IN THE SUPREME COURT OF IOWA
Supreme Court No. 18-1298

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LEVI GIBBS, III,
Defendant-Appellant.

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

APPELLEE'S BRIEF

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ROUTING STATEMENT

At the time of briefing, Iowa Code section 704.2B(1) is a statute that the Iowa Supreme Court has yet to construe and apply. Because Gibbs challenges the constitutionality of this statute and its being given as a jury instruction, Iowa Rule of Criminal Procedure 6.1101(2)(a) and (c) could apply. But, the challenge Gibbs presents was not preserved and may only be addressed through the ineffective assistance framework. Because Iowa's Court of Appeals is well-versed in applying the two-part *Strickland* analysis, transfer to the Court of Appeals would be appropriate pursuant to Rule 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

Following his conviction for second-degree murder, Levi Gibbs appeals. He presents several challenges, (1) that Iowa Code section 704.2B(1) violates his Fifth Amendment right against self-incrimination; (2) that the district court erred in instructing the jury consistent with section 704.2B(1) over his objection; (3) that his jury panel was not representative and was biased. The Honorable Thomas J. Bice presided at trial.

Course of Proceedings

The State accepts the defendant's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

Facts

In the early morning of September 3, 2017 an after party was occurring in the Pleasant Valley neighborhood of Fort Dodge, Iowa. Trial Vol.II p.282 line 14–p.283 line 18. Brandon Mapes was present and socializing with a friend, Shane Wessels. Trial Vol.II p.283 line 16–p.285 line 20. Wessels was in good spirits. Trial Vol.II p.285 line 21–p.285 line 7. As the two were talking, Gibbs appeared and shoved Wessels. Trial Vol.II p.286 line 8–p.287 line 19. Gibbs was angry, yelling and posturing as though he was going to fight with Wessels. Trial Vol.II p.287 line 12–p.288 line 12; p.289 line 24–p.290 line 8; p.387 line 4–19. Mapes attempted to warn Gibbs off the notion, "Shane was a badass, and it wasn't a good idea." Trial Vol.II p.288 line 13–p.289 line 23; p.322 line 6–19. As Mapes was giving this warning, Gibbs's sister Latricia Roby, Chassdie Mosley, Maria Ayala, and Haven Junkman attacked Wessels. Trial Vol.II p.290 line 9–p.291 line 22;. p.302 line 3–14; p.350 line 4–p.351 line 11; p.440 line 10–p.441 line 6.

Roby first struck him with a bottle of vodka. Trial Vol.II p.394 line 13–p.395 line 3; p.439 line 9–22; p.487 line 3–p.20. Wessels was initially holding his own against the attackers; he knocked Gibbs to the ground, then Roby. Trial Vol.II p. 294 line 1–p.295 line 11; p.353 line 1–12; p.440 line 3–7; p.441 line 7–12; p.501 line 5–p.502 line 7. Roby then retreated to obtain an extendable baton. Trial Vol.II p.351 line 14–22; p.354 line 1–p.355 line 3. Mosley accompanied Roby and returned armed with a stun gun. Trial Vol.II p.353 line 13–p.355 line 12. Both used the weapons on Wessels and eventually, Wessels fell to his attackers. Trial Vol.II p.352 line 9–25; p.504 line 1–p.506 line 12. During this time, Mapes was attempting to break up the fighting. Trial Vol.II p.312 line 2–12; p.441 line 25–p.442 line 11.

At some point during the melee Gibbs left to go to his vehicle and returned with a handgun. Trial Vol.II p.352 line 2–5; p.355 line 16–p.357 line 15; p.397 line 5–23; p.446 line 2–p.448 line 10. As the attacks continued, Wessels retreated and stated he "was done." Trial Vol. II p.911 line 3–17. Mosley tased him. Trial Vol.II p.444 line 3–p.445 line 7; p.505 line 10–p.506 line 19; p.509 line 5–12; Exh. 13 03:33:52–03:33:55. Then Gibbs withdrew the gun and shot Wessels as his back was turned. Exh. 24 03:33:51–03:33:57; Trial Vol.II p.396

line 19–p.397 line 4; p.408 line 16–p.409 line 10; p.448 line 18–p.449 line 8.

After Gibbs fired, Wessels stumbled forward into Roby. Exh. Exh. 24 03:33:55–03:34:00; Trial Vol.II p.398 line 17–25; p.449 line 3–14. Wessels collapsed and the attackers swarmed him. Trial Vol.II p.399 line 1–11. Gibbs struck him with the gun. Trial Vol.II p.359 line 18–p.360 line 4; p.397 line 24–p.398 line 16; p.506 line 13–p.507 line 12. Gibbs stood over Wessels and shot again. Trial Vol.II p.361 line 7–19; p.408 line 7–10; p.409 line 11–18; p.507 line 9–25.

Gibbs pointed the gun at the Dominick Altman and said "Bitch, if you say anything, I'll shoot you too." Trial Vol.II p.358 line 5–p.359 line 17. Preston Mosley than fired at Gibbs several times as Gibbs fled. Trial Vol.II p.399 line 12–21; p.298 line 4–8; p.510 line 5–25.

Wessels died at the scene. He was killed by a single bullet which entered his right arm, passed through his right lung, pierced his heart and left lung and came to rest in his pectoral muscle. Trial Vol.II p.546 line 23–p.547 line 21; p.549 line 14–p.551 line 8. The bullet's trajectory was level moving slightly back to front. Trial Vol.II p.557 line 6–p.558 line 13. There was no soot or stippling on Wessel's body,

which indicated the kill-shot did not occur at very close range. Trial Vol.II p.554 line 25–p.556 line 16.

Fort Dodge Police and the Iowa Department of Criminal Investigation began investigating almost immediately. From the start Gibbs was the focus of the investigation because a contemporaneous 911 call identified him as the gunman. Trial Vol.II p.603 line 5–13; p.775 line 20–p.777 line 7; Exh. 103. At no point did Gibbs call law enforcement and notify them he shot Wessels. Trial Vol.II p.645 line 11–15. Because he was a subject of interest, Detective Hedlund of the Fort Dodge Police Department worked on locating and interviewing Gibbs. Trial Vol.II p.788 line 8–13. Attempts to find Gibbs on September 3 were unsuccessful. Trial Vol.II p.777 line 23–p.781 line 10. The search continued on September 4 with Gibbs agreeing to meet Hedlund shortly before 2 a.m. Trial Vol.II p.794 line 2–p.796 line 13. Hedlund went to Gibbs's location and met with him for over two-hours at his dining room table. Trial Vol.II p.795 line 1–p.796 line 7; p.798 line 5–p.799 line 24. Gibbs denied being the gunman or owning a gun. Trial Vol.II p.800 line 23–p.801 line 16. He did so even when confronted with the fact there was video evidence of him committing

the crime. Trial Vol.II p.801 line 17–21. Gibbs was not arrested at this time.

Gibbs did not assist the investigation of the shooting and in intentionally misled authorities. Despite requests for his clothing worn on the night, he did not provide them to police—nor were they recovered during investigatory searches. Trial Vol.II p.644 line 3–p.645 line 10; p.787 line 21–p.788 line 7. Instead, Gibbs lied to Hedlund as to what he was wearing at the time of the shooting. Trial Vol.II p.802 line 7–p.803 line 7. Likewise, in multiple interviews, Gibbs denied having a firearm and never provided it to investigators. Trial Vol.II p.620 line 7–14; p.799 line 25–p.801 line 4; p.802 line 2–6. The firearm was never located. Trial Vol.II p.611 line 7–22; p.619 line 16–p.620 line 6. On his own volition, Gibbs brought Hedlund a cell phone and told the detective he had carried it on his person the night of the shooting. Trial Vol.II p.807–p.808 line 14. The phone had not been used for months. Trial Vol.II p.808 line 15–p.809 line 1.

A warrant was filed for Gibbs's arrest on September 11, 2017. Trial Vol.II p.636 line 15–20. Gibbs could not be located. Trial Vol.II p.636 line 21–p.638 line 3. Gibbs was later arrested in Des Moines,

Iowa on September 18, 2017. Trial Vol.II p.638 line 4–17; p.819 line 12–24.

After being brought back to Fort Dodge and given *Miranda* warnings, investigators met with him. Trial Vol.II p.639 line 3–p.640 line 15. After informing Gibbs that they knew he had shot and killed Wessels, investigators again asked Gibbs for his side of the story. He repeatedly denied shooting Wessels or being the gunman. Trial Vol.II p.640 line 19–p.642 line 13; p.674 line 5–20; p.674 line 24–p.675 line 17; p.676 line1–11; p.821 line 10–p.822 line 14; *see generally* Exhs. 13, 180. Gibbs insisted he was being honest. Trial Vol.II p.642 line 14–16; p.683 line 7–9. During each of his interviews with investigators, he never mentioned he had acted in defense of his sister. Trial Vol.II p.673 line 18–p.674 line 23; p.676 line 1–11; p.790 line 21–p.791 line 4; p.805 line 7–p.806 line 15.

ARGUMENT

I. Gibbs did not Preserve a Categorical Challenge to Iowa Code section 704.2B; the Statute is Constitutional When Applied to the Facts of his Case.

