

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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SUPREME CT. NO. 22-1974

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

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APPELLANT'S 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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TRW/lr/06/23

TRW/sm/9/23

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

**I. The evidence was insufficient to support Chawech's convictions. The evidence established Chawech was justified in using reasonable force to defend himself against like force. Alternatively, even if he were not justified, the evidence did not establish that Chawech's bullet was the one that hit Nyamal Deng.**

### **Authorities**

State v. Crawford, 972 N.W.2d 189, 196-98 (Iowa 2022)

State v. Adney, 639 N.W.2d 246, 250 (Iowa Ct. App. 2001)

State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981)

In re Winship, 397 U.S. 358, 364 (1970)

Patterson v. New York, 432 U.S. 197, 211 (1977)

Jackson v. Virginia, 443 U.S. 307, 318 (1979)

Travillion v. Superintendent Rockview SCI, 982 F.3d 896, 902 (3<sup>rd</sup> Cir. 2020)

#### **A. Chawech was justified in firing his weapon.**

State v. Lorenzo Baltazar, 935 N.W.2d 862, 869 (Iowa 2019)

Iowa Code § 704.3 (2015)

Iowa Code § 704.1

Iowa Code § 704.7



State v. Wilson, 941 N.W.2d 579, 585 (Iowa 2020)

H.F. 517, 87th G.A., 1st Sess. (Iowa 2017)

2017 Iowa Acts ch. 69, §§ 37–44

Iowa Code § 704.1(3) (2021)

Iowa Code § 704.1(1)

Iowa Code § 704.2(1)(c)

Iowa Code § 704.2(2)

Iowa Code § 704.3 (2021)

**B. The evidence did not establish that Chawech’s bullet is the one that struck Nyamal Deng.**

No Authorities

**II. The District Court erred in failing to merge Assault with Intent to Inflict Serious Injury under Count II with Willful Injury under Count III.**

**Authorities**

State v. Love, 858 N.W.2d 721, 723 (Iowa 2015)

Iowa Code § 701.9 (2022)

State v. Bloom, 983 N.W.2d 44, 51 (Iowa 2022)

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Iowa Code § 814.20 (2022)

State v. Davis, 328 N.W.2d 301, 308 (Iowa 1982)

**III. The District Court imposed an illegal mandatory minimum sentence under Iowa Code section 902.7 where the enhancement was never charged.**

**Authorities**

State v. Lathrop, 781 N.W.2d 288, 293 (Iowa 2010)

State v. Dann, 591 N.W.2d 635, 637 (Iowa 1999)

Jefferson v. Iowa Dist. Ct., 926 N.W.2d 519, 522 (Iowa 2019)

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Hamling v. United States, 418 U.S. 87, 117 (1974)

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

## **ROUTING STATEMENT**

This case should be transferred to the Court of Appeals because the issues raised involve applying existing legal principles. Iowa R. App. P. 6.903(2)(d) and 6.1101(3)(a) (2023).

## **STATEMENT OF THE CASE**

**Nature of the Case:** This is an appeal by Defendant-Appellant Wichang Chawech from his convictions, sentence, and judgment for two counts of Assault with Intent to Inflict Serious Injury, aggravated misdemeanors in violation of Iowa Code sections 708.1 and 708.2(1) (2021), Willful Injury Causing Serious Injury, a class C felony in violation of Iowa Code section 708.4(1) and 902.7 (2021), and Intimidation with a Dangerous Weapon with Intent, a class C felony in violation of Iowa Code sections 708.6 and 902.7 (2021). Judgment was entered following a jury trial in Polk County District Court.

Chawech contends the evidence was not sufficient to support his convictions, that one of his convictions for Assault

with Intent to Inflict Serious Injury should have been merged into his conviction for Willful Injury Causing Serious Injury, and that his mandatory minimum sentences pursuant to Iowa Code section 902.7 were imposed illegally.

**Course of Proceedings:** On December 2, 2021, the State filed a trial information in Polk County District Court charging Defendant-Appellant Wichang Chawech with: Murder in the First Degree, a class A felony in violation of Iowa Code section 707.2(1)(a) (2021) (Count I); Attempted Murder, a class B felony in violation of Iowa Code section 707.11(1) (2021) (Count II); Willful Injury Causing Serious Injury, a class C felony in violation of Iowa Code section 708.4(1) (2021) (Count III); and Intimidation with a Dangerous Weapon – Injure/Provoke Fear, a class C felony in violation of Iowa Code section 708.6 (2021) (Count IV). (12/2/21 Trial Information) (App. pp. 5-6). Chawech pleaded not guilty and waived his right to a speedy trial. (12/3/21 Written Arraignment; 1/7/22 Waiver of Speedy Trial)(App. pp. 7-8, 10).

On November 8, 2021, Chawech filed a notice of defenses including use of reasonable force, justification, self-defense, and defense of others. (11/8/21 Rule 2.11 Notice)(App. p. 9).

Jury trial commenced September 12, 2022. (9/12/22 Tr. p. 1 L.1-25). The jury found Chawech guilty of the lesser included offenses of Assault with Intent to Inflict Serious Injury, aggravated misdemeanors in violation of Iowa Code sections 708.1 and 708.2(1) (2021), under Counts I and II, Willful Injury Causing Serious Injury as charged under Count III, and Intimidation with a Dangerous Weapon with Intent as charged under Count IV. (9/29/22 Verdict Tr. p. 3 L.8-p. 4 L.4; 9/29/22 Form of Verdict – Counts I to IV)(App. pp. 25-30). As to all counts, the jury determined Chawech was in immediate possession and control of a dangerous weapon, displayed a dangerous weapon in a threatening manner or was armed with a dangerous weapon. (9/29/22 Verdict Tr. p. 5 L.5-p. 5 L.21; 9/29/22 Form of Verdict - Interrogatory)(App. pp. 31-32).

