IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff–Appellee, v. LASONDRA A. JOHNSON, Defendant–Appellant.	S. CT. NO. 21–1891

APPEAL FROM THE IOWA DISTRICT COURT
FOR BLACK HAWK COUNTY
THE HONORABLE JOEL A. DALRYMPLE, JUDGE

APPELLANT'S BRIEF AND ARGUMENT

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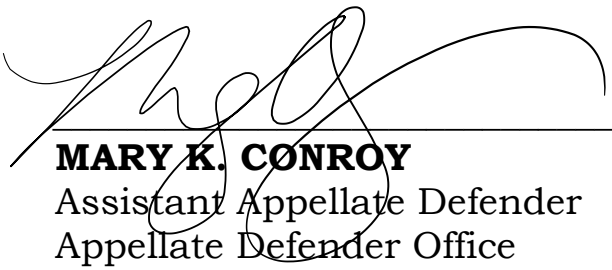
CERTIFICATE OF SERVICE

On 26th day of June, 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 the Appellant at her known home address.

STATE APPELLATE DEFENDER



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ROUTING STATEMENT

The Court should transfer this case to the Court of Appeals because it raises issues that involve the application of existing legal principles. Iowa R. App. P. 6.903(2)(d) & 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case: Defendant–Appellant Lasondra Johnson appeals her conviction, sentence, and judgment following a jury trial and verdict finding her guilty of assault causing serious injury, in Black Hawk County District Court Case No. FECR238076.

Course of Proceedings: On November 23, 2020, the State charged Johnson with murder in the first degree, a class "A" felony, in violation of Iowa Code section 707.2(1)(a). (Trial Information) (App. pp. 5–6). Johnson filed a written arraignment and plea of not guilty on December 4, 2020. (Written Arraignment) (App. pp. 7–8). Johnson also filed a notice of the defense of justification. (Notice) (App. p. 9).

A jury trial commenced on September 24, 2021. (9/14/21 p.1 L.1–25). On September 27, 2021, the jury returned a verdict of guilty on the lesser-included offense of assault causing serious injury. (9/27/21 p.3 L.17–21) (Verdict) (App. p. 21).

Sentencing hearing was held on December 13, 2021. (Sentencing p.1 L.1–p.2 L.11) (Sentencing Order) (App. pp. 25–29). The district court sentenced Johnson to five years in prison. (Sentencing p.20 L.10–13) (Sentencing Order) (App. p. 25). The court imposed the minimum fine; it also ordered Johnson to pay any victim restitution, as well as $150,000 in restitution to Mills's heirs or estate, pursuant to Iowa code section 910.3B. (Sentencing p.20 L.10–16) (Sentencing Order) (App. pp. 25–26).

Johnson appealed. (Notice) (App. p. 30).

Facts: Approximately twelve minutes after midnight on November 14, 2020, several calls came into the law enforcement 911 communications center regarding a shooting at 723 Dawson in Waterloo, Iowa. (9/15/21 p.75 L.13–p.80

L.25). One caller, later identified as Shara Harrington[1], and the homeowner of 723 Dawson, reported that Lasondra Johnson had shot Jada Young-Mills[2].

Waterloo police officers, including Officers Gann and Nichols, responded to the address within minutes. (9/15/21 p.84 L.14–p.85 L.9). There was a trail of blood leading into the house and up to Mills, who was sitting upright on the floor, leaning against the couch. (9/15/21 p.85 L.15–p.86 L.20). After unsuccessfully attempting to find the bullet wound, Gann started CPR on Mills, who had a faint pulse. (9/15/21 p.87 L.7–p.88 L.25, p.94 L.6–p.95 L.22). Paramedics arrived and transported Mills, who was now unconscious, to Allen Hospital. (9/15/21 p.90 L.16–22, p.104 L.10–p.109 L.12). Mills never regained consciousness and was later pronounced dead at the hospital. (9/15/21 p.116 L.21–p.117 L.12). She

[1] This case involves several members of the Harrington family. For clarity, the brief refers to each individual by their first name.

died from a single gunshot wound to the front upper left chest. (9/16/21 p.104 L.18–19, p.106 L.11–16).

A few hours later, Johnson called the police department and let them know she was coming into the station. (9/21/21 p.20–p.104 L.18). At approximately 4:20 a.m., Johnson came to the Waterloo Police Department. (9/16/21 p.79 L.11–24; 9/20/21 p.108 L.17–p.109 L.2) (Ex. E2 0:00–0:40). Johnson brought her Ruger 9mm handgun with her, and she gave it to the police, along with her phone and identification. (9/16/21 p.80 L.1–10) (Ex. E2 0:00–0:40; E3 0:15-0:23). Johnson fully cooperated with the police and answered their questions. (9/16/21 p.82 L.14–p.83 L.5).

Johnson admitted to the police investigator that she fired her gun. (9/20/21 p.109 L.12–23). Johnson repeatedly told the investigator that she had just fired a warning shot. (9/20/21 p.110 L.16–p.112 L.2). Johnson said she had heard that someone had a gun but did not see any other guns. (9/20/21 p.112 L.3–6). The investigator testified that he informed Johnson that Mills had died, and Johnson started

crying. (9/21/21 p.16 L.10–23) (Ex. 5). The investigator then left the room; Johnson started sobbing and slumped to the ground. (Ex. 5).

A police officer testified that Johnson had injuries, including an abrasion on her cheek, consistent with a bite mark, a sore shoulder, and an injury to the top of her head. (9/17/21 p.145 L.5–p.146 L.11, p.150 L.2–3). Johnson did not change clothes before coming to the station. (9/22/21 p.116 L.11–14). The officer noted that Johnson's left pant leg was scuffed with dirt and had grass stains. (9/17/21 p.146 L.15–21, p.150 L.8–10). The officer testified Johnson was emotional and "in a state of shock"; Johnson had to be escorted to the bathroom at one point because she thought she might throw up. (9/17/21 p.119 L.12–20).

The immediate events leading up to Mills death were hotly contested at trial. The State presented evidence that Johnson got into a fight with Mills, and just after the fight had finished, got in her car, retrieved her gun, and shot Mills as Mills was walking away; its explanation for the altercation was

that the two women got in a fight over Mills selling Johnson bad hair to use in a wig, months before the incident, in July. However, contrary to the theory, Mills actually texted Johnson that she was going to "beat her ass." (9/16/21 Trial p.59 L.4–p.69 L.6). Moreover, the uncontested evidence established that Mills and Johnson had seen each other between the "hair incident" and November 14th at various social gatherings without incident or continuing animosity between the women. (9/16/21 p.45 L.18–23, p.73 L.11–16; 9/22/21, p.112 L.15–22).

The defense's theory was that Mills, Sharra, and Gloria Boldon were upset that Johnson and Sharra's brother, Christopher Harrington, were dating again after being in an on/off relationship for roughly three years and that Christopher was not with Kijafa Parsons, or possibly was dating both women at the time, as both Shara and Sherry testified he had multiple girlfriends at once. (9/16/21 p.14 L.16–19, p.33 L.7–15, p.38 L.12–16, p.187 L.24–p.187 L.3; 9/22/21 p.91 L.17–p.91 L.1). After a night of drinking, the

women returned to 723 Dawson to find Johnson parked in front of the house, waiting for Christopher to finish visiting his mother, Sherry Harrington, who was temporarily staying at 723 Dawson. (09/16/21 L.17–p.178 L.3; 09/17/21 p.13 L.9–17). The defense presented evidence that Mills instigated a fight with Johnson and then the three women ganged up on her; the fight eventually ended when Johnson fired her gun in self-defense. There was surveillance video of the altercation, taken from a neighbor's house, across the street and five houses down from 723 Dawson. (9/15/21 p.125 L.1–16; 9/16/21 p.91 L.12–19).

Mills and Shara were best friends and had been friends since childhood. (9/16/21 p.8 L.16–18, p.32 L.18–p.33 L.1). Boldon was a close family friend of the Harringtons and Mills. (9/17/21 p.80 L.9–p.81 L.10). On November 13, 2020, the three women met at 723 Dawson and went to Applebee's, where their friend, Parsons worked. (9/16/21 p.10 L.1–p.12 L.5). Parsons was the ex-girlfriend of Christopher but remained close to the family after they broke up. Sherry and

M.H., who is Shara and Christopher's niece, would watch Parsons's child while she worked. (9/16/21 p.34 L.3–13; 9/16/21 p.178 L.4–10; 9/17/21 p.117 L.21–p.118 L.5) (Ex. M 14:48:10–14:48:35). Parsons and Shara referred to each other as "sister", and M.H. referred to Parsons as her "auntie". (9/16/21 p.34 L.17–20; 9/17/21 p.121 L.5–17) (Ex. M 14:48:10–14:48:35).

At Applebees, Boldon, Shara, and Mills drank some alcoholic beverages and ate some wings. (9/16/21 p.12 L.6–20). They then went to Briqhouse, where they had more drinks; after approximately an hour and a half later, Shara drove the women back to her house. (9/16/21 p.12 L.19–p.13 L.3). While the women were gone, Christopher had driven Johnson's Kia Telluride, with Johnson riding along in the passenger seat, to Shara's house to see Sherry. (9/21/21 p.25–p.107 L.17).

Christopher was inside the house, and Johnson was sitting in the Telluride when the women returned. Shara pulled her car directly next to Johnson's vehicle, which was

parked on the curb, so the two vehicles' driver's side windows were next to one another. Eventually, all three women got into Johnson's vehicle and were talking; there was a verbal altercation that turned into a physical fight outside of the vehicles. (9/16/21 p.16 L.7–8, p.17 L.2–10, p.39 L.13–20, p.41 L.10–17, p.45 L.24–p.46 L.7).

