without ignoring that phrase's inherent limitations.

It is unnecessary to conflate "immunity from liability" with "immunity from prosecution" or fabricate new pretrial procedures to give effect to every word of section 704.13. The term "for damages" modifies and limits any immunity from criminal or civil liability. *See* Iowa Code § 704.13. This is not total immunity from liability for acts, which might obviate the need for trial. *See*, *e.g.*, Iowa Code § 692A.123. Section 704.13 only grants immunity from liability for *damages*, and it adds a specific effect to any finding that use of force was justified. Criminal liability for damages and civil liability for damages each have unique meanings—this does not render either term superfluous. *E.g.*, Iowa Code § 915.100(2)(i) (affirming rights to both forms of damages). This language can be given full effect while rejecting Wilson's reading.

C. Extending immunity from prosecution based on pretrial evidentiary hearings would produce absurd, inequitable, and unjust results.

This Court resolves ambiguity in statutes by presuming that legislative enactments aim to promote "just and reasonable result[s]" that are "feasible of execution." *See* Iowa Code § 4.4(3)–(4); *see also* Iowa Code § 4.6(5). Wilson asserts "a key purpose of the immunity is to avoid costly litigation, and that legislative goal is thwarted when claims subject to immunity proceed to trial." *See* Def's Br. at 38

(quoting *Nelson v. Lindaman*, 867 N.W.2d 1, 7 (Iowa 2015)). But interests in avoiding costly litigation cannot outweigh the interests of injured victims and bereaved families in seeking justice—especially in the context of criminal prosecutions, which this Court has recognized "has some costs that cannot be necessarily eliminated or reduced by principles of efficiency." *See State v. Hager*, 630 N.W.2d 828, 835 (Iowa 2001). Such efforts "must always be compatible with fairness, and fairness must consider the fundamental principles which drive our system of justice and the rights and liberties of each individual." *See id.* at 836. Indeed, the legislature is willing to pay extra to appoint *two* attorneys for any indigent Iowan charged with a Class A felony—it views costs as largely irrelevant in first-degree murder prosecutions. *See* Iowa Code § 815.10(1)(b); *see also* Iowa Code § 815.7 (allocating more compensation to appointed attorneys in Class A felony cases). And there is no statute of limitations on murder—concerns about the costs and burdens associated with stale prosecutions are outweighed by the weighty collective interest in bringing murderers to justice. *See* Iowa Code § 802.1; *accord State v. Walden*, 870 N.W.2d 842, 845–46 (Iowa 2015). Any list of the legislature's goals for murder prosecutions only includes "minimize costs of litigation" as an afterthought, if at all.

Where avoiding costly litigation is a concern, pretrial hearings on stand-your-ground immunity are counterproductive. Wilson's advocacy envisions a separate trial, where he would need to prove that his use of force was reasonably necessary and therefore justified, by a preponderance of the evidence. *See* Def's Br. at 42–56; *see also* HearingTr. (10/27/17) 5:23–6:18 (explaining Wilson's counsel would call at least "26 witnesses" for the pretrial immunity hearing because they were "fact witnesses that [Wilson] need[s] to have come in here and say what they saw happened"). That hearing would amount to a full duplicate trial—which means Wilson's proposal would effectively double all costs and burdens associated with every criminal trial that involves a justification defense. At best, Wilson's approach is a wash for efficiency interests: even if granted immunity, it would be after an evidentiary hearing that would amount to a bench trial on the merits. Conversely, if Wilson failed to prove justification, that pretrial ruling would have no preclusive effect at Wilson's subsequent jury trial. And Florida's experience demonstrates that Wilson's interpretation would dramatically increase the costs and burdens of unnecessary litigation, rather than avoid them. *See* Susan Taylor Martin, *Florida "Stand Your Ground" Law Yields Some Shocking Outcomes Depending on*

How Law Is Applied, TAMPA BAY TIMES (updated Feb. 17, 2013), http://www.tampabay.com/news/publicsafety/crime/florida-stand-your-ground-law-yields-some-shocking-outcomes-depending-on/1233133 (noting stand-your-ground immunity burdens Florida courts with "expensive, unnecessary, time-consuming hearings").

Wilson's approach would create another practical problem: stand-your-ground immunity hearings in high-profile cases frequently generate pretrial publicity. News coverage would presumably include summaries of witness testimony *before* any jurors could be selected, empaneled, and admonished to avoid exposure to extrajudicial facts. Even the court's findings of fact would presumably be public, which would magnify the potential dangers of exposure to any coverage. *Accord Rodgers*, 285 S.W.3d at 755 (noting that evidentiary hearings on self-defense/justification "would involve the same witnesses and same proof to be adduced at the eventual trial, in essence a mini-trial and thus a process fraught with potential for abuse").

Kaleek's mother lost her son. The community interest in trying any defendant accused of murder is weighty, and this Court should not impute a legislative intent to subvert that interest unless the legislature makes that intent unmistakably clear—and it did not. *See*

Iowa Code § 4.4(5) (noting presumption that "[p]ublic interest is favored over any private interest" in construing statutes). If there were some kernel in section 704.13 that required Iowa courts to rule separately on whether defendants are immune from criminal liability, both community vindication interests and judicial economy interests weigh heavily in favor of resolving that question *after* the jury verdict, if it remains unanswered. A verdict of acquittal would moot the issue by ending the prosecution with finality (unlike a pretrial order that granted immunity and dismissal, which the State could appeal). *See* Iowa Code § 814.5(1)(a). And if the defendant is convicted, the court can assess issue preclusion and determine if additional hearings are necessary to supplement the record made at trial. Indeed, the Iowa Supreme Court did not criticize that procedure in *State v. King*, when it was used for immunity from criminal liability under section 232.73; the trial court had "postponed ruling on defendant's motion to dismiss until the jury returned a verdict," and submitted a special interrogatory that asked the jury to determine whether the defendant had met the triggering condition for child-abuse-reporter immunity. *See State v. King*, 434 N.W.2d 627, 628–29 (Iowa 1989). Although the *King* court reversed the grant of immunity because the statute was inapplicable

when the defendant's own criminal conduct necessitated the report, it did not criticize the use of that procedure—to the contrary, its review was facilitated by its access to the full trial record and the jury verdict, which enabled it to isolate the legal question and guaranteed that its ruling would not be moot. *See id.* at 629 (remanding the case "for the entry of the appropriate judgment on the verdict of the jury").