The District Court held a sentencing hearing on November 18, 2022. (11/18/22 Sent. Tr. p.1 L.1-25). The court sentenced Chawech to two years in prison and a suspended \$855 fine on each of Count I and Count II. (11/18/22 Sent. Tr. p. 19 L.6-11, p. 22 L.8-11; 11/18/22 Sent. Order pp. 2-3)(App. pp. 34-35). The court sentenced him to 10 years in prison with a five-year mandatory minimum and a suspended \$1370 for each of Counts III and IV. (11/18/22 Sent. Tr. p. 19 L.12-p. 20 L.2, p. 22 L.8-11; 11/18/22 Sent. Order pp. 2-3)(App. pp. 34-35). The court ran Counts I, III, and IV consecutively to one another but concurrently to Count II for a total of 22 years in prison. (11/18/22 Sent. Tr. p. 20 L.6-14; 11/18/22 Sent. Order p. 2)(App. p. 34). The court also ordered Chawech to provide a DNA sample, notified him he was prohibited from possessing firearms, and determined no Category B restitution analysis was necessary. (11/18/22 Sent. Tr. p. 22 L.4-7, p. 23 L.11-

14, 24-p. 24 L.2; 11/18/22 Sent. Order pp. 3-4)(App. pp. 35-36).

Chawech filed a timely notice of appeal on November 30, 2022. (11/30/22 Notice)(App. p. 38).

**Facts:** On October 9, 2021, about a hundred people attended a one-year memorial for Reverend Pastor Bilim in Des Moines. (9/13/22 Tr. p. 67 L.19-p. 68 L.2, p. 81 L.24-p. 82 L.12). Later that night, a number of people at the memorial decided to go to the High Dive hookah lounge on Indianola Avenue. (9/13/22 Tr. p. 68 L.24-p. 69 L.6, p. 82 L.25-p. 83 L.5). They included Nyamal Deng, Nyalat Deng, Nyador Bilim, and Nyalat Dak.<sup>1</sup> (9/13/22 Tr. p. 68 L.24-p. 69 L.6, p. 83 L.6-p. 86 L.10; 9/15/22 Tr. p. 52 L.10-19). Defendant-Appellant Wichang Chawech had also been at the memorial and went to the High Dive, where he was well known and often assisted with security. (9/13/22 Tr. p. 68 L.3-p. 70 L.22, p. 82 L.10-15; 9/19/22 Tr. p. 47 L.2-p. 48 L.17).

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<sup>1</sup>. Given the similarity in the women's names, they be referred to by their full names to avoid confusion.

Abdullahi Maiqudi and Redemer Gbeddeh were with a group of soccer players from the Quad Cities who also stopped by the bar that night. (9/13/22 Tr. p. 121 L.5-p. 124 L.25; 9/14/22 Tr. p. 46 L.17-p. 48 L.12).

Soon after Maiqudi and Gbeddeh arrived, there was a confrontation between the group of soccer players and a group including Chawech and his girlfriend in the back lot of the bar. (9/13/22 Tr. p. 125 L.3-p. 126 L.20; 9/14/22 Trial Tr. p. 48 L.13-p. 50 L.5). According to Chawech, several of the players flashed guns while insulting him and his girlfriend, and he tried to diffuse the situation. (9/19/22 Tr. p. 51 L.6-p. 55 L.3). Maiqudi testified he saw Chawech's group come up to and start arguing with his teammates, and heard Chawech's girlfriend threaten to shoot all of them. (9/13/22 Tr. p. 125 L.17-p. 127 L.15). Both Gbeddeh and Chawech testified they were able to diffuse the situation, shook hands, and the soccer players went into the bar. (9/14/22 Tr. p. 48 L.13-p. 50 L.17; 9/19/22 Tr. p. 55 L.10-p. 57 L.6).



Nyalat Deng testified she was waiting in line at security when her cousin Chawech and his girlfriend approached her. (9/13/22 Tr. p. 68 L.3-17, p. 70 L.3-16). The pair lifted up their shirts to show her their guns, and Chawech assured her that nothing would happen to her that night. (9/13/22 Tr. p. 70 L.3-19).

Things appeared to be relatively calm until there was an altercation inside the bar. (9/14/22 Tr. p. 70 L.12-19; 9/19/22 Tr. p. 81 L.17-p. 82 L.7). Nyalat Deng, who was inside the bar at the time, saw three or four men pushing each other before security approached them. (9/13/22 Tr. p. 71 L.11-24). At her deposition, Nyalat Deng indicated a group of people had attacked one of Chawech's friends. (9/13/22 Tr. p. 76 L.12-p. 77 L.16). Nyador Bilim and Nyalat Dak identified the friend as Treatment Ruot. (9/13/22 Tr. p. 94 L.1-19; 9/15/22 Tr. p. 53 L.9-21).

According to Chawech, security asked Gbeddeh to leave after he became involved in a fight inside. (9/19/22 Tr. p. 82

L.16-p. 83 L.12). Gbeddeh claimed he did not witness a fight inside the bar and went outside simply to cool off. (9/14/22 Tr. p. 50 L.18-23). Maiqudi, meanwhile, claimed it was Chawech and his friends inside assaulting his friend Lucky Boy while he and Gbeddeh stood back. (9/13/22 Tr. p. 128 L.16-p. 129 L.20, p. 148 L.12-p. 149 L.23). Even so, Maiqudi claimed Chawech and his friends were able to get outside before him and confronted him and Gbeddah as they left the bar. (9/13/22 Tr. p. 129 L.21-p. 130 L.2, p. 150 L.10-p. 151 L.9; 9/14/22 Tr. p. 15 L.9-20).

What happened next is a matter of debate. According to Nyador Bilim, Chawech and Ruot attacked Gbeddeh when he came out of the bar. (9/13/22 Tr. p. 88 L.13-p. 89 L.8). Both Nyador Bilim and Nyalat Dak testified Chawech immediately snatched up Gbeddeh by the collar, pushed him against a wall by a window, and pulled out a gun. (9/13/22 Tr. p. 89 L.4-8, p. 94 L.23-p. 97 L.15; 9/15/22 Tr. p. 56 L.2-p. 59 L.3). Nyador Bilim claimed Chawech let off one shot, while

Nyalat Dak testified he pulled the trigger but the gun jammed. (9/13/22 Tr. p. 89 L.4-19, p. 97 L.25-p. 98 L.8; 9/15/22 Tr. p. 59 L.4-8).

