IN THE SUPREME COURT OF IOWA

STATE OF IOWA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	S.CT. NO. 17-1351
	)	
STEPHON TRAVELL CURRY,	)	
	)	
Defendant-Appellant.	)	

APPEAL FROM THE IOWA DISTRICT COURT
FOR JOHNSON COUNTY
HONORABLE PAUL D. MILLER, AND
HONORABLE KEVIN MCKEEVER, JUDGES

APPELLANT'S BRIEF AND ARGUMENT

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CERTIFICATE OF SERVICE

On June 11, 2018, 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 Stephon Curry, No. 6704926, Anamosa State Penitentiary, 406 North High Street, Anamosa, IA 52205.

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BJG/lr/03/18
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ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because the issues presented on appeal require clarification of existing Supreme Court precedent or overturning such precedent. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(c). Specifically, Curry requests this Court clarify the existing law surrounding when the determination of the defendant's reasonable ability to pay is required to be made, and overturn State v. Van Hoff, 415 N.W.2d 647 (Iowa 1987), and State v. Kaelin, 362 N.W.2d 526 (Iowa 1985), and require the sentencing courts to explicitly state the reasons on the record considered by the court when determining the defendant's reasonable ability to pay.

STATEMENT OF THE CASE

Nature of the Case: Appellant Stephon Curry appeals following his guilty plea, conviction, and sentence for: Robbery in the Second Degree, a Class C forcible felony, in violation of Iowa Code sections 711.1(1)(b) and 711.3.

Course of Proceedings: On April 6, 2017, the State charged Curry with Robbery in the First Degree, a Class B felony, in violation of Iowa Code sections 711.1(1)(B) and 711.2; and Theft in the Fourth Degree, a serious misdemeanor, in violation of Iowa Code sections 714.1(1) and 714.2(4). (Trial Information) (App. pp. 7-9).

On June 1, 2017, Curry pled guilty to the lesser included offense of Robbery in the Second Degree, a Class C forcible felony, in violation of Iowa code sections 711.1(1)(b) and 711.3. (Plea Tr. p. 2 L7-p. 3 L11; Order for PSI) (App. pp. 10-11). The agreement dismissed the second charge with costs assessed to Curry, and the State concurring with the sentencing agreement in the PSI. (Plea Tr. p. 2 L20-p. 3 L5).

On June 2, 2017, a second plea hearing was held to discuss the financial ramifications of Curry's guilty plea. (Financial Hearing Tr. p. 3 L6-15; Order re: Financial Penalties) (App. pp. 12-13).

On July 31, 2017, Curry was sentenced to an indeterminate term of confinement not to exceed 10 years,

with a mandatory minimum of seventy percent, a fine of $1000 with appropriate surcharges-suspended, and court costs. The Court ordered the State to submit victim pecuniary damages within 30 days of sentencing. The court also found that the Defendant was unable to pay for attorney fees and waived them. The Court indicated that all sums were due and payable by August 30, 2017. (Sent. Tr. p. 8 L7-p. 9 L24; Order of Disposition) (App. pp. 14-16).

On August 24, 2017, the defendant filed a pro se motion requesting the court to reconsider the amount of mandatory time the defendant would have to serve. (Pro se Motion) (App. p. 17).

On August 24, 2017, the defendant filed a pro se notice of appeal. (Notice of Appeal) (App. p. 18).

On September 1, 2017, the court denied the defendant's motion. (Order-Denial of Motion) (App. pp. 28-29).

Facts: The minutes of testimony establish the following: On or about March 26, 2017, Curry ran up to S.B. and punched S.B. in the head several times. Curry took S.B.'s

pink iPhone and fled the scene. (Plea Tr. p. 10 L9-p. 12 L15; Minutes) (Conf. App. pp. 5-7).

Other relevant facts will be discussed below.

ARGUMENT

I. THE DISTRICT COURT ERRED IN ASSESSING FINANCIAL OBLIGATIONS TO CURRY WITHOUT FIRST MAKING A CONSTITUTIONALLY MANDATED DETERMINATION OF HIS REASONABLE ABILITY TO PAY.

Preservation of Error: The general rule of error preservation is not applicable to void, illegal or procedurally defective sentences. State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994). The sentence in the instant matter is illegal by virtue of the fact that Curry was ordered to pay court costs without any showing that he had the reasonable ability to repay those obligations. (Sent. Tr. p. 8 L11-16; Order of Disposition) (App. pp. 14-16).

The failure of the district court to note reasons for the sentence trigger the appellate court's inability to divine trial court's abuse of, or forbearance from exercising, its discretion. State v. Thompson, 856 N.W.2d 915, 919 (Iowa 2014).