The State called Shara, Boldon, Sherry, and M.H. to testify about the altercation. Approximately a week before the trial, the State met with the women and showed them the surveillance video. (9/16/21 p.55 L.25–p.57 L.14, p.181 L.23–p.183 L.20; 9/17/21 p.46 L.2–23, p.100 L.4–p.101 L.25).

Shara Harrington: Shara testified that she and Mills were talking to Johnson through the vehicles' front windows. (9/16/21 p.14 L.11–15). Shara testified they were talking about Johnson's daughter and her birthday party. (9/16/21 p.15 L.10–13). Shara confronted Johnson about Johnson's daughter blocking her on FaceTime, which Johnson denied. (9/16/21 p.15 L.13–19, p.38 L.17–23). Shara called Johnson's daughter and had a short conversation with her.

(9/16/21 p.15 L.18–25, p.39 L.3–12). Johnson's daughter had not blocked Shara. (9/16/21 p.16 L.1–3). Shara stated their conversation was friendly, and she eventually left her vehicle and got into Johnson's vehicle's driver's seat. (9/16/21 p.15 L.4–9).

Shara testified that Mills and Johnson were talking about hair. (9/16/21 p.17 L.11–19). Earlier in the year, in July, Mills had sold hair for a wig to Johnson. (9/16/21 p.17 L.11–p.18 L.4). Johnson had believed the hair was not good quality and complained. (9/16/21 p.17 L.22–24). Shara testified M.H. confronted Johnson about still wearing the wig if she believed it was not quality hair. (9/16/21 p.17 L.24–p.18 L.1).

Shara testified the conversation between Mills and Johnson was initially friendly, but Mills and Johnson started yelling at each other. (9/16/21 p.18 L.12–14). Shara heard Johnson said "Get out of my car" or "Get away from my car" to Mills. (9/16/21 p.42 L. 9–15). Shara testified that Johnson pushed Mills out of the car. (9/16/21 p.18–25). Shara testified she thought Johnson then got out of the vehicle to

continue a fight with Mills and the two women were yelling back and forth at each other. (9/16/21 p.18 L.21–p.19 L.1, p.43 L.3–10). They then started physically fighting next to the passenger side of Johnson's vehicle. (9/16/21 p.19 L.1, p.43 L.16–p.44 L.2). Shara testified Mills and Johnson were grabbing and pulling each other. (9/16/21 p.20 L.11–16). Shara testified they were wrestling, "kind of tussling, like . . . rolling on the ground." (9/16/21 p.20 L.11–19).

Shara testified that Christopher and Sherry separated the two women, but after being initially separated from each other, Mills and Johnson started fighting again. (9/16/21 p.43 L.16–23). At trial, Shara testified she did not remember Johnson heading towards her vehicle's driver's seat or Mills trying to follow Johnson. (9/16/21 p.44 L.3–8). However, in her pretrial statements from that night, Shara told the police that Johnson went around her car to the driver's side to get in, but instead of getting in, came back over to where Mills was standing on the passenger side. (9/16/21 p.70 L.1–22).

Shara denied joining the fight and she denied that anyone besides Mills hit or attacked Johnson. (9/16/21 p.20 L.20–p.21 L.20, p.44 L.9–20). She testified that she was trying to get the women apart from each other and break it up. (9/16/21 p.20 L.20–p.21 L.20). Shara testified the fight did not last long and then Johnson got back inside her vehicle. (9/16/21 p.21 L.4–12). Shara testified that she was standing on the grass by the back of the vehicle when Johnson reentered it. (9/16/21 p.21 L.21–p.22 L.12).

She testified she and Christopher were arguing. (9/16/21 p.21 L.21–p.22 L.18). Christopher was standing between Shara and Johnson's vehicle. (9/16/21 p.21 L.21–p.22 L.12). Shara testified that she was shoving, hitting, and "bossing [her] brother around, telling him to get his girlfriend out of there." (9/16/21 p.22 L.13–18, p.44 L.12–17 p.71 L.15–21). At trial, Shara denied that Christopher told her to get back from the vehicle. (9/16/21 p.71 L.22–23). However, she admitted she "probably did" tell police that Christopher had hit her and said "Get back, you just had surgery" to which

she responded "I don't give a fuck. Jada is like my sister and I love her." (9/16/21 p.71 L.24–p.72 L.4).

She testified that "the fight was over. Lasondra got back in her truck and she shut her door." (9/16/21 p.47 L.12–15). Shara testified that Johnson did not seem scared to her when she got back into her vehicle; rather, Shara described her as angry and still yelling. (9/16/21 p.23 L.20–p.24 L.3). She stated that Johnson "came out of the top of her vehicle or the window and she shot her gun." (9/16/21 p.22 L.13–18). Shara heard the gunshot and saw the flash of the gun went it discharged. (9/16/21 p.22 L.22–p.23 L.1). Shara testified did not know where Mills was when Johnson fired the gun. (9/16/21 p.23 L.8–19). When she heard the gunshot, Shara ran and hid behind a car. (9/16/21 p.24 L.4–7). Once the Telluride left, she got in her own car and parked it on the street. (9/16/21 p.24 L.9–14). Shara then went inside, saw Mills lying on the couch, and called 911. (9/16/21 p.24 L.15–18).

At trial, Shara denied that the women had discussed Johnson earlier that night. (9/16/21 Trial p.13 L.12–17). However, the defense admitted a video showing Parsons arriving on scene after the shooting. In it, Shara told Parsons that Johnson shot Mills, and Parsons stated "That fucking bitch, we was just talking about that!" (9/16/21 Trial p.35 L.3–p.36 L.6, p.69 L.19–25) (Def. Ex. 6). When confronted about the statement, Parsons claimed she was referring to several months before, not earlier that night, despite being confused as to where and when she actually made the statement. (9/17/21 Trial p.119 L.11–p.121 L.4). However, when confronted that there was a recording of her telling Christopher, "Well, I just told them you can just stay with that bitch", she admitted she probably said that; she could not explain the statement. (9/17/21 Trial p.122 p.17–p.123 L.4).

At trial, Shara denied being intoxicated that night and rejected the idea that alcohol played a role in her hazy memory. (9/16/21 p.36 L.19–24, p.42 L.22–p.43 L.2). However, two police officers that responded on scene testified

that she was "very intoxicated". (9/15/21 p.96 L.14–23, p.128 L.10–13). Additionally, at trial, she testified she remembered getting in her car after the Telluride left and moving it from the street to the curb. (9/16/21 p.37 L.13–25). However, that night she asked, "Where's my car? Who moved my car?" (9/15/21 p.139 L.3–20).

Gloria Boldon: Boldon testified that after arriving back at Dawson, she and Mills both got out of Shara's car to start their vehicles. (9/17/21 p.66 L.11–24). Boldon testified she returned to Shara's car but could not remember if Mills or Shara were still in the car when she got back in. (9/17/21 p.67 L.23–p.68 L.6). Boldon testified she eventually got in Johnson's backseat, Shara was in the driver's seat, Johnson was in the front passenger seat, and Mills was standing next to Johnson in the front door, which was open. (9/17/21 p.68 L.9–p.70 L.11). Boldon stated Mills and Johnson were having a discussion about the hair when Johnson pushed Mills out of her vehicle. (9/17/21 p.70 L.12–p.71 L.22). Boldon testified that Mills hit Johnson back, and that the two women were

"kind of fighting for a minute . . . then they eventually fell on the ground." (9/17/21 p.71 L.7–p.72 L.5). Boldon testified the two women were wresting on the ground, with Johnson on top of Mills. (9/17/21 p.72 L.7–25).

Boldon claimed she and Shara tried to separate Mills and Johnson. (9/17/21 p.73 L.2–4). She testified that Christopher and Sherry came out of the house and also tried to break up the fight; eventually the women were separated. (9/17/21 p.73 L.2–p.74 L.4). Boldon testified the fight was over and she started walking away to her car when she heard a "pow". (9/17/21 p.74 L.2–21). Boldon testified that Mills was walking back with her to their cars; she testified their backs were turned to Johnson. (9/17/21 p.96 L.2–p.97 L.17).

At trial, Boldon denied being drunk at the time of the shooting, denied ever getting drunk, and denied telling law enforcement she was drunk at the time; however, video evidence established she had told law enforcement that she was drunk that night. (9/17/21 p.85 L.25–p.86 L.19; p.89 L.19–p.92 L.6; 9/21/21 p.101 L.25–p.102 L.14). At trial,

Boldon testified that she refused to give her name to police when they arrived because she was "traumatized and scared". (9/17/21 p.77 L.15–23). However, on cross-examination, she changed course and claimed she had actually not refused to give her name or made it difficult for the officer to get her name. (9/17/21 p.92 L.7–p.93 L.2). An officer testified Boldon was reticent to identify herself and had to be asked several times before she provided her name and information. (9/15/21 p.128 L.2–9). She also denied telling the officer that she had just arrived and did not know what happened. (9/17/21 p.93 L.3–p.94 L.4, p.103 L.13–p.104 L.).

Sherry Harrington: Sherry testified she was asleep when M.H. woke her up. (9/16/21 p.178 L.15–19). She went outside and saw Johnson and Mills fighting. (9/16/21 p.178 L.21–24). Sherry told them to stop. (9/16/21 p.179 L.2–5). She testified she picked up Mills and turned around to walk back to the house; she thought the fight was over. (9/16/21 p.179 L.2–8). As she got towards the front door, Mills ran past and said she'd been shot. (9/16/21 p.179 L.7–12).