Gbeddah, meanwhile, testified Chawech walked toward him with three or four friends, pointed a gun and threatened him with it, and then the other men in the group started beating him. (9/14/22 Tr. p. 56 L.10-p. 57 L.9, p. 59 L.4-p. 60 L.). Gbeddeh testified Chawech was not beating him, and tried to pull people off of him. (9/14/22 Tr. p. 90 L.1-25). Gbeddeh ran when he saw the gun, but Maiqudi remained and was shot. (9/14/22 Tr. p. 57 L.10-p. 58 L.15, p. 60 L.23). Maiqudi claimed he was trying to walk to his car when Chawech blocked his way and put a gun to his head. (9/13/22 Tr. p. 130 L.20-p. 131 L.9, p. 141 L.11-19). As he tried to walk by, the gun went off and a bullet grazed his chin. (9/13/22 Tr. p. 134 L.25-p. 135 L.18).

According to Chawech, he had been standing against the wall outside when Gbeddeh and Maiqudi exited the bar.

(9/19/22 Tr. p. 86 L.5-p. 88 L.8). When he saw the confrontation between the two men and others, he stepped in to try to diffuse the situation. (9/19/22 Tr. p. 87 L.22-p. 88 L.10). Chawech testified Gbeddeh showed him a gun in his pocket, while Maiqudi had a gun at his waist. (9/19/22 Tr. p. 88 L.25-p. 89 L.19). When Maiqudi started to raise his arm, Chawech drew his gun and pushed Maiqudi, who fired. (9/19/22 Tr. p. 89 L.20-p. 90 L.10). Chawech fired his gun but it jammed, so he ducked and ran off between several vehicles. (9/19/22 Tr. p. 90 L.1-p. 91 L.8). He later came back to try to break up the fight. (9/19/22 Tr. p. 94 L.1-21). He did not realize anyone had been shot. (9/19/22 Tr. p. 95 L.9-11).

In fact, in addition to the grazing wound suffered by Maiqudi, Nyamal Deng had been shot in the neck resulting in her death. (9/14/22 Tr. p. 100 L.3-p. 101 L.7). According to Polk County Medical Examiner Dr. Joshua Akers, the gunshot wound created an injury to her spinal cord at the second and

third cervical vertebrae, leading to a failure to autonomic regulation and brain swelling. (9/14/22 Tr. p. 101 L.12-p. 103 L.18). He explained the entrance wound had an irregular shape, indicating the bullet may have traveled through an intermediate target resulting in yaw. (9/14/22 Tr. p. 106 L.6-p. 108 L.7). Akers testified that nothing in his autopsy report, the photos, or the videos was inconsistent with Chawech firing the gun, the bullet traveling through Maiqudi's skin, and striking Nyamal Deng in the neck. (9/14/22 Tr. p. 11 L.16-p. 112 L.7).

Akers admitted he initially thought the path of the bullet in Maiqudi's face was from front to back, but later realized the grazing wound actually went back to front. (9/14/22 Tr. p. 109 L.1-p. 111 L.1). The trajectory of fire was downward. (9/14/22 Tr. p. 119 L.3-25). The trajectory of the bullet wound to Nyamal Deng was back to front, right to left and slightly upward. (9/14/22 Tr. p. 120 L.3-7). Akers testified it was impossible for a bullet to go down and then up, but that

the trajectory of a bullet was dependent on how a body was positioned at the time. (9/14/22 Tr. p. 120 L.22-p. 123 L.6, p. 131 L.5-p. 132 L.24). He testified it was possible the same bullet could have caused both injuries, but not as the positioning of the bodies were described. (9/14/22 Tr. p. 133 L.4-10, p. 136 L.12-20). He could not say whether a gun possessed by Chawech or a gun possessed by Maiquidi was the one that caused Nyamal Deng's death. (9/14/22 Tr. p. 150 L.10-16).

Police, meanwhile, collected evidence at the scene. They found a spent shell casing on the front side of the building by a blue car, and a live round and part of a fired copper jacket on the opposite side of the building by Gbeddeh's red Charger. (9/14/22 Tr. p. 169 L.25-p. 170 L.6, p. 173 L.6-p. 174 L.2). The spent shell casing was an FC 9mm Luger. (9/14/22 Tr. p. 174 L.3-6). Police also discovered a black bullet holder along the wall. (9/14/22 Tr. p. 171 L.6-13).

At 2:30 in the morning of October 10, 2021, police received a call of shots fired at Bobber Park, which was within a couple of miles of the High Dive bar. (9/15/22 Tr. p. 6 L.11-p. 8 L.15). Initially, officers responded to the scene, was told it was just fireworks, and cleared the area. (9/15/22 Tr. p. 11 L.19-p. 12 L.8). About an hour later, Officer Jackson Bruckner arrived at the park and spoke with a group that included Chawech. (9/15/22 Tr. p. 8 L.16-p. 11 L.10). Bruckner briefly spoke to the group before they left. (9/15/22 Tr. p. 8 L.6-p. 9 L.3). After the group left, Bruckner found two spent casings and three live rounds. (9/15/22 Tr. p. 8 L.16-p. 9 L.12, p. 15 L.17-p. 16 L.21). Both the casings and the live rounds were all FC 9 mm Luger. (9/15/22 Tr. p. 18 L.8-p. 21 L.17).

Police searched Gbeddeh's red Charger and found live rounds in his glove box. (9/15/22 Tr. p. 101 L.24-p. 102 L.19). They were Hollow Point 9mm GFLs. (9/15/22 Tr. p. 102 L.20-25). Gbeddeh eventually admitted having a gun at

the High Dive bar, though he claimed it was in his car or a friend's car for most of the night. (9/14/22 Tr. p. 52 L.6-p. 55 L.6). He did not give his gun to police that night but on October 17, 2021. (9/14/22 Tr. p. 74 L.2-p. 75 L.25; 9/15/22 Tr. p. 105 L.11-23). The gun contained Hollow Point 9mm GFL rounds. (9/15/22 Tr. p. 105 L.24-p. 106 L.10). No FC 9 mm Luger rounds were found in association with Gbeddeh. (9/15/22 Tr. p. 106 L.4-7).