Standard of Review: This Court reviews restitution orders for correction of errors at law. When reviewing a restitution order, the appellate court determines whether the district court has properly applied the law. State v. Jenkins, 788 N.W.2d 640, 642 (Iowa 2010); State v. Klawonn, 688 N.W.2d 271, 274 (Iowa 2004). The Court's review of constitutional claims is de novo. State v. Dudley, 766 N.W.2d 606, 612 (Iowa 2009).

Discussion: The issue raised by Curry is whether the District Court had an affirmative obligation to **preemptively** make a determination regarding his reasonable ability to pay restitution (court costs, attorney fees, jail room and board, etc.) **before** issuing a plan of restitution. A brief history of the current state of the law is provided to help provide the Court with a better understanding of the confusing state of the law.

The Iowa Code establishes how restitution is to be applied in a criminal case. Section 910.2 sets forth when restitution applies:

> In all criminal cases in which there is a...verdict of guilty, ...the sentencing court shall order that restitution be made by each offender...

what restitution must be ordered:

> to the victims of the offender's criminal activities, to the clerk of court for fines, penalties, surcharges, and, **to the extent that the offender is reasonably able to pay**, for crime victim assistance reimbursement, ... **court costs including correctional fees approved pursuant to section 356.7**, court-appointed attorney fees ordered pursuant to section 815.9, including the expense of a public defender...

and how that restitution is to be ordered:

> In structuring a plan of restitution, the court shall provide for payments in the following order of priority: victim, fines, penalties, and surcharges, crime victim compensation program reimbursement, public agencies, court costs including correctional fees approved pursuant to section 356.7, court-appointed attorney fees ordered pursuant to section 815.9, including the expense of a public defender, contribution to a local anticrime organization, and the medical assistance program.

Iowa Code § 910.2 (2017) (emphasis added).

Iowa Code section 910.3 discusses how the amount of restitution is determined and when it applies:

> The county attorney shall prepare a statement of pecuniary damages to victims of the defendant, and, if applicable, any award by the crime victim compensation program...and shall provide the statement to the presentence investigator or submit

> the statement to the court at the time of sentencing. The clerk of court shall prepare a statement of court-appointed attorney fees...including the expense of a public defender, and court costs including correctional fees claimed by a sheriff or municipality pursuant to section 356.7, which shall be provided to the presentence investigator or submitted to the court at the time of sentencing.
>
> ***
>
> If pecuniary damages are not available at the time of sentencing, the county attorney shall provide a statement of pecuniary damages incurred up to that time to the clerk of court. The statement shall be provided no later than thirty days after sentencing.
>
> ***
>
> At the time of sentencing or at a later date to be determined by the court, the court shall set out the amount of restitution...and the persons to whom restitution must be paid. **If the full amount of restitution cannot be determined at the time of sentencing, the court shall issue a temporary order determining a reasonable amount for restitution identified up to that time.** At a later date as determined by the court, the court shall issue a permanent, supplemental order, setting the full amount of restitution. The court shall enter further supplemental orders, if necessary. **These court orders shall be known as the plan of restitution.**

Iowa Code § 910.3 (2017) (emphasis added).

Section 910.5 addresses the establishment of a "restitution plan of payment" for individuals committed

"to the custody of the director of the Iowa department of corrections":

> d. ...the director or the director's designee shall prepare a restitution plan of payment or modify any existing plan of payment.
>
> (1) The new or modified plan of payment shall reflect the offender's present circumstances concerning the offender's income, physical and mental health, education, employment, and family circumstances.
>
> (2) The director or the director's designee may modify the plan of payment at any time to reflect the offender's present circumstances.

Iowa Code § 910.5 (2017).

Finally, section 910.7 addresses modifications to the plan of restitution or plan of payment:

> At any time during the period of probation, parole, or incarceration, the offender or the office or individual who prepared the offender's restitution plan may petition the court on any matter related to the plan of restitution or restitution plan of payment and the court shall grant a hearing if on the face of the petition it appears that a hearing is warranted.

Iowa Code § 910.7 (2017).

In Harrison, the Iowa Supreme Court first addressed the sentencing court's discretion when assessing restitution. State v. Harrison, 351 N.W.2d 526 (Iowa 1984). The Court

discussed the difference between a "plan of restitution", which establishes the amounts and kind of restitution, and a "plan of payment", which is created by the department of corrections. Id. at 528-29. The Court held that "The order [at the time of sentencing] therefore must include a plan of restitution setting out the amounts and kind of restitution in accordance with the priorities established in 910.2." Id. At 528.

