IN THE SUPREME COURT OF IOWA
Supreme Court No. 17–1075

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KENNETH LEROY HEARD,
Defendant-Appellant.

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

APPLICATION FOR FURTHER REVIEW

(Iowa Court of Appeals Decision: January 9, 2019)

THOMAS J. MILLER
Attorney General of Iowa

LOUIS S. SLOVEN
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
Louie.Sloven@ag.iowa.gov

JOHN P. SARCONE
Polk County Attorney

THOMAS H. MILLER & OLUBUNMI SALAMI
Assistant Polk County Attorneys

ATTORNEYS FOR PLAINTIFF-APPELLEE

QUESTIONS PRESENTED FOR FURTHER REVIEW

The Iowa Court of Appeals reversed and remanded for a new trial because it found Heard's right to compulsory process was violated when the trial court accepted Brown's assertion of Fifth Amendment privilege as to the entire subject matter of this murder trial. The facts had established that Brown was at least an accessory to the murder. Heard had argued and was arguing that Brown was the actual killer.

(1) On the question of the proper scope of the privilege, did the trial court err when it determined that any answer that would help prove Heard's defense that Brown was the killer would incriminate Brown?

(2) Did the trial court err in applying the categorical rule from *Bedwell* that prohibits a defendant from calling a witness for the sole purpose of raising an inference from his invocation of Fifth Amendment privilege?

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STATEMENT SUPPORTING FURTHER REVIEW

On January 9, 2019, the Iowa Court of Appeals reversed Heard's conviction for first-degree murder. *State v. Heard*, No. 17–1075, 2019 WL 141005 (Iowa Ct. App. Jan. 9, 2019). That decision conflicts with Iowa precedent: *State v. McDowell* and *State v. Bedwell*.

Heard challenged the trial court's refusal to compel Brown to testify at trial, because Brown invoked his Fifth Amendment privilege against self-incrimination. The panel reversed and held the trial court had "fail[ed] to determine the extent and validity of Brown's reported assertion of his Fifth Amendment privilege." *See* SlipOp. at 10.

That premise is factually incorrect. The trial court appraised the claim of Fifth Amendment privilege in the context of the case, based on Heard's sustained advocacy that Brown was the actual murderer. *See*, *e.g.*, Order (2/14/17) at 1 (noting that Heard maintains "Brown was the shooter"); Ruling (4/26/17) at 1 ("It is Defendant's theory that this witness is the real killer."); PretrialTr. (1/3/17) at 5:11–16 (noting court "had an opportunity to inquire of [Brown] on the record" regarding intent to claim privilege); *cf.* PretrialTr. (1/3/17) at 14:2–15 (requesting filing of Brown's trial testimony and Heard's proposed examination questions to decide on admissibility of prior testimony).

More importantly, the application of law in the panel opinion conflicts with Iowa precedent. *See* Iowa R. App. P. 6.1103(1)(b)(1). On the scope of the invocation, the panel stated "Brown's unequivocal statement of his intent to assert his Fifth Amendment privilege is not sufficient to justify his blanket claim of privilege." *See* SlipOp. at 10. But *State v. McDowell* establishes that, when a defendant alleges that a witness was the real culprit, compelling that witness to testify about relevant facts may amount to "compell[ing] her to place herself at the center of the alleged crime"—and, in that situation, there is no error in "respecting the validity and extent of the privilege" as applied to "the whole subject matter of the case." *See State v. McDowell*, 247 N.W.2d 499, 500–02 (Iowa 1976). *McDowell* is controlling precedent, and the panel's opinion conflicts with *McDowell*.

The panel's opinion also conflicts with *State v. Bedwell*, which Heard had urged this Court to overrule. Heard's focus on this appeal was on the ruling that barred him from calling Brown to the stand at trial to stage a live invocation of Fifth Amendment privilege, to urge the jury to infer Brown's culpability from that invocation. The panel recognized *Bedwell* established a "categorical prohibition" against such tactics. *See* SlipOp. at 10; *accord* SlipOp. at 8 (quoting *State v.*

Bedwell, 417 N.W.2d 66, 69 (Iowa 1987)) ("[T]he jury is not entitled to draw any inferences from the decision of a witness to exercise his constitutional privilege whether those inferences be favorable to the prosecution or the defense."). It also recognized that it did not have "the power to overturn Iowa Supreme Court precedent." *See* SlipOp. at 8–9. But it still held that *Bedwell*'s rule "does not take into account the unique context of this case." *See* SlipOp. at 10. Carving out such an exception to any "categorical prohibition" effectively overrules it, so the panel opinion impermissibly conflicts with *Bedwell*.