On October 12, 2021, officers were trying to locate Chawech as a person of interest in the investigation when they observed him driving a yellow Mustang. (9/15/22 Tr. p. 28 L.3-p. 29 L.22). They ended up pursuing the vehicle until it crashed into a fence and the driver fled. (9/15/22 Tr. p. 33 L.20-p. 34 L.12). In the vehicle, officers discovered a bag containing four handguns and extended magazine clips. (9/15/22 Tr. p. 107 L.6-15). The rounds loaded in the guns were FC 9 mm Luger. (9/15/22 Tr. p. 107 L.21-p. 109 L.10).



Officers also found a live FC 9 mm Luger round in Chawech's red truck. (9/15/22 Tr. p. 109 L.20-p. 111 L.5).

Officers submitted a casing from Bobber Park and the casing found at the High Dive bar to the DCI Crime Lab. (9/15/22 Tr. p. 22 L.17-23). Criminalist Kristin Hart opined the two casings were fired by the same gun based upon their markings. (9/19/22 Tr. p. 11 L.18-p. 18 L.24). She also examined the 9mm gun seized from the yellow Mustang, but determined it was not the gun that had fired the casings. (9/19/22 Tr. p. 10 L.10-p. 11 L.12). Police never recovered a gun that matched the seized casings. (9/15/22 Tr. p. 113 L.16-20).

Sergeant Jason Hayes interviewed Chawech at the police station on October 24, 2021. (9/19/22 Tr. p. 26 L.12-22). A video recording of the interview was played at trial. (9/19/22 Tr. p. 27 L.1-10; Ex. 50). In the video, Chawech admitted being at both the memorial service and the High Dive bar.

(Ex. 50 17:32:35-17:34:30).<sup>2</sup> He acknowledged witnessing a fight and trying to break it up before as many as four shots were fired. (Ex. 50 17:34:30-17:34:55, 17:40:00-17:40:20, 17:43:44-17:44:00). He claimed not to know the people involved in the confrontation. (Ex. 50 17:34:40-17:34:50, 17:40:50-17:41:13, 17:45:30-17:45:35). He also claimed not to have a gun or to have seen anyone else with guns, even when confronted with a still from the SnapChat video showing him and his girlfriend with a gun. (9/19/22 Tr. p. 27 L.21-25; Ex. 50 17:46:20-17:46:39, 18:12:55-18:15:00).

At trial, Chawech testified he had a financial stake in the High Dive bar and would help with security and customer relations. (9/19/22 Tr. p. 47 L.2-p. 48 L.17). He admitted he was not honest in his interview because his experiences with police led him to mistrust them. (9/19/22 Tr. p. 49 L.6-p. 50 L.5, p. 126 L.1-p. 127 L.12). In addition, he asked his friends who were there to come forward with information, but

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<sup>2</sup>. All times cited on video exhibits are approximate.

none of them would out of fear of being targeted or being labeled a snitch. (9/19/22 Tr. p. 50 L.6-p. 51 L.24).

Chawech testified there were three shots fired at the bar and that he fired one of them. (9/19/22 Tr. p. 106 L.14-21). He explained that he shot his gun because he was afraid for his life – Abdullahi shot at him and he returned a shot. (9/19/22 Tr. p. 111 L.7-12, p. 113 L.4-20). Chawech testified he was unsure if he hit Maiqudi, so he ducked and ran. (9/19/22 Tr. p. 113 L.23-p. 114 L.2). His gun was jammed so he cocked it, resulting in the live round by the vehicle. (9/19/22 Tr. p. 115, p. 129 L.10-15).

Chawech explained that he left the scene because he was in shock from nearly being shot. (9/19/22 Tr. p. 118 L.5-20). He admitted going to Bobber Park later after receiving a call from his cousin. (9/19/22 Tr. p. 118 L.21-p. 119 L.11). He denied shooting his gun at the park, believing it was still in the glove box of his truck. (9/19/22 Tr. p. 119 L.14-p. 120

L.8). He denied killing Nyamal Deng. (9/19/22 Tr. p. 129 L.24-25).

## **ARGUMENT**

**I. The evidence was insufficient to support Chawech's convictions. The evidence established Chawech was justified in using reasonable force to defend himself against like force. Alternatively, even if he were not justified, the evidence did not establish that Chawech's bullet was the one that hit Nyamal Deng.**

**Preservation of Error:** Error was preserved by the District Court's rulings on Chawech's motion for directed verdict and motion for judgment of acquittal. (9/19/22 Tr. p. 36 L.19-p. 41 L.23, p. 131 L.21-p. 133 L.3). Chawech specifically argued that there were multiple shots, he was defending himself, and his bullet could not have hit Nyamal Deng. (9/19/22 Tr. p. 36 L.22-p. 40 L.11). Nonetheless, a motion for judgment of acquittal is no longer required to preserve error from a jury trial. State v. Crawford, 972 N.W.2d 189, 196-98 (Iowa 2022).

**Standard of Review:** 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). The verdict must be supported by substantial evidence, "such evidence as could convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt." Id. The evidence presented must do more than create speculation, suspicion, or conjecture. State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981).

**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).

“[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.” Id. at 319. In Travillion v. Superintendent Rockview SCI, the Third Circuit explained the Jackson standard as requiring “the finder of fact ‘to reach a subjective state of *near certitude* of the guilt of the accused.’” Travillion v. Superintendent Rockview SCI, 982 F.3d 896, 902 (3<sup>rd</sup> Cir. 2020) (quoting Jackson v. Virginia, 443 U.S. 307, 315 (1979)).

The evidence in this case did not rise to the level of “near certitude of guilt” to support Defendant-Appellant Wichang Chawech’s convictions on any of the four counts. Rather, the evidence supported a finding that Chawech was acting in self-defense and defense of others after he perceived Abdullahi Maiqudi raise a weapon during a bar fight. Even if this Court

does not find his actions justified, the evidence failed to establish the bullet he fired was the one that hit Nyamal Deng.

