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IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. JAMES MIKALE WIGGINS, Defendant-Appellant.	Supreme Court No. 24-1691 Polk Co. No. FECR368187

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
HONORABLE DAVID NELMARK, JUDGE

APPELLANT'S BRIEF AND ARGUMENT AND REQUEST FOR ORAL ARGUMENT

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Did the district court policy to place a deputy near the witness stand during Wiggins' testimony violate due process, and did the district court fail to exercise its discretion for this security measure?

II. Did Wiggins act with justification in shooting Hutchins?

III. Did the district court erroneously instruct the jury it could consider aider and abettors' acts and conduct to find malice?

IV. Is the requirement to participate in a victim offender dialogue an illegal sentence because Wiggins was sentenced to prison?

ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because an issue raised involves a substantial issue of first impression in Iowa. Iowa R. App. P. 6.903(2)(a)(4) and 6.1101(2)(c). While Iowa appellate courts have addressed other courtroom security measures, this Court has not considered the question presented here. *See, e.g., State v. Wilson*, 406 N.W.2d 442, 448-50 (Iowa 1987) (holding requiring defendant to wear shackles before jury was inherently prejudicial); *State v. Bartnick*, 436 N.W.2d 647, 648-49 (Iowa Ct. App. 1988) (finding shackling and positioning guards on either side of defendant during trial was not an abuse of discretion due to the security risk and destructive behavior of the defendant). Wiggins respectfully requests this Court retain his case to address whether stationing a deputy at the witness stand during a defendant's testimony is inherently prejudicial, particularly when there were no case-specific findings it was necessary as James Wiggins was a respectful and cooperative defendant.

Furthermore, Wiggins submits if inherent prejudice does not apply, the actual prejudice standard is unworkable. The *Wilson* Court required the defendant to show "actual prejudice," meaning to "show the incident prejudicially affected the jury." *Wilson*, 408 N.W.2d at 448; *see also Holbrook v. Flynn*, 475 U.S. 560, 572 (1986) (requiring actual prejudice if inherent prejudice doesn't apply). Yet, the United States Supreme Court instructs that jurors' impressions cannot be dispositive because they won't understand how a security measure affects them. *Holbrook*, 475 U.S. at 570 ("Even though a practice may be inherently prejudicial, jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused."). And Iowa rules prohibit introduction of jury deliberations so as to not have a chilling effect. Iowa R. Evid. 5.606(b) (2024); *Fischer, Inc. v. Standard Brands, Inc.*, 204 N.W.2d 579, 585 (Iowa 1973) ("We have consistently held that a juror may state by affidavit or other means what actually took place in the jury room since actual happenings do not inhere in the verdict, a juror however may not by affidavit or otherwise state what

influenced the jury in reaching its decision or verdict as such showing inheres in the verdict."). Thus, a defendant is prohibited from introducing evidence of prejudice in order to meet the actual prejudice standard set by the Court, making it unworkable. Therefore, Wiggins asks the Court to find this practice inherently prejudicial.

NATURE OF THE CASE

This is an appeal by Defendant-Appellant James Wiggins following a guilty verdict in Polk County District Court. The State charged Wiggins with first-degree murder. D0019, Trial Information (3/25/24). The jury found Wiggins guilty of murder in the second degree, a class B felony, in violation of Iowa Code sections 707.1 and 707.3 (2024). D0212, Verdict Order (8/30/24); D0225, Disposition Order (10/14/2024). The district court sentenced Wiggins to 50 years in prison with a mandatory 35. D0225 at 1.

Wiggins timely appealed. D0226, Notice of Appeal. (10/16/24). On appeal, Wiggins challenges the following: the district court's order for a deputy to sit near the witness stand during Wiggins'

testimony despite a lack of any case-specific findings requiring the security measure, the sufficiency of the evidence regarding justification, the inclusion of an aiding and abetting element in the malice instruction, and ordering Wiggins to participate in a victim offender dialogue as part of his sentence.

STATEMENT OF THE FACTS

James Wiggins,[1] age 35, was raised in Des Moines but had lived in Las Vegas for four to five years. D0250, Trial vol. III 82:6-85:5 (8/28/24). He returned to Des Moines a few times a year. D0250 at 85:6-9.

On December 10, 2022, Wiggins was in Des Moines with his brother, Marcell Wiggins, to take their kids Christmas shopping. D0250 at 87:21-88:21; 116:5-21. That day they went to a funeral with family friend Lorenzo Reese. D0250 at 87:21-88:21; 108:10-16. After the funeral, they went to the repast—a meal and gathering of

[1] Appellant is referred to by his last name while his family members are referred to by their first names.

mourners—which was held at Zora's. D0250 at 87:21-88:21; 89:25-90:9; 113:17-20.

Wiggins had been licensed to carry a gun since 2017. D0250 at 85:10-87:7. Earlier in his life, he was shot twice in Des Moines because he was in the wrong place at the wrong time. D0250 at 85:10-87:7. So, he carried a gun with him in dangerous environments when visiting Iowa. D0250 at 85:10-87:7. He carried it at Zora's because there had been a shooting there; he had it "racked"[2] but kept the safety on. D0250 at 111:17-114:19; 136:21-137:1. He was unaware Marcell was also carrying a gun that night. D0250 at 91:9-17; 114:20-116:4.

When the repast ended, the crowd moved to Rico's on University Avenue, including Wiggins, Marcell, and Reese. D0250 at 88:22-89:24. Wiggins had never been to Rico's before. D0250 at

[2] "Racking" it means sliding the top of the gun back towards you and letting it go, which pulls one of the cartridges from the magazine into the chamber in preparation for firing. D0250 at 111:17-114:19.

89:5-12. He heard "bad stuff" about Rico's, so he carried his gun with him. D0250 at 109:25-111:2.

Tyrone Hutchins, known as T.Y., was a regular at Rico's. D0247, Trial vol. II 7:9-8:18; 37:6-38:6 (8/27/24). He went there several times a week with his best friend, Tori Sellers. D0247 at 8:1-18; 37:6-38:6. Hutchins and Sellers usually posted on social media to indicate they were there. D0247 at 44:20-45:23; 46:4-9.

Hutchins and Sellers arrived at Rico's around 5:00 p.m. D0247 at 8:23-9:25 38:7-25. They were eating, drinking, and talking with others. D0247 at 8:23-9:25; 38:7-25; State Exh. 2,[3] Rico's Interior Video at 0:00-1:20. Their friend, Theresa Martin, was bartending. D0247 at 6:15-7:8; 37:6-38:6. Hutchins always carried a gun, which he had with him that night. D0247 at 47:17-24. Hutchins' gun was visibly in his possession as he interacted with

[3] The video exhibits in this case are identified by their exhibit numbers only because they do not have EDMS docket numbers. The State's videos are on one flash drive and the defense videos on another.

other patrons. D0247 at 136:16-137:15; State Exh. 2 at 1:04-1:08; 1:44-1:55.

Wiggins and Hutchins had been friends as kids but had grown apart. D0250 at 116:22-117:10. Their respective groups of friends didn't always get along. D0250 at 116:22-117:10. Wiggins didn't know Hutchins would be at Rico's that night. D0250 at 106:21-107:17.

Marcell briefly parked in front of Rico's and then drove to a parking lot instead. D0247 at 117:20-119:23; 122:11-124:14; State Exh. 6, University Ave. East Video at 38:08-38:53; State Exh. 7, Parking Lot Video at 13:34-15:05. When Marcell parked the car, Wiggins was on the phone. D0250 at 90:10-91:8. Marcell and Reese got out while Wiggins finished his call and brushed his hair, so Wiggins was lagging behind the other two. D0250 at 90:10-91:8; State Exh. 6 at 40:25-40:50; State Exh. 7 at 13:34-15:05.

Keevon Washington, a.k.a. Keevon Bernstine, came and went from Rico's a couple of times. D0247 at 112:1-114:14; State Exh. 2 at 0:00-2:05. After leaving Rico's the second time, Washington met

up with Marcell and Reese on University Avenue near Rico's. D0247 at 119:24-121:12; 124:24-129:23; State Exh. 4, Rico's Exterior Video at 2:04-3:05; State Exh. 5, University Ave. West Video at 35:05-36:00; State Exh. 6 at 40:09-40:37.