Trial courts have broad discretion to determine the scope of Fifth Amendment privilege in the context of each case and to manage the presentation of evidence—but they need clear guidelines and unambiguous boundaries to guide their exercise of that discretion. *McDowell* allows trial courts to use deductive logic when a defendant is calling a witness for the express purpose of accusing that witness of committing the crime in the defendant's place. *Bedwell* forbids use of Fifth Amendment invocations as evidence—they lack probative value and are unduly prejudicial because they rely on speculative inferences and cannot be tested in cross-examination. This Court should grant review, reaffirm both *McDowell* and *Bedwell*, and reverse the panel.

STATEMENT OF THE CASE

Nature of the Case

The Court of Appeals held (1) the trial court erred in accepting Brown's "blanket invocation" of Fifth Amendment privilege when Heard's theory was that Brown killed Hutchinson; and (2) the court should have required Brown to invoke his Fifth Amendment privilege in the jury's presence to enable Heard to argue Brown was invoking his Fifth Amendment privilege because Brown was the killer. Both holdings conflict with Iowa precedent. The State seeks further review.

Course of Proceedings

At Heard's first trial, Brown testified that he saw Heard shoot Hutchinson. That testimony was corroborated by two other witnesses. Heard was convicted of first-degree murder, and that conviction was affirmed on direct appeal. *See State v. Heard*, No. 09–0102, 2010 WL 2090851, at *1–2 (Iowa Ct. App. May 26, 2010). Heard's conviction was vacated on post-conviction relief, partially because of a finding that Heard's trial counsel was ineffective for failing to impeach and implicate Brown on cross-examination to support Heard's defense that Brown killed Hutchinson. *See* PCR Ruling (12/31/15); App. 29. At depositions before retrial, Brown invoked his Fifth Amendment privilege and refused to answer questions. The trial court inquired

and confirmed Brown's intent to assert Fifth Amendment privilege in a similar manner, if called at trial. *See* PretrialTr. (1/3/17) at 5:11–16. The State moved to have Brown declared unavailable and to admit his testimony from Heard's previous trial at retrial. The trial court ruled that Brown was unavailable and that admitting Brown's prior testimony would violate the Confrontation Clause. *See* Order (2/14/17); App. 56.

Heard moved to compel Brown to "testify before a jury to (1) all non-incriminating questions, and (2) questions in which he invokes his Fifth Amendment right against self-incrimination." *See* Motion to Compel (2/20/17) at 4; App. 68. The trial court observed that Heard "would call this witness for the specific purpose of using that silence—the exercise of a constitutional right—as evidence." Ruling (4/26/17) at 1; App. 95. It refused to allow such tactics, citing *State v. Bedwell* and explaining its concerns with "evidence by innuendo, untested by the adversarial process." *See id.* at 1–2; App. 95–96. Again, Heard was found guilty as charged—this time, without any testimony from Brown.

On appeal, Heard leaned into his argument that he should have been permitted to call Brown to the stand, let jurors hear him invoke his Fifth Amendment privilege, and raise inferences from Brown's invocation of privilege as substantive evidence. *See* Def's Br. at 30–40.

He also challenged the scope of Brown's Fifth Amendment privilege. *See* Def's Br. at 27–30. The State argued that *Bedwell* and *McDowell* foreclosed those two challenges, respectively. *See* State's Br. at 27–46.

Heard requested retention to overrule *Bedwell*, but his appeal was routed to the Iowa Court of Appeals. *See* Def's Br. at 9, 30–39. The panel identified *Bedwell* as controlling precedent setting out a "categorical prohibition" against calling a witness for the purpose of arguing an inference from invocation of Fifth Amendment privilege. But it declined to follow *Bedwell* because of "the unique context of this case," without any explanation as to why the circumstances of the instant case rendered *Bedwell* inapplicable or how it could carve out an exception to a "categorical prohibition" without overruling it. *See* SlipOp. at 8–10. The panel also held that the trial court erred in permitting Brown to invoke Fifth Amendment privilege as to the entire subject matter of this case, without discussing *McDowell* or pointing to questions that Brown could answer. *See* SlipOp. at 7–10.