**A. Chawech was justified in firing his weapon.**

“Justification is a statutory defense that permits a defendant to use reasonable force to defend himself or herself.”

State v. Lorenzo Baltazar, 935 N.W.2d 862, 869 (Iowa 2019).

The Iowa Code had traditionally provided that “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 (2015). Reasonable force was the amount of force a reasonable person would deem necessary to prevent injury or loss. Id. § 704.1. It could include deadly force to resist a similar force or to protect the life and safety of the person or another. Id. Reasonable force could be used to defend another or to resist a forcible felony. Id. §§ 704.3, 704.7. A person generally had a duty to retreat before resorting to force, unless retreating would pose a risk to

life or safety, or if a person was in their dwelling or place of business. Id. § 704.1.

In 2017, the Iowa General Assembly made significant changes to Iowa’s self-defense statutes. State v. Wilson, 941 N.W.2d 579, 585 (Iowa 2020) (citing H.F. 517, 87th G.A., 1st Sess. (Iowa 2017); 2017 Iowa Acts ch. 69, §§ 37–44). Iowa’s new justification statutes, which were in effect at the time of the shooting in this case, provided that a person had no duty to retreat so long as they were in *any place* where they were lawfully entitled to be and were not engaged in illegal activity. Iowa Code § 704.1(3) (2021).

The new statutes retained the ability to use deadly force “to avoid injury or risk to one’s life or safety ... or it is reasonable to believe that such force is necessary to resist a like force or threat.” Id. § 704.1(1). The definition of deadly force continued to include force used for the purpose of causing serious injury, force the actor knows or reasonably should know will create a strong probability, that serious



injury will result, or discharge of a firearm “in the direction of some person with the knowledge of the person’s presence there, even though no intent to inflict serious physical injury can be shown.” Id. § 704.2(1)(c). The fact that a person might be wrong in estimating the danger or the force necessary to repel the danger does not undermine the defense so long as long as there is a reasonable basis for the belief of the person and the person acts reasonably in the response to that belief. Id. § 704.2(2).

The jury in Chawech’s trial was instructed on his defense of justification. (Inst. 21)(App. p. 12). In accordance with Iowa’s stand your ground law, the jury was instructed that Chawech had no duty to retreat from a location where he was legally allowed to be so long as he was not engaged in illegal activity. (Insts. 23, 26)(App. pp. 14, 17). The jury was instructed Chawech must have acted with an honest and sincere belief danger existed, and that his perception of danger was reasonable. (Insts. 27, 28)(App. pp. 18-19).

The evidence presented at trial established Chawech was justified in using reasonable force against Abdullahi Maiqudi. Chawech testified he observed men in Maiqudi's group with guns before they entered the bar, and Maiqudi was "cussing [him] out" while Gbeddeh tried to get Maiqudi to calm down. (9/19/22 Tr. p. 51 L.6-p. 55 L.25). Chawech was alerted to a fight inside the bar apparently involving Gbeddeh and others. (9/19/22 Tr. p. 82 L.16-p. 83 L.12). When Gbeddeh and Maiqudi exit the bar, Chawech saw them get into a confrontation with another group of men. (9/19/22 Tr. p. 86 L.5-p. 88 L.1). Chawech went to step in to stop the situation from escalating, which was his role at the bar. (9/19/22 Tr. p. 47 L.2-17, p. 88 L.2-10).

According to Chawech, Gbeddeh displayed a gun from his pocket, and Maiqudi had one at his waist. (9/19/22 Tr. p. 88 L.25-p. 89 L.19, p. 112 L.19-p. 113 L.3). Chawech did not draw his gun until Maiqudi raised his arm and aimed at him. (9/19/22 Tr. p. 89 L.15-p. 90 L.23, p. 113 L.4-16).

According to Chawech, he pushed Maiqudi, Maiqudi fired his gun, and then Chawech fired his gun but it jammed.

(9/19/22 Tr. p. 90 L.1-10). Chawech heard more shots as he retreated between two vehicles and unjammed his gun.

(9/19/22 Tr. p. 90 L.11-15, p. 106 L.10-21, p. 115 L.7-19, p. 129 L.5-15). Chawech testified he was in fear for his life.

(9/19/22 Tr. p. 111 L.7-11).

Gbeddeh admitted having a gun when he was at the bar, but claimed he did not have it on him when the shooting occurred. (9/14/22 Tr. p. 52 L.6-8, p. 53 L.8-p. 55 L.4).

Maiqudi denied ever having a gun. (9/13/22 Tr. p. 138 L.12-17). Even so, the surveillance video from the bar shows Maiqudi getting closer to the confrontation and raising his arm toward Chawech just before the shooting. (9/16/22 Tr. p. 16 L.24-p. 18 L.20, p. 91 L.7-p. 92 L.9; 9/19/22 Tr. p. 89 L.15-p. 90 L.25; Ex. 87 1:54:30-1:54:45; Ex. F-3)(Ex. App. p. 7).

Maiqudi testified that a metallic object seen at the end of his hand was his bracelets and not a gun. (9/14/22 Tr. p. 24

L.9-p. 25 L.15). Dr. Joshua Akers, however, testified that a still shot from the surveillance video appeared to show Maiqudi holding a gun. (9/14/22 Tr. p. 148 L.9-17). Even assuming Maiqudi did not have a gun, given the presence of guns on “everyone” as both Gbeddeh and Chawech put it, the metallic appearance of Maiqudi’s bracelets, and Chawech’s earlier experience with the group, it would not be unreasonable for Chawech to assume Maiqudi was pulling a gun on him. (9/14/22 Tr. p. 24 L.9-p. 25 L.15, p. 53 L.19-22; 9/19/22 Tr. p. 51 L.6-p. 52 L.25).

Notably, the surveillance video contradicts the testimony of various witnesses who claimed Chawech was the aggressor. Nyador Bilim admitted that -- before seeing the video -- she believed Chawech immediately grabbed Gbeddeh as he walked out, put him against the wall, pulled out a gun, and let out a shot. (9/13/22 Tr. p. 89 L.4-8, p. 94 L.23-p. 97 L.15).

