IN THE SUPREME COURT OF IOWA

STATE OF IOWA	)	
	)	
Appellee,	)	
	)	
v.	)	SUPREME COURT 20-0156
	)	(FLOYD)
SHANE M. DAVIS	)	
	)	
Defendant/Appellant,	)	

APPEAL FROM THE IOWA DISTRICT COURT
FOR FLOYD COUNTY
THE HONORABLE, JUDGE CHRISTOPHER FOY
THE HONORABLE, JUDGE DEDRA SCHROEDER

APPELLANT'S APPLICATION FOR FURTHER REVIEW OF THE COURT OF APPEAL'S RULING FILED Aug. 4,2021

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APPLICATION FOR FURTHER REVIEW

CERTIFICATE OF SERVICE

On the 22nd day of Aug., 2021, 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 Shane M. Davis, Inmate #6204130, Anamosa State Penitentiary, 406 N. High St., Anamosa Ia.

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STATEMENT SUPPORTING FURTHER REVIEW

1. The Iowa Court of Appeals erred by finding it had no jurisdiction to rule on the Appellant's improper sentencing claims in addition to his claims of invalid guilty plea, in violation of his rights under Article I Sect. 9 and 10 of the Iowa Constitution, and the 5th 6th and 14th Amendments to the U.S. Constitution.

2. The defendant had alleged error by the trial court in sentencing the defendant to consecutive terms contrary to the intent of the plea agreement between the parties, and contrary to the PSI recommendation.

3. That the remedy for a prosecutor's failure to adhere to the terms and intent of the plea agreement is to vacate the sentence and remand to the district court for resentencing before a different district court judge. State v. Delaney, 526 NW2d 170 (Iowa App. 1994)

4. The defendant had alleged error by the trial court in sentencing the defendant to consecutive terms after considering improper factors in arriving at the decision to impose consecutive terms.

5. That the remedy for the improper consideration of an inappropriate factor in imposing consecutive terms is to vacate the sentence and remand to the district court for resentencing before a different district court judge. State v. Ashley 462 NW2d 279 (Iowa 1990); State v. Lovell 857 NW2d 241 (Iowa 2014)

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Authorities

STATEMENT OF THE CASE

Nature of the Case: This is an appeal by the Defendant-Appellant, Shane M. Davis, from the judgment and sentence imposed 1-21-20 in the District Court for Floyd County Case No. FECR027926 following a guilty plea on 11-25-19 for Counts of Lascivious Acts with a Child, a Class D Felony in violation of Iowa 709.8(1)(e)(2011), 903B.2; and Indecent Contact with a Child, in violation of Iowa Code 709.12(1)(a), 903B.2, an Aggravated Misdemeanor.

Course of Proceedings in the District Court: On 11-4-19, the state filed a Trial Information in Floyd County Case No. FECR027926 charging Defendant, Shane M. Davis, with Counts of Lascivious Acts with a Child, a Class D Felony in violation of Iowa 709.8(1)(e)(2011), 903B.2; and Indecent Contact with a Child, in violation of Iowa Code 709.12(1)(a), 903B.2, an Aggravated Misdemeanor. (see Trial Information) (App. p. 7).

The Defendant executed a Plea Agreement, and a written guilty plea form on 11-25-19. Written Guilty Plea (App. p. 49) The Court entered an Order accepting the defendant's plea on 11-25-19, ordered a PSI, and released the defendant from jail to be under pre-trial services. (See Order 11-25-19) (App. p.53) On 1-15-20 a PSI was filed recommending consecutive prison terms of 5 and 2 years, both suspended with 5 years probation, sex registry for 10 years, 10 year special sentence, court costs, fines, and DNA sample.See PSI 1-15-20 (App.p.61)

On 1-21-20 the Court sentenced Davis to an indeterminate

term of imprisonment not to exceed 5 years with a suspended $750 fine and 35% surcharge, on Count 1; an indeterminate term of imprisonment not to exceed 2 years on Count 2 with a suspended $625 fine, and 35% surcharge, court costs and fees, and a domestic violence surcharge of $100. and required a DNA sample. The court ordered the sentence in Count One to run consecutively with Count 2. Pursuant to Iowa Code Chapter 903B, upon completion of the sentence imposed above the defendant is to be committed into the custody of the Director of the Iowa Department of Corrections for a special sentence 10 years, with eligibility for parole as provided in Iowa Code Chapter 906. (Judgment)(App. p. 89). The Defendant was ordered to register with the Sheriff for the Sex Offender Registry within 5 days of release.