Statement of Facts

The underlying facts of this murder are accurately summarized in the panel opinion. *See* SlipOp. at 1–4.

ARGUMENT

I. *McDowell* is controlling. The trial court was correct that any questions on the subject matter of this case would enable Brown to invoke his Fifth Amendment privilege—so this "blanket assertion" was proper.

The panel opinion stated "[t]he trial judge was obligated to determine whether Brown would have been able to answer any of the questions Heard proposed without incriminating himself." *See* Slip Op. at 8. But its finding that Brown could not do so was inherent in the ruling that found Brown was wholly unavailable to testify, which included a review of Heard's proposed questions for Brown. *See* Order (2/14/17) at 3–8; App. 58–63; Order on Rule 6.807 Motion (7/17/18). The questions listed in Heard's motion to compel can be sorted into three distinct categories. Some are aimed at implicating Brown in Hutchinson's murder; those would clearly be within the scope of his Fifth Amendment privilege. *See* Motion to Compel (2/20/17) at 1–2; App. 65–66. Others are aimed at "impeaching" Findley—but those are all questions that necessarily rely on Brown's testimony about what he personally observed at the time/place of the killing. *See id.* at 2–4; App. 66–68. That would implicate Brown by providing "a significant 'link in a chain' of evidence tending to establish his guilt." *See State v. Godbersen*, 493 N.W.2d 852, 856 (Iowa 1992) (quoting *Marchetti v.*

United States, 390 U.S. 39, 47–48 (1968)); *accord State v. Parham*, 220 N.W.2d 623, 627 (Iowa 1974) (citing *Hoffman v. United States*, 341 U.S. 479, 486–87 (1951)) (noting Fifth Amendment privilege "is properly asserted where the answer might furnish a link in the chain of evidence needed to prosecute a crime"). And the final category of questions would have impeached Brown's credibility as a witness—but Brown was no longer testifying about Heard's involvement (and none of Brown's statements could be admitted as hearsay because of the Confrontation Clause issue), so those questions were not relevant. *See* Motion to Compel (2/20/17) at 2; App. 66. No question could be both relevant *and* non-inculpatory—and neither Heard nor the panel could disprove that logic by identifying even one.

The panel cited *Hoffman* and *Parham* during its discussion of guiding principles in this area. *See* SlipOp. at 7–8 (citing *Hoffman*, 341 U.S. at 386, and *Parham*, 220 N.W.2d at 627). But *McDowell* distinguished both cases. *McDowell* upheld a ruling that "respect[ed] the validity and extent of the privilege" by recognizing that the scope of the privilege encompassed "the whole subject matter of the case" based on deductive logic, rather than a question-by-question inquiry. *See State v. McDowell*, 247 N.W.2d 499, 500–02 (Iowa 1976). That

was possible because the defendant's theory was that the witness was the actual culprit—which meant that compelling the witness to testify about any relevant fact would have "compelled her to place herself at the center of the alleged crime." *See id.* at 500–02. Here, just like in *McDowell*, the trial court applied a deductive analysis and concluded that any question that touched on the murder or furthered Heard's theory that Brown killed Hutchinson would necessarily be inculpatory. Indeed, compelling any relevant testimony "would have compelled [Brown] to place [him]self in the center of the alleged crime." *See id.*

The panel cited *Johnson v. United States* and *Littlejohn v. United States* for the propositions that "when a witness' invocation of his Fifth Amendment privilege conflicts with a defendant's right to compulsory process under the Sixth Amendment, the trial court must rule on the claim of privilege one question at a time" and that "[a] blanket privilege may be granted to the witness only when it is evident to the court that anything less will not adequately protect him." *See* SlipOp. at 7–8; *Johnson v. United States*, 746 A.2d 349, 355 (D.C. 2000); *Littlejohn v. United States*, 705 A.2d 1077, 1083 (D.C. 1997). But even after recognizing those general principles, *Johnson* upheld the "blanket privilege" asserted in that case:

> [T]he trial court was correct when it ruled that anything Mims might have said about his presence in the automobile and his knowledge of how the marijuana got there fell within his privilege against self-incrimination. The privilege extends to any statements which may provide a "link in the chain of evidence" needed to support a conviction, [*Hoffman*, 341 U.S. at 486], and "protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." [*Kastigar v. United States*, 406 U.S. 441, 445 (1972)] . . .
>
> Under this standard, any questions requiring Mims to acknowledge that he was in the car on the day in question, or that he knew anything about the marijuana or its origin, would have implicated his Fifth Amendment privilege.