Likewise, Nyalat Dak testified that Chawech put Gbeddeh against the wall, put a gun to his head, and pulled the trigger

before the gun jammed. (9/15/22 Tr. p. 56 L.16-p. 57 L.21, p. 59 L.4-8). She had to admit the video did not show Gbeddeh against the wall with a gun to his head. (9/15/22 Tr. p. 87 L.7-p. 89 L.11). When confronted with the inconsistency, Nyador Bilim simply agreed “the video is what it is.” (9/13/22 Tr. p. 114 L.13-16).

For his part, Gbeddeh did not recall Chawech throwing him against the wall. (9/14/22 Tr. p. 72 L.6-8). In fact, the video showed Chawech initially against the wall while Gbeddeh and Maiqudi argued with others. (Ex. 87 1:52-47-1:54:43). Maiqudi testified that Chawech put a gun to his head and shot at him as he tried to walk by. (9/13/22 Tr. p. 131 L.5-9, p. 134 L.25-p. 135 L.18). Both Maiqudi and Gbeddeh admitted they could not see a gun pointed at Maiqudi’s head on the video as it was played. (9/14/22 Tr. p. 20 L.14-p. 23 L.16, p. 85 L.10-p. 87 L.22). Simply put, the video contradicts the State’s key witnesses on the critical question of who fired first.

The record also supports more than one shot being fired outside of the High Dive bar. Chawech testified he fired one shot after Maiqudi fired his gun, but heard another shot as he retreated. (9/19/22 Tr. p. 90 L.1-15, p. 113 L.4-20).

Detective Jeffrey Shannon testified that the High Dive's three security guards and two other people he interviewed also mentioned hearing multiple shots. (9/16/22 Tr. p. 53 L.18-p. 54 L.24). Nyalat Deng testified she heard one shot, but did not remember if she told Shannon she heard shots. (9/13/22 Tr. p. 77 L.17-p. 78 L.2). Nyalat Dak testified she was positive she heard only shot, but admitted that she told Shannon she heard two or three shots. (9/15/22 Tr. p. 65 L.6-p. 66 L.16, p. 77 L.10-p. 78 L.9, p. 80 L.2-p. 81 L.7). And while the video is less than clear, it appears there may be two muzzle flashes at the time of the shooting. (Ex. 87 1:54:35-1:54:43).

Chawech does not dispute that he fired his gun toward Maiqudi, but contends he only did so after Maiqudi fired at

him first. (9/19/22 Tr. p. 90 L.1-15). He was in fear for his life. (9/19/22 Tr. p. 111 L.4-8). He was in front of the business that employed him to deescalate potentially dangerous situations. (9/19/22 Tr. p. 47 L.2-p. 48 L.17). While he did not have any legal obligation to leave a location where he had a right to be, he also had no opportunity to do so. Iowa Code § 704.1(3) (2021). The confrontation escalated quickly, giving Chawech reason to believe he would be shot if he either tried to leave or call 911 and wait for police. Chawech used reasonable force to protect himself and others from what he perceived to be a real and reasonable danger of deadly force. Iowa Code § 704.3 (2021).

Chawech's actions were justified as a matter of law, and his convictions, judgment, and sentence should be vacated.

**B. The evidence did not establish that Chawech's bullet is the one that struck Nyamal Deng.**

Even if this Court does not find Chawech's actions were justified, the record fails to support a finding that the bullet he fired was the one that hit Nyamal Deng. There is ample

evidence that a bullet fired by Abdullahi Maiqudi was the bullet that struck and fatally injured Nyamal Deng.

Polk County Medical Examiner Dr. Joshua Akers testified that cause of Nyamal Deng's death was a gunshot wound to the neck and the manner of her death was homicide.

(9/14/22 Tr. p. 100 L.22-p. 101 L.11). He opined, but did not definitively conclude, that the same bullet that grazed Abdullahi Maiqudi's chin could have suffered yaw and created the irregular entrance wound in Nyamal Deng's neck.

(9/14/22 Tr. p. 106 L.17-p. 108 L.7, p. 111 L.22-p. 112 L.7, p. 133 L.3-11).

Akers testified that the trajectory of the bullet path through Maiqudi was downward while the trajectory of the bullet path through Nyamal Deng was upward. (9/14/22 Tr. p. 119 L.18-p. 120 L.13). He explained that a bullet would not be able to reverse course, but that the trajectory of a bullet's path was dependent on the position of the gun and the position of the body. (9/14/22 Tr. p. 120 L.14-p. 121 L.19, p.



130 L.22-p. 132 L.24). Even though he testified it was possible the same bullet could have caused both injuries, he acknowledged that it could not have done so based on the positioning of the parties at the time of the shooting.

(9/14/22 Tr. p. 133 L.4-10, p. 136 L.3-20).

Akers testified he could not say whether a gun held by Chawech or a gun held by Maiqudi caused Nyamal Deng's death. (9/14/22 Tr. p. 150 L.10-16). He acknowledged that if Maiqudi had a gun pointed down, started to raise it as he went by Nyamal Deng, and then clenched the trigger, he could have created the upward trajectory seen in Nyamal Deng's wound. (9/14/22 Tr. p. 150 L.10-p. 151 L.8).

According to Chawech, Maiqudi had a gun at his waist. (9/19/22 Tr. p. 89 L.15-19, p. 112 L.16-p. 113 L.5). Chawech did not draw his gun until Maiqudi raised his arm and aimed at him. (9/19/22 Tr. p. 89 L.15-p. 90 L.10, p. 113 L.4-18). According to Chawech, he pushed Maiqudi, Maiqudi fired his gun, and then Chawech fired his gun but it jammed.

(9/19/22 Tr. p. 90 L.1-15). Chawech heard more shots as he retreated between two vehicles and unjammed his gun.

(9/19/22 Tr. p. 90 L.1-15, p. 106 L.10-21, 115 L.7-19, p. 129 L.1-18).