Wilson's complaint is that he was prosecuted without a pretrial opportunity to prove his innocence. He ignores that the trial, in itself, was his opportunity to prove facts that created doubt as to his guilt. *See Loza v. State*, 325 N.E.2d 173, 176 (Ind. 1975) (holding immunity "must arise from the same factual context as the guilt or innocence of the accused and that to require such facts to be tried preliminarily, before there may be a trial, would be to require an absurd waste of judicial resources"); *accord McNeely v. State*, 422 P.3d 1272, 1275–76 (Okla. Ct. Crim. App. 2018). A cumulative evidentiary hearing "only wastes valuable judicial resources." *State v. Gonzalez*, 718 N.W.2d 304, 309 (Iowa 2006). Wilson's proposal would double the cost of murder prosecutions where stand-your-ground immunity was denied, and would not reduce litigation costs even if immunity was granted. And the community deserves to see murder prosecutions advance to

trial on their merits—anything else would undermine confidence in the criminal justice system. *See, e.g.* Frances Robles, *Florida's "Stand Your Ground" Law Applies to Police, Too, Court Rules*, N.Y. TIMES (Dec. 13, 2018), https://www.nytimes.com/2018/12/13/us/florida-stand-your-ground-police.html (observing that pretrial immunity means that a jury will "never get a chance to hear disputed evidence," which is "particularly troubling" in controversial murder cases). Even if this Court finds some ambiguity in section 704.13, it should reject Wilson's proposed approach as impractical, burdensome, and unjust.

D. Even if Wilson should have received a pretrial stand-your-ground hearing, any error is harmless because the trial court held that the weight of the credible evidence supported the jury's verdict that Wilson's use of force was not justified.

Elsewhere, Wilson argues that authority from other states "should be adopted by this court interpreting the necessary procedure to enforce section 704.13." *See* Def's Br. at 46. But such authority is absent from his argument demanding reversal. *See* Def's Br. at 47–57. States with stand-your-ground statutes that provide immunity from criminal prosecution and require pretrial stand-your-ground hearings mostly reject similar claims that deprivation of such a pretrial hearing requires reversal of a conviction obtained after a subsequent trial.

- In *Rodgers*, the Kentucky Supreme Court recognized that Kentucky's stand-your-ground statute provided immunity from prosecution, which enabled Kentucky defendants to file motions to dismiss at early stages to challenge the existence of probable cause to believe any use of force was not justified. *See Rodgers*, 285 S.W.3d at 752–55. But it granted no relief because Rodgers's self-defense claim "ha[d] been thoroughly examined by both the trial judge under the directed verdict standard and the jury under the court's instructions and his entitlement to self-defense ha[d] been rejected." *Id.* at 756. He was "tried and convicted by a properly instructed jury in a trial with no reversible error," and "applying the [correct] standard would have produced the same conclusion," so any error was "purely academic" and not reversible. *Id.*

- In *Dennis*, the Florida Supreme Court found "the trial court erred in denying Dennis an evidentiary hearing on his claim of statutory immunity." *See Dennis*, 51 So.3d at 463. But it held the record "demonstrates that the trial court's summary denial of his motions to dismiss was harmless" because the court and the jury heard the same evidence during his trial, and neither had concluded that his use of force was justified. *Id.* at 463–64. Because there was no reason to conclude "that his trial itself was unfair or that his ability to present his claim of self-defense was limited in any way by the trial court's pretrial ruling," that meant "there is no reasonable possibility that the trial court's failure to make a pretrial evidentiary determination regarding Dennis's immunity claim contributed to Dennis's conviction." *Id.* at 464.

- In *State v. Ultreras*, 295 P.3d 1020 (Kan. 2013), the Kansas Supreme Court found the trial court erred at the statutorily required pretrial immunity hearing. But it agreed with the analysis in *Dennis* and made similar observations: "[T]he trial court's pretrial ruling did not limit [Ultreras]'s ability to present his claim of self-defense at trial or otherwise cause the trial to be unfair. Nor was there any indication the evidence in a pretrial proceeding would have been different from the evidence presented at trial." *Ultreras*, 295 P.3d at 1031–32. Thus, any error was harmless, and the court affirmed.

This case illustrates the logic behind those holdings. Wilson raised and litigated his justification defense at trial. The jury found, beyond a reasonable doubt, that he "did not act with justification." *See* Jury Instr. 23, 29, 32, 34; App. 83–86. Justification was defined accurately; Wilson raises no challenge to the jury instructions. *See* Jury Instr. 40; App. 87. And although Wilson claims that "[e]very facet of [his] trial was affected" by this error, he has not identified any such effect with particularity or specificity. *See* Def's Br. at 49–50. The State can find no effect and has no specific assertion to investigate and respond to; this Court should not permit Wilson to identify one for the first time in his reply brief. *See*, *e.g.*, *Duder v. Shanks*, 689 N.W.2d 214, 220 n.2 (Iowa 2004); *Pierce v. Staley*, 587 N.W.2d 484, 486 (Iowa 1998).

The closest Wilson comes to arguing a specific source of error is his claim that, to prove immunity by a preponderance of the evidence, "he had to put in evidence of his own" and was forced to accept "risk that the witnesses will answer differently than expected or will further reinforce the State's case." *See* Def's Br. at 53. But anyone who claims self-defense or justification must introduce enough evidence to create a jury question on the issue, or no such instructions are given. *See State v. Rains,* 574 N.W.2d 904, 915 (Iowa 1998); *State v. Delay*, 320

N.W.2d 831, 833–35 (Iowa 1982). Moreover, Wilson was on trial for first-degree murder, facing life without parole if convicted. There is no reason to believe that Wilson sandbagged his justification defense and omitted favorable evidence that would have shown that his use of deadly force was justified. Indeed, any rational actor in that situation would present any/all favorable evidence to the jury, who could not convict Wilson if the trial left them with reasonable doubt—that was the heaviest burden of proof that prosecutors would need to carry, so his jury trial was the singular point where favorable evidence had the best chance of impacting the outcome. *See* Jury Instr. 3–5; App. 80.

Wilson alleges structural error. *See* Def's Br. at 50–55. But this is not a situation where "the effects of the error are simply too hard to measure" or where error "always results in fundamental unfairness." *See* Def's Br. at 51–52 (quoting *Weaver v. Massachusetts*, 137 S.Ct. 1899, 1908 (2017)). Other courts reach the same conclusion, even in states with statutes that provide immunity from criminal prosecution that have been interpreted to require pretrial hearings, because the record from any subsequent trial usually contains ample material to enable harmless error analysis—especially if the trial court considered and rejected the justification claim on its merits, at trial or afterward.

See, *e.g.*, *Ultreras*, 295 P.3d at 1031–32; *Dennis*, 51 So.3d at 463–64; *Rodgers*, 285 S.W.3d at 756. Here, the court specifically found that the evidence supported the jury's finding that Wilson's use of force was not justified. *See* Sent.Tr. 21:24–22:13. It made the same finding after considering Creed and Smith's testimony, submitted after trial. *See* Ruling (3/27/18) at 5–6; App. 114–15. Any error from declining to pre-litigate the issue before trial had a measurable effect: none at all.