Preservation of Error

Gibbs did not preserve his present challenge to Iowa Code section 704.2B during the jury instruction conference at trial. No pretrial challenge on this ground was filed. *See generally* 6/19/2018

Defendant's First Response to State's Proposed Jury Instr.; App. 15–16; *see also State v. Allen*, 304 N.W.2d 203, 206 (Iowa 1981) ("A party challenging a statute on constitutional grounds must do so at the earliest available time in the progress of the case."). At trial, his attorney argued instruction 36 violated the Fifth Amendment. This instruction told the jury

> A person using deadly force is required to notify or cause another to notify a law enforcement agency about his use of deadly force within a reasonable time period after the use of the deadly force, if the Defendant or another person is capable of providing such notification.
>
> A person using deadly force is also required to not intentionally destroy, alter, conceal, or disguise physical evidence relating to the person's use of deadly force, and a person using deadly force cannot intentionally intimidate witnesses into refusing to cooperate with any investigation relating to the use of such deadly force or induce another person to alter testimony about the use of such deadly force.

Instr. 36; App. 24. Gibbs's challenge below was premised upon *his* circumstances—his lack of knowledge about the change in Iowa law and the tensions in the community surrounding the murder:

> MR. BERGER: Okay. I'm going to propose the —well, first of all, first of all, I object to the entire Instruction because it violates the state

Constitution and federal Constitution and 5th and 14th Amendments. This would require a man such as Levi Gibbs, who as Detective Hedlund said, a lot of people don't trust us. I'm paraphrasing. And by seeing Detective Hedlund's demeanor and attitude, even arguing with counsel during this, during his interrogation of Levi Gibbs, it would be hard to imagine that Levi Gibbs, without knowing the law of defense of another, would be willing to share the fact with Detective Hedlund information that is required in Instruction No. 36, in violation of his 5th Amendment rights and how it affects his 14th Amendment rights of due process.

Now, with that said, I don't think that Instruction should be given in this case particularly in light of the factual circumstances, Judge, that Levi Gibbs saw his sister with significant injuries, doesn't know—as far as the record, doesn't know the complicated law of defense of another and justification. He's not a lawyer, he doesn't have extensive education, could very well be one of those people that wouldn't trust Detective Hedlund, again, as shown by his attitude during this trial, in my opinion. Transcript speaks for itself in arguing with counsel. Or I agree I'm not a witness, he is. And he's the one that interrogated Levi, not me. And we know that Preston Mosley shot at my client. And not knowing the law, but knowing his sister was seriously hurt, he ran from the scene, probably fearing for his own life, in a very dangerous community.

. . . .

This Instruction, in this set of Instructions, in this town, in this shooting in the Flats, allows

> the jury to say Levi Gibbs violated the law; and they could conclude, therefore, he's guilty. And I know the State's going to argue that. That is direct violation of his due process and his Fifth Amendment rights.
>
> Now, I'm not giving up on this Instruction. I don't think it should flat out be given. So when I'm offering another paragraph, I'm not trying to give the Court an alternate course of action and I'm just trying to settle. I think this would be a huge mistake on the part of the Attorney General to have to try this case again. If this goes south for Levi and he has Murder One, Murder Two, this is going to be a constitutional challenge, especially in your application of this Instruction to the facts of this case that I've just said. This case could get reversed over this, in my opinion. Whether it's a statute or not, I don't think it fits the facts.
>
> So that's my objection, state and federal Constitution, that it should not be flat out given. Whether it's a statute or not.

Trial Vol.II p.1011 line 8–p.1014 line 21. Although his objection was lengthy, Gibbs did not present the *substance* of his current challenge to the district court—that the statute unconstitutionally compelled him to make a statement which would result in a substantial risk of incrimination. Appellant's Br. 29–39. Constitutional arguments, like any other challenge, must be articulated and specific. *See State v. Seering*, 701 N.W.2d 655, 661 (Iowa 2005) (rejecting claim that was preserved because it was "inherent in the argument" presented to the

district court; "our rules of preservation do not hinge on the mere entwinement of claims or the inherency of a discrete claim as part of a broader claim"); *see generally State v. Coleman*, 890 N.W.2d 284, 303 (Iowa 2017) (Waterman, J. dissenting) ("Constitutional jurisprudence should not be a race to the bottom.").

And the district court did not make a categorical constitutional ruling. It found the instruction accurately stated the law and rejected the argument Gibbs's attorney presented—the instruction should not have been given based upon the facts of his client.

> THE COURT: Well, the Court believes that proposed Instruction No. 36 does accurately reflect the statutory language as found in 704 point—is it 2B?
>
> MR. McALLISTER: Yes, Your Honor.
>
> THE COURT: And, therefore, the objection is noted; and it is overruled. If there's to be some correction of a legislative defense created by statute, then we'll let the appellate court be the one to give us appropriate direction in that regard.
>
> MR. BERGER: Understood, Your Honor. So—So the record is clear, which I think it is, you're overruling my objection to 36 in it's entirety and the proposed amendment; am I correct?
>
> THE COURT: That is correct.

Trial Vol.II p.1016 line 21–p.1017 line 10.

This Court should not fault the district court for failing to anticipate Gibbs's subsequent revisions to his advocacy when it denied the unclear claim before it. *State v. Pickett*, 671 N.W.2d 866, 869 (Iowa 2003) ("[I]t is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider."). The claim he asserted—that the instruction should not be given because Gibbs did not know about section 704.2B—was meritless. *See, e.g., Millwright v. Romer*, 322 N.W.2d 30, 33 (Iowa 1982) ("Every citizen is assumed to know the law and is charged with knowledge of the provisions of statutes.").

Finding unclear claims unpreserved is consistent with the fundamental role error preservation serves. *Pickett*, 671 N.W.2d at 869. Shotgun citations to constitutional provisions do not give the district court adequate notice of the claim on which it is being asked to rule. Such hazy advocacy necessarily requires the court to adopt the role of advocate. *See Hyler v. Garner*, 548 N.W.2d 864, 876 (Iowa 1996) ("[W]e will not speculate on the arguments [the parties] might have made and then search for legal authority and comb the record for facts to support such arguments."); *see also In re S.P.*, 719 N.W.2d 535, 539–40 (Iowa 2006) ("[T]he court is prohibited from assuming

the role of an advocate" and calling for the "'cold neutrality of an impartial judge'" (quoting *State v. Glanton*, 231 N.W.2d 31, 35 (Iowa 1975))). Gibbs's present constitutional challenge is unpreserved and may only be addressed through the ineffective assistance of counsel framework. *See State v. Ambrose*, 861 N.W.2d 550, 555–56 (Iowa 2015).

Standard of Review

No matter this Court's approach to Gibbs's challenge the standard of review is identical. Constitutional challenges to statutes and ineffective assistance of counsel claims are reviewed de novo. *See Ennenga v. State*, 812 N.W.2d 696, 701 (Iowa 2012); *Seering*, 701 N.W.2d at 661.

When reviewing a constitutional challenge, the statute under attack is cloaked with a presumption of constitutionality. *State v. Hernandez-Lopez*, 639 N.W.2d 226, 233 (Iowa 2002). The challenger bears a heavy burden to prove the statute unconstitutional beyond a reasonable doubt. *Id.* A challenger must refute every reasonable basis upon which the statute could be found constitutional. *Id.* Furthermore, if the statute is capable of multiple constructions, one of which is constitutional, this Court must adopt that construction. *Id.*

Merits

Gibbs's present challenge was not preserved. Accordingly, this Court may only address the claim through the ineffective assistance framework. The test is two-fold. To satisfy the first prong, Gibbs must prove counsel breached an essential duty. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987). To satisfy the second, he must establish counsel's breach prejudiced him. *State v. Hildebrant*, 405 N.W.2d 839, 841 (Iowa 1987). That means he must prove there is a reasonable probability but for counsel's unprofessional error, the result of the proceeding would have been different. *Id.* The State addresses the question of breach first. Subdivisions I(A) and (B) resolve whether counsel was obligated to challenge Iowa Code section 704.2B(1) while subdivision I(C) resolves the prejudice inquiry.

Iowa has long recognized that a person's use of violent force, including deadly force, may be justified. *See e.g.*, Iowa Code §§ 5102–04 (1897). The legislature has concluded that the use of deadly force can be reasonable where "such force is necessary to avoid injury or risk to one's life or safety or the life or safety or another, or it is reasonable to believe that such force is necessary to resist a like force

or threat." Iowa Code § 704.1(1) (2017). It has recognized such decisions may be made in extreme situations and a "person may be wrong in the estimation of the danger or the force necessary to repel the danger as long as there is a reasonable basis for the belief of the person and the person acts reasonably in the response to that belief." Iowa Code § 704.1(2).

In 2017, the Iowa Legislature made several substantive modifications to Iowa's law on the defensive use of force. Pursuant to the newly adopted section 704.2B, an individual who has exercised deadly force is now required to

> notify or cause another to notify a law enforcement agency about the person's use of deadly force within a reasonable time period after the person's use of the deadly force, if the person or another person is capable of providing such notification.

Iowa Code § 704.2B(1). The apparent purpose of this duty is to bring a violent incident to police attention for investigation and give notice that the person used justified force. Consistent with these objectives, the section also creates a duty not to

> intentionally destroy, alter, conceal, or disguise physical evidence relating to the person's use of deadly force, and the person shall not intentionally intimidate witnesses into refusing to cooperate with any

> investigation relating to the use of such deadly force or induce another person to alter testimony about the use of such deadly force.

Iowa Code § 704.2B(2). There is no express sanction attached to a person's failure to comply with either duty.