Sherry testified Mills had the upper hand and was winning the fight. (9/16/21 p.185 L.2–8). About thirty minutes after the fight, Boldon and Sherry talked about it. (9/16/21 p.188 L.6–p.189 L.8). In the recording, Sherry says something about Johnson, and Sherry responds, "Probably not." Boldon states, "You don't think so? She done shot somebody, Mama Sherry!" Sherry responds, "Well, for protection, that's what she's got it for. . . . I could see the bitch was scared." (Def. Ex. 3 01:05–01:25).

M.H.: M.H. was fourteen at the time of the shooting and fifteen by trial. (9/17/21 p.12 L.17–21). M.H. testified she heard arguing outside but initially thought was the neighbors. (9/17/21 p.16 L.1–11). She saw Christopher enter the house, go back outside, then return. (9/17/21 p.16 L.12–p.17 L.10, p.22 L.2–12). M.H. stated that Mills then came inside the house. (9/17/21 p.22 L.9–16). M.H. said the Christopher and Mills seemed happy and were talking, but Mills kept saying "hold my wig". (9/17/21 p.22 L.20–16) (Ex. M 14:39:00–14:39:15). M.H. claimed she was unaware the phrase "hold

my wig" meant that the speaker was going to fight someone. (9/17/21 p.49 L.20–p.50 L.3) (Ex. M 14:41:15–14:41:45). She testified Mills and Christopher then both went outside. (9/17/21 p.23 L.18–22).

M.H. she looked out the window and saw Johnson and Mills "tussling". (9/17/21 p.24 L.4–21). M.H. woke up Sherry, and they both went outside. (9/17/21 p.24 L.22–p.25 L.12). M.H. testified when she got outside, no one was fighting anymore. (9/17/21 p.25 L.11–17). Shara was standing in the street and was hitting Christopher. (9/17/21 p.25 L.19–p.26 L.3). She heard Christopher telling people to get back. (9/17/21 p.38 L.7–12). In her CPC interview, M.H. stated that her uncle was telling people to get back when she first saw the gun. (Ex. M 14:55:00–14:55:20). Christopher was standing near Johnson, who was in the passenger side of her vehicle. (9/17/21 p.26 L.9–22). M.H. stated Mills was near the passenger side door but not as close as Christopher. (9/17/21 p.26 L.9–p.27 L.1). M.H. testified she saw the passenger side door was cracked open, Johnson had her gun

in the seal of her door, said, "Where your gun at now, bitch?", and then shot Mills. (9/17/21 p.27 L.2–16). M.H. testified that when Johnson shot Mills, no one was fighting or trying to attack Johnson. (9/17/21 p.29 L.15–22).

It was clear from her testimony that M.H. did not want to be there; she stated she wanted to go home, and she was lectured by the judge. (9/17/21 p.14 L.10–17, p.17 L.21–p.20 L.3). She asked to go to the bathroom twice during cross-examination. (9/17/21 p.35 L.8–12, p.37 L.16–22). She also denied that seeing a video of her prior statements would help refresh her memory of what she had previously said. (9/17/21 p.38 L.13–p.39 L.7).

Her trial testimony had several inconsistencies with her prior statements. She denied refusing to tell the officer Christopher's last name, testifying that the officer never asked her. (9/17/21 p.34 L.9–11). However, when confronted with the video evidence, she admitted it. (9/17/21 p.48 L.4–11). M.H. repeatedly denied stating Shara was also trying to fight Johnson, even after being shown the video of her prior

statements. (9/17/21 p.39 L.14–20, p.48 L.16–24). In the video, M.H. stated that when she went outside Shara "was having a fit" and "was trying to fight this girl too"; M.H. also said that Christopher and Shara had ripped their jackets off to fight. (Ex. M 14:41:07–14:42:30).

At trial, M.H. testified that she never actually saw the gun; she denied ever telling the CPC worker she saw the gun, despite doing so several times. (9/17/21 p.41 L.12–23) (Ex. M 14:43:40–14:44:10, 14:53:20–14:55:50, 15:15:00–15:16:10). She also later confirmed that she saw the gun and drew a picture of the gun at that CPC interview, describing it as all black. (9/17/21 p.41 L.24–p.42 L.1) (Ex. M 14:53:20–14:55:50). Later, despite testifying at trial that she did not know the difference between a revolver and a pistol, she admitted she told the CPC worker that the gun looked like a revolver because it had a twisted barrel. (9/17/21 p.56 L.1–22).

M.H. denied telling the police the night of the incident that she saw Johnson standing up in her car to shoot the gun.

(9/17/21 p.42 L.13–16). She denied making a sworn statement in July that she saw Johnson standing up in the car. (9/17/21 p.42 L.17–20). However, her deposition testimony was that after Johnson got back in the car she saw "the car door open just a little bit . . . open enough to stick something through hit . . . . Then it looked like she kind of, like, stood on top of the car, like, the little foot part." (9/17/21 p.43 L.9–18). M.H. testified she remembered giving that answer but also still maintained at trial that she could not see Johnson, how Johnson was positioned, or the gun. (9/17/21 p.44 L.23–p.44 L.7). In a police video from that night, M.H. stated she saw Johnson shoot the gun and shows an officer how Johnson was positioned when she shot it. (Def. Ex. 3). Despite testifying at trial that Johnson was aiming at Mills, M.H. admitted she previously told people that she thought the bullet had just hit the ground. (9/17/21 p.50 L.4–25) (Ex. M 14:44:20–14:44:30, 15:15:20–15:15:50).

She denied stating that she had never liked Johnson and did not remember saying that Johnson should have never

come to Shara's house that night. (9/17/21 p.40 L.5–22) (Ex. M 15:02:15–15:02:50, 15:07:15–15:07:40). M.H. denied stating, "I hope that bitch die. I hope that bitch die", on the 911 call she made. (9/17/21 p.33 L.12–16). Only after being confronted with the recording, did she agreed she told police that she hoped Johnson's kids also died. (9/17/21 p.33 L.17–19, p.48 L.12–15).

The defense called Christopher and Denise Olson. Christopher had not seen the surveillance video; the State had shown Denise a small portion of it. (9/21/21 p.128 L.7–12). The defense also admitted evidence of Beau Olson's statements. Additionally, Johnson also testified about what occurred.

Christopher Harrington: Harrington testified he and Johnson had been dating again prior to the shooting. (9/21/21 p.106 L.12–22). However, at the time of trial, they had not been in a relationship since November 2020. (9/21/21 p.106 L.7–22). Christopher testified neither he nor Johnson had used alcohol or drugs that night. (9/21/21

p.123 L.9–11). Christopher testified he drove Johnson's Telluride and went to 723 Dawson to check on Sherry, his mother; this was not unusual, as he checked on her every day. (9/21/21 p.107 L.1–17).

Christopher testified he left the house and went over to the Telluride because both Mills and Shara were in the front seat with Johnson; he found it unusual. (9/21/21 p.110 L.1–15). He testified Mills was actually sitting in the front seat with Johnson; he told Shara and Mills to get out of the vehicle. (9/21/21 p.110 L.13–25). After Johnson told him everything was okay, Christopher returned to the house to say goodbye to Sherry. (9/21/21 p.110 L.16–p.111 L.3). Christopher testified that as he left the house to return to the vehicle, he heard Johnson tell Mills to get out of the Telluride. (9/21/21 p.111 L.4–8). Christopher testified Mills said, "Bitch, move me." (9/21/21 p.111 L.9–12). Christopher testified Johnson pushed Mills out of the truck, and then the two women started fighting. (9/21/21 p.111 L.13–14, p.124 L.1–8). Christopher tried to break up the fight between the women; he testified

Johnson was not trying to continue going after Mills, but Mills was continuously trying to keep fighting Johnson. (9/21/21 p.111 L.14–p.112 L.4). Christopher testified that he heard Mills tell Johnson that "she has the same gun as her" during the fight. (9/21/21 p.112 L.7–10).

Christopher testified that after the women were separated, he witnessed Johnson try to get into the Telluride's driver's seat door. (9/21/21 p.112 L.14–16). However, he stated she was prevented from doing so by Mills, who came around the Telluride to keep fighting; this prompted the women to physically fight for a second time. (9/21/21 p.112 L.14–22).

Christopher testified after the women were again separated, he opened the Telluride's passenger door and put Johnson inside. (9/21/21 p.113 L.17–19). He testified that Mills and Shara were still nearby; Mills was coming towards the truck and Shara was hitting him. (9/21/21 p.113 L.20–p.114 L.3). Christopher testified that he had not gotten the door all the way shut because he was trying to keep Mills and

Shara back from the vehicle. (9/21/21 p.114 L.7–14). Christopher testified he was telling Mills and Shara back away from the vehicle and the women were yelling; he did not hear Johnson say anything before he heard the gunshot. (9/21/21 p.114 L.4–p.115 L.11). Christopher testified that he did not see Johnson shoot the gun; his back was to her. (9/21/21 p.114 L.22–p.115 L.2). He also testified that Mills and Shara were still coming at the Telluride when the gun was shot. (9/21/21 p.121 L.24–p.122 L.19).

Christopher testified he remembered Mills stating that she was shot or hit. (9/21/21 p.125 L.3–10). He admitted to not staying to try to help Mills or dialing 911. (9/21/21 p.125 L.11–22). Christopher testified he drove Johnson to her sister's house. (9/21/21 p.125 L.25–p.126 L.15). He stated that Johnson did not say anything about shooting Mills. (9/21/21 p.126 L.16–18). He testified Johnson was not angry after the fight; he described her as "nervous or . . . hysterical". (9/21/21 p.118 L.10–p.119 L.4). Christopher noted Johnson's

sister drove her to the police station later that morning, and he went with them in the car. (9/21/21 p.126 L.19–23).