Marcell and Reese entered Rico's together. D0247 at 114:15-115:1; State Exh. 2 at 2:47-3:05; State Exh. 4 at 2:40-2:55. Reese approached Hutchins as Marcell turned away and someone said, "We can do this anywhere." D0247 at 10:1-15; 39:1-41:16. Sellers stood up between Hutchins and the other two. D0247 at 39:1-41:16; State Exh. 2 at 2:47-3:05.

As Wiggins approached the bar from outside, he heard "a lot of commotion, like glass and bottles breaking, and I thought I heard a shot." D0250 at 91:18-93:25; 103:1-105:13; 120:13-124:11. Washington fled after Wiggins entered the bar. D0247 at 127:1-5; 133:18-134:16; State Exh. 4 at 2:55-3:55.

Inside Rico's, Hutchins pushed Reese away and pulled his handgun as Wiggins entered the bar. D0247 at 115:15-116:5; State Exh. 2 at 2:47-3:05. Wiggins saw Hutchins point his gun at a crowd

of people, including Marcell and Reese. D0250 at 91:18-94:10; 103:1-105:13; D0194, Def. Exh. A, Hutchins Display Gun Photo; D0194, Def. Exh. B, Hutchins Display Gun Close Up Photo; Def. Exh. F, Rico's Slow-Motion Video at 00:18-00:30. Reese and Marcell backed away from Hutchins as other patrons began ducking down, running out the back, or going over the half wall, knocking over barstools in the process. State Exh. 2 at 2:47-3:05.

Hutchins pushed Tiasia Herron in front of him toward the exit while still holding the gun in his right hand as Wiggins stood by the door. D0247 at 111:21-23; 139:5-7; D0250 at 91:18-94:10; 103:1-105:13; D0196, Def. Exh. C, Hutchins Exit Photo; State Exh. 2 at 2:47-3:05; Def. Exh. F at 00:30-00:40. Wiggins saw Hutchins point his gun at him. D0250 at 94:1-10; 130:13-132:12. Wiggins feared for his life and the lives of Marcell and Reese. D0250 at 104:13-105:3. In response, Wiggins fired two or three times. D0250 at 94:1-10; 130:13-132:12; State Exh. 2 at 2:47-3:05.

Hutchins fell to the sidewalk immediately outside the entrance to Rico's. D0247 at 42:18-44:10; 129:18-22. Martin ran outside and

called 911. D0247 at 16:3-17. Bystanders gave him CPR until emergency personnel arrived and took him to the hospital. D0247 at 42:18-44:19.

Seeing Hutchins had fallen and dropped his gun, Wiggins walked away, worried Hutchins might have friends at the bar who would retaliate. D0250 at 99:17-24; 133:8-136:16; State Exh. 4 at 3:00-3:30. When Marcell and Reese came running out, all three returned to the car and left. D0247 at 121:17-122:10; 124:15-124:23; State Exh. 4 at 3:00-3:30; State Exh. 6 at 41:25-41:47; State Exh. 7 at 16:45-17:12. Marcell and Reese asked Wiggins why he shot Hutchins and Wiggins replied, "Because I was fearing for my life. He had a gun. I thought I was going to get shot when he was shooting at the crowd." D0250 at 99:25-100:9.

Wiggins went to his sister Matisha Wiggins' house and told her what happened. D0250 at 76:9-77:15; 95:16-96:7. Wiggins was nervous, crying, and scared. D0250 at 77:9-15. He tried to call his mother and kids before turning himself in. D0250 at 77:16-78:7; 95:16-96:7. Then he presented himself at the Des Moines Police

Station at 8:00 p.m. and turned over his Ruger handgun. D0247 at 67:2-71:13; 74:11-21; 107:4-24; D0250 at 95:3-15; D0215, State Exh. 76, Ruger Photo.

Lead Detective Lucas Harden hadn't identified a suspect yet and was still processing the scene at Rico's when he was called to the station to interview Wiggins. D0247 at 102:3-23; 104:16-106:7. Wiggins agreed to speak without an attorney because he had nothing to hide. D0250 at 96:8-97:1. He answered Harden's questions for three to four hours, admitting he shot Hutchins and explaining why. D0250 at 94:25-95:2; 102:8-25. He didn't see the surveillance videos until after speaking with Harden. D0247 at 106:14-107:3; D0250 at 18:19-19:6; 23:8-15; 94:11-24; 97:22-98:10.

Harden let Wiggins go that night as the police were just beginning their investigation and collecting surveillance footage. D0247 at 108:5-21; D0250 at 19:23-20:14. Harden asked Wiggins to return to Iowa to speak further, but he didn't return. D0250 at 20:15-23. Wiggins talked to Harden over the phone three to five

times in the ensuing months; he was unaware there was a warrant for his arrest until he was arrested on February 2, 2024, in Las Vegas. D0250 at 101:15-102:7.

Sellers is a convicted felon. D0247 at 48:23-49:3. At trial, Sellers testified she didn't see who fired a gun because she "hit the floor." D0247 at 41:17-42:17. She heard one shot. D0247 at 41:17-25. Sellers recalled giving a statement to detectives at the hospital on December 10 but didn't recall telling them Hutchins may have fired the first shot. D0247 at 46:22-47:16. The parties stipulated Sellers told Detective Grimes that Hutchins had a gun on him and may have fired the first shot that night. D0250 at 81:20-24.

Immediately after the shooting, Martin told Officer Mercer she heard gunshots fired both inside and outside the bar; she heard three or four shots. D0245 at 148:19-149:15; D0197, Def. Exh. D, Mercer Body Cam 00:38-01:06. At trial, Martin said she heard three or four shots, and they sounded "pretty close" as she got down behind the bar. D0247 at 10:16-24; 17:11-18:1. She didn't see what happened at the door. D0247 at 20:14-20.

Many people fled the scene. D0247 at 133:18-135:15. Washington was not located. D0247 at 133:18-135:15; D0250 at 14:24-15:3. Reese spoke with the police, but Marcell declined to come in for an interview. D0250 at 24:3-24. Marcell's gun was not recovered but appeared to be a large, MAC 9-type. D0247 at 115:15-116:5; 128:16-129:3; State Exh. 2 at 02:47-03:05.

No phone records were obtained. D0247 at 132:4-133:17; 135:16-23; D0250 at 16:16-17:13. Harden admitted some records can be obtained through subpoenas, but it's easier when you have the actual phone, and Wiggins did not give police his phone. D0250 at 25:5-28:12; 29:6-31:25. Records from Wiggins' Snapchat account revealed no communications with Hutchins, Reese, or Washington. D0250 at 32:1-14.

Hutchins' Smith & Wesson handgun was collected from the scene. D0247 at 55:21-56:11; 61:8-61:23; D0163, State Exh. 36, Sidewalk Photo; D0181, State Exh. 54, Smith & Wesson Photo. One round was chambered and 12 bullets were in the magazine; all the bullets had brass casings. D0247 at 62:2-63:22.

Three nickel casings were collected from a corner of the bar. D0245, Trial vol. I 144:17-145:21; 154:8-158:10 (8/26/24); D0247 at 64:1-6; D0168, State Exh. 41, Casings Photo; State Exh. 55, Scene Video at 2:00-2:15; D0205, State Exh. 74, Scene Diagram. The three nickel casings shared class characteristics with a round test fired in Wiggins' Ruger, but the results were inconclusive because the examiner "did not have enough individual characteristics to make the conclusion." D0247 at 88:12-93:4; D0193, State Exh. 67, Firearm Report. Hutchins' Smith & Wesson did not fire the three nickel casings. D0247 at 88:12-93:4; D0193 at 1. No other casings or bullet impacts were found at Rico's. D0245 at 145:25-146:12; 158:20-159:20; D0247 at 33:8-34:15; 64:7-65:4.

One gunshot entered Hutchins' left chest, piercing his heart and both lungs, which was a fatal wound. D0250 at 40:20-46:22. Another shot entered the left side of his back and went through the aorta; it was also likely fatal. D0250 at 48:19-51:11. One bullet entered his upper left arm and exited his forearm. D0250 at 52:7-55:12. Two projectiles were recovered from Hutchins' body. D0250

at 46:23-47:7; 51:12-25. The projectile from Hutchins' arm wasn't recovered; it's possible it reentered his body and caused one of the other wounds or struck another person. D0250 at 55:13-56:24. Hutchins died of multiple gunshot wounds. D0250 at 6-15.