Gibbs urges his attorney should have preserved his constitutional challenge to Iowa Code section 704.2B(1). Appellant's Br. 39–42. He believes the statute violates his right against self-incrimination because it "compels Gibbs to disclose that he was involved in a potential criminal offense." Appellant's Br. 40–42. This Court should reject the claim. Discussed below, Iowa Code section 704.2B(1) does not violate the Fifth Amendment and Gibbs's proposed analysis is misplaced—counsel did not breach an essential duty.

A. Iowa Code section 704.2B(1) does not violate the Fifth Amendment.

Gibbs cannot show section 704.2B(1) is unconstitutional for four reasons. The first is definitional, the disclosures the statute requires are neither "compelled" nor "incriminating" in a constitutional sense. Second, a person's prearrest, un-Mirandized silence is admissible in Iowa—Gibbs's failure to report his use of deadly force is admissible evidence. Third, because the defense

provided by Iowa Code chapter 704 is statutory, there was no unconstitutional compulsion. Fourth, the legislature may define the contours of the defense and the prerequisites for its application.

1. Iowa Code section 704.2B does not compel incriminating statements.

The Fifth Amendment was adopted in response to "Star Chamber" proceedings. The "Star Chamber" was a sixteenth and seventeenth century inquisitorial method of arresting a person, requiring them to take an oath and compelling the person to answer questions designed to uncover uncharged offenses, without evidence from another source. *See generally Doe v. United States*, 487 U.S. 201, 212 (1988); *see also* Frank Riebli, *The Spectre of Star Chamber: The Role of an Ancient English Tribunal in the Supreme Court's Self-Incrimination Jurisprudence*, 29 HASTINGS CONST. L.Q. 807, 813–21 (2002). The individual was often given the choice of answering incriminating questions or facing punishment for failure to comply. The United States Supreme Court has observed the privilege was designed "primarily to prevent 'a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality.'" *Pennsylvania v. Muniz*, 496 U.S. 582, 596 (1990) (quoting *Ullmann v. United States*, 350 U.S. 422, 428 (1956)). The horrors of the "Star Chamber"

were invoked in *Miranda* as a reason for applying the protection during custodial interrogation: "our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." *Miranda v. Arizona*, 384 U.S. 436, 459–60 (1966). And the Court has framed the privilege as a reflection of the justices' "'unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt.'" *Muniz*, 496 U.S. at 596 (quoting *Doe v. United States*, 487 U.S. 201, 212 (1988)). Against this historical context, Iowa Code section 704.2B cannot be said to "compel" speech that is "incriminating."

As to the compulsion element, the Supreme Court has previously concluded "[t]he Constitution does not prohibit every element which influences a criminal suspect to make incriminating admissions." *United States v. Washington*, 431 U.S. 181, 187 (1977). "Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions." *Id.* "The test is whether, considering the totality of the circumstances, the free will of the witness was overborne." *Id.* 704.2B cannot meet that

standard because it does not overcome a speaker's freewill or extract an involuntary statement.

As will be discussed further in subdivision I(B)(1), the disclosure is not mandated on threat of criminal punishment—there is no criminal sentence as a sanction for violating the statute. *See* Iowa Code § 704.2B; *c.f. State v. Akins*, 423 P.3d 1026 (Idaho 2018). Nor is there a threat of material loss that would create compulsion. *See generally Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977) ("[W]hen a state compels testimony by threatening to inflict potent sanctions unless the constitutional privilege is surrendered, that testimony is obtained in violation of the Fifth Amendment and cannot be used against the declarant in a subsequent criminal prosecution."); *Garrity v. New Jersey*, 385 U.S. 493, 497–500 (1967) (finding that public employers could not require employees to waive self-incrimination rights or face termination). The statement is not extracted through coercive police interrogation. *See Miranda*, 384 U.S. at 446–58.

Rather, the statute straightforwardly requires an individual who uses deadly force to contact law enforcement or have another person do so. *See* Iowa Code § 704.2B(1). Although not the exclusive means

of doing so, such contact is likely to occur through telephone communications outside police custody. And it is reasonable to expect that in the vast majority of cases this disclosure will occur before any investigation has begun or as it is in an early phase. Because the report is not made on the threat of punishment and is likely to occur before police's attention has focused upon any particular individual, there is no overwhelming pressure or compulsion driving the disclosure. The Fifth Amendment's protections are inapplicable.

This point is compellingly demonstrated by caselaw and analogy. In *State v. Caibaiosai*, 363 N.W.2d 574 (Wis. 1985), the defendant urged Wisconsin section 940.09(2) violated the right against self-incrimination. *Caibaiosai*, 363 N.W.2d 578–79. The statute provided an affirmative defense of intervening cause for defendants tried for operating a vehicle while intoxicated and causing the death of another. *Id.* Caibaiosai argued that because he is the "only possible witness able to present evidence in support of the defense" he would by necessity be forced to testify at trial. The Wisconsin Supreme Court rejected the notion and pointed to the United States Supreme Court's discussion in *Yee Hem v. United States*, 268 U.S. 178, 185 (1925):

> The point that the practical effect of the statute creating the presumption is to compel the accused person to be a witness against himself may be put aside with slight discussion. The statute compels nothing. It does no more than to make possession of the prohibited article *prima facie* evidence of guilt. It leaves the accused entirely free to testify or not as he chooses. If the accused happens to be the only repository of the facts necessary to negative the presumption arising from his possession, that is a misfortune which the statute under review does not create but which is inherent in the case. The same situation might present itself if there were no statutory presumption and a *prima facie* case of concealment with knowledge of unlawful importation were made by the evidence. The necessity of an explanation by the accused would be quite as compelling in that case as in this; but the constraint upon him to give testimony would arise there, as it arises here, simply from the force of circumstances and not from any form of compulsion forbidden by the Constitution.

As the Wisconsin Supreme Court concluded: "the availability or attraction of an affirmative defense does not amount to compulsion in the constitutional sense." *Id.*

Like *Caibaiosai*, the sum of Gibbs's argument is that to take advantage of a justification defense he was required to contact law enforcement and "testify." He urges that he must "testify" prior to the initiation of adversarial proceedings, prior to the administration of

Miranda warnings, and prior to arrest. But if the attractiveness of an affirmative defense does not "compel" a defendant to testify at trial, then the Fifth Amendment is implicated even less here. His actual lack of compulsion is acutely shown by his failure to notify, his unequivocal denials during interviews, and his decision not to testify at trial. He was not unconstitutionally compelled, and this Court should conclude the statute is not "compulsive."

Second, the statute does not require an individual to make an incriminating statement. To violate the Fifth Amendment the communication "'*must itself*, explicitly or implicitly, relate a factual assertion or disclose information' that incriminates. This requirement removes from the Fifth Amendment's protection a myriad of compelled acts that, while leading to the discovery of incriminating evidence, do not themselves make an incriminating factual assertion." *United States v. Sweets*, 526 F.3d 122, 127 (4th Cir. 2007) (quoting *Doe v. United States*, 487 U.S. 201, 209 (1988)). Likewise, "the Fifth Amendment addresses only a relatively narrow scope of inquiries. Unless the government seeks testimony that will subject its giver to criminal liability, the constitutional right to remain silent absent

immunity does not arise." *Garner v. United States*, 424 U.S. 648, 655 (1976).

While it does require a disclosure that an individual has exercised the use of deadly force, such statements are not inherently incriminating. Presumably those actions were justified and would not be subject to criminal liability. *See* Iowa Code §§ 704.2; 704.2A(1). Even a mistaken use of deadly force remains justified and criminal liability is precluded so long as the person's use of force was based upon a reasonable belief such force was necessary. *See* Iowa Code § 704.1(2). Under these definitions, the individual's use of deadly force is not even an assault. *See* Iowa Code § 708.2 ("A person commits an assault when, *without justification*, the person does any of the following . . ." (emphasis added)).

Because Iowa Code section 704.2B(1) does not "compel" testimony nor are the statements it solicits "incriminating," Gibbs's constitutional challenge necessarily fails.

2. *Even if Iowa Code section 704.2B(1) did not exist, Gibbs's prearrest, pre-Miranda warning silence was admissible.*

An additional reason Gibbs's Fifth Amendment framing for this challenge fails is because the statute does not alter the fact that the

State could already introduce evidence he failed to report his use of force as proof of guilt. A defendant's admissions are admissible at trial. Iowa R. Evid. 5.801(d)(1). Likewise, the State is not prohibited from discussing a defendant's silence that precedes arrest and *Miranda* warnings. *See United States v. Frazier*, 408 F.3d 1102, 1110–11 (8th Cir. 2005) (finding government may use evidence of defendant's post-arrest and pre-*Miranda* silence in case-in-chief); *Doyle*, 426 U.S. at 618–19; *see also Jenkins v. Anderson*, 447 U.S. 231, 240–41 (1980); *Fletcher v. Weir*, 455 U.S. 603, 606 (1982) (per curiam) (no violation of Fifth Amendment where prosecutor cross-examined defendant on his failure to report defensive use of deadly force); *State v. Riley*, No. 07-1440, 2008 WL 2902145, at *2–3 (Iowa Ct. App. July 30, 2008) (questions about defendant's failure to report injuries to police did not infringe Fifth Amendment rights); S*tate v. Goodrich*, No. 00–1644, 2002 WL 984477, at *4 (Iowa Ct. App. May 15, 2002) (counsel not obligated to object to prosecutor's argument about his pre-arrest silence). Federal courts are split on this question. *See United States v. Burson*, 952 F.2d 1196, 1200–01 (10th Cir. 1991); *Coppola v. Powell*, 878 F.2d 1562, 1568 (1st Cir. 1989); *United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1017 (7th Cir. 1987).