Johnson, 746 A.2d at 355–56. And while *Littlejohn* held that a blanket assertion of Fifth Amendment privilege was overbroad, that case involved concerns about the witness incriminating himself by admitting his presence at the physical location of another murder, *months before it happened*—and it specifically noted that "could not any more constitute evidence of guilt than the easily proven fact that [the witness] lived in that vicinity." *See Littlejohn*, 705 A.2d at 1084. Contrast that with Heard's case, where any testimony from Brown that revealed personal knowledge of the shooting would place him at the scene of the murder *at the moment it was committed* and in the company of witnesses who testified that he hid the murder weapon afterwards. *See*, *e.g.*, TrialTr.V4 p.61,ln.17–p.65,ln.2; *accord Letsinger*

v. United States, 402 A.2d 411, 416 (D.C. 1979) (upholding similar blanket invocation of privilege because events in question "were so intertwined as to make it impossible to fashion a narrower privilege," and "had Huff been questioned about all of these dates the evidence would have been highly damaging to him at any subsequent trial").

If Brown's testimony matched testimony from other witnesses, it would establish that he was an accessory to murder after the fact because he hid the murder weapon. *See* Iowa Code § 703.3 (2007); TrialTr.V4 61:17–65:2; TrialTr.V5 14:14–16:24; TrialTr.V5 28:20–29:2. The scope of his Fifth Amendment privilege is not limited to questions about the murder itself—even questions about Brown's presence at the house with other witnesses who testified about his participation and questions about the nature of his associations with those people would tend to prove "links in the chain" establishing criminal liability.

> "I hid the gun in Joe's apartment" may not be a confession of a crime; but if it is likely to help the police find the murder weapon, then it is certainly self-inculpatory. "Sam and I went to Joe's house" might be against the declarant's interest if a reasonable person in the declarant's shoes would realize that being linked to Joe and Sam would implicate the declarant in Joe and Sam's conspiracy.

Williamson v. United States, 512 U.S. 594, 603 (1994). Not a single relevant question in Heard's proposed list can survive this analysis.

Heard may argue that Brown waived his Fifth Amendment privilege regarding the subject matter of his prior testimony. That argument was not made below—instead, Heard argued "[i]nvocation of the Fifth Amendment right against self-incrimination is limited to the particular proceeding in which it was invoked." *See* Motion to Compel (2/20/17) at 4; App. 68. Heard cited *State v. Kellogg* for that proposition, and *Kellogg* specifically noted the inverse: "waiver of a [F]ifth [A]mendment privilege is limited to the particular proceeding in which the waiver occurs," even to the point where "a person who had waived a [F]ifth [A]mendment privilege in a grand jury proceeding was not prevented from asserting it at a subsequent trial." *See State v. Kellogg*, 385 N.W.2d 558, 560 (Iowa 1986) (citing *Duckworth v. Dist. Ct.*, 264 N.W. 715, 721 (Iowa 1936)). Thus, Brown's invocation of his Fifth Amendment privilege in this retrial is not affected by his prior testimony—except insofar as it heightens Brown's exposure, because contradicting his trial testimony could potentially amount to perjury. Moreover, Heard clearly intended to go beyond the scope of Brown's prior testimony into matters that created a risk of self-incrimination for Brown. *See* Motion to Compel (2/20/17) at 1–3; App. 65–67. Any waiver would extend no further than testimony Brown already gave.