Maiqudi denied ever having a gun. (9/13/22 Tr. p. 138 L.12-17). Even so, the surveillance video from the bar shows Maiqudi getting closer to the confrontation and raising his arm toward Chawech just before the shooting. (9/16/22 Tr. p. 16 L.24-p. 18 L.20, p. 91 L.7-p. 92 L.9; 9/19/22 Tr. p. 89 L.15-p. 90 L.10; Ex. 87 1:54:30-1:54:45; Ex. F-3)(Ex. App. p. 7).

Maiqudi testified that a metallic object seen at the end of his hand was his bracelets and not a gun. (9/14/22 Tr. p. 24 L.9-p. 25 L.15). Akers, however, testified that a still shot from the surveillance video appeared to show Maiqudi holding a gun. (9/14/22 Tr. p. 148 L.9-17).

The medical examiner in this case could say that Nyamal Deng was killed by a bullet that entered the back of her neck, but he could not say definitively that Chawech was the one

who fired the bullet. Rather, he acknowledged that the position of the parties made it unlikely Chawech was the one who fired the fatal shot. (9/14/22 Tr. p. 136 L.6-20).

Other evidence in the record suggested that Maiqudi had a gun and likely fired the shot that struck Nyamal Deng. This evidence included Chawech's account of Maiqudi with a firearm, reports from numerous witnesses that more than one shot was fired, and evidence showing Maiqudi with his arm raised and a metallic object in his hand. (9/13/22 Tr. p. 77 L.17-p. 78 L.2; 9/14/22 Tr. p. 148 L.9-15; 9/15/22 Tr. p. 65 L.6-p. 66 L.16, p. 77 L.10-p. 78 L.9, p. 80 L.2-p. 81 L.7; 9/16/22 Tr. p. 53 L.18-p. 54 L.24; 9/19/22 Tr. p. 89 L.15-19, p. 112 L.16-p. 113 L.5; Ex. F-3)(Ex. App. p. 7).

The evidence presented at trial was not sufficient to establish that Chawech fired the bullet that struck Nyamal Deng. His conviction, sentence, and judgment for Assault with Intent to Inflict Serious Injury under Count I should be vacated.

**II. The District Court erred in failing to merge Assault with Intent to Inflict Serious Injury under Count II with Willful Injury under Count III.**

**Preservation of Error:** Failure to merge convictions as required by statute results in an illegal sentence, which can be raised at any time. State v. Love, 858 N.W.2d 721, 723 (Iowa 2015).

**Standard of Review:** Review is for correction of errors at law. State v. Love, 858 N.W.2d 721, 723 (Iowa 2015).

**Merits:** Defendant-Appellant Wichang Chaweck was convicted and sentenced for both Willful Injury Causing Serious Injury and Assault with Intent to Inflict Serious Injury as to the shooting of Abdullahi Maiqudi. (12/2/21 Trial Information Cts. II, III; Insts. 51-52; 9/29/22 Forms of Verdict Cts. II, III)(App. pp. 5, 22-23, 27- 29). Although the sentences were run concurrently, the convictions should have merged as a matter of law. (11/18/22 Sent. Order p. 2)(App. p. 34).

Iowa Code section 701.9 provides:

No person shall be convicted of a public offense which is necessarily included in another public

offense of which the person is convicted. If the jury returns a verdict of guilty of more than one offense and such verdict conflicts with this section, the court shall enter judgment of guilty of the greater of the offenses only.

Iowa Code § 701.9 (2022). Section 701.9 codifies the double jeopardy protections against multiple punishments for the same offense. State v. Bloom, 983 N.W.2d 44, 51 (Iowa 2022); U.S. Const. amend 8. See also Iowa R. Crim. P. 2.6(2) (2023). The merger doctrine only applies when there is a complete overlap between the two offenses and there is no legislative intent to impose separate punishment. State v. Bloom, 983 N.W.2d at 51.

To find Chawech guilty of Willful Injury Causing Serious Injury, the jury was required to find:

1. On or about October 10, 2021, Defendant discharged a firearm at Abdullahi Maiqudi or another.
2. Defendant specifically intended to cause a serious injury to Abdullahi Maiqudi or another.
3. Abdullahi Maiqudi sustained a serious injury as a result of the Defendant's actions.
4. Defendant was not justified.

(Inst. 52)(App. p. 23).

To find Chawech guilty of Assault with Intent to Cause Serious Injury as a lesser-included offense under Count II, the jury was required to find:

1. On or about October 10, 2021, Defendant did an act which was intended to [cause pain or injury] [result in physical contact which was insulting or offensive] to Abdullahi Maiqudi or another in fear of an immediate physical contact which would have been painful, injurious, insulting or offensive] to Abdullahi Maiqudi or another.
2. Defendant had the apparent ability to do the act.
3. The act was done with the specific intent to cause a serious injury to Abdullahi Maiqudi or another.
4. The defendant was not justified.

(Inst. 51)(App. p. 22).

Under the elements of the offenses presented to the jury, Assault with Intent to Cause Serious Injury was a lesser-included offense of Willful Injury Causing Serious Injury. Both offenses required an assault, with Willful Injury requiring a more specific assault of discharging a firearm. (Insts. 51-(1), 52(1))(App. pp. 22-23). Both offenses required the intent to cause serious injury, with willful injury requiring an actual

serious injury. (Insts. 51(3), 52(2), (3))(App. pp. 22-23). Both offenses required that Chawech's was not justified. (Insts. 51(4), 52(4))(App. pp. 22-23).

The factual record also supports merger. The State proceeded under a one-gunshot theory – that Chawech fired a bullet that went through Maiqudi's chin and entered Nyamal Deng's neck. (9/14/22 Tr. p. 111 L.22-p. 112 L.7). Chawech admitted firing his gun once, but contended that other shots were fired at the scene and resulted in Nyamal Deng's death. (9/19/22 Tr. p. 90 L.1-p. 91 L.19, p. 106 L.10-21, p. 113 L.4-22). Either way, the evidence presented to the jury did not suggest Chawech fired any more than one shot. Nor did the evidence suggest Chawech committed any other act that resulted in serious injury to Maiqudi. The jury was not asked to find a break in the action or distinct criminal acts to support the two charges. State v. Love, 858 N.W.2d 721, 724-25 (Iowa 2015).