In the prearrest, pre-*Miranda* context, a defendant's silence, conduct, and statements are admissible because there is no inherently coercive custodial environment. *See generally Miranda*, 384 U.S. at 444–45. Nor is evidence of the defendant's silence inadmissible because the State induced that silence through assurances that the defendant's statements would be used against him or her. *See Doyle*, 426 U.S. at 618–19. The use of this prearrest conduct as substantive evidence does not comment upon or violate the right to stand silent at trial. *See Griffin v. California*, 380 U.S. 609 (1965). None of these rationales can be relied upon to find section 704.2B(1) unconstitutional.

And, in *Salinas v. Texas*, 570 U.S. 178 (2013), the Supreme Court held the prosecution could admit the defendant's un-*Mirandized* silence during non-custodial questioning in its case-in-chief. In *Salinas*, two men were shot and killed in their home; the petitioner had been a guest at the home the night before the murders. 570 U.S. at 181–182. Police visited petitioner at his home, and he agreed to provide his shotgun and accompany police for questioning. *Id.* During the approximately one-hour interview, the petitioner answered questions until officers inquired "whether his shotgun

'would match the shells recovered at the scene of the murder.'" *Id.* at 182. He did not answer, and instead "'[l]ooked down at the floor, shuffled his feet, bit his bottom lip, cl[e]nched his hands in his lap, [and] began to tighten up.'" *Id.* (internal quotations omitted). This evidence was used in the State's case-in-chief at trial.

Although the Supreme Court took the case to resolve the question of whether the prosecution could use "a defendant's assertion of the privilege against self-incrimination during a noncustodial police interview as part of its case in chief," it found that it was unnecessary to resolve the question. *Id.* at 183. Key to the outcome was the fact that the petitioner had agreed to go the police station and voluntarily answered questions without invoking the Fifth Amendment. "To prevent the privilege from shielding information not properly within its scope, we have long held that a 'witness who desires the protection of the privilege . . . must claim it.'" *Id.* (internal quotations omitted). The Court found the failure to invoke the protections of the amendment meant the its protections simply did not apply and the State could use evidence of his silence in the face of questioning to establish his guilt. *Id.* at 185–86. The Court observed that "Statements against interest are regularly admitted into evidence

at criminal trials . . . and there is no good reason to approach a defendant's silence any differently." *Id.* at 190.

Here, Gibbs met with Hedlund voluntarily on two occasions. Trial Vol. II p.794 line 6–p.796 line 13, p.798 line 5–p.799 line 24; p.803 line 8–p.805 line 6. Both times he denied shooting Wessels or even having a gun. Trial Vol. II p.799 line 25–p.802 line 6; p.805 line 7–p.807 line 2. These statements could be admitted at trial. Iowa R. Evid. 5.801(1)(d). Like the petitioner in *Salinas*, there is no indication he invoked the Fifth Amendment's protections. His silence—his failure to report his use of force—was admissible as evidence of his guilt. So too was his incriminating conduct of fleeing Fort Dodge and attempting to mislead police. Trial Vol. II p.802 line 7–p.803 line 7; p.807 line 3–p.809 line 1; p.819 line 12–p.821 line 2. Regardless of the statute, each of these evidentiary avenues were available to the State in proving his guilt.

3. Gibbs was not required to choose one right over another. Other states permit the use of a defendant's notice of justification in their case in chief.

An additional reason Gibbs cannot prevail is because the statute does not require him to make a Hobson's choice of sacrificing his right against self-incrimination to vindicate another constitutional

right. The most relevant United States Supreme Court opinion on this point is *Simmons*.

In *Simmons v. United States*, 390 U.S. 377 (1968) one of the petitioners, Garrett, had testified in a suppression hearing to support a claim the government had violated his Fourth Amendment rights. *Simmons*, 390 U.S. at 381. The suppression motion failed and his testimony at the hearing was used to establish guilt at trial. *Id.* In reviewing the action of lower courts, the Supreme Court concluded that "when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at the trial on the issue of guilt unless he makes no objection." *Id.* at 394. The Court acknowledged that "testimony is not always involuntary as a matter of law simply because it is given to obtain a benefit." *Id.* at 393–94. But because the benefit before Garrett—the vindication of his Fourth Amendment rights—was a constitutional entitlement, it found he could not be required to choose between testifying at the suppression hearing and having that testimony subsequently used against him or standing silent to give effect to his Fifth Amendment right against self-incrimination and sacrifice an otherwise valid Fourth Amendment

claim. *Id.* at 392–94; *see also State v. Craney*, 347 N.W.2d 668, 672–73 (Iowa 1984) (finding that defendant's incriminatory statements to psychiatrist for purposes of insanity defense are not to be admitted at subsequent trial).

The United States Supreme Court has not expanded *Simmons* beyond its original context and has questioned its ongoing validity. *See McGautha v. California*, 402 U.S. 183, 211–13 (1971). In *McGautha,* the Court rejected a claim that Ohio's unitary guilt and death penalty trial required sacrifice of the petitioner's Fifth Amendment rights. *Id.* The Court mused that although the soundness of the result in *Simmons* was not presently before it, "to the extent that its rationale was based on a 'tension' between constitutional rights and the policies behind them, the validity of the reasoning must now be regarded as open to question . . . ." *Id.*

Florida has confronted the *Simmons* question in the context of whether a defendant's pre-trial statements in furtherance of a "stand your ground" justification defense were admissible as substantive evidence of guilt. In Florida, a defendant relying on justification immunity must present a prima facie defense during a preliminary evidentiary hearing. *See* Fla. Stat. § 776.032(4) (2017) (requiring

defendant to raise and establish a prima facie claim of self-defense immunity in pretrial hearing). In *Cruz v. State*, the appellant argued that the government's use of his testimony during the pre-trial immunity hearing at trial violated the rule set out in *Simmons*. 189 So.3d 822, 827–28 (Fla. Dist. Ct. App. 2015). The court rejected the claim, finding that the immunity conferred by Florida's "stand your ground" law was statutory and not constitutional in origin. *Id.* at 828.

> Here, because appellant was not forced to make a choice between two constitutional rights, his testimony at the pre-trial Stand Your Ground immunity hearing was admissible against him at trial. Appellant was not required to surrender any constitutional right by voluntarily testifying in the pre-trial Stand Your Ground immunity hearing.

Id. at 829 (citations omitted). The court explicitly rejected Cruz's assertion that he was required to choose between exercising a Florida constitutional right to bear arms in self-defense and his Fifth Amendment right—"Appellant obviously had the right of self-defense. The only dispute was whether appellant was, in fact, exercising that right when he stabbed the two victims." *Id.*

Other courts comparing similar claims have refused to apply *Simmons*'s holding to a choice between a statutory benefit and a constitutional right. *See United States v. Ashimi*, 932 F.2d 643, 647–

48 (7th Cir. 1991) ("*Simmons* does not apply . . . when a defendant is made to choose between a constitutional benefit and a statutory benefit."); *United States v. Wilks*, 629 F.2d 669, 672 (10th Cir. 1980) (finding that defendant elected to seek dismissal rather than continuance and "the necessity of choosing between holding the government to the exact time limits of the Speedy Trial Act and requesting time to prepare a defense does not, on the facts of this case, create the sort of trade-off of constitutional rights denounced by *Simmons* . . . ."); *see also United States v. Snipes*, 611 F.3d 855, 866 (11th Cir. 2010) ("*Simmons* has never been extended beyond its context."); *People v. Snow*, 936 N.W.2d 662, 668–70 (Ill. App. Ct. 2010) (finding that defendant's testimony in administrative proceeding could be used in criminal trial).

This Court should reach the same conclusion. Like *Cruz*, the justification defenses created by Iowa Code chapter 704 are statutory. Gibbs was not presented with a *Simmons*-quandary of selecting between two constitutional benefits, with either selection undermining the other. The Supreme Court's refusal to expand *Simmons* holding beyond its original context over the last fifty years—not to mention its subsequent critique of the opinion—is another

indication its application is inappropriate here. There is no reason to invalidate the statute.

4. The legislature may define an affirmative defense and the prerequisites for its use.

Iowa Code section 704.2B(1) is a sub-requirement of the affirmative defense of justification. Again, Iowa's law on the justified use of force is statutory. *See generally* Iowa Code §§ 704.1–.13. Our legislature has "wide latitude in recognizing affirmative defenses and allocating the burden of proving those defenses." *State v. Boland*, 309 N.W.2d 438, 440 (Iowa 1981). The legislature may require a defendant to assume the burden of taking action to support an affirmative defense without violating the constitution. *Id.*

In addition to being required to adduce sufficient evidence to necessitate a justification instruction, Iowa law requires defendants to comply with notice requirements. A defendant must provide timely notice of certain defenses. Iowa R. Crim. P. 2.11(11)(a)–(c). Failure to do so without good cause can result in barring the defense and excluding evidence supporting the defense. Iowa. R. Crim. P. 2.11(11)(d). Ordinarily this Court does not intrude upon the legislature's structuring of an affirmative defense. *Boland*, 309

N.W.2d at 441 ("It is not for us to substitute our judgment on the wisdom of recognizing the defense or allocating its burden of proof.").

