SUPREME COURT NO. 17-1075
POLK COUNTY NO. FECR217722

# IN THE SUPREME COURT OF IOWA

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**STATE OF IOWA**
Plaintiff-Appellee,

v.

**KENNETH LEROY HEARD**
Defendant-Appellant.

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*ON APPEAL FROM THE IOWA DISTRICT COURT*
*IN AND FOR POLK COUNTY*
*HONORABLE ROBERT J. BLINK, DISTRICT COURT JUDGE*

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## REPLY BRIEF FOR APPELLANT

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## PROOF OF SERVICE & CERTIFICATE OF FILING

On June 13, 2018, I served this brief on the Applicant at his address at the Iowa State Penitentiary and all other parties by EDMS to their respective counsel:

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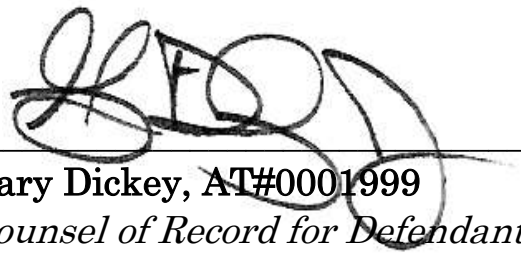
I further certify that I did file this proof brief with the Clerk of the Iowa Supreme Court by EDMS on June 13, 2018.



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## REPLY ARGUMENT

### I. THE ABSENCE OF ANY FACTUAL FINDING BEYOND A REASONABLE DOUBT BY THE JURY THAT HEARD WAS AN ADULT AT THE TIME OF HIS OFFENSE RENDERS HIS LIFE WITHOUT PAROLE SENTENCE SUBSTANTIVELY UNCONSTITUTIONAL

Through rhetorical sleight of hand, the State attempts to recast Heard's challenge to his illegal sentence as a dispute over "marshalling instructions" and "trial procedure." (State's Br. at 21-22). It is neither. Instead, Heard's sentence is illegal because it is beyond the authority of criminal law under the Iowa Constitution to impose a mandatory life sentence for an offense committed by a juvenile offender. *State v. Sweet*, 879 N.W.2d 811, 839 (Iowa 2016). As a result, a defendant's status as an adult, which increases the mandatory minimum sentence for the crime, is an "element of the crime." *Alleyne v. United States*, 570 U.S. 99, 105-116 (2013).[1] And, because "a defendant can be convicted

[1] Stated differently, a defendant's status as an adult is not a "sentencing factor," nor is it a "fact that influences judicial discretion" in imposing a criminal sentence. *Id.* at 105-106, 116. For this reason, the cases cited in the State's brief are inapposite. (State's Br. at 24-25). It is true that *Alleyne* would not apply to *Lyle* and *Miller* sentencing proceedings in which the judge retains authority to impose mandatory minimum sentences. After *Sweet*,

only if the jury has found each element of the crime of conviction" beyond a reasonable doubt, it necessarily follows that Heard cannot be sentenced to life without parole in the absence of a jury finding that he was an adult at the time of his offense. *Id.* at 115. Thus, because the district court lacked authority to impose a life without parole sentence following the jury's general verdict, Heard's sentence is illegal.

The State also misses the mark on the appropriate remedy for the *Alleyne* violation. (State's Br. at 25)("the proper remedy would be a remand for trial on the issue of age alone"). As explained in *Alleyne*, increasing the penalty at sentencing on the basis of an element that was found by the judge, rather than the jury, violates the defendant's Sixth Amendment rights. *Id.* at 117. Accordingly, the proper remedy is to vacate Heard's judgment with respect to his sentence of life without the possibility of parole, and "remand the case for resentencing consistent with the jury's verdict." *Id.* at 118. It is not to remand for a new trial.

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however, Iowa judges have no discretion to impose a life without parole sentence for a juvenile offender. For this reason, an offender's status as an adult is an element of any offense resulting in a life sentence without the possibility of parole.

## II. THE UNIQUE CIRCUMSTANCES OF HEARD'S CASE WARRANT A DEPARTURE FROM THE CATEGORICAL RULE SET FORTH IN *STATE V. BEDWELL* THAT PROHIBITS A DEFENDANT FROM CALLING A WITNESS TO INVOKE HIS RIGHT AGAINST SELF-INCRIMINATION IN THE PRESENCE OF THE JURY

The State defends a categorical rule prohibiting a defendant from calling a witness to assert his right against self-incrimination in front of the jury on three grounds. First, the State asserts that invocation of the right against self-incrimination is never relevant. (State's Br. at 32-34). Second, the State claims the invocation would be unfairly prejudicial. (State's Br. at 35-36). Finally, the State argues that a departure from the categorical rule set forth in *State v. Bedwell*, 417 N.W.2d 66 (Iowa 1987), would encourage "flagrant manipulation" by conspiring "comrade[s]." (State's Br. at 31). None of these reasons independently, or when taken together, is availing.

There can be no meaningful dispute that the invocation of the right against self-incrimination by a suspect in front of the jury has probative value:

> While not every plea of the Fifth will be sufficiently probative to be admissible, if the question asked is

> narrowly drawn, an inference can be logically compelling and at least as probative as other inferences routinely drawn by a jury. A per se rule barring such inferences, therefore, will necessarily exclude probative evidence. Because the privilege is only available to protect against answers that would be incriminating and a witness is under oath when she invokes the privilege, it can at least be inferred that the witness *believes* that the answer to the instant questions would incriminate her. The value of this inference will vary with the scope of the question. . . . If the witness claims the Fifth when asked "Did you plant the glove that you claimed to have found?" the logical inference will be that she did. Because testimony that she did not plant the glove would not be incriminating, no Fifth Amendment privilege would be available if that were the truth. To the extent that it is possible to think of other reasons that a witness might plead the Fifth in response to this question, it will be incumbent upon the prejudiced party to clarify through more specific questioning. As each party questions and re-questions each witness, these other possible inferences will disappear. Far from being a radical idea, this is the basic method by which our adversary system is intended to seek truth.