Notice of Appeal was filed on 1-21-20. (Notice of Appeal) (App. p. 94). The State Appellate Defender withdrew and Thomas M. McIntee was appointed for Appeal on 2-1-20.

Facts:

On 11-4-19, the state filed a Trial Information in Scott County Case No. FECR027926 charging Defendant, Shane M. Davis, with Counts of Lascivious Acts with a Child, a Class C Felony in violation of Iowa 709.1, 709.8(1)(a), 709.8(2)(a)2011), 903B.2; and Indecent Contact with a Child, in violation of Iowa Code 709.12(1)(a), 903B.2, an Aggravated Misdemeanor. (see Trial Information) (App. p. 7).

The Defendant was accused of indecent and lascivious contact with the nieces of his fiancé, B.T. aged 10 (touching her groin/vaginal area) and K.T. age 11 (touching her breast), on the outside of their clothing. See Minutes of Testimony (App. p. 10); Trial Information (App. p. 7) The defendant denied these allegations at all times. See Minutes of Testimony (App. p.10)

The Defendant executed a Plea Agreement, and a written guilty plea form on 11-25-19. Guilty Plea Form (App. p. 49)

On 11-25-19 the Court (Judge Foy) accepted the guilty plea, to Count I of Lascivious Acts with a Child, a Class D

Felony in violation of Iowa 709.1, 709.8(1)(e) (2011), 903B.2; and Indecent Contact with a Child, in violation of Iowa Code 709.12(1)(b), 903B.2, an Aggravated Misdemeanor. and ordered a PSI. On 1-15-20 a PSI (App. p. 61) was filed recommending consecutive prison terms of 5 and 2 years, both suspended with 5 years probation, sex registry for 10 years, 10 year special sentence, court costs, fines, and a DNA sample. Sentencing was held on Jan. 21, 2020. The prosecutor read allegations contained in victim statements concerning alleged threats by the defendant to the parents of the alleged victims after his guilty plea, which had not been filed or proven in court, nor ever admitted by the defendant. The prosecutor also related to the Court their complaints about Davis' release pending the sentencing hearing.

The Court (Judge Schroeder) sentenced the defendant as follows: to an indeterminate term of imprisonment not to exceed 5 years with a suspended $750 fine and 35% surcharge, on Count 1; an indeterminate term of

imprisonment not to exceed 2 years on Count 2 with a suspended $625 fine, and 35% surcharge, court costs and fees, and a domestic violence surcharge of $100. and required a DNA sample. The court ordered the sentence in Count One to run consecutively with Count 2. Pursuant to Iowa Code Chapter 903B, upon completion of the sentence imposed above the defendant is committed into the custody of the Director of the Iowa Department of Corrections for 10 years, with eligibility for parole as provided in Iowa Code Chapter 906. (Judgment/Sentencing Order)(App. p.89). The Court based the prison sentences and the decision to make them consecutive on a perceived 'eyeroll' by the defendant at some point during the sentencing proceedings, as well as unproven allegations by family members read to the Court by the prosecutor. (Sentencing Transcript p 18).

Notice of Appeal was filed on 1-21-20. (Notice of Appeal) (App. p. 94). The Appellate Defender, subsequently withdrew,

and Counsel Thomas M. McIntee was appointed on appeal on 2-4-20.

ARGUMENT

I. WHETHER THE PROSECUTOR UNDERMINED THE PLEA AGREEMENT DURING SENTENCING? WHETHER TRIAL COURT ERRED BY CONSIDERING IMPROPER FACTORS IN SENTENCING THE DEFENDANT TO CONSECUTIVE PRISON TERMS?

A. Standard of Review and Preservation of Error.

In Iowa, appellate courts review a district court's sentencing procedure for correction of errors at law. State v. Formaro 638 NW2d 720 (Iowa 2002). A sentence will ordinarily not be upset on review unless the defendant shows an abuse of discretion by the trial court, or a defect in the sentencing procedure such as the court's consideration of an impermissible factor. State v. Witham 583 NW2d 677 (Iowa 1998).