The attractiveness of an affirmative defense does not make it unconstitutionally compelling. *See Yee Hem*, 268 U.S. at 185. Because the legislature possesses the ability to define crimes and their defenses, it is likewise permitted to establish prerequisites for an individual's justified use of deadly force and may place some burden of notice upon the individual who wishes to rely upon the defense. Section 704.2B(1) requires a person who uses deadly force to report their use of force within a "reasonable time," akin to the notice requirements of other affirmative defenses.

For example, an individual asserting a claim of alibi must furnish notice and a list of proposed witnesses. Iowa R. 2.11(11)(a). Then, the State may interview or depose these witnesses in anticipation of trial. Such depositions may lead to additional incriminating information or an unraveling of the defense altogether. Yet this mandatory furnishing of information does not violate the Fifth Amendment. *Williams v. Florida*, 399 U.S. 78, 83–84 (1970). An individual may voluntarily employ a defense or decline to do so, but if they elect to stand on the defense the individual must comply

with the legislature's prerequisites for doing so. *Id.* The fact that complying with this requirement creates a tension does not make it unconstitutional. *Id.* at 84 ("However 'testimonial' or 'incriminating' the alibi defense proves to be, it cannot be considered 'compelled' within the meaning of the Fifth and Fourteenth Amendments."). Just like rule 2.11(11), section 704.2B(1) requires an individual to disclose their justified use of force. The State may then investigate the defense, just as it would a claim of alibi, insanity or diminished capacity, intoxication, or entrapment. The choice of whether to rely on the defense at trial remains with the defendant. *Id.* 84–85. This notice requirement does not violate the Fifth Amendment.

B. Gibbs misframes the issue; Iowa Code section 704.2B(1) does not criminally punish non-compliance.

Gibbs spends the majority of his argument on this claim applying the United States Supreme Court's mandatory reporting cases. Appellant's Br. 24–29 (discussing *United States v. Sullivan*, 274 U.S. 259 (1927); *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965); and *California v. Byers*, 402 U.S. 424 (1971)). Specifically, he highlights the application of those cases through the Idaho Supreme Court's case *State v. Akins*, 423 P.3d

1026 (Idaho 2018). Under that framework, he urges section 704.2B(1) is unconstitutional because it is (1) a criminal statute that (2) targets a highly selective group inherently suspected of criminal activities and (3) creates a real risk of self-incrimination because the required disclosure will provide a link in the chain for a subsequent prosecution for homicide. Appellant's Br. 29–39. This analysis is flawed because this body of law is readily distinguished.

The simplest and most straightforward explanation as to why Gibbs's analysis fails is because each and every case applying the *Sullivan*/*Marchetti*/*Byers* analysis he relies upon contained a criminal sanction for non-compliance with a mandatory disclosure requirement. Sullivan was convicted for failing to file a tax return. *Sullivan*, 274 U.S. at 262, 268. Albertson was compelled to register as a communist and his failure to do so was "severely sanctioned"—a $10,000 fine or imprisonment for up to five years or both. *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70, 75–76, 81 (1965). Registration could automatically support an investigation and subsequent prosecution under the Smith Act, 18 U.S.C. § 2385 (1964) and section 4(a) of the Subversive Activities Control Act, 50 U.S.C. § 783(a) (1964). *Id.* at 77–78. In *Marchetti* and *Grosso*, each defendant

was convicted for failure to register and pay a tax on illegal gambling activities. *See Marchetti v. United States*, 390 U.S. 39, 40–41 (1968) (discussing violation of 26 U.S.C. § 4412); *Grosso v. United States*, 390 U.S. 62, 63 (1968) (violation of 26 U.S.C. § 4401 and 18 U.S.C. § 371). In *Haynes*, the defendant challenged statutes making it illegal to possess an unregistered firearm and illegal to fail to register a firearm illegally obtained after pleading guilty to the same. *Haynes v. United States*, 390 U.S. 85, 95 (1968) (discussing 26 U.S.C. §§ 5841, 5848, 5851, 5861). In *Leary*, the defendant challenged his conviction for failure to file a marijuana order form and failure to pay a transfer tax under 26 U.S.C. § 4744(a)(2). *Leary v. United States*, 395 U.S. 6, 25–27 (1969).

In each of these cases the defendant was required to disclose incriminating information or be subject to conviction and punishment for not disclosing. It is not surprising that the Fifth Amendment precluded such inventive attempts to circumvent its protections through a "catch-22."

California v. Byers applied the same framework but required a different result. The Supreme Court in *Byers* applied the foregoing framework to a statute that punished a person's failure to stop at the

scene of an accident. *California v. Byers*, 402 U.S. 424, 425–26, (1971). But a plurality of the court distinguished the California statute after finding it failed the first prong and second prongs of the analysis: the statute did not target a "highly selective group inherently suspect of criminal activities" rather, it was "essentially regulatory . . . [and] was not intended to facilitate criminal convictions but to promote the satisfaction of civil liabilities arising from automobile accidents." *Id.* at 430. Unlike *Marchetti*, *Grosso*, *Albertson*, *Haynes*, and *Leary*, the statute did not create a substantial risk of incrimination. There was no burden to report and face prosecution or face prosecution for failure to report: "it is not a criminal offense under California law to be a driver 'involved in an accident.'" *Id.* at 431. The fact that the disclosure *could* lead to subsequent investigation and penalties was insufficient risk of incrimination to find the statute unconstitutional. *Id.*

Additionally, the plurality opinion rejected the application of the Fifth Amendment altogether when it found the requirement to stay and report did not require the disclosure of testimonial evidence: "Disclosure of name and address is an essentially neutral act." *Id.* at 431–32. Likening California's statute to the requirement to file a tax

return in *Sullivan*, an expansion of the amendment to this context would be an "extravagant" extension of the privilege; the statute "identifies but does not by itself implicate anyone in criminal conduct." *Id.* at 431, 433–34.

Relying on these cases, Gibbs points to the Idaho Supreme Court's *Akins* opinion. Appellant's Br. 28–29; *Akins*, 423 P.3d 1026. In *Akins*, the defendant took the corpse of Kimberly Vezina—believed to have died from an intentional overdose—wrapped the body in a tarp, drove it into Idaho from Washington state, attached bags of cement mix to the corpse, and threw it into a lake. 423 P.3d at 1027–28. Akins was charged with failure to notify of a death in violation of Idaho Code section 19-4301A(3). This statute required

> (1) Where any death occurs which would be subject to investigation by the coroner under section 19-4301(1), Idaho Code, the person who finds or has custody of the body shall promptly notify either the coroner, who shall notify the appropriate law enforcement agency, or a law enforcement officer or agency, which shall notify the coroner. Pending arrival of a law enforcement officer, the person finding or having custody of the body shall take reasonable precautions to preserve the body and body fluids and the scene of the event shall not be disturbed by anyone until authorization is given by the law enforcement officer conducting the investigation.

> . . .
>
> (3) Any person who, with the intent to prevent discovery of the manner of death, fails to notify or delays notification to the coroner or law enforcement pursuant to subsection (1) of this section, shall be guilty of a felony and shall be punished by imprisonment in the state prison for a term not to exceed ten (10) years or by a fine not to exceed fifty thousand dollars ($50,000) or by both such fine and imprisonment.

Idaho Code § 19-4301A(1), (3). Akins alleged that this statute violated her right against self-incrimination. The Idaho Supreme Court, applying the *Sullivan*/*Marchetti*/*Byers* line found that the statute's disclosure requirement was directed to the public at large. *Id.* at 1033. But the court rejected the notion that the statute was regulatory in nature—the individual making the disclosure was required to provide the reported information to law enforcement. *Id.* at 1033–34. Examining the legislative history of the statute the court concluded that "the statute fits somewhere between *Albertson* and *Byers*: it applies against the public at large but carries with it an underlying criminal purpose." *Id.* at 1034. In resolving the third element, the court found that under the facts her disclosure "would have effectively admitted to her commission of the State's charge of destroying evidence . . . we find it difficult to invent a more substantial hazard of

self-incrimination than the one that was actually present here." *Id.* As applied to Akins, the statute violated the Fifth Amendment.

But again, the Idaho Supreme Court's opinion identified the very reason this entire body of cases is inapplicable here: "The statutory schemes at issue in all of these cases follow the same pattern: a requirement to report or otherwise provide information is imposed, and failures to comply with that requirement are penalized." *Akins*, 423 P.3d 1032. "[T]he statute reveals that it is meant to serve, at least in part, as a punishment device when other means of imposing criminal sanctions are not available." *Id.* at 1034. This logic immediately distinguishes section 704.2B(1).

To be clear, the section creates a requirement that a person notify police of their use of deadly force. But it does not punish a defendant's failure to comply with criminal sanctions. In fact, unlike Iowa Rule 2.11(11)(d), failure to provide notice does not explicitly preclude a defendant from raising the defense. Gibbs was permitted to stand on his elected defense notwithstanding his failure to notify law enforcement. Instr. 34, 36; App. 22, 24. As instructed and argued in this case, his failure to notify police created a permissible

inference—one the jury could but was not required to accept—akin to spoliation:

> Ladies and gentlemen, the Defendant violated all of the duties required of somebody that uses deadly force; and I suggest to you that you should use that information to consider, number 1, did he believe that the use of force was needed? And, number 2, was his use of force reasonable? I think, ladies and gentlemen, when you consider that, the evidence will show that he was not justified in this case.