Charles R. Nesson and Michael J. Leotta, The Fifth Amendment Privilege Against Cross-Examination, 85 Geo. L.J. 1627, 1674-75 (1997). Instead, the real question is whether the invocation of the privilege in front of the jury is unfairly prejudicial. "Even if the invocation of the privilege is at times more prejudicial than probative, however, undoubtedly it cannot *always* be so." *Id.* at

1677. "The probative value of the inference to be drawn will vary with the scope of the question; the prejudicial effect will vary with the circumstances of the case." *Id.*

Here, the basic facts of the crime are not in dispute. Joshua Hutchinson traveled together with Heard, Jaquisha Majors, Marco Brown, and Phillip Findley to a remote area behind an apartment building. Heard and Majors left together. Brown and Findley left together. Hutchinson remained behind with a fatal gunshot wound to the head. From these facts, only two possibilities exist to explain Hutchinson's death. Either Heard, Majors, Brown, or Findley committed the murder. Or, some combination of the four acted in concert to commit the murder. Under this set of undisputed facts, Brown's invocation of his privilege against self-incrimination in response to a question about whether he told another person that he shot Hutchinson would support the logical inference that he made the statement—and accordingly, the jury could reasonably infer that Brown did in fact shoot Hutchinson. Not only would this inference have been probative, it would have been the most relevant evidence of

Heard's defense. "Allowing such an inference would better serve the functions of the judicial system by improving the accuracy of the trial as a truth-seeking process, treating defendants more fairly, leading to more acceptable verdicts, and providing community catharsis." *Id.* at 1630.

The State overstates the unfair prejudice arising from Heard's request for Brown to invoke his privilege against self-incrimination in front of the jury. Indeed, the principal case to which the State cites, *State v. Allen*, 224 N.W.2d 237 (Iowa 1974), involved a *witness called by the prosecution* and required to invoke his right against self-incrimination in the presence of the jury. *Id.* at 239-40. Of course in that instance the forced invocation of the privilege is prejudicial because a criminal defendant has no power to offer immunity to force the witness to testify. The same consideration is absent in cases, such as this, in which a defendant seeks to have a witness invoke his or her privilege in front of a jury.[2]

[2] The State's citation to *Bedwell* is similarly unavailing for the reasons identified in Heard's initial merits brief. Namely, the Court in *Bedwell* failed to recognize the difference in fairness

Likewise, the State's belief that Heard's request would encourage the flagrant manipulation in which comrades team up to defeat the prosecution of a criminal case is overblown. (State's Br. 30-31). Setting aside the fancifulness of the State's concern, it is not present in Heard's case. Brown previously waived his right against self-incrimination when he testified at Heard's first trial so he has already provided statements that could be used against him in a criminal prosecution. (App. at 114). Furthermore, the trial court could screen out manufactured invocations by requiring the defendant to present evidence that "the proposed witness might have committed the crime instead of the defendant." *Gray v. Maryland*, 796 A.2d 697, 716-17 (Md. 2002).

To be clear, the Court need not create a categorical rule allowing to require a witness to invoke his or her Fifth Amendment privilege in the presence of the jury in every trial in order for Heard to be entitled to relief. Instead, the Court could fashion a rule that requires a district court to weigh the potential

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when the witness is called by the defendant rather than the prosecution. In addition, the Court analyzed the issue under the United States Constitution without any independent analysis under the Iowa Constitution.

probative value of the inference to be drawn from the witness's assertion of his or her privilege against the potential for unfair prejudice.[3] The unique facts of Heard's case would entitle him to relief under this approach. Heard's theory of defense was that Brown murdered Hutchinson at the behest of Deland Stanley. Consequently, the inference drawn from Brown's refusal to testify was central to his defense. Furthermore, the record contains substantial evidence that Brown had the motive and means to carry out the murder on behalf of Deland Stanley. And, it bears repeating that Brown previously waived his right against self-

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[3] On this point, it should be noted that not all of the jurisdictions following *Bowles* have adopted a categorical rule prohibiting compelling a witness to invoke his or her privilege in front of the jury as suggested by the State. (State's Br. at 41). *State v. Robinson*, 715 N.W.2d 531 (Ne. 2006), is a case in point. In *Robinson*, the Nebraska Supreme Court recognized that in appropriate circumstances a defendant may be entitled to call a witness to make an invocation in front of the jury but merely held that Robinson had "not presented sufficient believable evidence of the possible guilt of [his proposed witness] in the shooting [of the victim]." *Id.* at 725; *accord Connecticut v. Bryant*, 523 A.2d 451, 457 (Conn. 1987)("at the time the defendant sought to call [the witness] to the witness stand for the purpose of having him invoke his privilege the jury had before it little evidence implicating [the witness] as the third party culprit").

incrimination when he testified previously at Heard's first trial. In fact, the basis for the district court setting aside Heard's first trial was his trial counsel's failure to adequately cross-examine Brown. (App. at 29). Considering these facts together, the district court's refusal to allow Heard to call Brown to invoke his privilege in the presence of the jury violated his rights to confrontation and compulsion.

## CONCLUSION

For the reasons set forth above, Kenneth Heard, requests this court reverse his conviction and remand the case to the district court for a new trial. Alternatively, Heard requests the court to vacate the portion of his sentences that imposes a life sentence without the possibility of parole.

## COST CERTIFICATE

I hereby certify that the costs of printing the Appellant's proof brief was $6.00 and that that amount has been paid in full by me.

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(*g*)(1) or (2) because:

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