A defendant may raise the issue of the sentencing Court's

reliance upon improper factors and violation of the plea agreement on direct appeal despite the absence of an objection in the trial court. State v. Lopez 872 NW2d 159 (Iowa 2015); State v. Thomas 520 NW2d 311 (Iowa Ct of App. 1994)

A timely Notice of Appeal from the final ruling was filed. Notice of Appeal) (App. p. 94)

B. Discussion.

1. Sentencing Court consideration of impermissible factors

When sentencing a defendant, the Court may not consider facts or allegations that are not established by the evidence or admitted by the defendant. State v. Black. Facts that are not admitted by the defendant or proven by the State amount to improper sentencing considerations. When a Court considers these factors in arriving at the sentence rendered it constitutes reversible error. State v. Ashley 462 NW2d 279 (Iowa 1990).

When the record reveal improper sentencing considerations, the reviewing Court cannot speculate about the weight a sentencing court assigned to the improper consideration. The

defendant's sentence must be vacated and the case remanded for resentencing. State v. Gonzalez 582 NW2d 515 (Iowa 1998); State v. Black 324 NW2d 313 (Iowa 1982).

In State v. Lovell 857 NW2d 241 (Iowa 2014), the Iowa Supreme Court noted, the defendant was charged with two counts of sexual abuse in the third degree and pled guilty to two counts of incest, in violation of Iowa Code section 726.2 (2011). The district court sentenced Lovell to two consecutive terms of incarceration not to exceed five years, but during sentencing relied upon the unproven allegation that Lovell paid the victim money in exchange for sex. Lovell appealed. We granted a summary reversal and remanded the case for resentencing before a different judge on the grounds the district court had relied upon an improper sentencing consideration. Upon resentencing, the district court again sentenced Lovell to two consecutive terms of incarceration not to exceed five years, but in doing so again referred to the impermissible sentencing factor stating,

"Well, Mr. Lovell, the problem with your case is, although you have a lack of criminal history, this is extremely offensive, obviously, in the eyes of the law, and in the eyes of the Court because [the victim] was in a vulnerable position.... In reading the case, she is desperate for diapers for her baby, and then, for sex, you're giving her money."

Likewise, in the case at bar, the District Court relied on unproven allegations that the defendant had made physical threats against the alleged victims parents as set forth in the victim statements the county attorney read to the Court during sentencing proceedings. (See Victim Statements) (App. p. 73) (Sentencing Transcript (p. 2 L 24 to p. 14 L11) (See Minutes) (App. p.10) These statements were a part of the PSI, which the Court declared had been relied upon in selecting the sentence imposed. See Sentencing Transcript p. 2 L 12 to L22, to-wit:

COURT: "This is the time and place set for sentencing. The Court has reviewed the presentence investigation report. Mr. Milder, have you had enough time to go through that report with your client?"

MR. MILDER: Yes, Your Honor.

THE COURT: Any changes, objections, or corrections?

MR. MILDER: No, Your Honor.

THE COURT: May the Court rely upon that for sentencing purposes?

MR. MILDER: Yes, Your Honor.

In this case the parties had agreed to join in the actual recommendation of the Pre-Sentence Investigator, which accordi8ng to the PSI was for suspended sentences on both offenses with 6 months in the residential facility, 5 years supervised probation, 10 year sex registry and a 10 year special sentence.

During the sentencing proceedings, the prosecutor never stated specifically that she was recommending suspended sentences, 6 months in the RFC, 5 years probation, and 10 year special sentence, 10 year sex registry. She only concurred with the PSI, with no advocacy embracing the recommendation and agreeing it was worthy for the Court to impose.

Instead the prosecutor insisted upon personally reading to the Judge from the victims' and their parents' statements which were part of the PSI, and which the Court had already reviewed and declared her intent to rely upon for selection of sentence. At the conclusion of her argument/narration the

prosecutor merely stated her concurrence with the PSI report's recommendation. See Sentencing Transcript (p. 2 L 19 to p. 14 L 11).

Additionally, in State v. Messer 306 NW2d 731(Iowa 1981), the Iowa Supreme Court held,

> "We will set aside a sentence and remand a case to the district court for resentencing if the sentencing court relied upon charges of an unprosecuted offense that was neither admitted to by the defendant nor otherwise proved. As we recently stated in State v. Messer, 306 N.W.2d 731 (Iowa 1981) The circumstances considered at the sentencing hearing related to the alleged illegal entry into the victim's home. We have stated that such consideration is improper. If there were additional factual circumstances considered, the district court has left us to speculate what these could be. As in Messer, we cannot speculate about the weight the sentencing court gave to these unknown circumstances. Since we cannot evaluate their influence, we must strike down the sentence. Messer, 306 N.W.2d at 733."