The panel criticized the trial court for "relying on *McCormick on Evidence* to rule that Brown's unequivocal intent to assert the Fifth Amendment was sufficient to make him unavailable for trial." *See* SlipOp. at 8 (referencing Order (2/14/17) at 5; App. 60). But the trial court specifically noted "case law suggest[ing] that the privilege may be invoked and the unavailability of the witness determined prior to the commencement of trial." *See* Order (2/14/17) at 5 & n.13; App. 60. That *McCormick* footnote collected additional cases about counsel relaying an invocation to the court, on behalf of the witness. *See* 2 *McCormick on Evidence*, § 253 at n.10 (7th ed. 2016). But that was superfluous because Brown personally communicated his intent to the court "on the record under oath," and he did so "emphatically and unequivocally." *See* Order (2/14/17) at 6; App. 61. Moreover, the trial court was correct that Iowa generally allows pretrial assessments of witness unavailability based on unequivocal invocations of privilege. *See*, *e.g.*, *Kellogg*, 385 N.W.2d at 559–60 (noting Walker's attorney, on appointment, "immediately informed the county attorney's office that Walker would not provide any further evidence in the case against Kellogg, based upon her fifth amendment privilege"—which enabled a pretrial finding that Walker was unavailable to testify at trial).

Any limit on the permissible timing/scope of pretrial invocations of Fifth Amendment privilege would necessarily recognize that "when a [person] has a clear entitlement to claim the privilege, forcing the [person] to take the stand [at trial] is 'futile' and thus unnecessary." *See United States v. Bates*, 552 F.3d 472, 475–76 (6th Cir. 2009).

> In order to lay a foundation for his proposed testimony, Plummer would have to admit his association with Foster-Bey and that he had extensively discussed robbing banks with him. These admissions tend to incriminate Plummer, *see* [*Hoffman*, 341 U.S. at 486], and he thus had a valid Fifth Amendment privilege. And Plummer's lawyer made it clear that Plummer intended to invoke his privilege. Indeed, the reason the district court did not force Plummer to take the stand was because his privilege and his intent to invoke his privilege were so clear. Under these circumstances, it was not error for the district court to fail to force Plummer to take the stand. It would have been pointless to do so.

See id. at 476. Because *laying the foundation* for relevant testimony would be self-incriminating, the scope of Fifth Amendment privilege was both unambiguously clear and sufficiently broad to enable the *Bates* court to sustain a blanket assertion of privilege before trial. *Id.* That mirrors the basis for granting Brown's blanket invocation of Fifth Amendment privilege: any relevant questions for Brown would first require him to admit personal knowledge of Hutchinson's murder via direct observation—which is, itself, incriminating. *See Williamson*,

512 U.S. at 603. Furthermore, Heard's oft-declared theory/strategy made it unambiguously clear—even to a layperson like Brown—that Heard's questioning would be laser-focused on establishing Brown's principal liability for murder. *See* PCR Ruling (12/31/15) at 19; App. 47 (noting Heard argued "Brown was the shooter" at his first trial); Motion to Compel (2/20/17) at 4; App. 68 ("Heard's defense is that Brown committed the murder."). It was obvious to everyone involved that Heard's objective was to extract self-incriminating testimony from Brown; any competent attorney appointed for Brown would know to advise Brown to invoke his Fifth Amendment privilege in response to any question that did not draw a relevance objection from the State. *Accord United States v. Mares*, 402 F.3d 511, 514–15 (5th Cir. 2005) (upholding ruling that allowed blanket assertion of privilege because "Mares intended to demonstrate through Martinez's testimony that it was Martinez, not Mares, who possessed the magazine clip and that he was the only one who fired shots after the altercation outside the bar," and consequently "Martinez had a legitimate basis for invoking his Fifth Amendment privilege to virtually all questions asked of him that would be relevant to Mares' defense"). The trial court was not required to feign obliviousness—the scope of Brown's privilege was clear.

McDowell establishes that the trial court did not abuse its discretion in applying a deductive analysis to conclude that Brown's blanket assertion of Fifth Amendment privilege was proper, in the specific context of Heard's defense that Brown was the killer. *See McDowell*, 247 N.W.2d at 500–02. The panel decision failed to apply or discuss *McDowell*, and its holding conflicts with *McDowell*. *See* SlipOp. at 5–10; Iowa R. App. P. 6.1103(1)(b)(1). This Court should reaffirm *McDowell* and reverse the panel opinion's holding.