Tiasia Herron was struck by a bullet in her left buttock. D0247 at 25:15-29:25; 111:8-23. Herron did not testify at trial.

ARGUMENT

I. The district court policy to place a deputy near the witness stand during Wiggins' testimony violated due process, and the district court failed to exercise its discretion for this security measure.

Preservation of Error: The defense objected to the courthouse policy of placing a deputy near the witness stand during the testimony of a custodial defendant, arguing it violated the presumption of innocence, insinuated dangerousness, and was unnecessary in this case. D0250 at 64:10-68:9. The State agreed with the policy and urged the district court to exercise its discretion instead of relying on the policy. D0250 at 64:10-68:9. The district court overruled the objection. D0250 at 64:10-68:9. In the alternative, the defense asked the court to have the deputy sit near

the witness stand for both defense witnesses. D0250 at 68:5-10. The judge granted the request. D0250 at 68:5-10. Error was accordingly preserved. *State v. Griffin*, No. 11-0012, 2013 WL 1223689, at *2 (Iowa Ct. App. Mar. 27, 2013) (holding the trial court adopting the defense's request for alternative security measures doesn't undermine error preservation). Furthermore, error was preserved on the due process argument because, even though not explicitly identified by the defense, the claim was apparent with the defense's reference to the presumption of innocence and the State's acknowledgement of due process concerns. D0250 at 64:10-68:9. *See State v. Ary*, 877 N.W.2d 686, 699 (Iowa 2016) ("Because there was no procedural basis on which the court might have been obligated to grant the motion, the constitutional basis for the claim was obviously apparent. Accordingly, Ary has properly preserved both his federal and state constitutional claims.").

Standard of Review: Constitutional issues are reviewed de novo. *State v. Christensen*, 929 N.W.2d 646, 676 (Iowa 2019).

Courtroom security issues are reviewed for an abuse of discretion. *State v. Wilson*, 406 N.W.2d 442, 450 (Iowa 1987).

Merits: Before the defense called its witnesses, the following record was made:

> [THE COURT:] The Court has informed the parties off the record that because the Defendant is in custody, when he testifies, a deputy will be seated in the corner of the courtroom near to the witness stand. That is the Court's policy. Throughout the trial, deputies have been seated four or five feet behind the Defendant. There will be a similar situation with him on the witness stand. If the Court did not follow that policy, the Defendant would be approximately three feet from the closest juror, and the closest deputy would be about 50 feet away from him, so the Court will not deviate from that policy.
>
> As long as it's okay with the Defense, what we will do is have a deputy seated at the corner of the courtroom before the Defendant takes the stand, and then we can break at the conclusion of his testimony given that that is your last witness, and that way a deputy won't escort him to or from the stand in the presence of the jury. Any record the Defense wants to make in that regard?
>
> [DEFENSE]: Judge, I object to that procedure. I understand it's a court rule and court policy. It's bad enough having a deputy sitting behind my client here in the open courtroom, but when you have a deputy sitting by his testimony so close to the jury, and I understand the safety concerns for the Court, but I think it impugns to the jury this is a dangerous man and we need a uniformed officer close by to protect them. I don't think

it's necessary in this case. There are deputies here in the courtroom. He's presumed innocent, he doesn't have any prior criminal history.

I object to that procedure. I think it tells the jury, This is a dangerous man and we've got to watch him. I understand it's a court policy, I just object to that policy. I even object to the policy in this particular case -- it doesn't make a difference now -- sitting so close to the counsel table with my client here at the table. That sends a message to the jurors that this is a dangerous man and we've got to watch him.

THE COURT: We're on Day 3 of the trial, and the deputies have been seated within five feet of your client throughout the trial. Is there any argument that there is any more prejudice to them sitting a same distance from him when he testifies than what they've already been doing?

[DEFENSE]: There is, Your Honor.

THE COURT: How so?

[DEFENSE]: Because now he's a witness and he's sitting next to the jurors. They're going to notice that police officer is there for my client. If he had been there the whole time, it's a different story, but they're only doing it for me, for my client.

THE COURT: There is a courthouse policy that the deputies sit near the witness, the Defendant, when he testifies when he is in custody. There was no request made to have a deputy sitting there throughout the trial in the witness stand. This is not a new policy that the

deputies would sit near the Defendant, so your objection is noted for the record, but it is overruled.

[STATE]: Judge, can I say something briefly?

THE COURT: Yes.

[STATE]: The only thing that -- I think that is a sensible procedure, I think the policy makes some sense. I just want to make sure for any appeal purposes, I want to avoid any suggestion that -- I think it is within the Court's discretion when we are in a jury trial, the security precautions that are taken and making sure that those weigh the interest of safety of everyone in the courtroom against the potential due process concerns of the Defendant.

So I think -- the only thing I want is to make sure that it's clear on the record that the Court is not simply relying on a policy and it stated that it has no discretion, because I think the Court does have discretion, and I think that would be the right ruling, but I want to make sure the Court is weighing those interests and deciding that is the appropriate balance that's right in this case.

THE COURT: For the reasons I stated earlier, given the layout of the courtroom, even if it is in my discretion whether or not a deputy sits there, the Court would exercise the discretion to have a deputy in the corner of the courtroom. I'll further note that there is a large TV that at least partially screens the deputy from the jury. So especially with the deputy sitting there before the testimony begins, I don't think it creates any additional prejudice than the deputy being seated near the Defendant as he has been throughout the trial.
Any further record?

> [STATE]: No, Your Honor.
>
> THE COURT: Anything else from the Defense?
>
> [DEFENSE]: Judge, in the alternative, could we have the deputy there on all my witnesses, then?
>
> THE COURT: If you would like the deputy seated there for each of the Defense witnesses, I will grant that request.

D0250 at 64:10-68:9.

Two defense witnesses were called: Wiggins, and his sister, Matisha Wiggins. D0250 at 76:1-19; 82:6-22. Matisha's testimony was brief. D0250 at 76:1-81:13.

A. Placing a deputy at the witness stand during Wiggins' testimony was inherently prejudicial.

The courthouse policy violated due process. Defendants are entitled to due process. U.S. Const. amend. XIV § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law"); Iowa Const. art. I, § 9 ("no person shall be deprived of life, liberty, or property, without due process of law"). The presumption of innocence is an essential due process safeguard attending the accused at trial even though it is not articulated in

the Constitution. *Estelle v. Williams*, 425 U.S. 501, 503 (1976); *State v. Wilson*, 406 N.W.2d 442, 448 (Iowa 1987) ("[A] defendant is entitled to the indicia of innocence in the presence of the jury."). "To implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process. In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." *Estelle*, 425 U.S. at 503 (citing *In re Winship*, 397 U.S. 358, 364 (1970)). As the defense argued, placing a deputy at the witness stand during his testimony undermined the presumption of innocence in this case. D0250 at 64:10-68:9. Thus, Wiggins' due process rights were violated.

The district court's policy diluted the presumption of innocence. While courts have faith in jurors and the adversarial system, it is not absolute. *Holbrook v. Flynn*, 475 U.S. 560, 568 (1986). Security measures can threaten the fairness of a proceeding, warranting "close judicial scrutiny." *Id.* The *Holbrook*

Court pointed to a study finding "defendants clad in prison garb or accompanied by guards are more likely to be found guilty than unsupervised defendants wearing their own clothes." *Id.* at 571 n.4 (citing Fontaine & Kiger, *The Effects of Defendant Dress and Supervision on Judgments of Simulated Jurors: An Exploratory Study*, 2 L. and Human Behavior 63, 69-70 (1978)). The Court relied on its "own experience and common sense," as opposed to the tentative study findings. *Id.* This Court should consider the effect of a defendant and his sister being singled out for supervision by law enforcement while on the witness stand when none of the State's nine witnesses—including one convicted felon—received the same treatment. D0245 at 3:1-10; D0247 at 1-4:6; 48:23-49:3; D0250 at 3:1-18. *People v. Stevens*, 218 P.3d 272, 288 (Cal. 2009) (Moreno, J., dissenting) (Turning to the security measure at issue here—a uniformed deputy sheriff escorting defendant to the witness stand and then sitting, in the jury's view, next to him as he testified—I conclude the arrangement is unlike the general deployment of security personnel in a courtroom, but instead, as with the use of

physical restraints or prison attire, poses a serious risk to the presumption of innocence and to the right to a fair trial and thus requires a trial court to first find a manifest need for such measures.") Accordingly, the presumption of innocence was undermined in this case.