Christopher testified the police did not ask him to give a statement; he did not know the police were trying to find him to talk to him about what had happened. (9/21/21 p.116 L.23–p.117 L.5). However, he also stated he was hesitant to go to the station because he was on parole for a felony offense. (9/21/21 p.117 L.13–21, p.127 L.18–25). He knew he was not supposed to be around a gun and he was not supposed to be driving. (9/21/21 p.117 L.18–24).

At trial, Christopher admitted to texting Parsons that night one time. (9/21/21 p.119 L.23–25). He testified that Parsons was "nobody to me" and just a friend to him. (9/21/21 p.119 L.16–22). He was arrested around Christmas for a parole violation. (9/21/21 p.120 L.8–10). Christopher testified he contacted Parsons several times while he was in jail. (9/21/21 p.120 L.17–19). In texts, the two told each other they loved one another unconditionally and eternally and used various endearments for one another including,

honey, bae, and sweetheart. (Def. Ex. 12) (Confidential App. pp. 6, 8–12).

At trial, he testified that he did not give the police permission to go through his phone when they arrested him and continued to decline to allow anyone to go through his phone to look for messages related to the case. (9/21/21 p.119 L.8–p.120 L.1–7).

Christopher testified both Shara and Mills appeared to be drunk. (9/21/21 p.113 L.1–4). Christopher also testified when Shara and Mills were intoxicated, they got "easily heated". (9/21/21 p.113 L.10–13).

Beau and Denise Olson: Police spoke with Denise and Beau Olson within thirty minutes of the shooting; they were the only neighbors that saw anything. (9/20/21 p.123 L.9–p.124 L.1; 9/21/21 p.89 L.3–p.90 L.5; 9/22/21 p.56 L.6–20) (Def. Ex. 8). Beau died before trial. (9/22/21 p.52 L.19–25). Denise testified she and Beau were outside smoking when they heard the altercation. (9/22/21 p.53 L.1–14). Denise was not facing the street but she could hear women yelling. (9/22/21

p.53 L.9–11). Denise testified she turned around and witnessed a woman wearing a black shirt get out of her car, which was parked in the middle of the street, and confront a person in a different vehicle, which was parked on the curb. (9/22/21 p.53 L.12–p.54 L.8). Denise was unsure how the situation escalated, but she saw "people just all kind of fighting each other." (9/22/21 p.53 L.1–8). Denise testified initially it was hard to tell if multiple people were attacking one person, because they were bunched; however, she testified that later "it did look like it was quite a few against one person." (9/22/21 p.54 L.9–15). Denise characterized what she witnessed:

> The main part that really stuck with me was . . . whoever the group was fighting, she was kind of, like, in between the sidewalk and her car, and I don't know if he was a boyfriend or a friend of whatever, but he was trying to get, like, the other group of girls off of her at the time.

(9/22/21 p.55 L.17–23). Denise testified her impression was that "the group of girls . . . [was] attacking one person". (9/22/21 p.75 L.20–23, p.81 L.6–12). She thought the

woman's boyfriend was trying to keep the other people away from her and she saw the person being attacked attempt to get into her vehicle parked on the curb. (9/22/21 p.77 L.8–p.78 L.18, p.81 L.6–12).

Denise testified she did not hear anyone mention a gun. (9/22/21 p.54 L.18–25). She did only saw the flash from the gun, she did not see the actual gun. (9/22/21 p.55 L.24–p.56 L.3). She and Beau ran inside their house, and Beau called 911. (9/22/21 p.56 L.6–9) (Def. Ex. 1). Denise testified she did not know any of the people involved. (9/22/21 p.64 L.5–18).

Denise's testimony was consistent with what she told officers that night: women were arguing loudly, and two eventually started physical fighting. (Def. Ex. 8 0:05–1:21). The boyfriend of the woman who was by herself tried to break up the fight. (Def. Ex. 8 1:21–1:44). She told officers that the other group of women "kept kind of going at that one girl." (Def. Ex. 8 1:40–1:50). On the video, Denise stated that "one of them did say . . . 'back up', and then all of the sudden we

just heard a shot.'" (Def. Ex. 8 1:40–1:57). Beau and Olson heard a woman say, "I have a gun", and Beau told the officer "And they kept coming at her." (Def. Ex. 8 1:40–2:20). The Olsons said that there was a gap in between what they termed the "warning" about the gun and the gunshot; they estimated about three minutes. (Def. Ex. 8 1:40–2:50). Beau described the one woman as trying to get away from the others and get into her vehicle. (Def. Ex. 8 2:40–3:10).

Lasondra Johnson: Johnson testified she and Christopher were not dating in November 2020; they had broken up a few months prior. (9/22/21 p.92 L.3–8). However, Christopher had contacted Johnson after learning that her mom had been hospitalized with COVID-19. (9/22/21 p.92 L.8–20). Johnson said Christopher had wanted her to drop him off that night to see his mom; he was already in the driver's seat when she got outside so he drove. (9/22/21 p.92 L.17–p.93 L.8). Johnson believed he was going to borrow Sherry's car. (9/22/21 p.93 L.4–17).

Johnson testified that as they neared the house Christopher was looking at his phone and asking where his sister was. (9/22/21 p.93 L.15–24). Johnson did not think anything about it at the time; she figured Christopher was borrowing Shara's car. (9/22/21 p.93 L.18–24). Eventually he went inside the house. (9/22/21 p.93 L.18–24).

Johnson testified Shara pulled up and started aggressively pointing at her and saying something. (9/22/21 p.94 L.15–4). Johnson got out of her vehicle and the two women talked in between the cars. (9/22/21 p.95 L.5–p.96 L.13). Johnson testified that she returned to her vehicle and then Shara also came into her car. (9/22/21 p.96 L.8–20). Shara called Johnson's daughter to check if she had blocked her on Facebook. (9/22/21 p.96 L.14–p.97 L.1).

Johnson stated that Mills came outside while Shara was on the phone with Johnson's daughter. (9/22/21 p.97 L.10). Johnson testified that Mills opened the door to her car, said "I heard you got", shoved Johnson over, got in the passenger seat, and closed the door. (9/22/21 p.97 L.5–15). Johnson

testified Shara and Mills were asking why Johnson was at the house and talked about her hair. (9/22/21 p.97 L.16–24). Johnson testified Christopher came out of the house shortly after Mills, and she told him she was fine. (9/22/21 p.97 L.21–p.98 L.24).

Johnson testified after Christopher returned to the house, Boldon also got into her car; the conversation turned hostile. (9/22/21 p.98 L.24–p.99 L.24). Johnson testified the other women started touching her hair and yelling at her. (9/22/21 p.97 L.21–p.100 L.5).

Johnson stated she told the other women to get out of her car several times, but they refused. (9/22/21 p.98 L.3–9). Johnson testified that eventually Mills responded, "Bitch, you gonna have to move me." (9/22/21 p.100 L.7–12). Johnson said, she leaned over her, opened the door, and then Mills grabbed her hair and pulled her out of the car. (9/22/21 p.100 L.13–p.101 L.5). Johnson admitted fighting with Mills and defending herself. (9/22/21 p.101 L.9–14).

Johnson testified she and Mills were fighting on the side of her car. (9/22/21 p.102 L.7–21). Johnson did not believe that the other women were trying to separate them. (9/22/21 p.102 L.12–21). Rather, when she was on top of Mills and they were both on the ground, she felt other people on top of her kicking and hitting her. (9/22/21 p.102 L.18–p.103 L.1).

Johnson testified the fight moved towards the back of her car; she and Mills had a hold of each other and were pulling at each other. (9/22/21 p.103 L.2–12). Christopher was in between them, with Shara and Boldon nearby. (9/22/21 p.103 L.2–12). Johnson testified then Sherry came out. (9/22/21 p.103 L.14–p.104 L.4). Sherry told them to let go, and Johnson complied out of respect. (9/22/21 p.104 L.4). Johnson testified there was a lot of yelling, and Mills said: "I don't give a fuck, I have the same gun she has." (9/22/21 p.104 L.6–22).

Johnson then tried to get to the driver's side of her car. (9/22/21 p.105 L.2–8). She testified she was not able to because Mills went around the back of the Telluride to get to

her while Shara went around the back of her car. (9/22/21 p.105 L.2–13). Both women came at her aggressively. (9/22/21 p.105 L.10–15). Johnson tried to move past Sherry to get to the passenger side of the Telluride when she saw the other women heading towards her. (9/22/21 p.105 L.16–20).

Johnson testified she tried to pick up her hat when Mills and Shara, and possibly Boldon, jumped her. (9/22/21 p.105 L.21–p.106 L.6). Johnson said she was on the ground and Mills was kicking her. (9/22/21 p.106 L.5–12). Johnson testified that she was "trying [her] best to get away from them because [she] was terrified for [her] life." (9/22/21 p.106 L.5–12). The women were all yelling at her. (9/22/21 p.106 L.13–16).

Johnson testified she got to her car but was not able to get in and close the door because the women were trying to get into the vehicle. (9/22/21 p.106 L.13–24). Christopher was attempting to stop the women from getting in. (9/22/21 p.106 L.22–24). Everyone was yelling. (9/22/21 p.106 L.25–p.107 L.1). Johnson testified she was scared so she grabbed her

firearm from her glovebox and discharged it to get the women away from her car. (9/22/21 p.107 L.2–19).

Johnson testified she did not take aim and meant to shoot the gun in the air. (9/22/21 p.107 L.4–p.108 L.12). Johnson testified she was scared at the time and the women were still trying to get into her car to attack her; she thought that shooting a warning shot would stop their attack on her. (9/22/21 p.107 L.4–p.108 L.23, p.113 L.9–14). She adamantly denied intentionally shooting at anyone. (9/22/21 p.112 L.23–25). Johnson stated that after she fired the gun, she dropped it and sat down; Christopher drove the car away. (9/22/21 p.108 17–20). Johnson described herself as in shock. (9/22/21 p.108 L.21–23).