Wilson also claims the post-trial immunity hearing was unfair because the court "unreasonably restricted [his] ability to prove he was justified as a matter of law." *See* Def's Br. at 55–57. But he affirmed that the evidence he wanted to present at any immunity hearing was the same testimony that the trial court accepted and considered. *See* HearingTr. (2/22/18) 12:8–18:3 and 21:14–25; Ruling (3/26/18); App. 107. After assessing that testimony, the court found Wilson's use of force was not justified. *See* Ruling (3/27/18) at 2, 6; App. 111, 115. Wilson has not identified any additional evidence or argument that he would have submitted, nor does he articulate reasons to believe that receiving the sum total of this evidence in a pretrial hearing or with slightly different intonations and inflections could have altered the court's findings that foreclosed his claim to justification/immunity.

In sum, the legislature's deliberate choice to grant immunity from liability—not immunity from prosecution—expresses an intent not to require pretrial hearings to assess immunity from prosecution. Wilson's interpretation would be impractical, burdensome, and unjust. Finally, as the prosecutor explained below, any error was harmless:

> Had [the trial court] done a pretrial hearing, the State would have put on the same witnesses. The Defendant had a chance to put on what witnesses he chose to, either at trial or in the post-trial proceedings that the Court allowed. So the Defendant has had full opportunity to present any evidence he wishes to the Court, and the Court gave him every opportunity and then applied the lowest standard possible, by preponderance of evidence, and still found that the Defendant was not justified.

Sent.Tr. 6:12–20. Consequently, even if Wilson's interpretation of section 704.13 were correct, his convictions should still be affirmed.

II. The trial court did not err in denying Wilson's motion for judgment of acquittal on the justification element.

Preservation of Error

The court considered and rejected Wilson's motion for judgment of acquittal on these grounds. TrialTr.V9 2:8–9:11; TrialTr.V9 16:10–18:15. Thus, error was preserved. *See Lamasters*, 821 N.W.2d at 864.

Standard of Review

"Sufficiency of evidence claims are reviewed for a correction of errors at law." *See State v. Sanford*, 814 N.W.2d 611, 615 (Iowa 2012).

Merits

A verdict withstands a sufficiency challenge if it is supported by substantial evidence, viewed in the light most favorable to the verdict. *See State v. Hennings*, 791 N.W.2d 828, 823 (Iowa 2010); *State v. Gay*, 526 N.W.2d 294, 295 (Iowa 1995).

Wilson argues the evidence, viewed in the light most favorable to the verdict, was not sufficient to prove lack of justification. *See* Def's Br. at 64–66. But the jury was not required to credit Wilson's claim that he believed he was in danger, nor was it required to find any use of deadly force was reasonable under these circumstances.

The State could prove lack of justification and disprove Wilson's justification defense by proving any of these four premises:

1. The Defendant started or continued the incident which resulted in injury or provoked or caused force to be used against him intending to use it as an excuse to injure another.
2. The Defendant did not believe he was in actual or imminent danger of death or injury and the use of force was not necessary to save him.
3. The Defendant did not have reasonable grounds for the belief.
4. The force used by the Defendant was unreasonable.

Jury Instr. 41; App. 88; *accord* Iowa Code §§ 704.1(1), 704.6(2); *cf. State v. Richards*, 879 N.W.2d 140, 148 (Iowa 2016). Any alternative, if proven, sustains the verdict—and the State proved all four.

A. Wilson started and escalated this confrontation.

Wilson shot first, and he said so. *See* Exhibit 4, 24:30–25:10. Even before guns were drawn, every witness who testified about the beginning of the incident said that Wilson initiated the confrontation with Taylor and his group after they passed by. *See* TrialTr.V5 72:16–74:7 (Xavier); TrialTr.V5 140:17–142:14 (D'Andre); TrialTr.V5 201:10–204:2 (Taylor); TrialTr.V6 44:16–46:8 (Woods). And Wilson was the first to draw a gun. TrialTr.V5 148:21–149:15; TrialTr.V5 204:3–205:3. Because Wilson initiated and escalated the incident, his justification defense fails. *See State v. Rubino*, 602 N.W.2d 558, 565 (Iowa 1999).

B. Wilson did not believe he was in imminent danger and did not believe deadly force was necessary.

Wilson's conduct after the shooting illustrates that he knew that he had fired without justification. *See State v. Wilson*, 878 N.W.2d 203, 211–13 (Iowa 2016). He initially refused to follow orders to stop, until held at gunpoint. *See* TrialTr.V6 138:13–140:7; TrialTr.V6 151:11–157:10. He was not forthcoming with information and did not initially claim ownership of the gun "until he knew he wasn't going to be able to talk his way out of [detention]." *See* TrialTr.V10 15:17–16:5; *see also* Exhibit 5 at 18:04–20:40; TrialTr.V6 160:7–162:19; TrialTr.V8 71:22–75:20. His explanation that he did not want to "take chances"

with police by claiming a gun was undermined by his willingness to run from police after a shooting, when ordered to stop. *See* Exhibit 4 at 10:17–11:12. Wilson's attempts to avoid law enforcement and his reluctance to report his involvement are "circumstantial evidence of consciousness of guilt and hence of the fact of guilt itself," because his then-existing subjective belief that his use of force was indefensible is sufficient to establish lack of justification. *See State v. Wimbush*, 150 N.W.2d 653, 656 (Iowa 1967) (quoting *McCormick on Evidence* § 248, at 532–33 (1st ed. 1953)). Wilson had a permit to carry—if he thought he fired in self-defense, he had no reason to flee or deny involvement. *See*, *e.g.*, *State v. Thornton*, 498 N.W.2d 670, 673–74 (Iowa 1993) (finding "the jury could rationally believe these were not the actions of someone who honestly believed he acted in self-defense," in part because "Thornton left the scene immediately after the shooting without stopping to call the police or an ambulance" then concealed the gun in his basement and avoided police); *cf.* Iowa Code § 704.2B.

C. Even if Wilson did believe that he was in danger and that deadly force was necessary, there were no reasonable grounds for that belief.

Wilson drew his gun "in the middle of the conversation" and started shooting—nobody else had pointed a gun at anybody. *See*

TrialTr.V5 74:11–75:14. "As soon as it was revealed, he started firing." TrialTr.V5 114:18–115:6; *accord* TrialTr.V5 141:13–144:6; TrialTr.V6 46:3–8. Whirl saw Wilson shooting into the breezeway, and he did not see anybody else with a gun—so even if others were *holding* guns, nobody but Wilson could have been *pointing* a gun in any conspicuous or visibly threatening manner. *See* TrialTr.V5 48:19–49:23; TrialTr.V5 53:25–54:21. Taylor testified that nobody else had drawn guns before Wilson drew his own. *See* TrialTr.V5 204:3–205:3. Even after that, nobody ever pointed a gun at Wilson. *See* TrialTr.V5 208:10–209:6; TrialTr.V6 26:13–20; TrialTr.V6 32:12–33:7.

