

IN THE SUPREME COURT OF IOWA

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STATE OF IOWA,

Plaintiff–Appellee,

v.

LASONDRA A. JOHNSON,

Defendant–Appellant.

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S. CT. NO. 21–1891

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

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APPLICANT’S APPLICATION FOR FURTHER REVIEW  
OF THE DECISION OF THE IOWA COURT OF APPEALS  
FILED OCTOBER 25, 2023

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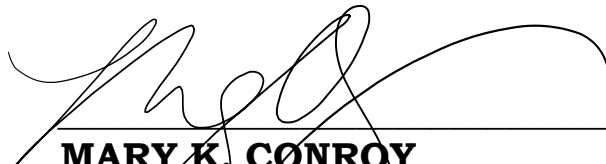
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## **CERTIFICATE OF SERVICE**

On the 14th day of November, 2023, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant–Appellant by emailing her at her known email address and by placing one copy thereof in the United States mail, proper postage attached, addressed the Appellant at her known home address.

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## QUESTIONS PRESENTED FOR REVIEW

Should the Iowa Supreme Court overrule its decision in State v. Longo, 608 N.W.2d 471 (Iowa 2000), which heavily relied on the much-criticized U.S. Supreme Court's decision in United States v. Watts, 519 U.S. 148, 157 (1997), and conclude that a district court's consideration of acquitted conduct is an improper sentencing factor?

Does Iowa Code sections 704.1(3) and 704.2A forbid the stand-your-ground defense only when there is *active* engagement of a criminal activity *separate* from the use of force that the defendant claims is justified or does the "illegal activity" and "criminal activity" refer to the use of force for which the defendant claiming was justified?

When the State does not present evidence or argue that the defendant was engaged in an active illegal activity at the time the defendant uses the force that constitutes the basis of the criminal charge and for which the defendant claims is justified, is it error for the instructions to include references to the defendant engaging in illegal activity of assault?

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## **STATEMENT IN SUPPORT OF FURTHER REVIEW**

This Court should accept further review and overrule its decision in State v. Longo, 608 N.W.2d 471 (Iowa 2000), which the Court of Appeals relied on to find the district court's consideration of acquitted conduct was a proper sentencing factor. See Iowa R. App. P. 6.1103(1)(b)(3), (4). In Longo, the Iowa Supreme Court relied on the U.S. Supreme Court's decision in United States v. Watts, 519 U.S. 148, 157 (1997). The Watts decision has been widely criticized, even by members of the U.S. Supreme Court. See, e.g., United States v. Booker, 543 U.S. 220, 240 n.4 (2005) ("Watts, in particular, presented a very arrow question regarding the Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument. It is unsurprising that we failed to consider fully the issues presented to us in these cases."); State v. Melvin, 258 A.3d 1075, 1086 (N.J. 2021) (noting "seven current and former Supreme Court justices, as well as numerous federal and state court judges, have expressed concerns about Watts"); Jones v. United States, 574

U.S. 948 (2014) (Scalia, J., joined by Thomas & Ginsburg JJ., dissenting from the denial of certiorari); McClinton v. United States, 600 U.S. \_\_\_\_\_, 143 S.Ct. 2400 (2023) (Sotomayor, J., and Kavanaugh, J. joined by Gorsuch & Barrett, JJ., making statements regarding the denial of certiorari).

Acknowledging policy and constitutional concerns, including the right to a jury trial, due process, and double jeopardy, several state courts, including Michigan, Hawaii, North Carolina, New Hampshire, Georgia, and New Jersey have “prohibited a trial court from using acquitted conduct to determine a defendant’s sentence.” See Melvin, 258 A.3d at 1086 (citing cases). Johnson asks the Iowa Supreme Court to join those states and “hold that the findings of juries cannot be nullified through lower-standard of fact findings at sentencing.” See id. at 1089. This Court should accept further review and explicitly conclude the use of acquitted conduct to determine a defendant’s sentence amounts to an improper sentencing factor.