Johnson testified she called the police because she did not know if she needed to bring in her gun to the station since she had discharged it. (9/22/21 p.108 L.24–p.109 L.11). She was not sure if she would have to stay overnight at the police station; she did not want her car to be stuck there so she went to her sister's house to get a ride. (9/22/21 p.108 L.24–p.110

L.2). She testified she did not know she had actually shot anyone; she did not know Mills had been shot. (9/22/21 p.110 L.16–20; p.112 L.6–8).

Character witnesses: A client of Johnson's daycare testified she knew Johnson to be friendly, kind, and trustworthy. (9/22/21 p.5 L.15–p.6 L.23, p.10 L.5–22). (9/22/21 p.5 L.15–p.6 L.15). She testified her kids loved Johnson and Johnson had never been violent towards them. (9/22/21 p.10 L.23–p.11 L.6). Johnson's childhood friend also testified. (9/22/21 p.13 L.10–p.14 L.21). As did two of Johnson's cousins that lived in the Waterloo area, one of Johnson's sisters, and her mother. (9/22/21 p.16 L.1–p.17 L.15, p.19 L.16–23, p.22 L.3–22, p.25 L.4–p.26 L.3). Every single one of these individuals testified that Johnson was a peaceful person, they had never witnessed her be violent, and they knew her to be someone that followed the law. (9/22/21 p.6 L.19–23, p.11 L.7–12, p.14 L.22–p.15 L.7, p.18 L.5–12, p.20 L.16–p.21 L.6, p.22 L.23–p.23 L.7, p.26 L.8–14).

Any additional relevant facts will be discussed below.

ARGUMENT

I. The district court erred in failing to accurately instruct the jury.

Preservation of Error: Johnson preserved error by objecting to the faulty instructions. (9/22/21 p.145 L.23–p.146 L.25, p.148 L.23–p.152).

Standard of Review: The Court reviews challenges to jury instructions for errors at law. State v. Benson, 919 N.W.2d 237, 241 (Iowa 2018) (citations omitted).

Discussion: The district court "is required to 'instruct the jury as to the law applicable to all material issues in the case . . . .'" State v. Marin, 788 N.W.2d 833, 837 (Iowa 2010), overruled on other grounds by Alcala, 880 N.W.2d 699. "[T]he court is not required to give any particular form of an instruction" but "must . . . give instructions that fairly state the law as applied to the facts of the case." Id. at 838. "[T]he instruction must be a correct statement of the law and the instructions as a whole should adequately and correctly cover the substance" of the applicable law. State v. Monk, 514

N.W.2d 448, 451 (Iowa 1994). Failure to sufficiently instruct a jury on the applicable law is reversible error. State v. Bennett, 503 N.W.2d 42, 45 (Iowa Ct. App. 1993). The Court will find prejudice when the instruction "'could reasonably have misled or misdirected the jury.'" State v. Hoyman, 863 N.W.2d 1, 7 (Iowa 2015) (citation omitted).

Both of the challenged instructions dealt with Johnson's justification defense. Iowa code section 704.1(3) provides: "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 specified in this chapter." Iowa Code § 704.1(3) (2019). Amended in 2017, it is the "stand your ground" statute. Additionally, Iowa Code section 704.2A sets forth the circumstances under which an individual can be "presumed to reasonably believe that deadly force is necessary to avoid injury or risk to one's life of safety". Iowa Code § 704.2A (2019). Under that section, a person is presumed to reasonably believe that deadly force is necessary if "[t]he person against whom force is used, at the time the force is

used, is . . . [u]nlawfully entering by force . . . the . . . vehicle of the person using force . . . ." Id. However, this presumption "does not apply if, at the time force is used, . . . [t]he person using defense force is engaged in a criminal offense . . . ."

At the jury instructions conference, Johnson objected to the court's instructions that included the "illegal activity language of assault." (9/22/21 p.20–p.152 L.8). Instruction Number 54 accurately stated: "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. (Instruction 54) (App. p. 18); see also Iowa Code § 704.1(3). However, Instruction Numbers 55 and 58 both contained the objected-to language.

Instruction Number 55 stated:

> 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.

> 3. *The defendant was engaged in the illegal activity of Assault as defined in instruction 48 in the place where she used force, she made no effort to retreat, and retreat was a reasonable alternative to using force.*

If the State has proved any of these beyond a reasonable doubt, the defendant's use of force was not justified.

(Instruction 55) (App. p. 19) (emphasis added). Instruction Number 58[3] stated the following:

> If you find that the defendant knew, or had reason to believe, Jada Young-Mills was unlawfully entering defendant's occupied vehicle by force at the time she used deadly force, you must presume the defendant reasonably believed that deadly force was necessary to avoid injury or risk to her life or safety.
>
> Yet, if you find the defendant was engaged in the crime of Assault as defined in instruction 48 was also true at the time the defendant used deadly force, you need not presume that the defendant reasonably believed deadly force was necessary to avoid injury or risk to her life or safety.

(Instruction 58) (App. p. 20). Johnson explained her objection:

> [I]n the Baltazar case, he was doing other things that weren't part and parcel with the actual event in which they were claiming self-defense.
>
> And so I don't think that we should include -- or allow the State to argue that she was committing

[3] At the time of the conference, it was labeled as Instruction 57. (9/22/21 p.145 L.20–p.146 L.25).

> an assault at the time that she had the duty to retreat. That's what we're here for, is that whole event right here.

(9/22/21 p.149 L.2–25). With regards to Instruction Number 58, she stated:

> . . . It's the second paragraph I take issue with, because we have had zero facts in evidence that suggest that at the time she used deadly force that she was engaging in the crime of assault. I haven't heard anybody say anything about that. I don't think it's supported by the evidence, and so I do not think that the second paragraph should be included.

(9/22/21 p.145 L.20–p.146 L.11). Notably, Instruction Numbers 55 and 58 were patterned after the Iowa Bar Association Instruction Numbers 400.3 and 400.6. See Iowa State Bar Ass'n, Iowa Criminal Jury Instruction Nos. 400.3, 400.6 (June 2020). Each of these model instructions includes a comment that instructs to only use the language that is "supported by the evidence." Comment, Iowa State Bar Ass'n, Iowa Criminal Jury Instruction Nos. 400.3, 400.6 (June 2020).

There were no facts in the record that supported the inclusion of the "illegal activity of assault" language. At the time Johnson shot the gun, the State did not argue that she

was engaged in any other illegal activity that would warrant the inclusion of the "illegal activity" language in Instructions 55 and 58. Johnson argued she was justified in her use of deadly force because she thought the women were trying to follow her into the Telluride. The State contested that theory by presenting evidence and arguing that Mills was not unlawfully trying to get into Johnson's vehicle at the time Johnson shot her gun. It argued that the fight was over; it presented evidence that Mills was walking away from the vehicle and that she was walking towards her own vehicle. See, e.g., (9/16/21 p.12–21; 9/23/21 p.9 L.19–21, p.14 L.25–p.15 L.3, p.21 L.16–24, p.22 L.12–p.23 L.18, p.60 L.13–22, P.61 L.10–22). It did not argue that Johnson was engaged in a different illegal activity at the time.

When the Court interprets a statute, it considers the plain meaning of the statutory language. State v. Nall, 894 N.W.2d 514, 518 (Iowa 2017) (citations omitted). The plain language of Iowa Code sections 704.1(3) and 704.2A both forbid the *active* engagement of a criminal activity *separate*

from the use of force at issue. See Iowa Code §§ 704.1(3); 704.2A. Thus, an ongoing illegal activity, other than the use of force for which the defendant is on trial, is necessary to disqualify a defendant from asserting the stand-your-ground defense for that use of force. See, e.g., State v. Lorenzo Baltazar, 935 N.W.2d 862, 870–71 (Iowa 2019) (noting the defendant illegally carried the gun used in the use of force he claimed was justified). In this case, the *only* illegal activity the State alleged Johnson was engaged in at the time the force was used was the force for which she argued she was justified—the firing of the gun. Thus, the district court erred in submitting these instructions to the jury over Johnson's objections.

Where the instructional error is of a constitutional dimension, "the State must show beyond a reasonable doubt the error did not result in prejudice" in order to avoid reversal. State v. Hanes, 790 N.W.2d 545, 550 (Iowa 2010). Where the instructional error is not of a constitutional dimension, our appellate courts "presume prejudice and reverse unless the

record affirmatively establishes there was no prejudice." Id. at 551. In this case, the instructional error denies Johnson the presumption of law she is entitled to regarding the use of deadly force if the jury concluded she reasonably believed the women were following her into the Telluride. The errors implicate Johnson's constitutional rights to a fair trial and to present a defense. See U.S. Const. amends. VI, XIV; Iowa Const. art. I, § 10; see also State v. Simpson, 587 N.W.2d 770, 771 (Iowa 1998). Thus, the instructional error is of a constitutional dimension. However, even if it is a nonconstitutional error, a full review of the record does not affirmatively establish there was no prejudice to Johnson.