In Lovell, the District Court's consideration of more serious conduct, an allegation that Lovell paid the victim money in exchange for sex which was never proven, never charged, or admitted to by the defendant required the Court to remand for resentencing by the district court before a different judge on the grounds the district court had relied upon an improper

sentencing consideration in sentencing Lovell to two consecutive terms of incarceration not to exceed five years.

In the case at bar, the prosecutor's narration was a de facto argument for maximum prison sentences, contrary to the parties' plea agreement. The prosecutor made virtually no effort to comply with the spirit and intent of the plea agreement, and in essence sought to undermine it by interjecting articulation of unproven allegations, which affected the Court's disposition.

In Lovell, the Iowa Supreme Court stated,

> "[i]f a court in determining a sentence uses any improper consideration, resentencing of the defendant is required," even if it was "merely a 'secondary consideration.' " *State v. Grandberry,* 619 N.W.2d 399, 401 (Iowa 2000) (quoting *State v. Messer,* 306 N.W.2d 731, 733 (Iowa 1981)). Information contained in the minutes of testimony is not a permissible sentencing consideration if unproven. ("Where portions of the minutes [of testimony] are not necessary to establish a factual basis for a plea, they are deemed denied by the defendant and are otherwise unproved and a sentencing court cannot consider or rely on them.").
>
> Here, although the district court attempted to disclaim the reference to the impermissible sentencing factor, "we cannot speculate about the weight the sentencing court gave to these unknown circumstances. Since we cannot evaluate their influence, we must strike down the sentence." *Black,* 324 N.W.2d at 316. In order to protect the integrity of our judicial system from the appearance of impropriety, we vacate the defendant's sentence and remand the case to the district court for resentencing before a different judge."

the Iowa Court of Appeals declared,

"Spiker claims the district court relied on uncharged and unproven facts contained in the minutes of testimony and that this reliance resulted in a violation of his due-process rights. The district court relied heavily on sections of the minutes of testimony, alleging another child, E.R., was forced to perform oral sex on Spiker. "A sentencing court may consider unprosecuted offenses in imposing sentences only if admitted by the defendant or adequate facts are presented at the sentencing hearing to show the defendant committed the crimes." *See State v. Delaney*, 526 N.W.2d 170, 179 (Iowa Ct. App. 1994) (citing *State v. Black*, 324 N.W.2d 313, 316 (Iowa 1982)).

The district court properly admitted that it considered improper factors and had the foresight to make a full and accurate record of its decision. The district court stated, "After the sentencing hearing, counsel for the State and your attorney advised the Court that the Court had made a mistake in stating that the act which was mentioned in the minutes wasn't the act you participated in."

However, the district court failed to resentence Spiker. Even when "the district court attempt[s] to disclaim the reference to the impermissible sentencing factor, 'we cannot speculate about the weight the sentencing court gave to these unknown circumstances. Since we cannot evaluate their influence, we must strike down the sentence.'" *State v. Lovell*, 857 N.W.2d 241, 243 (Iowa 2014) (citing *Black*, 324 N.W.2d at 316). We applaud the district court's candid admission but are required to "vacate the defendant's sentence and remand the case to the district court for resentencing before a different judge." *Id.*

In stating its reasons for rejecting the unanimous recommendations of the professionals involved in this case, including the prosecutor, defense attorney and pre-sentence investigator, the Court stated at Sentencing Transcript p. 18 L 10 as follows:

THE COURT: "The laws of Iowa require that a sentence be imposed that provides for your rehabilitation, protects the

> community, and deters others from committing this type of offense, and deters your future actions, unlawful actions.
>
> The Court looks at several different factors in determining what an appropriate sentence is. I look at your age. I look at your employment circumstances, your family circumstances, your record, the nature of the offense, your attitude, which included some eye rolling, some huffing and guess I wouldn't call it appropriate courtroom behavior, but -- It also includes everything I've learned through the presentence investigation report."