Polk County's policy to place a deputy at the witness stand during a custodial defendant's testimony is inherently prejudicial. A practice that unmistakably indicates that a defendant needs to be separated from the community at large is inherently prejudicial. *Holbrook* 475 U.S. at 569. The constant reminder of the accused's condition may affect a juror's judgment. *Estelle*, 425 U.S. at 504-05. "Whenever a courtroom arrangement is challenged as inherently prejudicial, therefore, the question must not be whether jurors actually articulated a consciousness of some prejudicial effect, but whether 'an unacceptable risk is presented of impermissible factors coming into play.'" *Id.* (citation omitted); *Stevens*, 218 P.3d at 289 (Moreno, J., dissenting) "(Contrary to the majority, I believe there can be no reasonable doubt that the security measure employed

here suggested 'particular official concern or alarm.'"). "If a practice gives rise to an unmistakable brand of guilt or creates an unacceptable risk the jury may consciously or subconsciously be influenced in their deliberations, the practice is inherently prejudicial." *Wilson*, 406 N.W.2d at 449 (citing *Holbrook*, 475 U.S. at 570).

The presence of the deputy by Wiggins during his testimony implied to the jury that court authorities considered Wiggins dangerous. *See Deck v. Missouri*, 544 U.S. 622, 633 (2005) (holding shackling during the death penalty phase is inherently prejudicial). The jury had to weigh whether to believe Wiggins' justification defense when he was confronted with an armed Hutchins coming at him in Rico's. A deputy stationed at the witness stand put a thumb on guilt's side of the scale. *See id.* (finding the use of shackles is a thumb on death's side of the scale).

In *Holbrook*, the Court concluded the addition of four uniformed state troopers seated in the first row of the spectator gallery, in addition to the usual security presence, was not

inherently prejudicial in a case involving six codefendants. *Id.* at 571. The Iowa Court of Appeals likewise found a jailer escorting a custodial defendant back and forth to the judge's chambers for individual voir dire wasn't inherently prejudicial. *State v. Bratcher*, No. 14-2058, 2016 WL 1677997 at *5 (Iowa Ct. App. Apr. 27, 2016) (citing *Holbrook*, 475 U.S. at 567, 569). However, both cases are distinguishable. *Holbrook* involved troopers seated behind codefendants at counsel table, which the jury could have concluded were for courtroom security. *Holbrook*, 475 U.S. at 562-64, 569; *Bratcher* involved a jailer escorting the defendant *and* attorneys for the prosecution and defense to and from chambers. *Bratcher*, 2016 WL 1677997 at *1. This escort also could've been understood as a courtroom security measure. The procedure in this case, however, singled out Wiggins and his sister as they took the stand in his defense.

Not every procedure singling out the accused needs to be struck down, but under certain conditions a security measure in the courtroom might create the impression the defendant is

"dangerous or untrustworthy." *Holbrook*, 475 U.S. at 567, 569; *see also State v. Gorman-Lykken*, 446 P.3d 694, 697 (Wash. Ct. App. 2019) ("Courtroom security measures that single out defendants as particularly dangerous or guilty threaten their right to a fair trial because those measures erode the presumption of innocence."). "The fact that a defendant, *and only the defendant*, is accompanied by a uniformed guard as he or she testifies cannot help but 'have a significant effect on the jury's feelings' and leave the impression that there is a 'need to separate a defendant from the community at large.'" *Stevens*, 218 P.3d at 289 (Moreno, J., dissenting) (emphasis in original) (internal citations omitted).

Wiggins was in jail at the time of trial. D0250 at 82:6-22. He wore a gray suit, not jail clothes. D0247 at 14:14-24. More than one deputy was seated about five feet behind Wiggins throughout trial. D0250 at 64:14-17. This arrangement was likely viewed by the jury as security for the entire courtroom, not specific to Wiggins. *See Holbrook*, 475 U.S. at 569 ("Jurors may just as easily believe that the officers are there to guard against disruptions emanating from

outside the courtroom or to ensure that tense courtroom exchanges do not erupt into violence.").

However, once the district court adhered to courthouse policy by placing a deputy within four to five feet of Wiggins on the witness stand throughout his testimony, the presumption of innocence was violated. D0250 at 64:8-66:5. The district court believed two factors alleviated any prejudice to Wiggins: placing the deputy there before the jury returned so Wiggins wouldn't be escorted to the stand in front of the jury, and a "large TV" partially screening the deputy from the jury's view. D0250 at 64:22-65:4; 67:16-68:1. These two factors didn't change that Wiggins' "special status" was announced to the jury when no State's witness received the same treatment. *Holbrook*, 475 U.S. at 569 ("If they are placed at some distance from the accused, security officers may well be perceived more as elements of an impressive drama than as reminders of the defendant's special status."). The arrangement emphasized Wiggins was a threat who posed a risk to the safety of those in the courtroom. D0250 at 65:5-24. *Stevens*, 218 P.3d at 290 (Moreno,

J., dissenting) ("The very nature of the arrangement underscored that it was focused on the defendant and the risk he might pose.").

The Iowa Supreme Court has encouraged trial courts "to employ the least prejudicial and least conspicuous security measures possible under the circumstances." *Wilson*, 406 N.W.2d at 450. In this case, that would have been by not placing a deputy at the witness stand during the defense's case. Accordingly, Wiggins' due process rights were violated when his status was singled out by the courthouse policy requiring a deputy by the witness stand during his testimony, which was inherently prejudicial.

If the Court finds prejudice is not inherent, it was not harmless beyond a reasonable doubt. Errors of constitutional magnitude are analyzed under the harmless beyond a reasonable doubt standard. *Estelle*, 425 U.S. at 506 (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). The burden is on the State. *Chapman*, 386 U.S. at 24, 25-26 (finding error was not harmless

beyond a reasonable doubt despite a "reasonably strong" circumstantial case).

The error wasn't harmless here because Wiggins was on trial for murder in a case where he stood his ground against an armed man. The jury spent more than a full day deliberating the case. D0246, Trial vol. IV 54:19-22 (8/29/24) (submitting case to jury at 11:01 a.m. on August 29 and jury returning verdict at 12:46 p.m. on August 30). The State argued the murder was planned as Marcell and Reese confronted Hutchins in Rico's and Wiggins shot Hutchins at the door as he fled. D0246 at 11:20-14:2. But the defense argued Wiggins arrived shortly after the other two, coming in the door as all hell broke loose with Hutchins pointing a gun at Marcell and Reese and patrons ducking down, hurtling over counters, and knocking over bar stools. D0246 at 30:16-31:25. Hutchins used a woman as a human shield, pushing her toward the exit where a terrified Wiggins drew his gun. D0246 at 30:16-31:25. Any insinuation Wiggins was dangerous—such as by the placement of a deputy at the witness stand as Wiggins told the jury

what happened—undermined his justification defense and the presumption of innocence. Therefore, error was not harmless, and a new trial is warranted.

In the alternative, if the Court finds prejudice is not inherent, Wiggins' defense was impaired. The burden is on the defense to show actual prejudice or an impairment of his defense. *Wilson*, 406 N.W.2d at 448. As laid out above, Wiggins' defense was impaired because the courthouse policy dictated a deputy be placed nearby as he testified in his own defense. As with the use of physical restraints, the discomfort of having a deputy nearby during what may be the most important statements of a defendant's life, interferes with his participation in his own defense. *See Deck*, 544 U.S. at 631 ("Indeed, [restraints] can interfere with a defendant's ability to participate in his own defense, say, by freely choosing whether to take the witness stand on his own behalf."); *see also Wilson*, 406 N.W.2d at 449 (listing negative effects on defendants and jurors when restraints are used in the courtroom). Additionally, Polk County's policy only applies to custodial defendants. Thus,

"[p]ersons who can secure release are not subjected to this condition." *Estelle*, 425 U.S. at 505. Therefore, Wiggins' defense was impaired.