The Court went on to interpret section 910.2 to require "the sentencing court to order restitution in the plan of restitution 'for court costs, court-appointed attorney fees or the expense of a public defender when applicable' only *'to the extent that the offender is reasonably able to [make such restitution].'*" Id. at 529. Finally, the Court indicated that the reasonable ability to pay is an "express condition on the determination of the amount of restitution for court costs and attorney fees." Id.

The Supreme Court addressed restitution in State v. Janz. State v. Janz, 358 N.W.2d 547 (Iowa 1984). When the court in Janz issued its plan of restitution there was an error

in the amount owed. The issue addressed by the Court was whether Janz could directly appeal the error, or if she needed to apply for relief under 910.7. Id.

The Court held: "If a defendant's time for appeal from the original judgment of conviction and sentence has expired, the defendant must initially obtain a ruling from the district court on a petition for modification before seeking modification on appeal." Id. at 549. The Court further specified in this case "that defendant's appeal from the final judgment was also a permissible appeal from all orders incorporated in that sentence, include the order of restitution here challenged." Id.

In Haines, the Supreme Court addressed a sentencing order that required Haines to pay restitution or perform public service, without a determination as to his reasonable ability to pay. State v. Haines, 360 N.W.2d 791 (Iowa 1985). The Court indicated that "the court must have the facts to determine the appropriate plan of restitution." Id. at 796. The Court went on to emphasize the statute's requirement that the court must

"determine whether the defendant is reasonably able to pay and to sentence accordingly." Id.

In Van Hoff, the defendant filed for a modification of his plan of restitution under section 910.7, claiming he was reasonably unable to pay the total amount. State v. Van Hoff, 415 N.W.2d 647 (Iowa 1987). The Supreme Court, citing to State v. Kaelin, 362 N.W.2d 526, 528 (Iowa 1985), placed the burden upon the defendant "to demonstrate either the failure of the court to exercise discretion or an abuse of that discretion." Van Hoff, 415 N.W.2d at 648. In addressing the long-term nature of Van Hoff's incarceration, the Court indicated that reasonableness "is more appropriately based on the inmates ability to pay the current installments than his ability to ultimately pay the total amount due." Id. at 649. In providing further explanation as to this determination of reasonableness, the Court said "These and other future events, all of which would bear on his ability to pay the full amount, are imponderables at the time of the restitution order." Id.

In Alspach, the Court was faced with the issue of when a defendant is entitled to a court-appointed attorney to assist with challenging a plan of restitution. State v. Alspach, 554 N.W.2d 882 (Iowa 1996). The Court held that a court-appointed attorney is required when a challenge is raised under section 910.3, but not when a modification is requested under 910.7. Id. at 884.

In Blank, the Court addressed the timeliness of a challenge to a plan of restitution. State v. Blank, 570 N.W.2d 924 (Iowa 1997). The Court, in interpreting section 910.3, found that "[c]ourts are permitted under section 910.3 to delay entry of judgment for restitution when, for good cause, restitutionary sums are not ascertainable at the time of sentencing. A defendant, however, is granted no such statutory reprieve." Id. at 926. The Court held:

> To be considered an extension of the criminal proceedings, however, the defendant's petition under section 910.7 must be filed within thirty days from the entry of the challenged order. Failing that, or a timely appeal, a *later* action under section 910.7 would still provide an avenue for relief. But the action would be civil, not criminal, in nature.

Id.

Jackson and Swartz were decided on the same day. State v. Jackson, 601 N.W.2d 354 (Iowa 1999); State v. Swartz, 601 N.W.2d 348 (Iowa 1999). Both cases addressed the issue of when the sentencing court must make a reasonable ability to pay determination. The Court held:

> First, it does not appear in the present case that the plan of restitution contemplated by Iowa Code section 910.3 was complete at the time the notice of appeal was filed. *Until this is done, the court is not required to give consideration to the defendant's ability to pay.* Second, Iowa Code section 910.7 permits an offender who is dissatisfied with the amount of restitution required by the plan to petition the district court for a modification. Unless that remedy has been exhausted, we have no basis for reviewing the issue in this court.

Jackson, 601 N.W.2d at 357 (citations omitted; emphasis added).

The Court in Goodrich again reasserted the constitutional requirement that "a court must determine a criminal defendant's reasonable ability to pay **before** entering an order requiring such defendant to pay criminal restitution

pursuant to Iowa Code section 910.2." Goodrich v. State, 608 N.W.2d 774, 776 (Iowa 2000)(emphasis added).