The improper statements and unproven allegations were contained as part of the PSI. See PSI (App. p. 61). They had also been verbally narrated verbatim by the prosecutor during the sentencing proceeding. This reviewing appellate Court may not speculate about the weight the District Court assigned to the improper considerations. The defendant's sentence must be vacated and the case remanded for resentencing. State v. Lovell 857 NW2d 241(Iowa 2014); State v. Gonzalez 582 NW2d 515 (Iowa 1998); State v. Black 324 NW2d 313 (Iowa 1982).

2. Breach of Plea Agreement by Prosecutor

In this case the parties had agreed to join in the actual recommendation of the Pre-Sentence Investigator, which according to the PSI was for suspended sentences on both

offenses with 6 months in the residential facility, 5 years supervised probation, sex registry and a 10 year special sentence. See Plea Agreement (App.p.49); See PSI (App. p. 61).

During the sentencing proceedings, the prosecutor never stated specifically that she was recommending suspended sentences, 6 months in the RFC, 5 years probation, and 10 year special sentence. Instead the prosecutor insisted upon personally reading to the Judge from the victims' and their parents' statements which were part of the PSI. The Court reviewed and declared her intent to rely upon the PSI for selection of sentence. At the conclusion of her argument the County Attorney merely stated her concurrence with the PSI report's recommendation. See Sentencing Transcript (p. 2 L 19 to p. 14 L 11).

The prosecutor's narration was a de facto argument for the victims' requests for maximum prison sentences, contrary to the parties' plea agreement. The prosecutor made virtually no effort to comply with the spirit and intent of the plea agreement, and in essence sought to undermine it by

interjecting articulation of unproven allegations, which affected the Court's disposition.

In State v. Delaney, 526 NW2d 170 (Iowa App. 1994) the Iowa Court declared,

"[T]he remedy for the State's breach of a plea agreement as to a sentencing recommendation is to remand the case for resentencing by a different judge, with the prosecutor obligated to honor the plea agreement and sentencing recommendation." *State v. Lopez*, 872 N.W.2d 159, 181 (Iowa 2015)

The remedy is the same when defense counsel fails to object to such a breach by the State. *See State v. Fannon*, 799 N.W.2d 515, 523–24 (Iowa 2011); *State v. Bergmann*, 600 N.W.2d 311, 315 (Iowa 1999). Ineffective-assistance-of-counsel claims are not subject to ordinary error- preservation rules. *Nguyen v. State*, 878 N.W.2d 744, 750 (Iowa 2016). Our review of such claims is de novo. *See State v. Harris*, 919 N.W.2d 753, 754 (Iowa 2018). In order to prevail on his ineffective-assistance-of-counsel claim, Hanna must show by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Harrison*, 914 N.W.2d 178, 188 (Iowa 2018)."

In State v. Lopez, the Iowa Supreme Court stated,

"Lopez's appellate brief asked that he be permitted to withdraw his guilty plea or, alternatively, that the case be remanded for resentencing by a different judge. His application for further review narrowed his requested relief to resentencing by a different judge. That was the relief sought by his appellate counsel at oral argument.[9]

We have repeatedly held that the remedy for the State's breach of a plea agreement as to a sentencing recommendation is to remand the case for resentencing by a different judge, with the prosecutor obligated to honor the plea agreement and sentencing recommendation. *Fannon,* 799 N.W.2d at 524 ("Doing so ensures Fannon receives the benefit of the bargain by demanding specific performance of the plea agreement."); *Bearse,* 748 N.W.2d at 219–20 ; *Horness,* 600 N.W.2d at 301."

In the Davis' case the parties had agreed to follow the PSI recommendation. The spirit and intent of this agreement, which is commonplace in many Iowa courts, contemplates the prosecutor articulating that specific recommendation set forth in the PSI to the Court in detail, and embracing it as worthy of the Court's acceptance. The County Attorney was duty bound to explain to the Judge she was recommending NO prison time, with a one 5 year suspended sentence on Count 2, an additional 2 year suspended sentence on Count 2, and probation for 5 years, 6 months in the RFC, 10 yr. sex registry, and a 10 year special sentence with supervision under Section 906. The prosecutor utterly failed to specifically articulate the agreed upon terms of the recommendation despite receiving the PSI a week before the hearing.