Furthermore, Wiggins submits the actual prejudice standard is unworkable. The Court requires the defendant to show "actual prejudice," meaning to "show the incident prejudicially affected the jury." *Wilson*, 408 N.W.2d at 448; *see also Holbrook*, 475 U.S. at 572 (requiring actual prejudice). Yet, the United States Supreme Court instructs that jurors' impressions cannot be dispositive because they won't understand how a security measure affects them. *Holbrook*, 475 U.S. at 570 ("Even though a practice may be inherently prejudicial, jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused."). And Iowa rules prohibit introduction of jury deliberations so as to not have a chilling effect. Iowa R. Evid. 5.606(b) (2024); *Fischer, Inc. v. Standard Brands, Inc.*, 204 N.W.2d 579, 585 (Iowa 1973) ("We have consistently held that a juror may state by affidavit or other means what actually took place in the jury room since actual happenings

do not inhere in the verdict, a juror however may not by affidavit or otherwise state what influenced the jury in reaching its decision or verdict as such showing inheres in the verdict."). Thus, a defendant is prohibited from introducing evidence of prejudice in order to meet the actual prejudice standard set by the Court, making it unworkable. Therefore, the Court should find this practice is inherently prejudicial, as argued above.

B. The district court failed to exercise its discretion by deferring to courthouse policy.

The district court must exercise its discretion regarding security measures. Though a formal hearing isn't required, the district court must "make specific findings of fact as a basis for the court's discretionary ruling" regarding security measures. *Wilson*, 406 N.W.2d at 450. Simply deferring to a policy does not constitute the exercise of discretion. *State v. Gorman-Lykken*, 446 P.3d 694, 695-96 (Wash. Ct. App. 2019) ("Washington courts have emphasized that the trial court must actually exercise discretion based on the facts of the case in considering whether to allow a courtroom security measure."); *People v. Hernandez*, 247 P.3d 167,

175 (Cal. 2011) ("Where it is clear that a heightened security measure was ordered based on a standing practice, the order constitutes an abuse of discretion, and an appellate court will not examine the record in search of valid, case-specific reasons to support the order."); *State v. Griffin*, No. 11-0012, 2013 WL 1223689, at * 4 (Iowa Ct. App. Mar. 27, 2013) ("The district court failed to articulate a specific need for restraints during the trial and, rather than exercising its own discretion, handed the decision over to the sheriff's office. It is for the court, not the police, to determine what restraints are necessary during trial."); *State v. Wilmer*, No. 06-1339, 2007 WL 4322212, at *5 (Iowa Ct. App. Dec. 12, 2007) ("The court did not cite reasons for requiring the brace during trial except that it was the sheriff's standard operating procedure and the court would not interfere with that policy.").

In the instant case, the district court cited the court's policy to have a deputy seated near a testifying custodial defendant. D0250 at 64:10-68:9. The court stated, "the Court will not deviate from that policy." D0250 at 64:10-68:9. The defense objected to the

policy overall but specifically in this case because it "sends a message to the jurors that this is a dangerous man and we've got to watch him." D0250 at 64:10-68:9. Despite the State urging the district court to exercise its discretion, the district court failed to do so, saying, "even if it is in my discretion," and then citing *courtroom*-specific reasons as opposed to *case*-specific reasons. D0250 at 64:10-68:9 (pointing out the distance between the witness stand and jury box and the placement of a television).

Case-specific reasons for stationing law enforcement at the witness stand include violent or defiant acts by the defendant in the courtroom. *People v. Marks*, 72 P.3d 1222, 1239-40 (Cal. 2003) (finding defendant had previously assaulted his attorney in the courtroom and been removed for being disruptive). In *Marks*, the defense team asked for their own client to be restrained at trial because one attorney worried the defendant would attack them while the other worried the defendant's conduct would harm his own defense. *Id.* at 1239. The court properly exercised its discretion when balancing those factors with the defendant's proximity to the

jury box. *Id.* Likewise, a trial court acts within its discretion to order additional security measures for a defendant who has threatened harm and escape and engaged in jailhouse disturbances. *State v. Bartnick*, 436 N.W.2d 647, 649 (Iowa Ct. App. 1988) (upholding shackling defendant in the courtroom with a guard on either side of him throughout trial).

In contrast, when a court merely defers to a policy that an officer be stationed next to a testifying defendant, it is an abuse of discretion. *State v. Gorman-Lykken*, 446 P.3d. 694, 696, 699 (Wash. Ct. App. 2019). The Washington Court of Appeals adopted a two-step approach for the trial court: "(1) state case-specific reasons for the need for such a security measure, and (2) determine that the need for the security measure outweighs the potential prejudice to the testifying defendant." *Id.* at 699 (citing *Stevens*, 218 P.3d at 272). The lack of case-specific reasons was an abuse of discretion. *Id.* at 700.

The California Supreme Court held the practice of stationing an officer at the witness stand during a defendant's testimony

cannot be imposed as a matter of routine, which constitutes an abuse of discretion. *Hernandez*, 247 P.3d at 174. In Iowa, the State has previously conceded an abuse of discretion when the district court deferred to law enforcement procedure for security measures without exercising its discretion, and the Court of Appeals has agreed. *Wilmer*, 2007 WL 4322212, at *5 (conceding abuse of discretion when the district court required a defendant to wear a leg brace because the court wouldn't interfere with the sheriff's standard operating procedure); *Griffin*, 2013 WL 1223689 at *2, *4 (conceding abuse of discretion when the district court deferred to the sheriff and Department of Corrections regarding leg restraints in the courtroom).

In the instant case, the district court failed to exercise its discretion even when it was urged to do so by the State. It cited only specifics about the courtroom, not about Wiggins. D0250 at 64:10-68:9. Indeed, the court couldn't find any case-specific reasons because Wiggins was not a violent or disruptive defendant. After the case was submitted to the jury, the district court thanked "everyone

in the gallery and the Defendant for your cooperation and acting respectfully." D0246 at 54:14-18. And even the State made no case-specific arguments for why it was necessary despite saying it was "a sensible procedure." D0250 at 64:10-68:9.

Moreover, defense counsel described Wiggins as "a perfect client." D0250 at 64:10-68:9; D0249, Sentencing 10:6-17 (10/14/24). Counsel stated at sentencing:

> Mr. Wiggins, in my view of 25 years of practice, was really a perfect client. He was cooperative, understanding, he listened to us, he had input for us, and he even, at the time the jury verdict was read and since then, he's continued to be very professional in the way he has accepted and asked intelligent questions about appealing things and post-conviction relief and that kind of thing. I would just like the record to reflect we couldn't have asked for a better client.

D0249 at 10:6-17.

The district court failed to exercise its discretion by deferring to a courthouse policy and a matter of routine practice in Polk County. It failed to state any case-specific reasons in support of its ruling. Indeed, there were none because James Wiggins was a

model defendant throughout the process. Polk County's generic courthouse policy should not have been imposed in this case.

Because the district court failed to exercise its discretion on an issue involving Wiggins' constitutional rights, the State must show error is harmless beyond a reasonable doubt. *Estelle v. Williams*, 425 U.S. 501, 506 (1976); *Chapman v. California*, 386 U.S. 18, 24-26 (1967)); *see also State v. Gorman-Lykken*, 446 P.3d 694, 700 (Wash. Ct. App. 2019). The State cannot show "beyond a reasonable doubt that stationing the officer next to the witness stand did not influence the jury." *Gorman-Lykken*, 446 P.3d. at 700.

The jury took over a day to reach a verdict in this case when the shooting was captured on video. D0246 at 54:19-22. Wiggins testified he believed he heard shots inside the bar, as did two State's witnesses. D0250 at 81:20-24; 91:18-93:25; Def. Exh. D at 00:38-01:06. It was not a case of overwhelming guilt. The jury had to consider whether it believed Wiggins' justification defense. The district court's insinuation he was dangerous by placing a deputy at

the witness stand damaged his defense. Thus, error was not harmless.

Conclusion: A new trial is warranted because the district court's practice of stationing a deputy at the witness stand for a custodial defendant violated due process, as well as the court's failure to exercise its discretion. *Id.* at 700.