The law regarding justification is complex. The error in the jury instructions was important to Johnson's defense. The objected-to language of these instructions injected confusion as to whether Johnson was engaging in the illegal activity of assault when the assault was the very force the jury was asked to determine whether it was justified or not. These instructions did "not convey[] the applicable law in such a way

that the jury ha[d] a clear understanding of the issues before it. See Benson, 919 N.W.2d at 241 (citations and internal quotation marks omitted). Even the trial judge recognized the inclusion of the objected language seemed to make the instructions circular. (9/22/21 p.150 L.1–10, L.25–p.151 L.6). Moreover, the inclusion of the "illegal activity of assault" language in Instruction 58 had the effect of misleading the jury as to the presumption *it had to make* regarding whether Johnson reasonably believed that deadly force was necessary to avoid injury or risk to her life or safety if it found she reasonably thought the women were trying to attack her still when she was in the Telluride; thus, by making a mandatory presumption a discretionary one, it lowered the State's burden of proof. See Benson, 919 N.W.2d at 241; (Jury Instruction No. 58) (App. p. 20).

Furthermore, the State repeatedly argued in closing that Johnson had a reasonable alternative to force and was guilty because she did not pursuing such alternatives or retreat. The Stated argued, "And she could have gotten in that car,

closed the door, locked the door, looked at Jada Mills and said ha-ha, can't get me. But she didn't." (9/23/21 p.13 L.2–5). "One of the things she could have done is sat in the car and calmed down." (9/23/21 p.18 L.21–22). "She could have . . . sat in the car, just locked that door, she could have driven away." (9/23/21 p.19 L.5–6). "She could have just slid over to the driver's seat, backed up, and driven away if she was really that scared." (9/23/21 p.19 L.10–11). "There was plenty she could have done. Even if she couldn't have driven off on the street, it's obvious that they can drive off. And, like I said, if you're really scared, call 911, lock your door, just sit in there." (9/23/21 p.22 L.4–7). Contrary to Iowa code section 704.1(3), the State's arguments suggested that Johnson had a duty to retreat even if she was not engaged in illegal activity: "Justification means did she use a reasonable force, the only thing she had available to her, in order to be able to save herself?" (9/23/21 p.18 L.4–7).

Nor was this a case of overwhelming evidence against Johnson or one that lacked evidence that Johnson acted with

justification. The very fact that the jury acquitted Johnson of several charges, including murder in the first and second degrees, attempted murder, willful injury means that the jury at least partially credited Johnson's versions of events. See (Verdict) (App. p. 21). As set forth in the facts, Johnson presented substantial evidence that supported her claims and testimony regarding what happened, including that of Christopher and the Olsons—the only witnesses to the incident that were disinterested third parties. Additionally, the surveillance video supports the defense's evidence and corroborates Johnson's testimony. See (Ex. J1 34:04–38:56).

The State's closing arguments, when coupled with the language of the jury instructions that defined the alleged "illegal activity" that Johnson was engaged in as the very act of force she was on trial, misled the jury on the actual elements of Johnson's defense. Even without instructional error, the law regarding the justification and stand-your-ground defenses is complex and difficult to understand. Under the circumstances, the circularity of the instructions and their

conflation of the "illegal activity" with the use of force for which Johnson was on trial for and claimed was justified would cause confusion for a layperson jury. As such, Johnson was prejudiced by the erroneous instructions. See Benson, 919 N.W.2d at 241

Conclusion: Defendant–Appellant Lasondra A. Johnson requests the Court reverse her conviction and remand for a new trial.

II. The district court violated Johnson's constitutional rights by imposing $150,000 restitution award when the jury did not find she caused the death of Mills.

Error Preservation: The State filed a request for the imposition of $150,000 restitution as part of Johnson's sentence. (Request 910.3B Restitution) (App. pp. 22–23). Johnson resisted; she argued against its imposition at the sentencing hearing, noting that "this jury did not find in any clear way that the restitution amount should apply to Ms. Johnson in this case." (Sentencing p.15 L.1–p.17 L.13); (Resis. Mot. 910.3B Restitution) (App. p. 24). Accordingly,

error was preserved by Johnson's resistance to the restitution and the district court's imposition of the $150,000 assessment. See Lamasters v. State, 821 N.W.2d 856, 863–64 (Iowa 2012). Additionally, "errors in sentencing may be challenged on direct appeal even in the absence of an objection in the district court." State v. Lathrop, 781 N.W.2d 288, 293 (Iowa 2010).

Furthermore, the general rule of error preservation is not applicable to void, illegal, or procedurally defective sentences. State v. Richardson, 890 N.W.2d 609, 615 (citing State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994)). "An unconstitutional sentence is an illegal sentence." State v. Lyle, 854 N.W.2d 378, 382 (Iowa 2014) (citing State v. Bruegger, 773 N.W.2d 862, 872 (Iowa 2009)). "An illegal sentence is void, which permits an appellate court to correct it on appeal without the necessity for the defendant to preserve error by making a proper objection in the district court." State v. Parker, 747 N.W.2d 196, 212 (Iowa 2008) (citing Woody, 613 N.W.2d at 217); see also Iowa R. Crim. P. 2.24(5)(a) (2019).

Thus, even if Johnson's objections to the $150,000 restitution were not sufficient, the Court may correct this portion of the sentencing order, because it is unconstitutional and illegal.

Standard of Review: Generally, the Court reviews a restitution order for correction of errors at law. State v. Davison, 973 N.W.2d 276, 280 (Iowa 2022) (citation omitted). However, when a restitution challenge implicates constitutional rights, review is de novo. Id. (citing State v. Izzolena, 609 N.W.2d 541, 545 (Iowa 2000)).

Discussion: The district court's imposition of the $150,000 restitution award against Johnson violated her constitutional rights under both the U.S. and Iowa Constitutions. Iowa Code section 910.3B(1) provides:

> In all criminal cases in which the offender is convicted of a felony in *which the act or acts committed by the offender caused the death of another person*, in addition to the amount determined to be payable and ordered to be paid to a victim for pecuniary damages . . . the court shall also order the offender to pay at least one hundred fifty thousand dollars in restitution to the victim's estate if the victim died testate. If the victim died intestate the court shall order the offender to pay the restitution

> to the victim's heirs at law as determined pursuant to section 633.210. . . .

Iowa Code section 910.3B(1) (2019) (emphasis added). It was pursuant to this code section, the district court ordered Johnson to pay $150,000 to Mills's estate. (Sentencing p.20 L.13–p.21 L.5) (Sentencing Order) (App. p. 26).

The district court violated Johnson's rights under the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution and article I, sections 9 and 10 of the Iowa Constitution by imposing the restitution award in the absence of a jury finding that Johnson caused the death of Mills. Both the constitutions provide criminal defendants a right to jury trial and ensure they are accorded due process of law. U.S. Const. amend V, VI, XIV; Iowa Const. art. I, §§ 9, 10; see also State v. Henderson, 287 N.W.2d 583, 585–85 (Iowa 1980); State v. Nail, 743 N.W.2d 535, 538–39 (Iowa 2007); United States v. Gonzalez–Lopez, 548 U.S. 140, 146 (2006) ("The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely

through the several provisions of the Sixth Amendment . . . ."). "An essential element of due process of law is 'that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.'" Crawford, 972 N.W.2d at 192 (quoting Jackson, 443 U.S. at 316). Accordingly, in a series of cases, starting with Apprendi v. New Jersey, 530 U.S. 466 (2000), the U.S. Supreme Court held that the Fifth Amendment due process and the Sixth Amendment right to a jury trial required a jury determination by a reasonable doubt of any facts that increased a defendant's mandatory minimum sentence. See Davison, 973 N.W.2d at 283 (citations omitted) (outlining Apprendi and the line of cases following the decision); see also Jones v. United States, 526 U.S. 227, 243 n.6 (1999).

Notably, when the district court entered the restitution order, it did so without the benefit of the Iowa Supreme Court's decision in State v. Davison, 972 N.W.2d 276 (Iowa

2022). In Davison, the Iowa Supreme Court "conclude[d] that the punitive and determinate characteristics of the $150,000 restitution bring it within the rule of Apprendi [v. New Jersey, 530 U.S. 466 (2000)] and its offspring." Id. at 286–87. Accordingly, the Court found for the $150,000 restitution to be constitutionally imposed, there must be a jury finding that a defendant caused the victim's death. Id.

The Iowa Supreme Court's decision in Davison squarely controls the outcome here. The jury found Johnson guilty of assault causing serious injury. (Verdict) (App. p. 21). That offense does not include a finding that the defendant caused the death of Mills. Iowa Code § 708.2(4) (2019); (Jury Instruction No. 38; Verdict) (App. pp. 16, 21). The jury did not make a determination that Johnson caused Mills's death; rather, it acquitted her of murder in the first degree, murder in the second degree, voluntary manslaughter—all offenses that contained such a causation element. (Instruction Nos. 22, 23, 31, 35, Verdict) (App. pp. 10–12, 14, 21); see also Davison, 973 N.W.2d at 292 (McDonald, J., concurring). Thus, the

district court "judge exceed[ed] his proper authority" by "inflicting punishment that the jury's verdict alone does not allow" and where "the jury has not found all the facts which the law makes essential to punishment". Id. at 287 (quoting Blakely v. Washington, 542 U.S.296, 304 (2004)) (internal citations omitted). As in Davison, the court's imposition of the $150,000 restitution without a jury determination of the necessary causation element violated Johnson's rights under the Sixth and Fourteenth Amendment.

Likewise, the imposition of the restitution violated Johnson's rights under the Iowa Constitution. Article I, section 9 provides "[t]he right of trial by jury shall remain inviolate". Iowa Const. art. 1, § 9. The Iowa Supreme Court is "the final arbiter of the meaning of the Iowa Constitution." State v. Wright, 961 N.W.2d 396, 402 (Iowa 2021). The Court jealously protects its authority to follow an independent approach under the Iowa Constitution. See id. at 402–403 (citations omitted).