Additionally, this Court’s guidance is necessary to clarify the meaning and applicability of the 2017 “stand your ground” amendments. See Iowa R. App. P. 6.1103(1)(b)(2–(5). In particular, it raises the issue of when the district court should instruct the jury on whether a defendant who raises a justification offense is “engaged in illegal activity” or “engaged in a criminal offense”. See Iowa Code §§ 704.1(3); 704.2A(2)(a) (2019). During the trial, when discussing the jury instructions, the district court stated:

I’ll be honest, the Court kind of struggled with the appellate court’s use of germane [in the Baltazar opinion] as to whether it is something that is completely -- if it’s the very offense for which the defendant is claiming justification, or if it’s something different, because it seems to be circular if it is the very offense for which they’re claiming justification to.

(9/22/21 Trial p.150 L.1–10). This Court should accept review and clarify the plain language of Iowa Code sections 704.1(3) and 704.2A both forbid the stand-your-ground defense when there is *active* engagement of a criminal activity *separate* from the use of force that the defendant claims is

justified. See Iowa Code §§ 704.1(3), 704.2A. Thus, this Court should find 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) (where defendant illegally possessed a gun).

In its opinion, the Court of Appeals accurately summarized, “The State claimed that the fight between Johnson and Mills was over when Johnson fired the gun, while Johnson claimed she fired in self-defense.” (Opinion p. 2). Yet, it found the district court properly instructed the jury, despite the instructions telling the jury to consider whether Johnson “was engaged in the illegal activity of Assault” in two different instructions that outlined Johnson’s justification defense. See (Opinion p. 4); (Instructions 55, 58) (App. p. 19–20). Because there was no evidence Johnson was *engaged in a separate assault* when she pulled out and shot her gun—the act for which she was on trial—the Court of Appeals’ decision

is in conflict with long-standing precedent of this Court that does not allow the district court to give instructions that are not supported by substantial evidence. See, e.g., State v. Ellison, 985 N.W.2d 473, 478 (Iowa 2023) (quoting State v. Liggins, 557 N.W.2d 263, 267 (Iowa 1996)).

For these reasons, Defendant–Appellant Lasondra A. Johnson respectfully requests this Court grant further review of the Court of Appeals’ decision on October 25, 2023.

### **STATEMENT OF THE CASE**

Defendant–Appellant Lasondra Johnson seeks further review of the Court of Appeals’ decision affirming her conviction, the part of her sentence imposing prison, and judgment following a jury trial and verdict finding her guilty of assault causing serious injury.

### **ARGUMENT**

#### **I. The Court of Appeals erred when it determined the district court accurately instructed the jury regarding Johnson’s justification defense.**

The Court of Appeals accurately summarized, “The State claimed that the fight between Johnson and Mills was over

when Johnson fired the gun, while Johnson claimed she fired in self-defense.” (Opinion p. 2). There was no evidence at trial that Johnson was engaged in an assault at the time she fired the gun, which formed the basis of the charge in the underlying case.

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., Lorenzo Baltazar, 935 N.W.2d at 870–71 (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 Court of Appeals erred in finding the

district court properly submitting these instructions to the jury over Johnson's objections.

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 or 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 . . . ." Id.

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<sup>1</sup> 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) (emphasis added).

Johnson objected to Instructions 55 and 58, noting there was "zero facts in evidence that suggest that at the time she used deadly force that she was engaging in the crime of an assault. I haven't heard anybody say anything about that." (09/22/21 p.146 L.6-11). In response to the objection, the State did not identify any assault that would constitute

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<sup>1</sup> At the time of the conference, it was labeled as Instruction 57. (9/22/21 p.145 L.20-p.146 L.25).

Johnson “engaging in illegal activity” nor did it point to any testimony or evidence in the record that supported the inclusion of this language in the instructions. (09/22/21 p.145 L.23–p.146 L.25, p.148 L.24–p.152 L.8).

Reasonably, this is because the State recognized there was no evidence in the record that supported the proposition that Johnson was “engaging in illegal activity” at the time she fired her gun. At trial, the State did not present any evidence Johnson was assaulting Mills or engaged in any assault when she got her gun and fired. To the contrary, the State’s entire theory of the case was that the fight was over when Johnson, still angry about the prior tussle with Mills, got into her car, grabbed her gun, and purposefully shot Mills. The State’s witnesses, Shara Harrington, Sherry Harrington, Boldon, and M.H. all testified that the fight was over when Johnson shot the gun. (9/16/21 p.21 L.4–23, p.46 L.22–p.47 L.15; p.179 L.2–p.180 L.5, p.190 L.10–p.191 L.3 L.15; 9/17/21 p.25 L.5–p.28 L.19, p.29 L.15–22, p.95 L.15–p.97 L.9, p.107 L.15–p.108 L.19). The State argued the shooting as a type of revenge for

the earlier fight; it argued to the jury that the fight was over and when Johnson shot her gun. (09/23/21 p.21 L.16–p.22 L.1).