II. There was sufficient evidence Wiggins acted in self-defense.

Preservation of Error: The defense moved for judgment of acquittal on the justification element, which the district court denied. D0250 at 69:1-73:2; 138:7-19. Error preservation is not required, however, because "a defendant whose conviction is not supported by sufficient evidence is entitled to relief when he raises the challenge on direct appeal without regard to whether the defendant filed a motion for judgment of acquittal." *State v. Crawford*, 972 N.W.2d 189, 200 (Iowa 2022).

Standard of Review: Sufficiency claims are reviewed for correction of errors at law. *State v. Mong*, 988 N.W.2d 305, 312 (Iowa 2023).

Merits: "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970); *see also Patterson v. New York*, 432 U.S. 197, 211 (1977) (recognizing requirement of proof beyond a reasonable doubt was the "universal rule" long before *Winship*). Review of a sufficiency claim requires not simply determining whether the jury was properly instructed, but "whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318 (1979).

The Court considers the evidence in the light most favorable to the State, and it considers all the evidence presented at trial, not just the evidence which supports the verdict. *State v. Adney*, 639 N.W.2d 246, 250 (Iowa Ct. App. 2001). "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

Jackson, 443 U.S. at 319 (emphasis in original). The evidence presented must do more than create speculation, suspicion, or conjecture. *State v. Hamilton*, 309 N.W.2d 471, 479 (Iowa 1981). The finder of fact needs "'to reach a subjective state of *near certitude* of the guilt of the accused.'" *Travillion v. Superintendent Rockview SCI*, 982 F.3d 896, 902 (3d Cir. 2020) (emphasis in original) (quoting *Jackson*, 443 U.S. at 315). The essential elements of the crime were not met in this case.

The State had to prove the following elements of second-degree murder beyond a reasonable doubt:

1. On or about December 10, 2022, the defendant shot Tyrone Hutchins.
2. Tyrone Hutchins died as a result of being shot.
3. The defendant acted with malice aforethought.
4. The defendant was not acting with justification.

D0211, Jury Instr. 26 (8/20/24). Malice was defined in instruction 18. D0211 at Jury Instr. 18.

The justification instructions included the following:

> The defendant claims he was justified in using reasonable force to prevent injury to himself or others. The defendant was justified in using reasonable force if he reasonably believed that such force was necessary to

defend himself or another from any actual or imminent use of unlawful force.

Reasonable force is only the amount of force a reasonable person would find necessary to use under the circumstances to prevent death or injury. If in the defendant's mind the danger was actual, real, imminent, or unavoidable, even if the defendant was wrong in estimating it or the force necessary to repel it, the force was justified if the defendant had a reasonable basis for his belief and responded reasonably to that belief.

It is not necessary that there was actual danger, but the defendant must have acted in an honest and sincere belief that the danger actually existed. Apparent danger with the defendant's knowledge that no real danger existed is no excuse for using force.

Reasonable force can include deadly force if it is reasonable to believe that such force is necessary to resist a like force or threat.

The State must prove beyond a reasonable doubt that the defendant's use of force was not justified.

D0211 at Jury Instr. 22.

A person who is not engaged in illegal activity has no duty to retreat from any place where the person is lawfully present before using force as described in these instructions.

D0211 at Jury Instr. 23.

If any of the following is true, the defendant's use of force was not justified:

1. The defendant did not have a reasonable belief that it was necessary to use force to prevent an injury or loss.

2. The defendant used unreasonable force under the circumstances.

D0211 at Jury Instr. 24.

The term "deadly force" means any of the following:

1. Force used to purposefully cause a serious injury;
2. Force that the defendant knew or should have reasonably known would create a strong probability that serious injury would result;
3. Discharging a firearm in the direction of someone, knowing they are present, even with no intent to cause a serious injury; or
4. Discharging a firearm at a vehicle in which someone is known to be.

"Deadly force" does not include a threat to cause serious injury or death, by the production, display, or brandishing of a deadly weapon, as long as the actions of the person are limited to creating an expectation that the person may use deadly force to defend oneself, another, or as otherwise authorized by law.

D0211 at Jury Instr. 25.

Wiggins acted with justification. "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." Iowa Code § 704.3 (2024). The

burden is on the State to prove a defendant's use of force is not justified. *State v. Ellison*, 985 N.W.2d 473, 479 (Iowa 2023).

Wiggins had about three seconds to act when he stepped into the chaos of Rico's that night. State Exh. 2 at 2:47-3:05. Reese and Marcell had just approached Hutchins, unknown to Wiggins, who was still making his way to the bar. State Exh. 2 at 2:47-3:05. Wiggins heard a commotion and thought he heard a gunshot. D0250 at 91:18-93:25; 103:1-105:13; 120:13-124:11. Then he entered the bar as Hutchins pointed a gun at Marcell and Reese. D0247 at 115:15-116:5; D0250 at 91:18-94:10; 103:1-105:13; D0194, Def. Exh. A, Hutchins Display Gun Photo; D0194, Def. Exh. B, Hutchins Display Gun Close Up Photo; Def. Exh. F at 00:18-00:30; State Exh. 2 at 2:47-3:05. Still armed, Hutchins used another patron as a human shield as he plowed toward the door where Wiggins stood. D0247 at 111:21-23; 139:5-7; D0250 at 91:18-94:10; 103:1-105:13; D0196, Def. Exh. C, Hutchins Exit Photo; State Exh. 2 at 2:47-3:05; Def. Exh. F at 00:30-00:40. When

he saw Hutchins' gun pointed at him, Wiggins fired. D0250 at 94:1-10; 130:13-132:12; State Exh. 2 at 2:47-3:05.

Wiggins testified he feared for his own life and the life of his brother and family friend. D0250 at 104:13-105:3. Two State's witnesses also thought they heard one or more shots inside the bar; Hutchins' best friend thought Hutchins might've fired the first shot. D0250 at 81:20-24; Def. Exh. D at 00:38-01:06. Wiggins' belief was reasonable, as was his use of force when confronted by an armed Hutchins. Thus, Wiggins acted with justification in shooting Hutchins. *Cf. State v. Wilson*, 941 N.W.2d 579, 591 (Iowa 2020) (holding there was "ample evidence of lack of justification" where defendant instigated a verbal confrontation, fired indiscriminately at an opposing group, and was the only one seen by an innocent bystander pulling out a gun).

Further, the evidence contradicts the State's claim in the district court that Wiggins was acting with Marcell and Reese with an intent to harm Hutchins that night. Wiggins had gone to a funeral with his brother and met Reese there before going to Rico's

because the repast crowd was moving there. D0250 at 87:21-89:24; 108:10-16. Wiggins testified he didn't know Hutchins would be there, and the State had no evidence to contradict that. D0250 at 106:21-107:17. Video evidence showed Marcell and Reece meeting with Washington, but not Wiggins, who was lagging behind. D0247 at 119:24-121:12; 124:24-129:23; State Exh. 4 at 2:04-3:05; State Exh. 5 at 35:05-36:00; State Exh. 6 at 40:09-40:37. Moreover, Marcell and Reese asked Wiggins why he shot Hutchins, contradicting the State's claim this was a planned homicide. D0250 at 99:25-100:9. Therefore, the record was sufficient Wiggins acted with justification when he shot Hutchins out of fear for his own life and the lives of his brother and family friend.

Conclusion: Because the evidence was sufficient Wiggins acted with justification, the conviction should be vacated and the charge remanded for dismissal. *State v. Chapman*, 944 N.W.2d 864, 875 (Iowa 2020) ("[W]hen the defendant's conviction is reversed on grounds that the evidence was insufficient to sustain the conviction . . . double jeopardy principles require that the case be dismissed.").

III. The district court erroneously instructed the jury it could consider aider and abettors' acts and conduct to find malice.

Preservation of Error: The defense resisted including aiding and abetting instructions in this case. D0250 at 7:2-8:4. The State did not request the instruction and was not pursuing an aiding and abetting theory because Wiggins was the principal. D0250 at 5:6-23; 7:2-8:4. The judge ruled there would be no aiding and abetting instruction since the defense resisted it, the State wasn't arguing it, and the jury would only be confused. D0250 at 7:2-8:4. Despite this ruling, the "malice" instruction referenced aiding and abetting.[4] D0211 at Jury Instr. 18. Wiggins was found guilty of second-degree murder, which includes an element of malice. D0212, Verdict Order (8/30/24); D0211 at Jury Instr. 18. Error was preserved by counsel's timely resistance to submission of aiding and abetting instructions. *See State v. Davis*, 951 N.W.2d 8, 16 (Iowa 2020).