In interpreting statutes, this Court has found the use of the word "shall" imposes a duty and mandatory action. State v. Luckett, 387 N.W.2d 298, 301 (Iowa 1986) (citation omitted) see also Shall, Black's Law Dictionary, (11th ed. 2019, Bryan A, Garner, ed.) (defining shall as "has a duty to; more broadly, is required to" and noting that "[t]his is the mandatory sense that drafters typically intend"). Whereas, "inviolate" means "[f]ree from violation; not broken, infringed, or impaired." Inviolate, Black's Law Dictionary, (11th ed. 2019, Bryan A, Garner, ed.). Thus, the plain language of the Iowa Constitution mandates the high protection of an individual's right to a jury trial.

In analyzing this exact language in its respective constitution, the Mississippi Supreme Court noted this was *stronger* language than the federal constitution's protections for the right to trial by jury. Harrell, 134 So.3d at 275. Thus, the Iowa Constitution, with its language that offers stronger protection for the jury trial right, also requires a jury finding of causation of death prior to the imposition of the Iowa Code

section 910.3B restitution award. Thus, the imposition of the $150,000 restitution violated Johnson's rights under the Iowa Constitution as well.

Conclusion: Defendant–Appellant Lasondra A. Johnson requests the Court vacate the portion of her sentencing order that imposes the section 910.3B surcharge and remand to the district court for entry of a corrected sentencing order.

III. The district court abused its discretion in determining Johnson's sentence by applying a fixed sentencing policy and by relying on improper considerations.

Error Preservation: The 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 Thomas, 520 N.W.2d at 313). A defendant is not required to raise an alleged sentencing defect in the trial court in order to preserve a right to appeal on that ground. Id.

Standard of Review: The Court reviews a sentence imposed in a criminal case for correction of errors at law. Iowa

R. App. P. 6.907 (2019); see also State v. Formaro, 638 N.W.2d 720, 724 (Iowa 2002). Sentencing decisions are reviewed for an abuse of discretion when the sentence is within the statutory limits. State v. Seats, 865 N.W.2d 545, 552 (Iowa 2015). An abuse of discretion exists when "the district court exercises its discretion on grounds or for reasons that were clearly untenable or unreasonable." State v. Thompson, 856 N.W.2d 915, 918 (Iowa 2014).

Discussion: Iowa Code section 901.5 states that a court must consider its sentencing options only after examining all pertinent information. See Iowa Code § 901.5 (2019). The sentencing court should "weigh and consider all pertinent matters in determining proper sentence", which includes the nature and circumstances of the offense, the defendant's age, character, propensities, and chances of reform. State v. Hildebrand, 280 N.W.2d 393, 396 (Iowa 1979). In exercising its discretion, the district court has a duty to weigh this information when determining the appropriate sentence for a particular defendant for a particular offense. See State v.

Thompson, 494 N.W.2d 239, 240 (Iowa 1992) (citation omitted).

When sentencing a defendant, the courts owe a duty to both the public and the defendant when determining the appropriate sentence. Hildebrand, 280 N.W.2d at 396 (citations omitted). "The punishment should fit both the crime and the individual." Id. As such, the court must exercise the sentencing option that would best accomplish justice for both society and the individual defendant, after considering all pertinent sentencing factors. State v. Fink, 320 N.W.2d 632, 634 (Iowa Ct. App. 1982). "In applying the abuse of discretion standard to sentencing decisions, it is important to consider the societal goals of sentencing criminal offenders, which focus on rehabilitation of the offender and the protection of the community from further offenses." Formaro, 638 N.W.2d at 724 (citing Iowa Code § 901.5). "When a sentence is not mandatory, the district court must exercise its discretion in determining what sentence to impose." State v. Thomas, 547 N.W.2d 223, 225 (Iowa 1996) (citing State v. Berney, 378

N.W.2d 915, 920 (Iowa 1985)). Additionally, Iowa Rule of Criminal Procedure 2.23(3)(d) requires the sentencing court to "state on the record its reason for selecting the particular sentence." Iowa R. Crim. P. 2.23(3)(d) (2019); State v. Luedtke, 279 N.W.2d 7, 8 (Iowa 1979).

In this case, the State requested the court impose a five-year prison sentence, noting that Johnson had violations on pretrial release and "voiced no remorse . . . continues to . . . feel[] like she was the victim in the case and that she was justified in using that gun." (Sentencing p.10 L.22–p.12 L.8). Johnson requested the court defer judgment for the offense and place her on probation. In doing so, Johnson noted her lack of criminal history, remorse for what occurred, overall performance on pretrial supervision, albeit with some minor violations, her family support and situation, and reputation for peacefulness, as outlined in the trial. (Sentencing p.12 L.9–p.18 L.5). After hearing Johnson's allocution, the district court stated:

> I do not believe given the facts and circumstances of this case, history of this case, that a deferred judgment is warranted.
>
> I have considered all other options including probation. I do not believe probation is appropriate at this time either. The jury reviewed the case. The jury did not find that Ms. Johnson was justified in her behavior, and the *jury returned a verdict of this felony offense resulting in the death of another individual.*
>
> *In sum, a gun was used. In sum, a gun was discharged. And in sum, Ms. Johnson killed another human being with the use of that gun. And it's the Court's opinion, given those short, simple facts, that a prison sentence is appropriate.*

(Sentencing p.19 L.19–p.20 L.9) (emphasis added). The district court then imposed a five-year prison sentence. After defense counsel objected to the appeal bond as excessive and overly punitive, the court also stated:

> With all due respect to the defense, the fact that the assertion is that the defendant's not a danger to the community in light of the fact that we are here for the very reason *she killed another human* being frankly doesn't hold water.
>
> *By conviction as we sit here now, not by allegation, but by conviction, she stands before the Court convicted of killing another human being.* She absolutely is a danger to the community in the Court's eyes at this point. *She took a firearm* under whatever circumstances either the defense or the prosecution wishes to present it, the Court sat through the testimony and *the jury ultimately*

rendered a verdict finding that she took it, she fired it, and she killed another human being.

(Sentencing p.26 L.11–p.27 L.2) (emphasis added). For the reasons outlined below, this Court should find the district court abused its discretion; Johnson is entitled to a new sentencing hearing.

1. Fixed sentencing policy

The sentencing court must exercise its discretion without application of a personal, inflexible policy relating only to one consideration. State v. Hildebrand, 280 N.W.2d 393, 397 (Iowa 1979); State v. Kelley, 357 N.W.2d 638, 640 (Iowa Ct. App. 1984). "The exercise of discretion in the area of imprisonment and freedom has been one of the hallmarks of our judicial system." State v. Hager, 630 N.W.2d 828, 834 (Iowa 2001). The district court must engage in an independent consideration of "the facts and circumstances which are necessary to make a sound, fair and just determination. The court is not permitted to arbitrarily establish a fixed policy to govern every case, as that is the

exact antithesis of discretion." Hildebrand, 280 N.W.2d at 396 (quoting State v. Jackson, 204 N.W.2d 915, 916 (Iowa 1973)).

If the court operates by fixed sentencing policy, it "abdicate[s] [its] responsibility to exercise discretion in each individual case." Kelley, 357 N.W.2d at 639 (citing Jackson, 204 N.W.2d at 917). It is impermissible for the district court to primarily fix on a single sentencing factor which, although itself a valid consideration for sentencing, triggers the court's previously fixed sentencing policy. Hildebrand, 280 N.W.2d at 396 (citation omitted); see also Kelley, 357 N.W.2d at 640 ("While the defendant's age and physical, mental, and financial condition might be relevant factors to consider, . . . [t]he trial court's denial of a deferred judgment primarily because defendant was not impaired or handicapped in some way reveals a fixed policy of refusing to consider deferments for average citizens.").

Even where a sentencing court considers "several legitimate factors upon which to base its sentencing decision", the court abuses its discretion if it primarily fixes on one factor

"which trigger[s] the court's perceived previously-fixed sentencing policy." State v. Jones, 662 N.W.2d 372 (Iowa Ct. App. 2003); see also Kelley, 357 N.W.2d at 640 (noting that even though the sentencing court acknowledged other factors, it also expressed a fixed policy). In other words, "[i]t is not enough to have considered each factor. The factors must be viewed with an appropriate perception of the manner in which they are to be considered." State v. Overton, Nos. 0-654, 00-0287, 2000 WL 1724030, at *2 (Iowa Ct. App. Nov. 20, 2000) (unpublished opinion).

In the present case, the district court's reasons for imposing a prison in the present case reveals a fixed policy to always impose prison when a death occurs. The district court's reasoning suggests that no matter who the defendant was—her lack of criminal history, employment history, family support, prior success on pretrial supervision, and her ability to be rehabilitated in the community—the nature of the offense and fact that Johnson discharged a gun, which killed a person, necessitated an imposed prison sentence. See

(Sentencing p.19 L.19–p.20 L.9, p.26 L.11–p.27 L.2). "When judges adopt a general order that a minimum penalty shall be different than a statute provides, they are changing the statute, for they are depriving themselves of the discretion to impose the minimum provided by the statute." State v. Jackson, 204 N.W.2d 915, 917 (Iowa 1973). A categorical determination that a certain offense carries a particular penalty is a decision for the legislature, not the courts. State v. Kirk, No. 16–1930, 2017 WL 2875695, at *2 (Iowa Ct. App. July 6, 2017) (vacating the sentence where the court stated that "there are some crimes that are so serious that it's not appropriate even for someone that doesn't have a prior criminal history to receive a deferred judgment").

Some offenses under Iowa law do require mandatory imprisonment, such as forcible felonies. Iowa Code §§ 702.11, 907.3 (2019). However, assault causing serious injury, under section 708.4, does not carry a mandatory prison sentence. Iowa Code §§ 708.4, 907.3 (2019). The district court had

discretion to grant Johnson a deferred judgment or suspended sentence but instead employed a fixed sentencing policy.