In Jose, the Court was faced with the question of what defendant should do to challenge a plan of restitution when it is ordered after the notice of appeal has been filed. State v. Jose, 636 N.W.2d 38 (Iowa 2001). The Court attempted to distinguish Jose from Swartz and Jackson when it stated "The ability to pay is an issue apart from the amount of restitution and is therefore not an 'order [] incorporated in the sentence' and is therefore not directly appealable as such." Id. at 45; See also State v. Campbell, No. 15-1181, 2016 WL 4543763, at *2 nt. 2 (Iowa Ct. App. Aug. 31, 2017). Further clarifying, the Court stated:

> Here, Jose challenges the *amount* of restitution, whereas in *Swartz* and *Jackson* the defendants only challenged the district court's failure to determine their *ability to pay.* The defendants in *Swartz* and *Jackson* were therefore challenging the 'restitution plan of payment,' rather than the actual 'plan of restitution'. Iowa Code § 910.7. At issue here is the plan of restitution, rather than the plan of payment.

Id. The Court also distinguished this case from Janz indicating "This case, however, is not a Janz case **because the restitution was not part of the sentencing order**." Id. at 47 (emphasis added). The Court remanded the case allowing Jose to obtain court-appointed counsel for a restitution hearing, if Jose filed the petition within 30-day of the Court's opinion. Id.

In Dudley, the Court was faced with the issue of assessing court costs against a defendant who was acquitted. State v. Dudley, 766 N.W.2d 606 (Iowa 2009). The Court held that "[a] cost judgment may not be constitutionally imposed on a defendant unless a determination is first made that the defendant is or will be reasonably able to pay the judgment." Id. at 615.

In Jenkins, the Court addressed the issue of the discretion of the sentencing court to determine a causal connection between restitution costs assessed and the defendant. State v. Jenkins, 788 N.W.2d 640 (Iowa 2010). The Court found that procedural due process related to restitution orders requires notice and an opportunity to be

heard. Id. at 646. The Court also indicated that section 910.7 should not be used as a remedy for failure to provide appropriate due process because "this is a postdeprivation remedy where a hearing is a discretionary matter, not a matter of right. In addition, an offender is not entitled to appointed counsel as a matter of right." Id. at 646-647.

Finally, in Coleman, the sentencing court assessed appellate attorney fees against Coleman for the full amount unless Coleman requested a hearing regarding his reasonable ability to pay. State v. Coleman, --N.W.2d --, 2018 WL 672132 (Iowa Feb. 2, 2018). The Court did not specifically address the issue because the case was being remanded on different grounds; however, the Court stated:

> Nonetheless, when the district court assesses any future attorney fees on Coleman's case, *it must follow the law and determine the defendant's reasonable ability to pay the attorney fees without requiring him to affirmatively request a hearing on his ability to pay.*

Id. at *16 (emphasis added).

The confusion surrounding the current state of the law rests with how Iowa Code sections 910.2, 910.3, 910.5, and 910.7 apply to defendants, and how the constitutional determination of the defendant's reasonable ability to pay fits within that structure. Curry suggests this Court return to a simple analysis of the code as was conducted in Harrison and Haines.

The cases all concur that the court is constitutionally required to make a determination as to the defendant's reasonable ability to pay. The question is **when** does this determination need to be made. Harrison, Haines, Van Hoff, Goodrich, Dudley, and Coleman all agree that the determination must be made **before** the order or plan of restitution is put into place. See Harrison, 351 N.W.2d at 529; Haines, 360 N.W.2d at 797; Van Hoff, 415 N.W.2d at 648; Goodrich, 608 N.W.2d at 776; Dudley, 766 N.W.2d at 615; Coleman, --N.W. --, 2018 WL 672132 at *16.

But the issue the sentencing court is faced with, when making the determination before the total amount of

restitution is known, is how to make a determination when the entire set of circumstances is unknown. See Haines, 360 N.W.2d at 796; Van Hoff, 415 N.W.2d at 648-9. In an attempt to address this concern, the Court in Jackson stated that until the complete plan of restitution was completed by the court, "the court is not required to give consideration to the defendant's ability to pay." Jackson, 601 N.W.2d at 357. The problem with this interpretation is that it is in direct conflict with section 910.2 and the cases discussed above. Additionally, the Court did not clarify what it considers a "complete plan of restitution." This is particularly concerning when considered in light of the extended amount of time it may take the court to complete the plan of restitution. While 910.3 requires the State to submit restitution applications within 30-days of sentencing, the Court of Appeals has interpreted that timeline to be a guideline. See State v. Bradley, 637 N.W.2d 206, 212-213 (Iowa Ct. App. 2001) (Failure by the State to meet the thirty-day requirement for restitution applications in 910.3 "is merely directory and not

mandatory." Furthermore, "the State's failure to comply with the thirty-day requirement will not affect the validity of subsequent proceedings unless prejudice is shown.") (citations omitted).