II. *Bedwell* set out a categorical prohibition, which the trial court applied. The panel created a mandatory exception, which amounts to overruling *Bedwell*—which the panel cannot do. Only this Court may overrule *Bedwell*, and it should decline to do so.

Heard's reply brief invited the Court to "fashion a rule that requires a district court to weigh the potential probative value of the inference to be drawn from the witness's assertion of his or her privilege against the potential for unfair prejudice." *See* Def's Reply Br. at 12–13. The panel opinion appears to have done just that, after recognizing that it lacked the power to do so. *See* SlipOp. at 8–10.

There is no way to read *Bedwell* to create anything other than a categorical rule against permitting defendants to call a witness for the purpose of arguing inferences from a Fifth Amendment invocation.

Bedwell did not state that the trial court did not abuse its discretion—it said "[t]he district court was *correct* in refusing to permit defendant to call the witness." *See Bedwell*, 417 N.W.2d at 69 (emphasis added). *Bedwell* cited two authorities that endorse similarly categorical rules. *See id.* (citing *Bowles v. United States*, 439 F.2d 536, 541–42 (D.C. Cir. 1970); *People v. Dyer*, 390 N.W.2d 645, 648–50 (Mich. 1986)). The reason for the rule it announced was that "the jury is not entitled to draw *any* inferences" from exercises of Fifth Amendment privilege. *See id.* (quoting *Bowles*, 439 F.2d at 541) (emphasis added).

The trial court was required to apply *Bedwell*, although it also indicated it would reach the same conclusion on its own. *See* Ruling (4/26/17); App. 95–96. The panel noted *Bedwell* was categorical, but found it did not "take into account the unique context of this case." *See* SlipOp. at 10. That ruling improperly appropriated both this Court's authority to overrule *Bedwell* and the trial court's wide discretion to manage the presentation of evidence and weigh relevance/prejudice. Indeed, even Heard's most ambitious advocacy below only claimed the trial court "has the discretion" to require Brown to take the stand and invoke his Fifth Amendment privilege before the jury. *See* Motion to Compel (2/20/17) at 4; App. 68; PretrialTr. (1/3/17) at 15:25–17:3.

The panel does not identify what probative inference Heard was entitled to draw/argue from Brown's invocation of Fifth Amendment privilege, nor does it address the trial court's stated concerns in any capacity. *Compare* SlipOp. at 8–10, *with* Order (4/26/17) at 1–2; App. 95–96; Sent.Tr. 12:18–13:21. "Discretion expresses the notion of latitude," and the panel afforded none to the trial court. *See State v. McNeal*, 897 N.W.2d 697, 710 (Iowa 2017) (Cady, C.J., concurring specially). Even if Iowa had not adopted *Bowles* as a categorical rule in *Bedwell*, the panel still could not usurp the trial court's discretion in this area.

The Nesson & Leotta article that Heard and the panel rely upon specifically tackles "[d]ifferent concerns" that arise "when a witness testifies fully on direct examination, then invokes the privilege against self-incrimination when faced with cross-examination." *See* Charles R. Nesson & Michael J. Leotta, *The Fifth Amendment Privilege Against Cross-Examination*, 85 GEO. L.J. 1627, 1645 (1997). Those concerns did not undermine Nesson and Leotta's agreement with the operative principles of *Bowles*: "[i]f a party called the witness with the intention of having him plead the Fifth, this unimpeachable drama would be unfair," and "[t]he inference that a party gains from calling to the stand a witness who will invoke a blanket privilege is arguably untestable."

See id. at 1673; *accord id.* at 1645 & n.155 (noting *Bowles* is "followed in almost every circuit" and collecting cases). The article's overriding focus is on maximizing the availability and use of *testable* evidence, so it favors allowing fact-finders to draw inferences from invocations of Fifth Amendment privilege on cross-examination, just to *impeach* testimony provided by the witness on direct examination (instead of striking testimony already given by that witness). *See id.* at 1646–52, 1660–63, 1678–88. The panel quoted from that article, but it omitted critical language that expressly limited Nesson & Leotta's advocacy to "[a]llowing inferences from the invocation of the privilege *to be used as impeachment*" when it altered the indefinite noun phrase in the explanatory parenthetical. *Compare id.* at 1683, *with* SlipOp. at 8 (citing Nesson & Leotta, *Privilege*, 85 GEO. L.J. at 1683).