Accordingly, the Court of Appeals erred in finding the district court properly instructed the jury because the record does not contain substantial evidence that Johnson was engaged in a continuous assault when she fired her gun. See State v. Bentley, 757 N.W.2d 257, 262 (Iowa 2008) (citation omitted) (“Substantial evidence’ is that upon which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.”). The district court erred by giving Instructions 55 and 58 when there was no evidence supporting that Johnson was engaged in a continuous assault. See State v. Ellison, 985 N.W.2d 473, 478 (Iowa 2023) (citing State v. Liggins, 557 N.W.2d 263, 267 (Iowa 1996)); Comment, Iowa State Bar Ass’n, Iowa Criminal Jury Instruction Nos. 400.3, 400.6 (June 2020) (warning to only use the language that is supported by the evidence).

Because the State did not present this evidence, the language regarding Johnson being engaged in the illegal activity of assault was “not related to the factual issues to be decided by the jury.” Ellison, 985 N.W.2d at 479 (citation omitted). The facts simply did not present an open question of whether Johnson was engaged in an illegal activity at the time she shot her gun. Thus, Instructions 55 and 58 did not “fairly state the law as applied to the facts of the case.” Id. (citation omitted).

The instructions regarding Johnson’s justification defense did not “convey[] the applicable law in such a way that the jury ha[d] a clear understanding of the issues’ before it.” State v. Benson, 919 N.W.2d 237, 245 (Iowa 2018) (citation omitted). Rather, the instructions were misleading and confusing; because there was no evidence that Johnson was engaged in a separate assault at the time she fired the gun, they provided the jury a circular path. The only assault in play at the time of the shooting was the act of shooting the gun itself. The instructions suggested that if Johnson was

engaged in the illegal act of assault when shooting her gun then she was not entitled to the presumption that she reasonably believed deadly force was necessary and/or her use of force was not justified because she made no effort to retreat. (Jury Instruction 55, 58) (App. pp. 19, 20). Such a suggestion is confusing, as the main question at issue for the jury to determine was whether Johnson's act of shooting the gun was justified.

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). 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.

**II. The Court of Appeals erred in finding the district court did not apply a fixed sentencing policy or rely on improper considerations.**

In pronouncing the sentence, 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). Later, 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).

First, the Court of Appeals erred in finding the remarks above did not illustrate the court's use of a fixed policy.

(Opinion pp. 7–8). 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).

While the district court did not explicitly state it was applying a fixed policy, its comments evince such a policy. See State v. Kelley, 357 N.W.2d 638, 640 (Iowa Ct. App. 1984); 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). 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 reveal the 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). Thus, a new sentencing hearing is required.

Second, this Court should find the district court’s consideration of acquitted conduct is an improper sentencing factor. 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.” In its opinion, the Court of Appeals cited State v. Longo, 608 N.W.2d 471 (Iowa 2000), which determined a sentencing court could consider “conduct underlying the acquitted charge based on its own determination of the facts.”

Id. at 475 (citing United States v. Watts, 519 U.S. 148, 157 (1997)).

As discussed earlier, the Watts decision has been widely criticized by not only practitioners and scholars but by judges and even by members of the U.S. Supreme Court. See Melvin, 258 A.3d at 1086. Several state courts, including Michigan, Hawaii, North Carolina, New Hampshire, Georgia, and New Jersey have “prohibited a trial court from using acquitted conduct to determine a defendant’s sentence.” Id. Those courts that have rejected the premise that a sentencing court may rely on acquitted conduct raise policy concerns, double jeopardy concerns, and due process issues.

A defendant whom the jury acquits retains a presumption of innocence. Id. at 1088 (citation omitted). “Indeed, a jury’s verdict of acquittal represents the community’s collective judgment regarding all the evidence and arguments presented to it. Thus, even if the verdict is based upon an egregiously erroneous foundation, its finality is unassailable.” Id. (citations omitted) (cleaned up). The

“inescapable point is that our law requires proof beyond a reasonable doubt in criminal cases as the standard of proof commensurate with the presumption of innocence; *a presumption not to be forgotten after the acquitting jury has left, and sentencing has begun.*” State v. Cote, 530 A.2d 775, 784 (N.H. 1987) (emphasis added).