Even after stand-your-ground, deadly force is not justified unless it is "reasonable to believe that such force is necessary." *See* Iowa Code § 704.1(1). Wilson had no reasonable grounds to believe that deadly force was *necessary* because he had alternatives available. He could have refrained from drawing his gun. He could have drawn his gun and used the threat of responsive force to deter aggression. He could have taken one step backwards and one step to the side, disappearing from view for anyone in the breezeway. *See* TrialTr.V6 35:4–10; Exhibit 13E; App. 77; TrialTr.V7 120:25–121:6 (discussing location of the ATM, outside the breezeway); TrialTr.V5 53:25–54:10

(placing Wilson near the ATM, "right outside" the breezeway). Indeed, even after Wilson fired multiple shots at Taylor's group, none of them returned fire at Wilson—and even Woods, who fired two shots, only fired *warning* shots. *See* TrialTr.V6 46:9–23; TrialTr.V6 58:16–23.

Wilson described his subjective belief that he needed to use deadly force in self-defense. But the facts in his narrative established that no reasonable grounds existed for such a belief. He said he did not know anyone in the Cedar Rapids group, but he inferred hostility from a look in their eyes. *See* Exhibit 4 at 9:20–9:50. He emphasized that he decided to use deadly force *before* any real threat emerged, because the group was from Cedar Rapids, reportedly carried guns, and made facial expressions. *See* Exhibit 4 at 23:54–25:14 ("The look in his face was saying like he was really gonna get to killing everybody. Like, the look in his face, that's how I know my reaction was so accurate. . . . I seen it in his eyes, like he was ready to start shooting."). Indeed, Wilson loaded his gun after seeing the Cedar Rapids group from afar, before a confrontation even began—he had already made his decision. *See* Exhibit 4 at 29:12–29:40. The only statements Wilson described hearing from the Cedar Rapids group had threatened *responsive* force ("I wish a motherfucker would") and the only threat was "subliminal."

See Exhibit 4 at 51:12–51:52. But Wilson could not be deterred—and instead, he used deadly, pre-emptive force during a verbal exchange, when they "ain't expect it." *See* Exhibit 4 at 12:55–13:38. Wilson's statement illustrated that any proclaimed subjective belief that deadly force had become necessary had no reasonable basis in objective fact. *Accord State v. Coffman*, 562 N.W.2d 766, 769 (Iowa Ct. App. 1997) (rejecting Michael's self-defense claim, primarily because "Michael simply turned and shot Jeremy, once, then again" without hesitation). No plausible view of the evidence supports a conclusion that Wilson had reasonable grounds to believe that deadly force was necessary.

D. Wilson used unreasonable force. Rather than firing once, he fired five shots as his victims fled.

Everyone in the Cedar Rapids group fled when Wilson fired. Kaleek was shot in the back. Even if Wilson needed to fire one shot, he certainly did not need to fire again—much less four more times. This establishes that Wilson used unreasonable force, far beyond what was necessary to defend himself. Once the Cedar Rapids group started to flee, every subsequent shot was inherently unreasonable—and each additional shot demonstrated that his decision to open fire was unconnected to any reasonable grounds for believing that he was in mortal danger. Claims like Wilson's typically fail, as they should:

> It is true that an ingenious argument is advanced by defendant's counsel in support of the claim that Hoover was in the act of striking the defendant when he was shot. . . . But, however plausible the theory may be, it cannot overcome the well-established physical fact that the shot was fired at the back of the deceased, and some distance from him, and at a time when he was making no resistance.

State v. Weston, 67 N.W. 84, 85 (Iowa 1896); *cf. State v. Hickman*, 623 N.W.2d 847, 850 (Iowa 2001) ("Although Hickman contends he shot the victim in self-defense, the facts, including Hickman's shooting the victim in the back of the head, tend to belie that scenario."). This alone would prove lack of justification. Thus, Wilson's challenge fails.

III. The trial court did not err in denying Wilson's claim that his use of force was reasonable and justified.

Preservation of Error

Wilson renewed his claim that his use of force was justified and that he was immune from criminal liability. The trial court considered and rejected that claim. *See* Ruling (3/27/18) at 1–6; App. 110–15. Thus, error was preserved. *See Lamasters*, 821 N.W.2d at 864.

Standard of Review

Wilson proposes the standard of review for motions to dismiss. *See* Def's Br. at 58. This ruling that Wilson did not prove justification by a preponderance of the evidence, after submission of evidence, makes findings of fact that have "the effect of a jury's special verdict."

State v. Knupp, 310 N.W.2d 179, 181 (Iowa 1981) (citing *State v. York*, 293 N.W.2d 13, 14 (Iowa 1980)). Wilson demands factual findings in his favor, but any appellate review must afford appropriate deference to the trial court's "opportunity to personally assess the credibility of the witnesses." *State v. Hallum*, 606 N.W.2d 351, 354 (Iowa 2000).

Merits

Wilson argues that he established by a preponderance of the evidence that he used reasonable force and was justified when he fired at Taylor's group, shot D'Andre, shot Xavier, and killed Kaleek with a shot through his back. *See* Def's Br. at 59–61. The jury disagreed, and their verdict must be given preclusive force on that issue.[3]

> Certain conditions must be present for collateral estoppel to exist: (1) the issue decided in the prior trial must be precisely the same issue presented in the pending action; (2) a decision on that issue must have been necessary for the judgment in the prior trial; and (3) the party to be estopped from relitigating the issue must have been a party in the prior trial (or the party's interests must have been adequately represented by a party to the prior proceeding). Furthermore, collateral estoppel applies only to ultimate facts, not to evidentiary facts.

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[3] The trial court rejected Wilson's claim of justification and immunity on its merits; it did not accept the State's argument that issue preclusion applied. *See* Ruling (3/27/18) at 1–6; App. 110–15; Renewed Motion (2/19/18) at 1–3; App. 100–02. The issue-preclusion argument in the State's filing preserved error for the same argument on appeal. *See DeVoss v. State*, 648 N.W.2d 56, 60–62 (Iowa 2002).

State v. Sharkey, 574 N.W.2d 6, 9 (Iowa 1997) (quoting *State v. Sunclades*, 305 N.W.2d 491, 495–96 (Iowa 1981)). This case shows why collateral estoppel will usually apply in this situation: the jury could not convict unless it decided the precise issue of justification, which was the "ultimate fact" that Wilson litigated throughout trial. *See*, *e.g.*, TrialTr.V4 97:6–12 (framing the jury's central inquiry as: "Was he justified in using deadly force?"); Jury Instr. 23, 29, 32, 34; App. 83–86; TrialTr.V10 40:8–22 (explaining that, "if you answer that Mr. Wilson is justified, your job is done" and the verdict is not guilty). This fortifies the statutory construction argument that section 704.13 describes additional *effects* of a finding that use of force was justified, rather than requiring additional procedures: justification is litigated at trial, and jury verdicts after trials involving justification defenses frequently include preclusive findings on that issue that would moot any prior proceedings and preclude additional/cumulative litigation.[4]

[4] That preclusive effect does not leave Wilson unable to challenge the jury verdict. Wilson could (and did) file a motion for new trial to challenge the verdict as against the weight of the credible evidence. *See* Motion for New Trial (3/24/18); App. 105. And he may still renew sufficiency-of-the-evidence challenges and weight-of-the-evidence challenges on appeal (as he is currently doing). Collateral estoppel simply prevents Wilson from re-litigating issues that were necessarily decided by the jury verdict in the first instance, as though the jury had not decided them at all.