[4] The "apparent ability" instruction also included a reference to aiding and abetting. D0211 at Jury Instr. 36. Since this instruction relates to the lesser offense of assault, which was not reached by the jury, Appellant does not challenge it on appeal.

Standard of Review: Review is for the correction of legal error. *State v. Kraai*, 969 N.W.2d 487, 490 (Iowa 2022). The instructions are reviewed as a whole. *Id.*

Merits: The State charged Wiggins with first-degree murder individually, by joint criminal conduct, and by aiding and abetting. D0019, Trial Information (3/25/24). The parties discussed including an aiding and abetting instruction:

> [STATE]: Your Honor, at some session off the record between counsel on whether there should be an aiding and abetting instruction because it's one of the alternatives he is charged under. There is not an aiding and abetting instruction. I think just for the sake that the jury is informed what that entails, I think it would make sense to put the aiding and abetting instruction in.
>
> The State is not exactly arguing the aiding and abetting in the traditional sense because the Defendant is the shooter. He is culpable as the principal in this case; however, the actions of his accomplices are imputed on him as well, regarding the justification defense since they were the first ones to be a part of the crime.
>
> So I think, you know, in the interest of keeping things as clean as possible, I think it makes sense to include that stock instruction.
>
> . . . .
>
> THE COURT: . . . What is the Defense's position on the aiding and abetting instruction?

> [DEFENSE]: Judge, I'm going to resist the abetting instruction. There is no evidence here. Mr. Wiggins did the murder, not Mr. Lorenzo Reese or Marcell Wiggins. It's my understanding the State is not going to argue aiding and abetting, so if that's the case, I think we're going to resist the aiding and abetting instruction.
>
> THE COURT: If the Defense resists it and the State is not going to argue it, then I think it would only confuse the jury.
>
> [STATE]: The reason I brought it up is because the Defense brought it up to me. If they don't want the instruction, I'm okay not having the instruction. We are not going to argue that somebody else committed the murder, but the Defendant should be held accountable. He was the shooter. We will, however, be arguing about the facts and circumstances leading up to the shooting, which did include a couple other people who came to the scene. So if the Defense doesn't think an aiding and abetting instruction is needed, then I'm okay with that.
>
> THE COURT: The Court is not inclined to put in an instruction that the Defense does not want and that the State is not requesting, so there will be no aiding and abetting instruction unless I hear differently.

D0250 at 5:6-23; 7:2-8:4.

Despite this ruling, the malice instruction included an aiding and abetting element:

> "Malice" is a state of mind which leads one to intentionally do a wrongful act to the injury of another out of actual hatred, or with an evil or unlawful purpose. It may be established by evidence of actual hatred, or by proof of a deliberate or fixed intent to do injury. *It may be*

> *found from the acts and conduct of the defendant, or someone he aided and abetted, and the means used in doing the wrongful and injurious act.* Malice requires only such deliberation as would make a person appreciate and understand the nature of the act and its consequences, as distinguished from an act done in the heat of passion.
>
> "Malice aforethought" is a fixed purpose or design to do some physical harm to another which exists before the act is committed. Malice aforethought need not exist for any particular length of time.

D0211 at Jury Instr. 18 (emphasis added). Malice is the third element of second-degree murder. D0211 at Jury Instr. 26 ("The defendant acted with malice aforethought.").

The district court erred in submitting the malice instruction with an aiding and abetting element. "The guilt of a person who aids and abets the commission of a crime must be determined upon the facts which show the part the person had in it, and does not depend upon the degree of another person's guilt." Iowa Code § 703.1 (2024). An aider and abettor must either possess the requisite intent or the knowledge the principal has the requisite intent. *State v. Lott*, 255 N.W.2d 105, 109 (Iowa 1977). The malice of one is not automatically imputed to the other. *State v. Williams*,

525 N.W.2d 847, 851 (Iowa 1994). One defendant can be found guilty of an offense with a malice element while a codefendant is found guilty of an offense without malice. *Id.* at 851 (upholding second-degree murder conviction for principal and voluntary manslaughter conviction for aider and abettor in first-degree murder trial).

In the instant case, the State didn't pursue an aiding and abetting theory because Wiggins was the principal. D0250 at 5:6-23; 7:2-8:4. The district court ruled it would be confusing to the jury to include an aiding and abetting instruction if the State wasn't pursuing that theory and the defense didn't want it. D0250 at 7:2-8:4. Yet, the jury was instructed to consider the acts and conduct of others to support a finding of malice, an element required to find Wiggins guilty of second-degree murder. D0211 at Jury Instr. 18. Thus, the jury was allowed to consider the actions and conduct of others who aided and abetted him to find malice in contravention of the court's ruling not to include aiding and abetting.

Prejudice to Wiggins is presumed due to the erroneous malice instruction. Unless the record affirmatively establishes otherwise, prejudice is presumed for instructional error. *State v. Davis*, 951 N.W.2d 8, 16 (Iowa 2020); *State v. Lorenzo Baltazar*, 935 N.W.2d 862, 871 (Iowa 2019). The record affirmatively establishes there was prejudice to Wiggins because the jury was instructed to consider the actions and conduct of others to find Wiggins acted with malice. But the malice of one participant in a crime cannot be automatically imputed to another. *Williams*, 525 N.W.2d at 851. Usually the marshaling instruction includes a malice element with a reference to aiding and abetting while the malice instruction contains no reference to aiding and abetting. *See State v. Tangie*, 616 N.W.2d 564, 573 (Iowa 2000). The opposite occurred in this case. D0211 at Jury Instr. 18, 26. Prejudice is presumed due to the erroneous instruction.

Even so, Wiggins has established prejudice. Prejudice can be established by "examin[ing] the record and consider[ing] the evidence presented, how the case was tried, and what the jury

instructions as a whole said." *State v. Kuhse*, 937 N.W.2d 622, 630 (Iowa 2020).

The erroneous instruction was problematic in this case because the State didn't just focus on Wiggins' actions. In great detail, the State presented evidence to support its theory Keevon Washington, Marcell Wiggins, and Lorenzo Reese acted in concert with Wiggins in an attempt to prove premeditation and malice. The State drew the jury's attention to how Washington came and went from Rico's three times, which caused Hutchins concern. D0247 at 112:1-114:14; State Exh. 2 at 0:00-2:05. They showed videos from three different directions of what they described as a planned meeting between Washington, Marcell, and Reese. D0247 at 119:24-121:12; 124:24-129:23; State Exh. 4 at 2:04-3:05; State Exh. 5 at 35:05-36:00; State Exh. 6 at 40:09-40:37.

They suggested Marcell parked the car in a way to ease their departure by backing into a space where other vehicles were parked in the opposite manner. D0247 at 122:11-124:14; State Exh. 7 at 13:34-15:05. And the State took great pains to point out Marcell

was armed with a “large” gun, pointing it out on video, and skeptically questioning Wiggins about his lack of knowledge Marcell was armed that night. D0247 at 115:15-116:5; 128:16-129:3; D0250 at 114:20-116:4; State Exh. 2 at 02:47-03:05.

It was also error because of how the State argued the case. The State opened by telling the jury, in part:

> Now, this story happened on December 10, 2022. As we mentioned before, it was at a bar called Rico's. This is over by Drake University along University Avenue. It's still there but it's called something else. But this was the regular bar for T.Y. and one of his friends, Tori Sellers. They went there that evening to get a drink. And we'll hear that, unfortunately, they both posted on social media that they were out, and T.Y. posted a picture of his drink at the bar.
>
> Now, for some reason, a car with three men came to the bar and parked at a parking lot nearby. These three men were not regulars at Rico's. But they came to this parking lot, they got out, and they quickly went to Rico's.
>
> We'll hear that they entered, and that two of these three men were armed with guns, concealed. One of them holding it under his shirt, the other one holding it in his pocket as they entered. Now, we'll hear that at first two of them entered, and then the third one entered a few seconds after this.
>
> We'll hear that the first two entered and immediately approached T.Y. T.Y. was sitting at the bar. He was on

the end in the corner, and these two guys came straight for him and confronted him. We'll hear that T.Y. got up, and that he pulled out his handgun, and then he backed away from these two guys. We'll hear he made his way to the door. He was making his way away from these two people who came into this bar looking for him. And he almost made it.