Instead the prosecutor spent 15 minutes personally reading victim statements directly to the Judge, with no objection from learned defense counsel. Their words became the prosecutor's words recited for dramatic effect, repeatedly

calling for maximum prison terms, contrary to the bargained for plea deal. The County Attorney clearly undermined that deal with prejudicial effect.

In Lopez, the Iowa Court declared,

"we reiterated the prosecutor's obligation under Iowa law is to not only recite the recommended sentence but also indicate that it is " 'worthy of the court's acceptance.' " *Bearse,* 748 N.W.2d at 216 (quoting *Horness,* 600 N.W.2d at 299–300 (recognizing prosecutor's "implicit obligation to refrain from suggesting more severe sentencing alternatives")). The Iowa Rule of Criminal Procedure governing plea-bargaining differs materially from the Federal Rule applied in *Benchimol. Compare* Fed.R.Crim.P. 11(c), *with* Iowa R.Crim. P. 2.10(1). In any event, the problem in this case is not merely the prosecutor's failure to enthusiastically endorse the recommended sentence but rather her conduct affirmatively undermining the recommendation.*See United States v. Cachucha,* 484 F.3d 1266, 1270–71 (10th Cir.2007) ("While a prosecutor normally need not present promised recommendations to the court with any particular degree of enthusiasm, it is improper for the prosecutor to inject material reservations about the agreement to which the government has committed itself.")…. Of course, on remand the prosecutor is required to honor the plea agreement and sentencing recommendation consistent with this opinion."

In State v. Black 324 NW2d 313(Iowa 1982), the Iowa Supreme Court held,

"Donald Eugene Black pleaded guilty to a charge of indecent exposure in violation of section 709.9, The Code, a serious misdemeanor, and was sentenced to the maximum term of incarceration. Black now contends that the district court erred in determining his sentence by giving consideration to a burglary charge that had been dismissed pursuant to a plea bargain. We find that the district court may have improperly based Black's sentence on allegations arising from the unprosecuted burglary charge that were neither admitted by the defendant nor proved independently. We therefore remand the case to the district court for resentencing."

In the case at bar, the prosecutor read allegations contained in victim statements concerning defendant's actions potentially violative of the No Contact Order. No complaint had been filed or proven in court, nor ever admitted by the defendant. There was no opportunity for cross-examination of the hearsay statements submitted by the state concerning post-guilty plea allegations. (p. 2 L 19 to p. 14 L 11). (See Sentencing Transcript p. 2 L 19 to p. 14 L 11).

Furthermore, in State v. Lovell 857 NW2d 241(Iowa 2014), the Iowa Supreme Court held,

"[i]f a court in determining a sentence uses any improper consideration, resentencing of the defendant is required," even if it was "merely a 'secondary consideration.' " *State v. Grandberry,* 619 N.W.2d 399 (Iowa 2001) Information contained in the minutes of testimony is not a permissible sentencing consideration if unproven. "The sentencing court should only consider those facts necessary to establish a factual basis for a plea,(otherwise) they are deemed denied by the defendant and are otherwise unproved and a sentencing court cannot consider or rely on them.")."

In this case, the prosecutor read allegations contained in victim statements concerning alleged threats to the parents of the alleged victims after his guilty plea, which had not been filed or proven in court, and never admitted by the defendant.

The prosecutor also indicated to the Court the victims' complaints about Davis' release pending the sentencing hearing.

In addition, after imposing consecutive prison sentences, the Judge stated there were 2 separate incidents involving 2 alleged victims but she also noted the defendant rolled his eye at some point during the proceeding. The Judge failed to inquire for clarification from the defendant about this perceived 'eye roll' prior to imposition of sentence, leaving the cause an ambiguous uncertainty that requires undue speculation. The Court's reliance on such an illusory factor is problematic as an impermissible consideration by the Court. This Court must vacate his consecutive sentences and remand to the district court for resentencing.

CONCLUSION

The Defendant/Appellant respectfully requests this Court vacate his consecutive sentences and remand for resentencing. As a further alterative, Mr. Davis respectfully requests this Court preserve his issues for a PCR. proceeding.

ATTORNEY'S COST CERTIFICATE

The undersigned certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $4.20, which has been paid fully by the undersigned counsel.

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

This brief complies with the typeface requirements and type-volume limitation of Iowa R. 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 2968 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

__/s/__Thomas M. Mc Intee_____ Dated: 8-22-2021

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