If issue preclusion does not apply, then the trial court's inquiry is guided by provisions of chapter 704, rather than jury instructions actually submitted—they become "law of the case" for purposes of sufficiency challenges, but presumably lose that binding effect if the jury verdict and the immunity ruling answer different questions. *See State v. Merrett*, 842 N.W.2d 266, 274–76 (Iowa 2014). This matters because section 704.2(2) explains that "deadly force" does not include "a threat to cause serious injury or death, by the production, display, or brandishing of a deadly weapon" that is "limited to creating an expectation that the person may use deadly force to defend oneself." *See* Iowa Code § 704.2(2). That exclusion clarifies that pre-emptive use of deadly force is not a justifiable response to armed deterrence.[5]

Deadly force is only reasonable self-defense "if it is reasonable to believe that such force is necessary to avoid injury or risk to one's life or safety or the life or safety of another, or it is reasonable to believe that such force is necessary to resist a *like* force or threat." *See* Iowa Code § 704.1(1) (emphasis added). Wilson claims Taylor's group

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[5] This argument also helps establish sufficiency of the evidence because the State objected to the omission of jury instructions that would have correctly stated this applicable principle. *See* TrialTr.V9 24:20–30:2; *State v. Tyler*, 873 N.W.2d 741, 752 n.8 (Iowa 2016) ("[T]he instructions, if not objected to, become the law of the case.").

"ultimately flashed their weapons and Wilson reacted by pulling out his own gun and firing repeatedly." *See* Def's Br. at 60–61. Even so, Wilson never claimed that anyone had aimed a gun at him—he said they were backing away with guns pointed at the ground, threatening *responsive* use of deadly force in self-defense. *See* Exhibit 4, at 51:12–55:42 ("I wish a motherfucker would."); *see also id.* at 23:54–25:14. Using deadly force to respond to those specific acts was unreasonable. Reasonable force may include deadly force when "necessary to resist a like force or threat"—but those threats are not "like" deadly force. *See* Iowa Code § 704.1(1). Rather, they are specifically excluded from the definition of "deadly force," and are legally distinguishable from it. *See* Iowa Code § 704.2(2). And such force would never be "necessary" to avoid injury. Someone may legally declare "stay back or I'll shoot," and it is not necessary to shoot them to avoid injury—just stay back.

Wilson is right when he explains that "the overall intent of the legislature in enacting HF517 was to expand the rights of and enhance the protections available to lawful gun owners in Iowa." *See* Def's Br. at 40. That is mostly accurate: it guarantees the right to display a gun and warn aggressors against triggering responsive use of deadly force, without giving those aggressors sufficient justification to shoot first

(and it does not limit that right to lawful gun owners). *See* Iowa Code §§ 704.1(1), 704.2(2). But Wilson's defense hinged upon ignoring that specific limitation of stand-your-ground justification defenses:

> Donte Taylor told you he pulled his gun out prior to Mr. Wilson firing a single shot. And that's what I mean. This is really clear cut. Gun, shots. He sees a gun, and he shoots. That is self-defense.

TrialTr.V10 31:7–10. He doubled down on that argument:

> The State can argue that no one pointed a gun at him. The law doesn't require Mr. Wilson to wait until someone has pointed a gun at him or shot him before he defends himself. That's not what the law requires. So I don't care. It doesn't matter. Donte Taylor could have his gun here or here or here. It doesn't matter. Mr. Wilson saw that gun. He told Officer Belay that he saw that gun. And he fired. His actions are reasonable.

TrialTr.V10 42:11–18; *see also* Def's Br. at 66. While the jury did not receive instructions that foreclosed that invalid defense, any separate judicial inquiry would reject his claim outright under section 704.2(2).

Wilson's narrative, at most, describes Taylor and his cohorts threatening *responsive* use of deadly force, which cannot justify a pre-emptive strike. *See* Exhibit 4, at 24:30–25:10, 51:12–55:42; Iowa Code § 704.2(2). Even if the jury's verdict had no preclusive effect, and even if Wilson's account were wholly truthful, his pre-emptive use of deadly force would still be unreasonable and unjustifiable.

Wilson argues that additional evidence submitted after trial—depositions from Ronnay Creed and Iamani Smith—established that Wilson was justified because "they saw D'Andre point a gun at Wilson that night, putting them in fear." *See* Def's Br. at 61. But Wilson never described that—and if he saw that, he would surely have mentioned it. So even if Creed and Smith were testifying truthfully, that specific fact could not impact either the subjective or objective reasonableness of Wilson's use of force. *See*, *e.g.*, *State v. Jacoby*, 260 N.W.2d 828, 837 (Iowa 1977) (noting that facts only help show "the degree and nature of [accused's] apprehension of danger which might reasonably justify resort to more prompt and violent measures of self-preservation" if those facts "were known to the accused"). Moreover, Creed and Smith lacked credibility—they each had a close relationship to Wilson, which was a substantial motive to fabricate testimony that exonerated him. *See* CreedDepo 30:19–33:18; SmithDepo 10:19–21. Indeed, it became abundantly clear that Creed and Smith were doing just that. *See*, *e.g.*, CreedDepo 38:11–40:5; SmithDepo 29:18–37:2. Their testimony was incapable of changing the facts as established by multiple witnesses and by Wilson himself: nobody but Wilson pointed a gun at anyone. The court was right to conclude Wilson's use of force was not justified.

Finally, even if Wilson were correct that he was entitled to a finding of immunity under section 704.13, such a finding would have a limited effect: he would be "immune from criminal or civil liability for all damages incurred by the aggressor"—but not for any damages incurred by anybody else. *See* Iowa Code § 704.13. It was undisputed that Kaleek and Xavier were both unarmed; Wilson only argues that D'Andre was armed with the extra gun found in Woods's bookbag. *See* Def's Br. at 60–61; TrialTr.V10 41:21–42:3 and 56:1–57:10. Thus, Wilson would only be immunized from liability for D'Andre's injury, at most—he would still be liable for killing Kaleek, injuring Xavier, and firing into the rest of the crowd. Any further immunity would fail to give effect to that specific limiting language, which is presumably "intended to be effective." *See* Iowa Code § 4.4(2). And proving that Wilson's use of force was justified in response to *Taylor's* aggression would not shield him from any of these charges under section 704.13.

In sum, the jury found beyond a reasonable doubt that Wilson's use of force was not justified; its finding has an issue preclusive effect that forecloses any re-litigation, other than direct challenges. Wilson's immunity claim was also foreclosed by section 704.2(2). Finally, the post-trial evidence had no credibility and, even if believed, little effect.