Reasons to adhere to *Bedwell* were argued in the State's brief, and the panel opinion contains nothing that addresses that advocacy. The sole rationale in the opinion is the panel's implied agreement with Heard's assertion that "Brown's previous testimony under these circumstances renders his decision to assert his Fifth Amendment privilege in the second trial more probative than . . . assertions of the Fifth Amendment in *Bedwell* and *Bowles*." *See* SlipOp. at 9. However,

that only renders Brown's invocation *less* probative because the jury was prohibited from receiving facts surrounding the prior trial and the content of Brown's prior testimony. Any marginal probative value of any Fifth Amendment invocation is premised on the inference that "the witness *believes* that the answer to the instant questions would incriminate her." *See* Nesson & Leotta, *Privilege*, 85 GEO L.J. at 1674. Brown's invocation at depositions was made with knowledge of facts that jurors would never be allowed to know—including, potentially, knowledge of Heard's testimony at his first trial and knowledge that Heard obtained retrial by arguing that he could have demonstrated Brown's liability for first-degree murder by cross-examining him. *See* PCR Ruling (12/31/15) at 4–7, 11–14; App. 32–37, 39–42. Inferences drawn without knowledge of key historical facts that had given rise to Brown's belief that testifying at retrial would have incriminated him would be based on fiction, rather than facts—and the State would be unable to test those inferences by cross-examining Brown about the true basis for his belief. *See United States v. Reyes*, 362 F.3d 536, 542 (8th Cir. 2004) ("[E]ven if the party seeking to argue the inference concocts a reason that the silence may be relevant, . . . there is no way the opponent can test the meaning attributed to the invocation.").

The panel failed to recognize the critical problem that deprives these inferences of probative value: an invocation is equally susceptible to multiple possible inferences, and it makes no single view of events more probable than any other version involving incriminating facts.

> The two most likely inferences to be drawn from Mrs. Coleman's claim of privilege are that she was involved in the importation scheme along with defendant Lacouture, or that she alone was guilty and Lacouture was an innocent dupe. One favors the defense, the other the prosecution; and one is as likely as the other. . . . We have little difficulty in concluding that the trial court was within its discretion in excluding matter of such dubious probative value and high potential for prejudice.

United States v. Lacouture, 495 F.2d 1237, 1240 (5th Cir. 1974); *accord Davis v. State*, 340 S.E.2d 869, 876 (Ga. 1986) (holding an inference from fact that witness invoked Fifth Amendment was not probative because witness "would be culpable under either version of the facts" proposed by the parties, and "[h]er refusal to testify does not tend to establish which is true"). Moreover, the potential for unfair prejudice is amplified here, because Heard's preferred inference about Brown's principal liability for murder would require no explanation of the law—but the State's counter-arguments about other probable inferences that explain Brown's fear of self-incrimination would require explanations of unsubmitted vicarious liability theories. *See* Iowa Code § 703.3.

Of course, the State's unsubmitted aiding-and-abetting theory *would* have been submitted to the jury in this counterfactual scenario. Many inferences that implicated Brown would implicate Heard as well, and the State would leverage those inferences to support its alternative aiding-and-abetting theory—so even if Heard could have persuasively argued that Brown was the shooter, the State would still use Heard's pre-shooting and post-shooting conduct and inculpatory statements to show Heard participated in the murder, even if Brown took the lead. *See* TrialTr.V3 85:17–87:19; TrialTr.V4 49:9–50:7; TrialTr.V4 52:4–53:3; TrialTr.V4 55:21–57:10; *cf.* TrialTr.V6 68:24–p.70:16. The State raised this argument in its brief, and it explained that submitting an aiding-and-abetting alternative "would eliminate any possible benefit that Heard could expect from forcing Brown to take the stand." *See* State's Br. at 45–46. The panel declined to address this argument, even though it found error and ordered reversal. *See* SlipOp. at 5–10. But reversal is still improper, under these facts, because any error in this ruling could not affect the final outcome. *Cf. In re Det. of Blaise*, 830 N.W.2d 310, 320 (Iowa 2013) (addressing lack of prejudice even when argument was "not explicitly made" by the State because it was "an intimately related variant of the argument it actually raised").