See Trial Vol.II p.1102 line 9–16; Instr. 36; App. 24. By its plain language section 704.2B(2) is a prohibition on the spoliation of evidence, creating a permissible inference when applicable. *See* Model Civ. J. Instr. 100.22. This Court should conclude that like Iowa's longstanding inferences from spoliation, section 704.2B(1) creates a permissible inference of guilt from the defendant's failure to report the use of deadly force. Because there is no criminal sanction attached to failure to comply the statute, Gibbs misframes the question before this Court. It should reject his analysis and affirm.

C. Gibbs's *Strickland* claim collapses because he was not prejudiced.

Gibbs's attorney did not breach an essential duty by not preserving Gibbs's present challenge because the claim was doomed

to failure—the statute does not violate the Fifth Amendment and counsel had no duty to object. But even more damaging to the claim is the fact that even if Instruction 36 had not been given the outcome of trial would have been identical.

The State's evidence overwhelmingly established Gibbs was not justified when he shot Wessels. Under Iowa Code section 704.3, "A person is justified in the use of reasonable force when the person reasonably believes that such force is necessary to defend oneself or another from any actual or imminent use of unlawful force." This statutory authorization for the use of force has limits. It is unavailable to a person "participating in a forcible felony, or riot, or a duel," or "who initially provokes the use of force against oneself, with the intent to use such force as an excuse to inflict injury on the assailant." Iowa Code § 704.6. It is also unavailable when the force used is unreasonable under the circumstances. Iowa Code § 704.1 (defining "reasonable force" as "that force and no more which a reasonable person, in like circumstances would judge to be necessary to prevent an injury . . ."). Instructions 34 and 37 informed the jury that the State could prove Gibbs was not justified if the evidence established beyond a reasonable doubt that:

1. The defendant knew the person or persons he helped had started or continued the incident, or the defendant himself started or continued the incident which resulted in death.

2. An alternative course of action was available to the defendant.

3. The defendant did not believe the person or persons he helped was in imminent danger of death or injury and the use of force was not necessary to save the person he helped.

4. The defendant did not have reasonable grounds for the belief.

5. The force used by the defendant was unreasonable.

Instr. 37, 34 (requiring State to disprove defense by beyond a reasonable doubt standard); App. 22, 25. The State proved that Gibbs's use of force was unjustified for multiple reasons.

First, the jury could have found that Gibbs and his sister initiated the melee and provoked Wessels, rendering the defense inapplicable under the first exception of instruction 37. Trial Vol.II p.286 line 5–p.291 line 55; p.439 line 4–p.441 line 14; Instr. 37; App. 25. Similarly, Gibbs continued the incident. Wessels declared he was finished and was retreating when he was tasered by Chassdie Mosely, pursued by Gibbs and his sister, and then Gibbs fired the fatal shot. Exh. 24 03:33:51–03:33:57; Trial Vol.II p.350 line 4–p.357 line 25;

p.443 line 6–449 line 25; p.509 line 5–14; p.910 line 13–p.911 line 22. In fact, the defense invited the jury to believe that Gibbs *missed* this first shot, and then shot again. Trial Vol.II p.449 line 1–14; p.456 line 7–p.457 line 24; p.1082 line 16–p.1084 line 2; Exh. 24 03:33:56–03:34:10. Testimony indicated Gibbs stood over Wessels to shoot him *after* he had collapsed to the ground. Trial Vol.II p.361 line 7–19; p.408 line 7–p.409 line 18; p.507 line 9–25; p.509 line 16–p.510 line 25; Instr. 37; App. 25. Even if this final shot missed, the use of force was clearly unreasonable. And Gibbs participated in others' assaults on Wessels after he fell for the last time. Trial Vol.II p.359 line 18–p.360 line 4; p.399 line 1–11; Exh. 24 03:34:00–03:34:10.

Gibbs also had alternative courses of action available—he had time to leave the fight, approach his car, and return with a gun to shoot Wessels. Trial Vol.II p.350 line 4–p.357 line 19; p.396 line 19–p.398 line 5; p.446 line 2–p.12; p.448 line 3–p.449 line 14; Exh. 24 01:40–03:00; Instr. 37; App. 25. Finally, when Gibbs fired the first shot, Wessels is standing alone and was not engaged with anyone, meaning his use of force was not necessary to save his sister. Exh. 24 03:33:50–03:34:10.

The jury could have also rejected the defense based on Gibbs's subsequent conduct. He threatened Altman prior to fleeing the scene. Trial Vol.II p.358 line 5–p.359 line 11. He avoided meeting with Hedlund on September 4. Trial Vol.II p.791 line 13–p.794 line 7. In multiple interviews he denied having a gun or shooting Wessels. Trial Vol.II p.639 line 7–p.642 line 16; p.674 line 1–p.676 line 11; p.798 line 5–p.802 line 6; p.805 line 15–p.806 line 8; p.821 line 10–p.822 line 14. Likewise, during interviews, Gibbs never indicated that he had acted in his sister's defense. Trial Vol.II p.806 line 9–15. Even when confronted with the fact that a video depicted him firing shots at Wessels, Gibbs deferred, stating he "didn't believe" the video existed. Trial Vol.II p.805 line 7–14. In fact, he suggested that there was another video that he had seen on social media showing he was not the shooter at all. Trial Vol.II p.831 line 7–p.832 line 11. This was strong indicia of guilt. *See State v. Odem*, 322 N.W.2d 43, 47 (Iowa 1982) ("A false story told by a defendant to explain or deny a material fact against him is by itself an indication of guilt.").

He intentionally misled the investigation. Earlier Gibbs volunteered an unused phone to Hedlund and told him it was the phone he carried on the night Wessels was killed. Trial Vol.II p.807

line 3–p.808 line 10. The phone had not been used for months. Trial Vol.II p.808 line 11–p.809 line 1. As the investigation intensified, he left Fort Dodge for Des Moines, Iowa. Trial Vol.II p.636 line 15–p.638 line 17; p.819 line 12–p.820 line 1; *State v. O'Meara*, 177 N.W. 563, 569 (Iowa 1920) ("It is a very old saying that 'Conscience does make cowards of us all,' and further, 'The wicked flee when none pursue.'" (quoting *State v. Robinson*, 152 N.W. 590 (Iowa 1915))).

In sum, the State presented an iron-clad case that Gibbs had killed Wessels without justification. His subsequent actions were consistent with a guilty conscience and inconsistent with the justified use of force. No matter counsel's actions on this issue, the outcome of the trial would have been the same. Gibbs cannot meet his burden under *Strickland* and accordingly, this unpreserved constitutional claim fails.

II. The District Court Correctly Instructed the Jury.

Preservation of Error

The State does not contest error preservation on this ground. Gibbs requested the district court not to provide instruction 36 and offered an alternative form of the instruction. Trial Vol.II p.1014 line 10–21; p.1015 line 1–p.1016 line 9. The district court overruled the

request. This was sufficient. *Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012).

Standard of Review

Absent a discretionary component, a court's refusal to give a requested instruction is reviewed for correction of errors at law. *See Alcala v. Marriott Int'l Inc.*, 880 N.W.2d 699, 707 (Iowa 2016). "Under Iowa law, a court is required to give a requested instruction when it states a correct rule of law having application to the facts of the case and when the concept is not otherwise embodied in other instructions." *Herbst v. State*, 616 N.W.2d 582, 585 (Iowa 2000). Where there is a discretionary component inherent in choosing between two competing formulations of an instruction, "[t]rial courts have a rather broad discretion in the language that may be chosen to convey a particular idea to the jury." *State v. Tipton*, 897 N.W.2d 653, 696 (Iowa 2017) (quoting *Stringer v. State*, 522 N.W.2d 797, 800 (Iowa 1994)). Because Gibbs challenges the district court's refusal to give his modified form of the instruction, review of the district court's ruling is for abuse of discretion.

Merits

Gibbs requested the district court to amend the proposed version of instruction 36 as follows:

> "If you determine that Defendant, Levi Gibbs, did not comply"—"did not comply with the requirements of this Instruction, he is still"—and I don't know the wording here, I'm just taking a shot at it, Judge; it could probably be written better—"he is still legally able to assert defense of another person as explained in Jury Instruction No. so and so." That at least tells the jury the case isn't over because of this Instruction as it stands now.

Trial Vol.II p.1014 line 10–21. The State resisted, urging that Gibbs's addition was not within the wording of the statute and would amount to commentary on the evidence. Trial Vol.II p.1015 line 1–p.1016 line 9. In the absence of guidance as to the implications of section 704.2B, the district court declined to give Gibbs's proposed addition to the instruction. The district court's decision should be affirmed because although the court could have exercised its discretion to provide the version Gibbs requested, the instruction given to the jury was a correct statement of law and did not prejudice him.

A. The district court correctly adapted Iowa Code section 704.2B(1) when it instructed the jury. It did not abuse its discretion.

"[T]he court is not required to give any particular form of an instruction; rather, the court must merely give instructions that fairly state the law as applied to the facts of the case." *State v. Marin*, 788 N.W.2d 833, 838 (Iowa 2010). The district court correctly instructed the jury; a highlighted review of the changes within instruction 36 reveals that the instruction is completely consistent with the statute because *it is the statute*.

