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

IN THE SUPREME COURT OF IOWA

STATE OF IOWA
Plaintiff-Appellee,

v.

KENNETH LEROY HEARD
Defendant-Appellant.

ON FURTHER REVIEW FROM THE COURT OF APPEALS OF IOWA & THE IOWA DISTRICT COURT FOR POLK COUNTY HON. ROBERT J. BLINK, DISTRICT COURT JUDGE

RESISTANCE TO APPLICATION FOR FURTHER REVIEW OF THE COURT OF APPEALS OF IOWA FROM AN OPINION FILED JANUARY 9, 2019

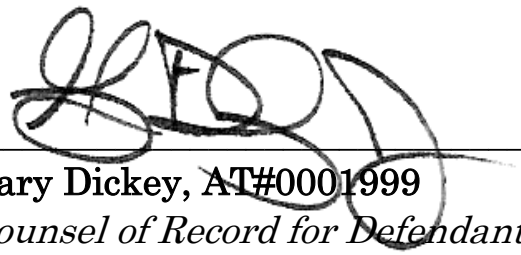
Gary Dickey
Counsel of Record
DICKEY & CAMPBELL LAW FIRM, PLC
301 East Walnut St., Ste. 1
Des Moines, Iowa 50309
PHONE: (515) 288-5008 FAX: (515) 288-5010
EMAIL: gary@dickeycampbell.com

PROOF OF SERVICE & CERTIFICATE OF FILING

On February 5, 2019, I served this resistance on the Applicant at his address at the Iowa State Penitentiary and all other parties by EDMS to their respective counsel:

Attorney General
Criminal Appeals Division
Hoover Building
Des Moines, Iowa 50319
(515) 281-5976

I further certify that I did file this resistance with the Clerk of the Iowa Supreme Court by EDMS on February 5, 2019.



Gary Dickey, AT#0001999
Counsel of Record for Defendant-Appellant
DICKEY & CAMPBELL LAW FIRM, PLC
301 East Walnut St., Ste. 1
Des Moines, Iowa 50309
PHONE: (515) 288-5008 FAX: (515) 288-5010
EMAIL: gary@dickeycampbell.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES:

QUESTIONS PRESENTED

1. Whether Kenneth Heard's right to compulsory process was violated when the district court allowed the prosecution's star witness to make a blanket assertion of his right against self-incrimination outside the presence of the jury?

2. Whether Kenneth Heard's sentence of life without parole is constitutional in the absence of any finding by the jury that he was an adult at the time of the offense?

STATEMENT IN RESISTANCE TO FURTHER REVIEW

The State of Iowa contends the court of appeals erred in reversing Kenneth Heard's first-degree murder conviction because the district court allowed its star witness to make a blanket assertion of his right against self-incrimination outside the presence of the jury. The court of appeals' decision is correct and does not conflict with any decision of this Court. Furthermore, the decision below rests entirely on "the unique context of the case" in which Marco Brown testified at Heard's first trial, without asserting his privilege, but trial counsel's cross-examination was constitutionally deficient. *State v. Heard*, slip op. at 10 (Iowa Ct. App. Jan. 9, 2019). Consequently, this case does not present any substantial questions of constitutional law *See* Iowa R. App. 6.1103(b)(2). Nor does it involve any issue of broad public importance. *Id.* 6.1103(b)(4). Because this case does not meet this Court's criteria for further review, the State of Iowa's application must be denied.[1]

---

1 The court of appeals did not reach Heard's *Apprendi* claim. Because the jury never made a finding beyond a reasonable double that Heard was not a juvenile at the time of the offense, his life-

STATEMENT OF THE CASE

On April 4, 2008, the State of Iowa filed a one-count trial information against Kenneth Heard charging him with Murder in the First Degree in violation of Iowa Code sections 707.1 and 707.2. (App at 6). Specifically, the State alleged that Heard willfully and deliberated killed Joshua Hutchinson with premeditation and malice aforethought. (App. at 6). Heard pled not guilty. The case first came to trial in November of 2008, and the jury convicted Heard of first-degree murder. (App at 24). He was sentenced to life in prison without the possibility of parole. (App at 27).

