

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,)
)
 Plaintiff-Appellee,)
)
 v.) S.CT. NO. 18-1298
)
 LEVI GIBBS, III)
)
 Defendant-Appellant.)

APPEAL FROM THE IOWA DISTRICT COURT
FOR WEBSTER COUNTY
HONORABLE THOMAS J. BICE, JUDGE

APPELLANT'S REPLY BRIEF AND ARGUMENT

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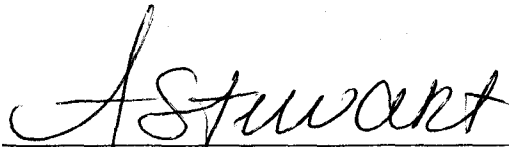
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CERTIFICATE OF SERVICE

On the 15th day of April, 2019, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Levi Gibbs, III, No. 6736533, Iowa State Penitentiary, 2111 330th Avenue, P.O. Box 316, Fort Madison, IA 52627.

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AS/lr/04/19

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

**I. WHETHER IOWA CODE § 704.2B(1) COMPELS
SELF-INCRIMINATION IN VIOLATION OF THE FIFTH
AMENDMENT OF THE UNITED STATES CONSTITUTION AND
INFRINGES ON DUE PROCESS RIGHTS UNDER ARTICLE 1,
§ 9 OF THE IOWA CONSTITUTION?**

Authorities:

Summy v. City of Des Moines, 708 N.W.2d 333, 338 (Iowa 2006)

Lamasters v. State, 821 N.W.2d 856, 863 (Iowa 2012)

State v. Allen, 304 N.W.2d 203, 206 (Iowa 1981)

State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1983)

STATEMENT OF THE CASE

Nature of the Case

COMES NOW the Defendant-Appellant, pursuant to Iowa R. App. P. 6.903(4), and hereby submits the following argument in reply to the State's proof brief filed on or about March 29, 2019. While the defendant's brief adequately addresses the issues presented for review, a short reply is necessary to address certain contentions raised by the State.

ARGUMENT

I. IOWA CODE § 704.2B(1) COMPELS SELF-INCRIMINATION IN VIOLATION OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND INFRINGES ON DUE PROCESS RIGHTS UNDER ARTICLE 1, § 9 OF THE IOWA CONSTITUTION.

Error was preserved by Gibbs.

Error preservation does not turn on the thoroughness of counsel's research and briefing so long as the nature of the error has been timely brought to the attention of the district court. Summy v. City of Des Moines, 708 N.W.2d 333, 338 (Iowa 2006). Here, Gibbs objected to the jury instruction after the court provided to both Gibbs' counsel and the State a set of

draft instructions for review. At that time the district court requested both the State and defense counsel to provide any objections or exceptions to the proposed instructions. (Tr. Vol. II, p. 1009, L17- p. 1010, L1-2). Upon that request, Gibbs' articulated his objections in a timely fashion.

The objection made by Gibbs' defense counsel was clear in challenging the constitutionality of the statute as a whole not only as applied to Gibbs. The following objection was Gibbs' categorical challenge:

Mr. Berger: "Okay, I am going to propose, well first of all, I object to the entire instruction because it *violates the state Constitution and the federal Constitution and the 5th and 14th amendments.*"

(Tr. Vol. II, p. 1011, L8-12) (emphasis added).

Defense counsel followed his facial challenge to 704.B(1) by explaining that the instruction is "particularly" troubling in this case, but he did not limit his challenge to Gibbs' specific circumstances. This application of the facts does not make the objection an as-applied argument as the State contends.

(State's Brief, p. 24).

Further, when the State replied to Gibbs' objection they did not give an as-applied response specific to Gibbs but rather made a broad argument to the Court about constitutional rights afforded to all defendants that use justification as a defense. Additionally, the State argued broadly that the jury instruction was a correct statement of the law and should be allowed.

Finally, the district court made a ruling on the objection. The preservation of error rule is not concerned with the substance, logic, or detail of the court's decision. If the court's ruling indicates the court considered the issue and necessarily ruled on it, even if the court's reasoning is incomplete or sparse, the issue has been preserved. Lamasters v. State, 821 N.W.2d 856, 863 (Iowa 2012). The district court in this case, stated:

“Well the Court believes that proposed jury instruction No. 36 does accurately reflect the statutory language as found in 704.2B... If there's to be some correction of a legislative defense created by statute, then we will let the appellate court be the one to give us the appropriate direction in that regard.”

(Tr. p. 1011, L2-11; p. 1013, L15; Tr. p. 1015, L15-p. 1016, p. 25; Tr. p. 1017, L1-9). Error was preserved. State v. Allen,

304 N.W.2d 203, 206 (Iowa 1981).

To the extent this Court concludes that error was not properly preserved for any reason, Gibbs requests that the issue be considered under the Court's familiar ineffective assistance of counsel framework, as argued in his opening brief. State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1983).

Conclusion: Gibbs timely preserved error when he objected to section 704.B(1) as unconstitutional because it violated both article I, § 9 of the state Constitution and the 5th and 14th amendments of the federal Constitution, during the conference on proposed jury instructions drafted by the district court.

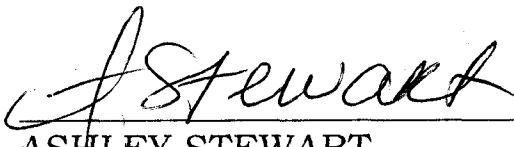
ATTORNEY'S COST CERTIFICATE

The undersigned hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was \$ 1.10, and that amount has been paid in full by the Office of the Appellate Defender.

**CERTIFICATE OF COMPLIANCE WITH TYPEFACE
REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR
BRIEFS**

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) because:

[X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 647 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).



Dated: 4/9/19

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