Heard occasionally argues that it is fair to use inferences from invocations of Fifth Amendment privilege against the State because prosecutors may respond by granting immunity. *See* Def's Reply Br. at 11. But this Court recognizes the State is not "required to negotiate in one case in order to secure the attendance of a witness in another." *See Kellogg*, 385 N.W.2d at 561. And *Kellogg* rejects the type of logic the panel used to sidestep *Bedwell*: precedent governing the effect of invocations of Fifth Amendment privilege is not suspended when a defendant asserts the unavailable witness is "critical to his defense." *Id.*; *contra* SlipOp. at 10 (rejecting "*Bedwell*'s categorical prohibition" because it "does not take into account the unique context of this case"). Heard's thirst for evidence that counters the damning testimony from Majors and Findley does not render inferences from claims of privilege more probative or less prejudicial, nor could it justify extraordinary departures in defiance of binding precedent. *See State v. Countryman*, 573 N.W.2d 265, 266 (Iowa 1998) (quoting *State v. Losee*, 354 N.W.2d 239, 242 (Iowa 1984)) ("A defendant's due process right to present evidence in a criminal action does not prevent the court from following evidentiary rules that are designed to assure both fairness and reliability in the ascertainment of guilt and innocence.").

Envision Heard's closing argument at the counterfactual trial where the court *did* allow him to argue inferences from Brown's claim of privilege: it would urge rampant speculation about possible reasons for Brown's invocation of Fifth Amendment privilege, leveraging the jury's uncertainty about the content of Brown's hypothetical testimony to distract from concrete facts established through actual proof. *See Commonwealth v. Gagnon*, 557 N.E.2d 728, 736–37 (Mass. 1990) ("[C]alling Marotta to the stand in the face of his expressed intention to invoke his privilege against self-incrimination would have produced no relevant evidence, while inviting the jury to engage in unwarranted and impermissible speculation."). The mischief would surely escalate in subsequent cases involving multiple defendants, who would insist on separate trials to vindicate their asserted rights to argue inferences from each other's invocations of Fifth Amendment privilege. *See State v. Heft*, 517 N.W.2d 494, 301–02 (Wis. 1994) (noting concerns about "[c]ollusion between criminal defendants and witnesses" who may be called "for the sole purpose" of manufacturing doubt from invocation of Fifth Amendment privilege). Heard's approach would spell the end of all joint trials in Iowa courts and encourage flagrant manipulation of the trial process—all for this "evidence" with no real probative value.

The panel opinion, if left to stand, would effectively overrule *Bedwell* by carving out a nebulous exception and establishing that a trial court can abuse its discretion by refusing to allow a defendant to choreograph and stage a "Perry Mason moment" where trial counsel accuses a witness of committing the crime and the witness responds by dramatically "taking the Fifth." *See* Ruling (4/26/17) at 2; App. 96. Such theatrics add no probative evidence and only distract from the solemn search for truth. Heard's request for a third trial where he can urge jurors to speculate about the meaning of Brown's invocation of Fifth Amendment privilege is at odds with established precedent in Iowa (and nearly everywhere else) because it elevates fiction over fact. Such an approach only benefits those who seek to "mislead the jury into findings not based on legitimate evidence." *See State v. McGraw*, 608 A.2d 1335, 1339 (N.J. 1992) (quoting *State v. Karlein*, 484 A.2d 1355, 1358 (N.J. Super. Ct. Law Div. 1984)). This Court should not allow the panel opinion to stand—instead, it should reaffirm *Bedwell*, reverse the panel, and affirm Heard's conviction.

CONCLUSION

The State respectfully requests this Court reaffirm *McDowell* and *Bedwell*, reverse the panel opinion that disregards both cases, and affirm Heard's conviction for first-degree murder.

REQUEST FOR ORAL ARGUMENT

The State believes oral argument is likely to assist this Court in resolving questions raised by this appeal that were left unresolved.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

LOUIS S. SLOVEN
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
Louie.Sloven@ag.iowa.gov

CERTIFICATE OF COMPLIANCE

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

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LOUIS S. SLOVEN
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
Louie.Sloven@ag.iowa.gov