As one judge noted, allowing the sentencing court to consider facts necessarily rejected by the jury is at odds with the right to a jury trial:

It makes absolutely no sense to conclude that the Sixth Amendment is violated whenever facts essential to sentencing have been determined by a judge rather than a jury, and *also* conclude that the fruits of the jury’s efforts can be ignored with impunity by the judge in sentencing.

United States v. Pimental, 367 F.Supp.2d 143, 150 (D. Mass. 2005) (citation omitted). Allowing the sentencing court to consider acquitted conduct also usurps the important role the jury plays in the criminal justice system. “[W]hen a court considers acquitted conduct it is expressly considering facts

that the jury verdict not only failed to authorize; it considers facts of which the jury expressly disapproved.” Id. at 153.

[T]he jury’s central role in the criminal justice system is better served by respecting the jury’s findings with regard to authorized and unauthorized conduct. To consider unauthorized conduct would be to denigrate wholly the right to a jury trial, which is a “fundamental reservation of power in our constitutional structure.”

Eang Ngov, Judicial Nullification of Juries: The Use of Acquitted Conduct at Sentencing, 76 Tenn. L. Rev. 235, 261 (2009) (citation omitted).

The Iowa Supreme Court should overrule State v. Longo and find that a sentencing court may only consider “facts reflected in the jury verdict or admitted by the defendant.” See State v. Shattuck, 704 N.W.2d 131, 141 (Minn. 2005) (citation omitted). The jury did not make any determination that Johnson criminally caused the death of Mills, and Johnson repeatedly asserted she only shot her gun to defend herself. Moreover, the district court’s statements suggest it found Johnson was 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 conclusion is belied by what the jury’s verdict establishes the facts the jury actually determined.

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. (Instructions 35, 37; Verdict) (App. pp. 13, 15, 21).

As mentioned, defense counsel noted the verdict could illustrate 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 is also 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 marshaling 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 are the sentencing court’s suggestions that Johnson intentionally shot at Mills to harm or kill her. The jury’s verdict did not convict Johnson of killing another human being, and its verdict illustrates that the jury must have rejected the idea that Johnson shot her gun at Mills with the intent to harm her.

This Court should find a sentencing court may not bypass the jury’s verdict, and by implication the jury’s factual findings, and “act as a thirteenth juror by substituting his judgment for that of the jury.” Melvin, 258 A.3d at 1080 (cleaned up). “Punishing a person for conduct of which a jury acquitted them violates the protection afforded by acquittal and undermines the purpose of a jury trial.” Id. Moreover, a sentencing court’s consideration of facts that the jury necessarily acquitted the defendant of in rendering its verdict violates the proper role of the judiciary after a jury trial, the defendant’s federal and state constitutional rights to a jury trial, due process, and double jeopardy. See U.S. Const.

amend. V, VI, XIV; Iowa Const. art. I, §§ 9, 10, 12; Iowa Code § 701.9 (2019). As such, this Court should conclude the district court's consideration of acquitted conduct in this case constituted unproven facts' therefore, it relied upon improper sentencing considerations when fashioning Johnson's sentence. See State v. Black, 324 N.W.2d 313, 316 (Iowa 1982); State v. Gonzalez, 582 N.W.2d 515, 517 (Iowa 1998).

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). It is clear from the sentencing court's remarks that it actually considered and relied on the improper factor. See id.; 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 in front of a different judge. See State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994); State v. Lovell, 857 N.W.2d 241, 243 (Iowa 2014).

## **CONCLUSION**

Defendant–Appellant Lasondra A. Johnson requests the Supreme Court accept her application for further review, vacate the Court of Appeals’ decision, reverse her conviction, and remand for a new trial. Alternatively, she requests a new sentencing hearing.

## **ATTORNEY’S COST CERTIFICATE**

The undersigned hereby certifies that the true cost of producing the necessary copies of the foregoing Application for Further Review was \$0.00, 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 FURTHER REVIEWS**

This application complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because:

[X] this application has been prepared in a proportionally spaced typeface using Bookman Old Style, font 14 point and contains 5,378 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).



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