IV. The trial court did not err in ruling that the verdict was not against the weight of the credible evidence.

Preservation of Error

Wilson challenged the weight of the evidence in a motion for new trial. The court considered and rejected his motion. *See* Sent.Tr. 20:8–22:13. Error was preserved. *See Lamasters*, 821 N.W.2d at 864.

Standard of Review

The ruling denying the motion for new trial is reviewed for abuse of discretion. *See State v. Nitcher*, 720 N.W.2d 547, 559 (Iowa 2006) (quoting *State v. Reeves*, 670 N.W.2d 199, 202 (Iowa 2003)).

The trial court's discretion to deny a challenge to the weight of the evidence is only abused where "the evidence preponderates heavily against the verdict." *Reeves*, 670 N.W.2d at 202 (quoting *State v. Ellis*, 578 N.W.2d 655, 658–59 (Iowa 1998)).

Merits

Wilson seizes on the trial court's statement that "the evidence clearly established that [Wilson] indiscriminately discharged a dangerous weapon five times into a crowd." *See* Def's Br. at 68 (quoting Sent.Tr. 21:24–22:7). Wilson argues that concluding that he fired "indiscriminately" negates the intent elements for charges that required an intent to kill or injure Kaleek, D'Andre, and Xavier. *See*

Def's Br. at 70–71. But firing indiscriminately *at a group* is consistent with specific intent to injure/kill members of that group, while being indifferent as to the specific individuals hit. In other words, Wilson was intentionally firing at the group with intent to injure all members, but was firing indiscriminately among individuals within that group (which was a key fact that undermined his justification defense, in the court's view, because he shot without aiming at the alleged aggressors). Sent.Tr. 21:24–22:7; Ruling (3/27/18) at 5–6; App. 114–15. The word "indiscriminate" can signify lack of selectiveness within a set group, rather than total randomness and indifference to identity. *See, e.g.*, *State v. Willis*, 218 N.W.2d 921, 923 (Iowa 1974) ("Common law prostitution was the act or practice of a female in offering her body to indiscriminate intercourse with men."). It can describe actions taken without concern about the existence/non-existence of key conditions. *See, e.g.*, *Schark v. Gorski*, 421 N.W.2d 527, 528 (Iowa 1988) (noting argument that limitation on taxable discovery costs "would discourage indiscriminate harassment by costly and unnecessary discovery"). Or it can describe mere imprecision. *E.g.*, *Noel v. Noel*, 334 N.W.2d 146, 148 (Iowa 1983) ("Considerable confusion exists in this area of law from the indiscriminate use of terminology.").

Indeed, the court's use of the word "indiscriminate" is, itself, indiscriminate: not random, but without concern for differentiation between its various shades of meanings. *See* Sent.Tr. 21:24–22:7; Sent.Tr. 61:7–20; Ruling (3/27/18) at 5–6; App. 114–15. Still, it is clear from context that Wilson is incorrect to claim that the trial court found that he lacked intent to injure members of the Cedar Rapids group. Rather, it found Wilson acted with specific intent to shoot *all* of them, which supports findings on his specific intent to shoot *each* of them. The word "indiscriminate" was used to emphasize the inconsistency between Wilson's justification defense and the fact that his victims had been unarmed—he shot without concern for whether each target could be characterized as an aggressor. *See* Sent.Tr. 61:7–20 (noting "his rationale for shooting was that he saw Donte Taylor pull out his gun first," but that "Mr. Taylor was not shot by Mr. Wilson"). This is not a finding that the verdict was against the weight of the evidence, nor should it have been. Therefore, Wilson's challenge fails.

V. The trial court did not err in denying Wilson's motion challenging the jury panel under *Duren* and *Plain*.

Preservation of Error

Error was preserved when the trial court overruled Wilson's motion challenging the jury panel. *See* TrialTr.V1 17:7–19:4.

Standard of Review

Review is de novo. *See State v. Plain*, 898 N.W.2d 801, 810 (Iowa 2017); *State v. Chidester*, 570 N.W.2d 78, 80 (Iowa 1997).

Merits

In *Plain*, the Iowa Supreme Court confirmed that Iowa follows *Duren* and requires three showings to support any claim alleging unconstitutional underrepresentation of a racial group in a jury pool:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Plain, 898 N.W.2d at 821–22 (quoting *Duren v. Missouri*, 439 U.S. 357, 364 (1979)). Wilson's claim satisfies the first prong. But it fails on the others: Wilson cannot show substantial underrepresentation, and he has not alleged any articulable theory of systematic exclusion.

A. African-Americans and Hispanics both qualify as distinctive groups.

Wilson alleged underrepresentation and exclusion of both African-Americans and Hispanics from jury panels in Polk County. *See* Motion (1/19/18); App. 67. Both are distinctive groups for *Duren* purposes. *See United States v. Garcia*, 991 F.2d 489, 491 (8th

Cir. 1993) ("It is clear that Hispanics and African-Americans are distinctive groups in the community."); *cf. Barber v. Ponte*, 772 F.2d 982, 999 (1st Cir. 1985) (noting that "distinctive group" prong intends "to give heightened scrutiny to groups needing special protection, not to all groups generally," and rejecting *Duren* challenge that alleged underrepresentation and exclusion of jurors under 34 years old).

The trial court appeared to reject Wilson's claim that alleged underrepresentation/exclusion of Hispanics on this prong, because Wilson is not Hispanic. *See* TrialTr.V1 5:10–17:3. Wilson's challenge to Hispanic representation levels would have been rejected on both other prongs of *Duren*, for the same reasons that prompted the court to deny his challenge to African-American representation levels. But both claims survive this stage because Wilson's race is not relevant to the *Duren* analysis. *See Duren*, 439 U.S. at 360–64 (granting relief to male defendant who alleged underrepresentation and exclusion of women from jury pools/panels); *Peters v. Kiff*, 407 U.S. 493, 495–500 (1972) ("[T]he existence of a constitutional violation does not depend on the circumstances of the person making the claim"). This Court should explain the error, but it may still affirm the trial court's ruling based on arguments about Wilson's failure to prove the other *Duren* prongs,

which were made below and which formed the basis for overruling the remainder of Wilson's challenge. Resistance (1/21/18); App. 69; TrialTr.V1 13:12–19:14; *DeVoss*, 648 N.W.2d at 61–62.

B. The representation of African-Americans and Hispanics on Wilson's jury panel was fair and reasonable in relation to their representation in the community.

The second prong of *Duren* requires Wilson to establish that "representation of the group" on his panel is not "fair and reasonable in relation to the number of such persons in the community." *See United States v. Weaver*, 267 F.3d 231, 240 (3d Cir. 2001) (citing *Duren*, 439 U.S. at 364); *Plain*, 898 N.W.2d at 822.