Iowa Code § 704.2B	**Instruction 36** (differences *italicized*)
1. If a person uses deadly force, the person shall notify or cause another to notify a law enforcement agency about the person's use of deadly force within a reasonable time period after the person's use of the deadly force, if the person or another person is capable of providing such notification.	*A person using deadly force is required* to notify or cause another to notify a law enforcement agency about *his* use of deadly force within a reasonable time period after the use of the deadly force, if the *Defendant* or another person is capable of providing such notification.
2. The person using deadly force shall not intentionally destroy, alter, conceal, or disguise physical evidence relating to the person's use of deadly force, and the person shall not intentionally intimidate witnesses into refusing to cooperate with any investigation relating to the use of such deadly force or induce another person to alter testimony about the use of such deadly force.	*A* person using deadly force *is also required to* not intentionally destroy, alter, conceal, or disguise physical evidence relating to the person's use of deadly force, and *a person using deadly force cannot* intentionally intimidate witnesses into refusing to cooperate with any investigation relating to the use of such deadly force or induce another person to alter testimony about the use of such deadly force.

The district court's failure to provide additional commentary on the inferences that could be gleaned from Gibbs's conduct is of no concern. "Obviously, it is not necessary that the court instruct the jury upon all inferences arising from the evidence." *See State v. Simpson*,

528 N.W.2d 627, 631–32 (Iowa 1995), *overruled on other grounds by State v. Webb*, 648 N.W.2d 72, 79 (Iowa 2002). The court in *Simpson* observed that specific instructions on a permissible inference can be unnecessary because counsel is already permitted to argue the inference and the jury to consider it. *Id.* And although not dispositive, the court has "expressed concern that instructions on certain inferences may involve selective comments on the evidence by the trial court." *Id.* (citing *State v. Mayberry*, 411 N.W.2d 677, 684 (Iowa 1987)). Thus, a district court can easily find itself in an untenable quandary. Its earnest attempt to assist the jury in understanding the law's application may later be faulted as indulging in "a practice which is not favored in instructing juries and is fraught with potential for abuse." *Mayberry*, 411 N.W.2d at 684. This district court was correct to take a cautious approach. It provided the jury with the applicable law and permitted the parties to argue the permissible inferences from the applying that law to the evidence. *See* Trial Vol.II p.1101 line 7–p.1102 line 16.

And the instruction given was not confusing or misleading. Under section 704.2B an individual who uses deadly force is obligated to disclose and not destroy evidence. This is common-sense. The

erroneous "implications" Gibbs points to—that his failure to comply with the statute indicate he did not act with justification—are the very outcomes the legislature intended. Appellant's Br. 44–45. There was no legal error. Although the district court could have given Gibbs's proposed modification to the instruction, it was not required to. And even if this Court were to disagree, any error was harmless in the context of this case.

B. Any error was harmless in light of the State's overwhelming evidence.

Even if error occurred, this Court may not vacate Gibbs's conviction and reverse unless the district court's error was prejudicial. *State v. Hanes*, 790 N.W.2d 545, 550 (Iowa 2010). Because of the constitutional dimension of Gibbs's claim, applying the harmless error standard here requires the State to show beyond a reasonable doubt the error did not result in prejudice. *Id.* In light of the State's evidence discussed in Subdivision I(A)(C), the district court did not prejudice Gibbs when it instructed the jury upon Iowa Code section 704.2B nor by rejecting his offered additions to the instruction. His conviction can be attributed to the video and testimonial evidence demonstrating he shot Wessels without justification.

Likewise, this Court should reject Gibbs's assertion that the instruction prejudiced him because it permitted "the jury to believe that compliance with the statute bolsters the credibility of an individual if they comply with Iowa Code § 704.2B(1) by reporting to law enforcement." Appellant's Br. 47. The instruction clarifies a common-sense determination—an individual acting within their legal rights has no need to flee, no need to threaten witnesses, no need to lie to police about their involvement, and no reason to mislead police's investigation. The jury was within its purview to compare the evidence of Gibbs's threats, misleading behavior, and repeated denials of shooting Wessels with the other video and testimonial evidence and conclude that his deception and flight was consistent with guilt. The instruction did not unfairly bolster the remaining witnesses testimony—it provided criteria by which the jury could determine the credibility of the defense. Instructions routinely identify criterion by which jurors may assess evidence. *See* Instrs. 6, 8, 12; App. 17–19.

The State's overwhelming evidence of guilt meant instruction 36 did not contribute to its verdict. Any error from the instruction was harmless. This Court should affirm.

III. The Issues in Gibbs's Pro Se Brief are Unpreserved or Addressed in Other Divisions of the State's Brief.

Gibbs has also filed a pro se brief raising three additional issues. The first cannot be resolved on the current record and significant portions of the third reiterate the claims within his counseled brief on appeal. Each may be quickly addressed.

A. Gibbs's challenge to his jury panel are unpreserved, his challenges to individual jurors fail.

Preservation of Error

Gibbs raises two claims under this heading. The first appears to argue that his jury panel was not a fair cross-section of his community pursuant to *State v. Plain*, 898 N.W.2d 801 (Iowa 2017). Pro Se Br. 7–9. He also alleges four jurors were biased based on their statements during voir dire. *Id.* Despite his claim to the contrary, the first claim was not preserved. A challenge to the jury panel must be raised at the earliest possible occasion. *See State v. Johnson*, 476 N.W.2d 330, 333 (Iowa 1991) ("Defendant had ample opportunity to view the jury panel during the jury selection process but failed to object to it during this time . . ."); *see also State v. Smith*, No. 16-1881, 2017 WL 4315058, at *3 n.2 (Iowa Ct. App. Sept. 27, 2017) (citing *Johnson* and

observing defendant was required to object to the racial composition of a jury pool prior to its being sworn in to preserve claim based on *Plain*, but proceeding to affirm on merits). Although the attorneys discussed race during voir dire, no objection to the racial composition of the panel was raised. *See generally* Trial Vol.I p.321 line 16–p.322 line 18 (discussing racial bias). Because Gibbs failed to preserve error or build a record on the issue, this Court may not directly address a claim based upon *State v. Plain*, or its progenitors *Duren v. Missouri*, 439 U.S. 357 (1979) and *Taylor v. Louisiana*, 419 U.S. 522 (1975).

His challenges to certain jurors are also unpreserved. Gibbs raised no challenge to Juror Hebert, and accordingly the issue can only be addressed through the ineffective assistance framework. However, Gibbs did preserve error as to Lewis. Counsel urged that Brianna Lewis should be struck for cause because she "said it would be challenging not to believe what her friend said that Mr. Wessels was murdered . . ." Trial Vol.I p.159 line 15–p.160 line 16. The district court overruled the request. Trial Vol.I p.160 line 17–25. Gibbs has preserved this sub-issue for appeal. *See State v. Manna,* 534 N.W.2d 642, 644 (Iowa 1995) (error "preservation rule requires that issues

must be presented to and passed upon by the district court before they can be raised and decided on appeal").

Standard of Review

Claims of ineffective assistance are reviewed de novo. *See State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008).

The "district court is vested with broad discretion" in ruling on for-cause challenges to jurors. *State v. Tillman,* 514 N.W.2d 105, 107 (Iowa 1994).

Merits

1. Gibbs's Plain challenge cannot be resolved on the present record.

Gibbs believes his jury panel was not a fair cross-section of his community and as a result, his right to a fair trial was violated. Pro Se Br. 7–8. However, because the claim was not preserved and can only be before this Court as an ineffective assistance of counsel claim, the analysis becomes nested. Pro Se Br. 9. Now, in addition to establishing that his claim was meritorious, Gibbs must also establish his counsel breached an essential duty by not raising the claim and counsel's failure prejudiced him. He cannot satisfy any of these burdens because of the present record's insufficiencies.

To establish a violation of the right to fair cross-section jury panel, Gibbs must make a prima facie showing that

> (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 822. Although the Iowa Supreme Court has recently established that alternative tests to the "absolute disparity" test may be employed to resolve Sixth Amendment fair cross-section jury panel challenges, none of those tests may employed at this time. *See Id.* at 824–27. The State's review shows that the discussion of Webster County's racial makeup in voir dire was at best generic, addressed to a specific strike for cause, and was not tethered to any formal records:

> MR. BERGER: I disagree, Your Honor. First, with juror number 14—and I know Coleman McAllister well enough and I know Ryan Baldridge well enough to know there's no racial bias. But 3 percent of this county is African American. And I was happy to see, I believe, two, possibly three, African Americans on this panel. And I think the objection for cause by the State here is thin. She said she could be neutral. She doesn't

> know anything good or bad about Levi. She understands whatever the papers say could be wrong. So I object for both of these reasons, Your Honor. I think we have to have a representative panel.

Trial Vol.I p.156 line 1–13. Absent from the record is any concrete data as to the total racial makeup of Gibbs's jury panel or Webster County generally. There is no detail as to the procedures used to form the juror pool. This is insufficient data to support a prima face claim of a non-representative jury panel.

Lacking the essential record to resolve his claim, Gibbs cannot perform a statistical analysis under any of the tests identified by the Iowa Supreme Court and cannot establish the State's procedures for finding and notifying jurors of their need to serve systematically excludes African-Americans. His claim fails. And even if this Court were inclined to address it, a better record should be built through the adversarial process prior to reversing an otherwise valid conviction. *See Plain*, 898 N.W.2d at 828–29.