One could envision a factual scenario where multiple assaults would warrant convictions for both Willful Injury Causing Serious Injury and Assault with Intent to Inflict Serious Injury. See id. at 724 (recognizing multiple separate assaults can provide the basis for multiple convictions). This is not such a case. The record does not support Chawech committing multiple assaults on Maiqudi, and the jury was not asked to find multiple assaults on Maiqudi.

Iowa Code section 814.20 permits the appellate courts to reduce the punishment for an offense where the record warrants it. Iowa Code § 814.20 (2022); State v. Davis, 328 N.W.2d 301, 308 (Iowa 1982). This Court should nullify the judgment and sentence for Assault with Intent to Inflict Serious Injury under Count II. State v. Davis, 328 N.W.2d at 308.



**III. The District Court imposed an illegal mandatory minimum sentence under Iowa Code section 902.7 where the enhancement was never charged.**

**Preservation of Error:** A challenge to an illegal sentence, including a challenge to the constitutionality of a sentence, is not subject to the requirement of error preservation. State v. Lathrop, 781 N.W.2d 288, 293 (Iowa 2010). See also State v. Dann, 591 N.W.2d 635, 637 (Iowa 1999) (finding error preserved on similar claim as presented here).

**Standard of Review:** Although illegal sentences are usually reviewed for correction of errors at law, an unconstitutional sentence is reviewed de novo. Jefferson v. Iowa Dist. Ct., 926 N.W.2d 519, 522 (Iowa 2019).

**Merits:** The District Court erred in imposing mandatory minimum five-year sentences on Defendant-Appellant Wichang Chaweck's convictions for Willful Injury Causing Serious Injury and Intimidation with a Dangerous Weapon. (Sent. Tr. p. 19 L.22-p. 20 L.2; 11/18/22 Sent. Order p. 2)

(App. p. 34). Iowa Code § 902.7 (2021). While jurors answered special interrogatories as to whether Chawech possessed a dangerous weapon for these counts, the enhancements were never formally alleged in the trial information. As a result, the imposition of the mandatory minimums is illegal.

“Any fact that, by law, increases the penalty for a crime is an ‘element’ that must be submitted to the jury and found beyond a reasonable doubt.” Alleyene v. United States, 570 U.S. 99, 103 (2013). Because mandatory minimums are penalties for a crime, any fact that increases a mandatory minimum must be submitted to a jury to comply with the Sixth Amendment and Due Process. Id. at 103-04, 111-12.

While Alleyene emphasized the importance of obtaining a jury finding on any element that increases the range of punishment, it also noted the common law requirement that a criminal defendant be placed on notice of the increased punishment by way of indictment. Id. at 109-111. This

notice allowed a criminal defendant to prepare his defense accordingly. Id. at 111. More specifically, “[d]efining facts that increase a mandatory statutory minimum to be part of the substantive offense enables the defendant to predict the legally applicable penalty from the face of the indictment.” Id. at 113-14.

The Iowa Rules of Criminal Procedure likewise acknowledge the importance of the notice requirement in Rule 2.6(6):

2.6(6) Allegations of use of a dangerous weapon. If the offense charged is one for which the defendant, if convicted, will be subject by reason of the Code to a minimum sentence because of use of a dangerous weapon, the allegation of such use, if any, shall be contained in the indictment. If use of a dangerous weapon is alleged as provided by this rule, and if the allegation is supported by the evidence, the court shall submit to the jury a special interrogatory concerning this matter, as provided in rule 2.22(2).

Iowa R. Crim. P. 2.6(6) (2022) (footnotes omitted).

The trial information in this case did not alert Chaweck to the possibility he would be facing five-year mandatory minimums pursuant for possessing a dangerous weapon.

(12/2/21 Trial Information)(App. pp. 5-6). Neither the trial information nor the written arraignment makes any mention of Iowa Code section 902.7, which allows for a five-year mandatory minimum for a person convicted of forcible felony who also possessed, displayed, or was armed with a dangerous weapon. (12/2/21 Trial Information; 12/3/22 Written Arraignment)(App. pp. 5-8). Iowa Code § 902.7 (2021). It does not appear that the trial information was ever amended to include a reference to Section 902.7.

By the time the instructions were submitted to the jury, however, special interrogatories were included that allowed the jury to make the required findings for imposition of the mandatory minimums under Section 902.7. (9/29/22 Form of Verdict – Interrogatory)(App. pp. 31-32). The parties stipulated to the instructions, though the record is unclear if the stipulation included the interrogatories. (9/20/22 Tr. p. 2 L.14-p. 3 L.13). Regardless, including the interrogatories in the instruction resolved only one of the Alleyene requirements

– a finding by the jury; it failed to address the other requirement – notice ahead of trial. Alleyene v. United States, 570 U.S. 99, 103 (2013). See also Hamling v. United States, 418 U.S. 87, 117 (1974) (“Our prior cases indicate that an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.”). Nor is the error waived by a defendant’s failure to object at the instruction stage or at sentencing. State v. Lockett, 387 N.W.2d 298, 301 (Iowa 1986).

The State failed to sufficiently plead the mandatory minimums under Iowa Code section 902.7. Because Chawech was not given proper notice of the enhancement before trial, his mandatory five-year minimum sentences under Counts III and IV were illegal and should be vacated. State v. Dann, 591 N.W.2d 635, 639 (Iowa 1999).

## **CONCLUSION**

The evidence was insufficient to support Defendant-Appellant Wichang Chawech's convictions for Assault with Intent to Inflict Serious Injury, Willful Injury Causing Serious Injury, and Intimidation with a Dangerous Weapon with Intent. His convictions, judgment and sentence should be vacated 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.

Chawech respectfully requests this Court vacate his convictions, sentence and judgment and remand his case to the District Court for the relief requested.

## **REQUEST FOR NONORAL SUBMISSION**

Counsel requests not to be heard in 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 \$6.46, and that amount has been paid in full by the Office of the Appellate Defender.

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

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

[X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 7,597 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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