All assessment of substantial underrepresentation starts with determining the percentage of the jurisdiction's eligible jurors who belong to the distinctive group. *See id.* at 822–23. Here, the State stipulated to the accuracy of census data for those demographics. *See* TrialTr.V1 15:24–16:1. The next step is to confirm numbers for the jury panel at issue. There were 100 potential jurors on the panel, but only 96 indicated their race. Of those, three were African-American and four were Hispanic. *See* TrialTr.V1 17:18–18:21. Here are figures for absolute disparity, comparative disparity, and standard deviation, as explained in *Plain*, 898 N.W.2d at 822–23.

TABLE 1	African-Americans	Hispanics
Observed representation	3.125% (3 out of 96)	4.167% (4 out of 96)
Census figure	6.8% [6]	8.4% [7]
Absolute disparity	3.675%	4.233%
Comparative disparity	54.04%	50.39%
Standard deviation √(96)(%C)(1−%C)	2.467	2.718
Expected representation	6.528 jurors (6.8% of 96 jurors)	8.064 jurors (8.4% of 96 jurors)
Observed deviation from expected	3.528 jurors (expected−3)	4.064 jurors (expected−4)
Z-Score (Actual deviation/SD)	1.430	1.495
CBP	10.17% [8]	8.643% [9]

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6 This was stipulated, based on 2016 census data. *See* TrialTr.V1 6:25–7:5; TrialTr.V1 15:24–16:1; TrialTr.V1 17:18–18:2.

7 This is not in the record, even in Wilson's written challenge. *See* Motion (1/19/18); App. 67. This parameter uses 2018 census data. *See* U.S. CENSUS BUREAU, *QuickFacts: Lee County, Iowa* (2018), https://www.census.gov/quickfacts/fact/table/polkcountyiowa/RHI325217, archived at https://perma.cc/SN3R-UPTU.

8 WOLFRAMALPHA, "3 successes in 96 trials with p=.068", https://www.wolframalpha.com/input/?i=3+successes+in+96+trials+with+p%3D.068 ("3 or less successes")

9 WOLFRAMALPHA, "4 successes in 96 trials with p=.084", https://www.wolframalpha.com/input/?i=4+successes+in+96+trials+with+p%3D.084 ("4 or less successes").

Plain discarded the 10% absolute disparity threshold, but the disparity figures presented still cannot support Wilson's assertion that representation on this jury panel is not fair and reasonable. *See Berghuis v. Smith*, 559 U.S. 314, 330 n.5 (2010) (collecting cases); *United States v. Orange*, 447 F.3d 792, 798–99 & n.7 (10th Cir. 2006) (collecting additional cases); *United States v. Suttiswad*, 696 F.2d 645, 648–49 (9th Cir. 1982). Both standard deviation figures are low, far below *Castaneda*'s threshold. *See Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977) ("[I]f the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the jury drawing was random would be suspect to a social scientist."). And these CBP figures show that similar underrepresentation would be expected to occur/reoccur randomly in a significant percentage of jury trials in Polk County. Therefore, these results are neither unfair nor unreasonable.

Wilson does not attempt to make any argument about the fairness or reasonableness of representation on his jury panel. *See* Def's Br. at 73–78. Consequently, his argument is facially deficient. And he cannot claim to need additional data for this analysis—this prong of *Duren* only assesses underrepresentation on *his* jury panel.

Otherwise, Wilson would be able to establish his *Duren* claim without establishing any cognizable violation of his Sixth Amendment rights. *See, e.g.*, *Alons v. Iowa Dist. Ct. for Woodbury Cnty.*, 698 N.W.2d 858, 867–68 (Iowa 2005) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)); *cf. State v. Smith*, No. 16–1881, 2017 WL 4315058, at *3 (Iowa Ct. App. Sept. 27, 2017) (explaining that distinctive group may have been *over*represented in jury pool, and holding Smith "cannot establish the second element of the *Duren* test" because "Smith cannot demonstrate underrepresentation in the jury pool for his case"). Even before analyzing the final prong of *Duren*, Wilson's claims are deficient and must fail.

C. Wilson's sandbagged request for historical data cannot excuse his failure to prove or allege systematic exclusion.

"[D]isproportionate exclusion of a distinctive group from the venire need not be intentional to be unconstitutional, but it must be systematic." *See Randolph v. California*, 380 F.3d 1133, 1141 (9th Cir. 2004). Exclusion must be "inherent in the particular jury-selection process utilized." *See Plain*, 898 N.W.2d at 824 (quoting *Duren*, 439 U.S. at 366). Barring exceptional demonstrations of total exclusion, statistics alone cannot prove that underrepresentation is systematic.

See United States v. Rodriguez, 581 F.3d 775, 790 (8th Cir. 2009) (quoting *United States v. Morin*, 338 F.3d 838, 844 (8th Cir. 2003)) ("[E]thnic and racial disparities between the general population and jury pools do not by themselves invalidate the use of [specific source] lists and cannot establish the systematic exclusion of allegedly under-represented groups."); *Rivas v. Thaler*, 432 Fed. App'x 395, 402–03 (5th Cir. 2011) ("[T]he fact that certain groups of persons . . . appear in numbers unequal to their proportionate representation in the community does not support Rivas's allegation that Dallas County systematically excludes them in its jury selection process."); *United States v. Hernandez-Estrada*, 749 F.3d 1154, 1166 (9th Cir. 2014) ("[W]hile Hernandez has introduced significant evidence regarding underrepresentation . . . , he has failed to provide evidence that this underrepresentation is due to the system employed . . . , and has therefore failed to establish a prima facie case under *Duren*."); *accord People v. Henriquez*, 406 P.3d 748, 763 (Cal. 2017); *People v. Burgener*, 62 P.3d 1, 20 (Cal. 2003); *People v. Smith*, 615 N.W.2d 1, 14 (Mich. 2000); *State v. Jackson*, 836 N.E.2d 1173, 1192–93 (Ohio 2005); *State v. Robles*, 535 N.W.2d 729, 733 (N.D. 1995); *United States v. Cecil*, 836 F.2d 1431, 1447–48 (4th Cir. 1988) (collecting more cases).

Wilson never articulated a theory of systematic exclusion below and does not present such a theory on appeal. *See* Motion (1/19/18); App. 67; TrialTr.V1 8:9–10:4; TrialTr.V1 14:10–15:7; TrialTr.V1 18:22–19:14; Def's Br. at 74–78. No amount of historical jury data could save this incomplete claim. Wilson did not need to show any particular level of underrepresentation on other panels—he needed to show unfair representation on *his* panel was "inherent in the particular jury-selection process utilized." *See State v. Fetters*, 562 N.W.2d 770, 777 (Iowa Ct. App. 1997) (quoting *Duren*, 439 U.S. at 366). He offered no evidence and made no argument that could carry that burden. *See* TrialTr.V1 18:22–19:14. Therefore, none of Wilson's complaints about unavailability of historical data can necessitate any further inquiry—no data could patch the gaping hole in his facially deficient claims.