This same lack of record also precludes resolution of Gibbs's ineffective-assistance-of-counsel variant on the claim. He cannot show that his counsel breached an essential duty when he has not shown that had the claim been raised it would have been successful.

See State v. Brubaker, 805 N.W.2d 164, 171 (Iowa 2011). Given the present inability to address the claim, the matter should be preserved for postconviction relief proceedings. *See State v. Hilliard*, No. 17-1336, 2018 WL 4923000, at *2–3 (Iowa Ct. App. Oct. 10, 2018) (preserving underdeveloped *Plain* claim for postconviction proceedings).

2. Gibbs's jury was not biased.

Gibbs also alleges that his trial was unfair because "prospective jurors expressed opinions about the ultimate question of Levi's guilt." Pro Se Br. 8. He urges that his attorney failed to "determine the pervasiveness of the inflammatory attitudes and statements made by prospective and actual jurors," pointing to comments from prospective jurors Larson and Klausen and seated jurors Lewis and Hebert. Pro Se Br. 8.

Iowa Rule of Criminal 2.18(5)(k) provides that a party may challenge a juror for cause when the juror indicates "[h]aving formed or expressed such an opinion as to the guilt or innocence of the defendant as would prevent the juror from rendering a true verdict upon the evidence submitted on the trial." A person remains qualified to serve "if, notwithstanding any impressions he may have received

from reading or hearing, he appears to be fair–minded and free from prejudice, and able and willing to render an impartial verdict." *State v. Rohn*, 140 Iowa 640, 119 N.W. 88, 90 (1909). In *Irvin v. Dowd*, 366 U.S. 717, 723 (1961) the United States Supreme Court wrote:

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Iowa courts have adopted this logic and cited it with approval in *State v. Walters,* 426 N.W.2d 136, 139 (Iowa 1988) and more recently in *State v. Webster,* 865 N.W.2d 223, 238 (Iowa 2015).

Because the district court is afforded discretion in granting motions to strike a juror, to overcome the trial court's ruling "the defendant must show (1) an error in the court's ruling on the challenge for cause; and (2) either (a) the challenged juror served on the jury, or (b) the remaining jury was biased as a result of the defendant's use of all of the peremptory challenges." *Tillman*, 514 N.W.2d at 108.

To establish prejudice from a district court's refusal to strike a juror, a party must comply with the requirements set out in *State v. Jonas*, 904 N.W.2d 566, 583–84 (Iowa 2017). Specifically, once a for-cause motion to strike has been denied, "the defendant must ask the court for an additional strike of a particular juror after his peremptory challenges have been exhausted." *Jonas*, 904 N.W.2d at 583. Where a defendant fails to do so and the juror is removed by peremptory strike, the defendant must demonstrate prejudice. *Id.* at 583–84; *State v. Neuendorf*, 509 N.W.2d 743, 746–47 (Iowa 1993). The defendant must show the jury was biased. *See Neuendorf*, 509 N.W.2d at 746 ("In the absence of some factual showing that this circumstance resulted in a juror being seated who was not impartial, the existence of prejudice is entirely speculative.").

This Court can easily resolve Gibbs's challenges to unseated jurors Klaassen[1] and Larson. Klaassen was struck for cause by the parties' agreement. Trial Vol.I p.157 line 21–p.158 line 7. There was no way for her to have had any impact on the jury or Gibbs's peremptory strikes. Next, Gibbs contends that Larson said Wessels

[1] To avoid any confusion, on page 8 of his pro se brief Gibbs refers to "Shontae Klausen." The transcript indicates that the juror's name is spelled Shauntae Klaassen. Trial Vol.I p.43 line 23–24.

was a "pretty good kid." Pro Se Br. 8. This reads too much into the juror's statements. Larson stated that her daughter was friends with Wessels's sister and had heard from her daughter that he was "a good kid." Trial Vol.I p.73 line 1–p.78 line 24. Larson straightforwardly confirmed her ability to independently render a verdict based upon the evidence adduced at trial.

> MR. McALLISTER: Just to be clear, you said that you had your own opinion about Shane Wessels.
>
> PROSPECTIVE JUROR LARSON: No, I don't have any opinion.
>
> MR. McALLISTER: Okay.
>
> PROSPECTIVE JUROR LARSON: I just hear he was a good kid is what I said. I don't have my own opinion.
>
> MR. McALLISTER: Okay. I just wanted to make sure I understood.
>
> PROSPECTIVE JUROR LARSON: Sorry.
>
> MR. BALDRIDGE: Did you mean you can form your own opinion?
>
> PROSPECTIVE JUROR LARSON: I know how to make my own judgment. I don't have to form it by everybody else's opinions. I can form my own.

Trial Vol.I p.78 line 9–p.79 line 8. Larson had no preconceived notion as to Gibbs's guilt. Neither of these jurors sat on Gibbs's jury. Trial

Vol.I p.431 line 3–14. Gibbs did not request an additional peremptory strike. He has not articulated prejudice. This challenge fails.

Nor did the district court err in rejecting Gibbs's remaining challenge to juror Lewis. In voir dire Lewis indicated that a friend knew Wessels and had mentioned to her over a lunch that he was "murdered" and that she was "depressed and she went to go visit him at his grave." Trial Vol.I p.94 line 6–p.95 line 21. This was their only conversation on the topic. Trial Vol.I p.96 line 4–9. Lewis denied forming an opinion as to Gibbs's innocence or guilt: "I have no idea who did it actually." Trial Vol.I p.96 line 7–19. She agreed she was able to make a decision based upon the evidence admitted at trial and could be fair and impartial to both sides. Trial Vol.I p.96 line 7–19; p.97 line 13–p.98 line 3. She admitted that she did believe her friend, and that "it would be a bit challenging; but, you know, at the same time, it's good to know what happened." Trial Vol.I p.98 line 15–p.99 line 15.

The district court correctly overruled Gibbs's challenge for cause. Although she had heard certain information earlier, she stated that she could make a decision based only on the evidence adduced at trial. Trial Vol.I p. 96 line 7–19. Additionally, the district court noted

that her demeanor suggested that she could be fair and impartial and that she had attributed her statements about Wessels being murdered to her friend. Trial Vol.I p.160 line 20–25. Gibbs did not request an additional peremptory strike nor has he articulated prejudice. Again, the claim fails.

Finally, the ineffective assistance claim arising from Juror Hebert may be dismissed out of hand. Pro Se Br. 8. The claim fails because there is no indication Hebert was biased. When asked a general question about "what the circumstances would be" when he would feel justified in the use of his concealed handgun, Hebert gave responses which had nothing to do with Gibbs's case:

> MR. McALLISTER: Have you sat and thought about what the circumstances would be when you would feel the need to use that weapon?
>
> PROSPECTIVE JUROR HEBERT: Yeah, it would have to be life threatening.
>
> MR. McALLISTER: What do you have in your own mind what the circumstances would be? Any preconceptions? Tell me what you're thinking.
>
> PROSPECTIVE JUROR HEBERT: Be really serious where somebody had a gun pointed at me or I felt they were planning on using that knife or somebody was breaking in. Just running away, I wouldn't use it.

> MR. McALLISTER: Okay. All right. Okay. And is there any incident that you've had where you've been required to pull out your weapon?
>
> PROSPECTIVE JUROR HEBERT: What's that?
>
> MR. McALLISTER: Has there ever been a time where you've had to draw your weapon?
>
> PROSPECTIVE JUROR HEBERT: No.

Trial Vol.I p.305 line 20–p.306 line 13. Based on these generalized statements, Hebert could not have been struck for cause pursuant to rule 2.18(5)(n). Gibbs's counsel was not ineffective.

B. Gibbs's challenge to Iowa Code section 704.2B is duplicative.

Gibbs also raises a conclusory constitutional challenge to Iowa Code section 704.2B. Pro Se Br. 9–10. Portions of this challenge were not preserved—in his heading Gibbs alleges the statute violates equal protection and his substantive due process rights. Appellant's Br. 9. No argument on these claims were raised below, nor are they elaborated in his brief. The argument need not be addressed on appeal. *See Iowa Supreme Ct. Att'y Disciplinary Bd. v. McGrath*, 713 N.W.2d 682, 693 n.3 (Iowa 2006) (finding issue waived when respondent raised an issue in headings but made no argument nor cited authority in support); *accord State v. Vaughan*, 859 N.W.2d

492, 503 (Iowa 2015); Iowa R. App. P. 6.903(2)(g)(3). To the extent his remaining claims are duplicative of his counsel's argument the State refers this Court to Subdivision I of this brief. For all the reasons stated there, Iowa Code section 704.2B(1) is not unconstitutional, and accordingly, this Court should affirm.

CONCLUSION

Gibbs's present challenge to Iowa Code section 704B.2(1) was not preserved at trial. He has not proven the statute is unconstitutional and misframes the issue by relying on precedent addressing disclosure statutes imposing criminal punishment. Any potential error was harmless considering the strength of the State's case. It necessarily follows that the district court correctly instructed Gibbs's jury as to the applicable law. Finally, each of his pro se claims fail. Because overwhelming evidence established that Gibbs shot and killed Shane Wessels without justification, the State requests this Court to affirm.

REQUEST FOR NONORAL SUBMISSION

The State does not request oral argument. If the Court orders argument, the State would 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:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **13,681** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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