

IN THE SUPREME COURT OF IOWA

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STATE OF IOWA,

Plaintiff-Appellee,

v.

WICHANG GACH CHAWECH,

Defendant-Appellant.

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S. CT. NO. 22-1974

APPEAL FROM THE IOWA DISTRICT COURT  
FOR POLK COUNTY  
HONORABLE JEANIE K. VAUDT, JUDGE

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APPELLANT'S REPLY BRIEF AND ARGUMENT

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## **CERTIFICATE OF SERVICE**

On the 13<sup>th</sup> day of September, 2023, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Wichang Chawech, No. 6930389, Fort Dodge Correctional Facility, 1550 L. Street, Fort Dodge, IA 50501.

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/s/ Theresa R. Wilson

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## **STATEMENT OF THE ISSUE PRESENTED FOR REVIEW**

**Error was preserved on Chawech's argument that the State failed to charge the dangerous weapon provision of Iowa Code section 902.7. Due to the State's omission, the mandatory minimum sentence may not be applied.**

### **Authorities**

State v. Richardson, 890 N.W.2d 609, 615 (Iowa 2017)

State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994)

State v. Gross, 935 N.W.2d 695, 698 (Iowa 2019)

State v. Lockett, 387 N.W.2d 298, 301 (Iowa 1986)

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Jones v. United States, 526 U.S. 227, 243 n.6 (1999)

Apprendi v. New Jersey, 530 U.S. 466, 476 (2000)

Alleyne v. United States, 570 U.S. 99, 112 (2013)

## **STATEMENT OF THE CASE**

COMES NOW Defendant-Appellant Wichang Chawech, pursuant to Iowa R. App. P. 6.903(4), and hereby submits the following argument in reply to the State's brief filed on August 28, 2023.

While the defendant's brief adequately addresses the issues presented for review, a short reply is necessary to address questions of error preservation and notice.

## **ARGUMENT**

**Error was preserved on Chawech's argument that the State failed to charge the dangerous weapon provision of Iowa Code section 902.7. Due to the State's omission, the mandatory minimum sentence may not be applied.**

The State contends that any failure to refer to Iowa Code section 902.7 in the trial information does not create an illegal sentence even though the mandatory minimum under that section is imposed. State's Brief pp. 30-31. Rather, the State suggests it is a flawed sentencing procedure that was not raised below, and therefore is not preserved for appeal. State's Brief pp. 30-32.

Even assuming that the argument is one of a defective sentencing procedure as opposed to an illegal sentence, it is a distinction without any practical difference when it comes to error preservation. “[T]he rule of error preservation ‘is not ordinarily applicable to void, illegal *or procedurally defective* sentences.’” State v. Richardson, 890 N.W.2d 609, 615 (Iowa 2017) (quoting State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994)) (emphasis added); State v. Gross, 935 N.W.2d 695, 698 (Iowa 2019) (same). However the parties or the Court chooses to characterize the error, it was preserved for appeal.

Nor does the case law support the State’s contention that Chawech would have been adequately aware from the minutes of testimony that the State was accusing him of using a dangerous weapon. The Iowa Supreme Court has previously rejected such arguments, holding that Iowa Rule of Criminal Procedure 6.2(4) requires the allegation be contained in the indictment or information. State v. Lockett, 387 N.W.2d 298,

301 (Iowa 1986) (referring to predecessor Criminal Procedure Rule 6.6); State v. Dann, 591 N.W.2d 635, 639 (Iowa 1999).

Finally, Chawech does not agree that a trial information's passing reference to a dangerous weapon is adequate to fulfill the State's responsibilities to notify a defendant of its desire to pursue a mandatory minimum sentence under Iowa Code section 902.7. In Jones v. United States, the United States Supreme Court held that any fact other than a prior conviction that increased the statutory maximum penalty for an offense should be *charged* in the indictment or information and submitted to the jury. Jones v. United States, 526 U.S. 227, 243 n.6 (1999); See also Apprendi v. New Jersey, 530 U.S. 466, 476 (2000) (acknowledging Due Process requirement of Fourteenth Amendment requires same process in state proceedings).

In Alleyne v. United States, the United States Supreme Court determined that the principle applied in Apprendi and Jones "applies with equal force to facts increasing the



mandatory minimum.” Alleyne v. United States, 570 U.S. 99, 112 (2013). According to the Court, “there is no basis in principle or logic to distinguish facts that raise the maximum from those that increase the minimum.” Id. at 116.

Accordingly, under U.S. Supreme Court precedent, the mandatory minimum sentencing provision of Iowa Code section 902.7 must be both charged in the trial information and submitted to the jury. Because the State neglected to formally incorporate Section 902.7 into its charges, it was illegal for the District Court to impose the five-year mandatory minimum.

### **CONCLUSION**

For all of the reasons discussed above and in his Brief and Argument Defendant-Appellant Wichang Chawech respectfully requests this Court vacate his convictions, judgment and sentence in their entirety. Alternatively, Chawech’s conviction for Assault with Intent to Inflict Serious Injury under Count II should have been merged with his

conviction for Willful Injury Causing Serious Injury under Count III, and his mandatory minimum sentences under Iowa Code section 902.7 should be vacated as illegal.

**ATTORNEY'S COST CERTIFICATE**

The undersigned hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was \$1.44, and that amount has been paid in full by the Office of the Appellate Defender.

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS AND TYPE-STYLE REQUIREMENTS**

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

[X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 646 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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