We'll hear that T.Y. was at the door, just about to walk out, when that third guy turned on him, and he was at the door waiting for his moment. We'll hear that this third person came in, stood there next to the door as T.Y. was making his way to the exit, and that it wasn't until T.Y. was almost past, to the side of him, that this third guy took out his gun, pointed it at T.Y. and shot him, shot at him three times, hitting him once in the side and once in the back, and then shooting a third shot and hitting a bystander.

Now, we'll hear that T.Y. collapsed on the ground outside the bar. We'll hear that he never got back up again. Those two bullets caused major damage inside his body. They both went through his aorta. One of them actually went through his heart. He was almost instantly killed.

Now, we will hear, ladies and gentlemen, that that person, that third person, the person who was standing by the door and pulled out his gun and fired at T.Y. and killed him, we'll hear that that was the Defendant in this case, James Wiggins. And we'll hear what he did after that. We'll hear that he fled the scene. He and his two friends that he came with went back to that car and they drove away.

D0245, Trial vol. I 132:7-134:10 (8/26/24). The State concluded by telling the jury Wiggins killed Hutchins "with malice and premeditation." D0245 at 135:2-6.

While the State did not mention the erroneous portion of the malice instruction in its closing arguments, the State argued, "[W]e can see the coordination between the Defendant, Marcell, Keevon, and Lorenzo." D0246 at 9:10-10:4; 13:23-14:15. They also tried to refute Wiggins' self-defense argument:

> Now, we spent a lot of time talking about premeditation and the planning that is apparent from the actions the Defendant has told us, and all of those do present premeditation, but only if they were going in there looking for trouble or trying to have an issue, then his actions were not reasonable in defending himself. You can't say that somebody's actions are reasonable if they're looking for a fight. And then they find one, right? And T.Y. wasn't looking for a fight, but the Defendant was and his friends were.

D0246 at 22:15-24. "He and his friends went looking to cause harm that night, and they succeeded," the State said. D0246 at 28:21-23.

In response, the defense told the jury:

> Now, nowhere are you going to see in these instructions that Mr. Wiggins -- will you see that they had to prove what Marcell Wiggins did, or Lorenzo Reese. These

> instructions concern James Wiggins. So whatever these other two yahoos are doing, if they did anything, it's not important here. They showed you what Mr. Wiggins did.

D0246 at 33:8-14.

On rebuttal, the State told the jury, "Everything points in the direction that they went to Rico's with a purpose to do harm, they found T.Y., and they did harm to him." D0246 at 46:1-3. The State argued:

> The Defendant also -- and don't watch just three seconds [of the videos], watch them all. They all support what happened here. The way they parked, the way they met with Keevon on the street. And no handshakes, hugs or greetings were exchanged at all, it was come together, exchange information and go to the bar. Then the Defendant comes running up to the bar with his gun in his hand, in his pocket, ready to go. That's premeditation. That's malice aforethought.

D0246 at 51:9-17.

Finally, the erroneous malice instruction wasn't cured. Improper instructions can be cured if other instructions properly advise the jury of the legal principles involved. *State v. Kraai*, 969 N.W.2d 487, 490 (Iowa 2022). No other instruction cured the error in this case. While the marshaling instruction didn't mention aiding

and abetting, it included the element of malice aforethought. D0211 at Jury Instr. 36. The malice instruction told the jury it could consider the actions and conduct of others to find malice. D0211 at Jury Instr. 18. Malice is only required for first and second-degree murder. D0211 at Jury Instr. 17, 26. Instructing the jury it could consider the conduct of the aiders and abettors for only the two most serious offenses—when the jury was instructed on 11 lesser-included offenses—undermines confidence in the verdict. D0211 at Jury Instr. 12 (listing lesser offenses). *See State v. Davis*, 951 N.W.2d 8, 17 (Iowa 2020) (finding *Strickland* prejudice where only first-degree murder instruction did not cross-reference the insanity defense). Thus, Wiggins has established prejudice in this case.

Conclusion: The erroneous malice instruction mandates a new trial. A significant error in a jury instruction undermines confidence in the verdict. *Id.* at 20 (Iowa 2020). Accordingly, a new trial should be granted.

IV. The requirement to participate in a victim offender dialogue is an illegal sentence because Wiggins was sentenced to prison.

Preservation of Error: "[I]llegal sentences are not subject to the usual requirements of error preservation and waiver." *State v. Halliburton*, 539 N.W.2d 339, 343 (Iowa 1995) (citations omitted). The Court may correct an illegal sentence at any time. *State v. Lathrop*, 781 N.W.2d 288, 292-93 (Iowa 2010).

Standard of Review: The Court reviews challenges to the legality of a sentence for correction of errors at law. *State v. Sisk*, 577 N.W.2d 414, 416 (Iowa 1998).

Merits: The district court imposed an illegal sentence by requiring Wiggins to participate in a Victim Offender Dialogue. Iowa Code section 901.5 sets out the sentencing options available to district courts. Iowa Code § 901.5 (2024). That list does not include ordering a defendant to complete victim–offender reconciliation programs when a prison sentence is imposed. *Id.* Yet, the district court ordered Wiggins to participate in one:

☒ **VICTIM OFFENDER DIALOGUE (VOD).** Defendant is ordered to participate in a VOD session with either 1) the actual victim of the crime if the victim chooses to participate; or, 2) a victim of a similar crime experience; or, 3) a person who has been trained to serve as a surrogate community member. Defendant shall call (515) 286-3057 within three (3) working days to register for the session. Any No-Contact Order between the Defendant and the victim is suspended temporarily and only during the VOD session. The temporary suspension of the NCO ends at the conclusion of the VOD session as announced by the mediator.

D0225 at 2; D0249, Sentencing Tr. 27:20-22 (10/14/24) ("The Defendant will participate in a Victim Offender Dialogue, if and only if, requested by the State on behalf of the victim.").

The district court may have authority to order a defendant's participation in a victim-offender reconciliation program as a condition of probation. *See* Iowa Code § 907.6; *see also State v. Thacker*, 862 N.W.2d 402, 404 (Iowa 2015) (noting the district court ordered the defendant to complete a victim-offender reconciliation program as a condition of probation). Victim–offender reconciliation programs were created as "workable alternative[s] to incarceration." Susan C. Taylor, *Victim-Offender Reconciliation Program—A New Paradigm Toward Justice*, 26 U. Mem. L. Rev. 1187, 1189 (1996); Fred Gay & Thomas J. Quinn, *Restorative Justice and Prosecution in the Twenty-First Century*, The Prosecutor, at 18 (Sept./Oct.1996) *available at* 30-OCT PROSC 16 ("In almost all cases, the referrals were prior to guilty plea with the agreement that, if the defendant

participated in good faith in a Victim Offender Reconciliation Program, [the Polk County Attorney's Office] would either reduce the pending charge or recommend a more favorable disposition to the court at the time of sentencing.").

Since Wiggins was ordered to serve 50 years in prison—not a term of probation—this condition of his sentence is not authorized by law. *See State v. Gardner*, No. 22–0422, 2023 WL 153509, at *2 (Iowa Ct. App. Jan. 11, 2023) ("We agree that the district court was without statutory authority to order [completion of sex-offender treatment while incarcerated], and therefore, it constitutes an illegal sentence."). Therefore, it is an illegal sentence. *See Tindell v. State*, 629 N.W.2d 357, 359 (Iowa 2001).

Conclusion: "[W]here a portion of a defendant's sentence is improper or invalid . . . th[e] court can sever the sentence without disturbing the balance of the sentence." *Bonilla v. State*, 791 N.W.2d 697, 702 (Iowa 2010). Accordingly, Wiggins asks this Court to vacate the portion of his sentence obligating him to participate in a victim offender dialogue.

CONCLUSION

For the reasons discussed above, Defendant-Appellant Wiggins respectfully requests this Court vacate the conviction and remand the case to the Polk County District Court for dismissal of the charge, or in the alternative, a new trial.

REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument.

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)(g)(1) and 6.903(1)(i)(1) because:

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