Even if Wilson's challenges would improve with prior jury data, his request was inexcusably untimely. The trial court observed that Wilson had sandbagged his challenge by waiting to request jury data until ten days before trial, around January 12—when he could have made such requests as early as November. *See* TrialTr.V1 12:19–13:9. Wilson argues that the district court was put on notice by the decision in *Plain*, issued months earlier—but so was he. *See* Def's Br. at 77–78.

And if Wilson had been having trouble obtaining records in the days preceding trial, he should have informed the trial court—but instead, Wilson reassured the trial court that he was only waiting for *his own* jury panel, and then ambushed the court with a last-minute complaint about data availability under *Plain*. *See* PretrialTr. (1/19/18) 46:2–25. That sandbagged complaint cannot salvage this deficient claim.

Finally, note that Wilson's data already showed that better minority representation had been achieved on *prior* jury panels that were drawn with the same system. *See* TrialTr.V1 8:2–10:4. This data would undermine any hypothetical theory of systematic exclusion: if the same process could produce more diverse/representative panels and did so recently, then underrepresentation cannot be "inherent in the particular jury-selection process utilized." *See Plain*, 898 N.W.2d at 824 (quoting *Duren*, 439 U.S. at 366). The trial court's ruling was correct on the evidence presented and would have remained correct even if Wilson offered centuries worth of historical data, because the two jury pools that immediately preceded Wilson's had foreclosed any showing of systematic exclusion. *See* Motion (1/19/18); App. 67–68. No last-minute fishing expedition for data could have saved Wilson's facially deficient challenge.

D. Wilson's proposed remedy would have violated equal protection principles and invalidated the ensuing trial. The court was correct to reject it.

Wilson did not seek to delay the trial. Instead, he suggested this: "the court should randomly select white jurors to be removed from the panel of 100 and replaced with randomly selected black and Hispanic jurors from the remaining [jury panels]." *See* Addendum (1/21/18); App. 71; TrialTr.V1 10:5–12:18. That would be unconstitutional—just like the Eastern District of Michigan's practice from *Ovalle*:

> [I]n an effort to assure that African-Americans are fairly represented in the qualified jury wheel, one in five non-African-Americans were selected at random to be removed from the jury wheel simply because of their racial status.
>
> [. . .]
>
> The selection of the grand and petit juries from a qualified jury wheel that was derived through racially discriminatory means, and the fact that the Jury Selection Plan was not narrowly tailored to meet any compelling governmental interest, constitute grounds for reversal of the defendants' convictions.

United States v. Ovalle, 136 F.3d 1092, 1095–1107 (6th Cir. 1998). The State pointed out this problem. *See* TrialTr.V1 15:8–18. Wilson's motions challenging the jury panel were without merit, and the court was correct to overrule them—and because Wilson had only sought a remedy that was unconstitutional, it would have *still* been correct to decline to grant that remedy, even if Wilson's challenges had merit.

VI. No challenge to the sentencing recommendation in the PSI report was raised. Removing the recommendation could not have changed Wilson's sentence.

Preservation of Error

Error was not preserved—there was no objection to including a recommendation in the PSI report. *See* Sent.Tr. 45:13–46:3. Wilson argues this issue "can be decided without further evidence," both to justify ignoring error preservation rules and to enable resolution of ineffective-assistance claims on direct appeal. *See* Def's Br. at 78–80. (quoting *State v. Gordon*, 921 N.W.2d 19, 25 (Iowa 2018)). But Wilson's argument is that the PSI author's recommendation is not "relevant information" or "pertinent information" that should be included in PSI reports for use at sentencing. *See* Def's Br. at 83–90 (quoting Iowa Code §§ 901.2(1), 901.2(4)). That requires Wilson to speculate about the process used to generate PSI recommendations and the qualifications of PSI report authors—and his failure to object deprived the State of any opportunity to build that record, deprived the sentencing court of any opportunity to rule on the challenge (and perhaps exclude the recommendation as a precaution), and resulted in presentation of this claim without any useful factual record. Just like in *Gordon* and *Guise*, "[i]t is unfair to the State for us to reverse

the district court's sentence for allegedly considering an improper factor when the court needed more information to determine if the factor it considered was improper and the defendant failed to bring that issue to the attention of the court at the time of sentencing." *See Gordon*, 921 N.W.2d at 23–24; *State v. Guise*, 921 N.W.2d 26, 29 (Iowa 2018). Even Wilson's alternative ineffective-assistance claim cannot be resolved because there are no facts to enable counterfactual resolution of a hypothetical challenge. *See Gordon*, 921 N.W.2d at 24. This claim must either be rejected for lack of *Strickland* prejudice or preserved for post-conviction proceedings.

Standard of Review

Review of sentencing decisions is "for abuse of discretion or defect in the sentencing procedure." *State v. Hopkins*, 860 N.W.2d 550, 553 (Iowa 2015). Ineffective-assistance claims are de novo. *Id.*

Merits

Because Wilson did not object to the PSI report's inclusion of a sentencing recommendation, any direct challenge is waived. *See State v. Grandberry*, 619 N.W.2d 399, 402 (Iowa 2000) ("In determining a defendant's sentence, a district court is free to consider portions of a [PSI] report that are not challenged by the defendant."). To prove that

his counsel was ineffective for failing to object, Wilson must establish that failing to object was a breach of duty and that it prejudiced him by depriving him of some reasonable probability of a different result. *State v. Keller*, 760 N.W.2d 451, 452 (Iowa 2009). The record is not sufficient to assess breach, but it forecloses any hint of prejudice.

Wilson is correct that the sentencing court, in explaining its decision, mentioned the PSI report's sentencing recommendation. *See* Sent.Tr. 62:2–5. But the recommendation was silent on question of concurrent/consecutive sentences. *See* PSI Report (3/15/18) at 10; CApp. 141 (recommending "prison imposed" since "the serious nature of the offense and harm to the victims warrant[s] incarceration"). And the PSI recommendation was so indefinite that it lent itself to Wilson's argument for "concurrent time." *See* Sent.Tr. 55:2–23.

Indeed, the recommendation was superfluous. Incarceration was mandatory on two convictions; running them all concurrently would have satisfied the PSI author. *See* PSI Report (3/15/18) at 10; CApp. 141; Sent.Tr. 52:15–20. But the court heard Kaleek's family give victim impact statements, saw no indication of any remorse from Wilson for causing Kaleek's tragic and senseless death, and concluded that both retribution and incapacitation required "the maximum." *See*

Sent.Tr. 60:24–62:14; *see also* Sent.Tr. 35:13–44:10. That discussion illustrates that, even without any PSI recommendation, the sentencing court would still have set Wilson's sentences to run consecutively and Wilson's sentence would have been unchanged. Because the record forecloses any possibility that excising the recommendation from the PSI report could have changed the outcome, there is no prejudice and no need to preserve this claim for PCR proceedings.

CONCLUSION

The State respectfully requests that this Court affirm Wilson's convictions and sentences.

REQUEST FOR NONORAL SUBMISSION

This case should be set for nonoral submission. In the event argument is scheduled, the State asks to be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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