Heard appealed. *State v. Heard*, 2010 WL 2090851 (Iowa Ct. App. May 26, 2010). He argued that his conviction was contrary to the weight of the evidence because the State's witnesses were not credible. *Id.* at *2. Additionally, he asserted that his trial counsel was ineffective for failing to request an instruction that accomplice testimony must be corroborated in

---

without-parole claim violates the Sixth Amendment. If the Court grants further review, it should be plenary to address the *Apprendi* issue.

order to support a conviction. *Id.* at *3. The court of appeals affirmed. *Id.* at *5-6.

Heard thereafter filed an application for postconviction relief in which he again claimed his trial counsel was ineffective. This time he contended that his trial counsel failed to investigate and offer evidence that another person present at the scene, Marco Brown, murdered Hutchison. (App. at 30). He also asserted that his trial counsel failed to investigate and present expert testimony explaining that blood spatter evidence would have been found on Heard's clothing if he fired the fatal gunshots. (App. at 30). The court found that Heard's counsel breached an essential duty in failing to investigate these two avenues of potential defenses, which was sufficient to undermine its confidence in the outcome of the trial. (App. at 50). Accordingly, the court granted Heard's postconviction relief application and ordered a new trial. (App. at 54).

The State elected to retry Heard on the first-degree murder charge. At the second trial, Heard's defense counsel laid out their theory of defense that Marco Brown carried out the murder at

Deland Stanley's direction because Hutchinson made a pass at Stanley's girlfriend and was stealing drugs from him. (05/22/17 Trial Tr. at 131-141). Notably, Brown testified at Heard's first trial. Indeed, Brown's trial testimony served as the basis of the district court's postconviction relief ruling that granted Heard a new trial. In particular, the court faulted the cross-examination of Brown in three respects: (1) failure to question Brown about his mental illness; (2) failure to impeach him on his prior conviction; and (3) failure to impeach him by a prior inconsistent statement to Charles Webster and Albert Harrison. (App. at 40, 43, 44).

When Brown appeared for depositions in preparation for the second trial, however, he asserted his right against self-incrimination and refused to testify. (App. at 56). He further declared that he would similarly refuse to testify at trial. (App. at 56). Accordingly, Heard's counsel filed a motion to compel Brown's testimony at trial. (App. at 65). In the motion, Heard identified several aspects of Brown's anticipated testimony that would significantly bolster his theory that Brown carried out the murder:

- Brown's admission that he had the murder weapon immediately before and after the murder;

- Brown cleaned the gun of all finger prints, DNA, and gun residue after the murder;

- Brown hid the gun after the murder;

- Brown disposed of his clothing after the murder because he thought there may be incriminating evidence on it;

- Stanley Brown to "mouse" Hutchinson;

- Brown was considered a follower of Stanley;

- Brown, at the direction of Stanley, helped Majors collect Stanley's personal items from Hutchinson the morning of the murder;

- Brown was extremely nervous and sweating profusely after the murder;

- Brown told Jaquisha Majors to lie to the police the day after the murder;

- Brown admitted to Majors that he murdered Hutchinson; and

- Brown made an admission of guilt after the murder while incarcerated.

(App. at 65-66). In addition, Heard's counsel identified several ways in which Brown's testimony would impeach his prior

accounts as well as Phillip Findley's version of events. (App. at 66-67).

The court denied Heard's motion to Compel Brown's testimony. (App. at 95). Relying upon *State v. Bedwell*, 417 N.W.2d 66 (Iowa 1987), the court concluded that a jury is not entitled to draw any adverse inference favorable to either party from a witness predetermined to invoke his or her right against self-incrimination. (App. at 95). The court explained that if found "troubling" the use of a witness's "exercise of constitutional rights as a weapon rather than a shield." (App. at 96). Such approach, the court reasoned, would invite "jurisprudential mischief in the criminal process." (App. at 96).

The jury again returned a guilty verdict. (App. at 99). Heard filed various post-trial motions, which were denied by the district court. (App. at 110). The court again sentenced Heard to life in prison without the possibility of parole. (App. at 110). Heard filed a timely notice of appeal. (App. at 112).