The district court does not have to explicitly state it is applying a fixed policy to necessitate reversal. An indication that the sentencing court evinced a fixed sentencing policy is enough to warrant remand. Compare Kelley, 357 N.W.2d at 640 (ordering a new sentencing where "the main reason the trial court expressed for denying a deferred sentence was that defendant was in no way disabled"), with Hildebrand, 280 N.W.2d at 395 (remanding for resentencing when the court denied the request stating, "I have a policy that when there is an accident involved, I do not and will not grant a deferred sentence"); see also State v. Ross, No. 18–1188, 2019 WL 2872324, at *1–3 (Iowa Ct. App. July 3, 2019) (unpublished table opinion); State v. Lachman, No. 09–0630, 2010 WL 200819, at *1–2 (Iowa Ct. App. Jan. 22, 2010) (unpublished table decision) (expressing doubt the district court actually employed a fixed sentencing policy, but concluding that its statements gave the appearance of it, thereby necessitating

reversal). In the instant case, the district court's statements indicated that when an offense was committed where the firing of a gun resulted in a death prison was necessarily required and appropriate to rehabilitate the defendant and protect the community from danger. (Sentencing p.19 L.19–p.20 L.9, p.26 L.11–p.27 L.2). These statements indicated the district court's policy to impose prison for such charges, as it did here. See State v. Harris, 528 N.W.2d 133, 135 (Iowa Ct. App. 1994) (citation omitted) ("[T]he nature of the offense alone cannot be determinative of a discretionary sentence."). The district court's fixed sentencing policy overlooked the other factors warranting a deferred judgment, or even a suspended sentence, and instead imposed a prison sentence in accordance with its stated intolerance. Thus, a new sentencing hearing is required.

2. Improper sentencing considerations

When sentencing a defendant, a court may not consider facts, allegations, or offenses that are not established by the evidence or admitted by the defendant. Witham, 583 N.W.2d

at 678 (citations omitted); State v. Black, 324 N.W.2d 313, 316 (Iowa 1982). Thus, facts that are not proven by the State or admitted to by the defendant, but considered by the court, amount to improper sentencing considerations. See id. at 315–17; State v. Gonzalez, 582 N.W.2d 515, 517 (Iowa 1998). Additionally, the rule "prohibits a sentencing court from imposing a 'severe sentence for a lower crime on the ground that the accused actually committed a higher crime . . . even if the prosecutor originally charged the higher crime . . . .'" State v. Sailer, 587 N.W.2d 756, 762 (Iowa 1998) (citation omitted). The district court's statements in this case repeatedly misstated the jury's findings and verdict, including that Johnson stood "before the Court convicted of killing another human being." As discussed above in the challenge to the $150,000 restitution award, the jury did not make any determination that Johnson caused the death of Mills. Moreover, the district court's statements suggest Johnson is a danger because she intentionally shot a gun at Mills and intending to harm and kill her. See (Sentencing p.19 L.19–

p.20 L.9). This suggestion is belied by what the jury's verdict actually establishes it found.

As defense counsel explained at the sentencing hearing:

> . . . When you consider the jury's verdict, assault causing serious injury, I thought about it for a long time. How did the jury get there[?] Well, if you compare it to the other possible verdicts, they all include something like intentionally shot [Mills]. Or had malice.
>
> This verdict could indicate that on this night Ms. Johnson meant to shoot a gun into the air. And that was an assault because it was designed to scare people away from her. But then that act did cause a serious injury to Jada Mills. So . . . this jury found that she did not mean to kill Jada Mills. She did not even mean to shoot Jada Mills according to this jury's verdict. This was a tragic event that resulted in the accidental death of Jada Mills.

(Sentencing p.14 L.9–p.15 L.10). Indeed, the jury acquitted Johnson of several offenses: murder in the first degree, murder in the second degree, voluntary manslaughter, involuntary manslaughter (both the public offense and reckless alternatives), attempt to commit murder, willful injury causing serious injury, and willful injury causing bodily injury. (Verdict) (App. p. 21). It rejected that propositions that Johnson acted "willfully, deliberately, premeditatedly with a

specific intent to kill" or that she acted with malice aforethought. (Instruction 22, 31; Verdict) (App. pp. 10, 12, 21). The verdict established the jury's rejection that Johnson specifically intended to cause Mills's death and that she specifically intended to seriously injure Mills. (Instruction 33, 37; Verdict) (App. pp. 13, 15, 21). The jury's rejections of the voluntary manslaughter and willful injury offenses also supports the conclusion that it credited Johnson's testimony that she did not mean to shoot anyone. (Instruction 35, 37; Verdict) (App. pp. 13, 15, 21).

As mentioned, defense counsel noted the verdict could illustrate that the jury found that Johnson meant to shoot the gun in the air and assault Mills by scaring her. (Sentencing p.14 L.9–p.15 L.10). However, the verdict could also be supported by a different theory. At trial, the State's theory was that Johnson first started the fight by pushing Mills out of the vehicle. (9/23/21 p.20 L.11–p.12 L.7). The State argued while the women were in a fist fight "Johnson had the upper hand and was beating up Jada Mills." (9/23/21 p.18 L.24–

p.19 L.4, p.19 L.22–p.21 L.15). The State argued that the video showed "Mills on her back with her shoes up in the air, [and] Lasondra Johnson is standing over her." (9/23/21 p.18 L.24–p.19 L.4, p.19 L.22–p.20 L.10).

It highlighted the injuries to Mills's face, including "those scratches down by her eye", the injuries to the sides of her face and the scratches to her ears. (9/23/21 p.21 L.8–15). The prosecutor alleged the scratches showed, "Lasondra was going for Jada's eyes". (9/23/21 p.21 L.9–15). Though the defense suggested that the injuries below Mills's eyes could have been caused by the medical intervention, it did recognize they were "deep gashes". (9/23/21 p.18 L.24–p.19 L.4, p.19 L.22–p.20 L.10).

Thus, it's possible that the jury verdict reflects a finding that it believed Johnson did start the initial altercation by pushing Mills from the vehicle, or by "beating her up" as suggested by the State. Notably, the marshalling instruction for assault causing serious injury given to the jury did not identify the actions that would constitute the assault, but

rather it gave a generalized definition of assault—"the defendant did an act". See (Instruction 38) (App. p. 16). Nor did the instruction indicate what the serious injury was. See (Instruction 38) (App. p. 16). The jury could have found the injuries to Mills's face were bodily injuries that would cause serious permanent disfigurement or the impairment of the use of her eyes. See (Instruction 39) (App. p. 17). Iowa law establishes that, while scarring is not a per se serious permanent disfigurement, a scar can constitute permanent disfigurement, and thus, rise to the level of a serious injury. See State v. Hanes, 790 N.W.2d 545, 554–56 (Iowa 2010). Accordingly, it is possible, and certainly also in line with the jury's verdict, that the jury found Johnson guilty of assault causing serious injury and at the same time also found Johnson was justified in firing her gun under such circumstances.

Under these unique circumstances and facts, the jury's verdict did not establish a conviction for Johnson causing the death of or killing Mills. The sentencing court's reliance on

Johnson being "before the Court convicted of killing another human being" is incorrect and improper. As is the court's suggestions that the shooting was intentionally done to harm or kill Mills. As such, these facts were improper sentencing considerations for the court to rely upon when fashioning Johnson's sentence. See Black, 324 N.W.2d at 316; Gonzalez, 582 N.W.2d at 517.

In order to establish reversible error, the defendant must show that the court was not just "merely aware" of the improper sentencing factor, but that the sentencing court "relied" on it in rendering its sentence. State v. Ashley, 462 N.W.2d 279, 282 (Iowa 1990) (citations omitted). Where such a showing is made, however, the reviewing court "cannot speculate about the weight a sentencing court assigned to an improper consideration and the defendant's sentences must be vacated and the case remanded for resentencing." Gonzalez, 582 N.W.2d at 517 (citations omitted). This is so even if the impermissible factor was "merely a secondary consideration." State v. Lovell, 857 N.W.2d 241, 243 (Iowa 2014) (internal

quotation marks omitted) (citation omitted). "The important focus is whether an improper sentencing factor crept into the proceedings; not the result it may have produced of the manner it may have motivated the court." Thomas, 520 N.W.2d at 313 (citation omitted).

It is clear from the sentencing court's remarks that it was not "merely aware" of the impermissible factors but actually considered and relied on them. See Ashley, 462 N.W.2d at 282; see also (Sentencing p.10 L.4–12). Thus, the improper considerations "crept into the proceedings", and Johnson is entitled to a new sentencing hearing. See Thomas, 520 N.W.2d at 313.

Conclusion: Defendant–Appellant Lasondra A. Johnson respectfully requests that this Court vacate his sentence and remand to the district court for resentencing before a different judge. See State v. Lovell, 857 N.W.2d 241, 243 (Iowa 2014) (finding "in order to protect the integrity of our judicial system from the appearance of impropriety," resentencing must be "before a different judge").

REQUEST FOR NONORAL SUBMISSION

Counsel requests this case be submitted without oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $10.43, and that amount has been paid in full by the Office of the Appellate Defender.

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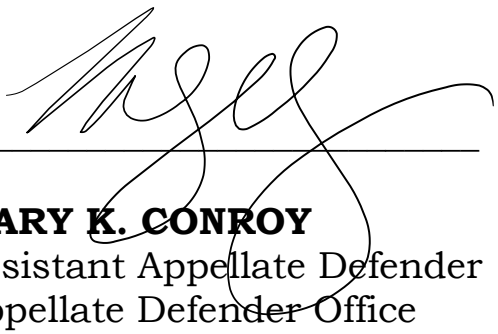

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