ARGUMENT

I. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH *STATE V. MCDOWELL*

The State of Iowa first seeks further review on the basis that the court of appeals' decision is in conflict with *State v. McDowell*, 247 N.W.2d 499 (Iowa 1976). (State's Further Review App. at 12-14). In that case, the district court excused a defense witness from testifying on the ground of self-incrimination because doing so would "place herself in the center of the alleged crime." *Id.* at 502. Heard's case is easily distinguishable.

As this Court recognized in *McDowell*, the "power to decide if the witness may assert his privilege against self-incrimination is thus vested in the trial court to be exercised in its sound discretion *under all the circumstances then present*." *Id.* at 501 (emphasis added) (quoting *State v. Parham*, 220 N.W.2d 623, 626 (Iowa 1974)). In *McDowell*, the court's reasoning rested, in part, on the fact that the witness had not pled guilty, and there was no suggestion of "any other cause for loss of the privilege." *Id.* In contrast, Brown expressly waived his privilege against self-incrimination when he testified at Heard's first trial. As the court

below observed, this "unique context" explains why Heard's right to compulsory process was violated. *State v. Heard*, slip op. at 10 (Iowa Ct. App. Jan. 9, 2019). For this reason, the court of appeal's decision does not conflict with *McDowell*, and therefore, the State's application must be denied on this ground.

II. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH *STATE V. BEDWELL*

The State of Iowa next seeks further review on the basis that the court of appeals implicitly overruled *State v. Bedwell*, 417 N.W.2d 66 (Iowa 1987). (State's Further Review App. at 21-24). The reports of *Bedwell's* death have been greatly exaggerated. As an initial matter, the State misreads *Bedwell* as creating a categorical rule against allowing a defendant to call a witness at trial who has indicated an intention to invoke his privilege against self-incrimination. In reality, this Court merely followed the reasoning established by the D.C. Circuit in *Bowles v. United States*, 439 F.2d 536 (D.C. Cir. 1970), to the particular facts of Bedwell's case. *Id.* And, because *Bowles* itself did not create a categorical prohibition, the State is incorrect to conclude that *Bedwell* establishes one. *See Bowles*, 439 F.2d at 541. Indeed,

more recent decisions from other jurisdictions have rejected the categorical view. *See West Virginia v. Whitt*, 649 S.E.2d 258, 267-68 (W. Va. 2007); *Nebraska v. Robinson*, 715 N.W.2d 531 (Ne. 2006); *Gray v. Maryland*, 796 A.2d 697, 716-17 (Md. 2002). Consequently, further review is not warranted.

CONCLUSION

For the reason set forth above, Kenneth Heard, requests this Court deny the State's application for further review.

REQUEST FOR ORAL ARGUMENT

Counsel for Appellant requests to be heard in oral argument.

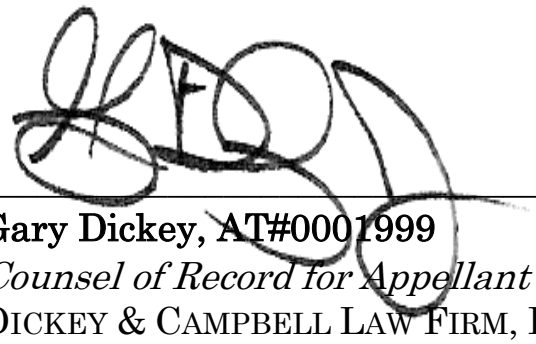
COST CERTIFICATE

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

This resistance complies with the type-volume limitation of Iowa R. App. P. 6.1103(4) because:

> [x] this resistance has been prepared in a proportionally spaced typeface using Century in 14 point and contains 1,512 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.1103(4)



Gary Dickey, AT#0001999
Counsel of Record for Appellant
DICKEY & CAMPBELL LAW FIRM, PLC
301 East Walnut St., Ste. 1
Des Moines, Iowa 50309
PHONE: (515) 288-5008 FAX: (515) 288-5010
EMAIL: gary@dickeycampbell.com