The Jackson Court went further, requiring the defendant o request modification of the plan of payment under 910.7 prior to being able to appeal restitution. Jackson, 601 N.W.2d at 357. The Court in Jose tried to further distinguish the issue, stating that the "reasonability to pay" is not a directly appealable issue because it is addressing the plan of payment not the plan of restitution. Jose, 636 N.W.2d at 45.

In addition to that confusion, the Court of Appeals has applied their own interpretation to this issue in some of its recent opinions, further mudding the waters.[1] In Kurtz, the Court of Appeals interpreted Harrison to require two parts to a "restitution order": the plan of restitution and the plan of payment. State v. Kurtz, 878 N.W.2d 469, 471 (Iowa Ct. App.

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[1] Defendant does note that the Court of Appeals cases are not controlling law on this issue, and once again urges this Court to address this matter and clarify the law.

2016); See also State v. Johnson, 887 N.W.2d 178, 183 (Iowa Ct. App. 2016). It is unclear how the Court of Appeals reached this determination since the only place in Harrison where the phrase "restitution order" appears is in relation to the Court's decision of the case ("we vacate the restitution order..." and "We vacate and remand the restitution order..." Harrison, 351 N.W.2d at 327, 329), and neither section 910.2, 910.3, 910.4, or 910.5 mentions the creation of a "restitution order" by the sentencing court.[2] See Iowa Code §§ 910.2, 910.3, 910.4, 910.5 (2017). The analysis portion of Harrison specifically refers to the two-part process of restitution: the plan of restitution ordered by the court, and the plan of payment established by the department of corrections or similar agency,

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[2] A review of the Supreme Court cases discussed above reveals the term "restitution order" used for the first time in Janz. It appears the Court uses the term "restitution order" interchangeably with the phrase "plan of restitution." Janz, 358 N.W.2d at 548 ("The State's fallback position is that a **plan of restitution or restitution order** is never appealable because there is no specific authority for such an appeal in Iowa Code section 814.6 (1983).") (emphasis added). The use of the phrase "restitution order" in both Van Hoff and Kaelin also seem to use the term interchangeably with "plan of restitution." Kaelin, 362 N.W.2d at 327-328; Van Hoff, 415 N.W.2d at 648-649.

but says nothing regarding a complete "restitution order". Harrison, 351 N.W.2d at 528-529. The Kurtz court found that until a defendant had both portions, the plan of restitution and the plan of payment, or the "restitution order", *prior to the notice of appeal being filed*, a direct appeal on restitution could not occur.[3] Kurtz, 878 N.W.2d at 472. The Court of Appeals in Alexander provided a succinct statement of this position:

> Our rule regarding the ability to appeal a restitution order can be summarized as follows: A restitution order is not appealable until it is complete; the restitution order is complete when it incorporates both the total amounts of the plan of restitution and the plan of payment. A defendant must also petition the court for a modification before they challenge the amount of restitution. If the above requirements are met, our Constitution requires the court to make a finding of the defendant's reasonable ability to pay.

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[3] The issue with this position is the unlikelihood that a defendant will have both the plan of restitution and plan of payment prior to the notice of appeal being filed. While a defendant has 30-days from the date of sentencing to file his notice of appeal, most file their notice of appeal immediately or shortly thereafter sentencing. Furthermore, the State has a minimum of 30-days in which to file for restitution. See Bradley, 637 N.W.2d at 212-213. In this case, the defendant filed his notice of appeal twenty-four days after sentencing. (Order of Disposition; Notice of Appeal) (App. pp. 14-16, 18).

State v. Alexander, No. 16-0669, 2017 WL 510950, at *3 (Iowa Ct. App. Feb. 8, 2017).

The current state of the law is inapposite of the Iowa Code and the constitutionally mandated requirement that the Court determine the defendant's reasonable ability to pay prior to creating the plan of restitution. To require a defendant to obtain a "complete plan of restitution" or a "complete restitution order" **and** to first request modification under 910.7, before being able to directly appeal the plan of restitution is a shirking of the sentencing court's responsibilities established by the Iowa Legislature. A sentence is inherently illegal, and thus directly appealable, if the sentencing court ordered restitution without making a determination as to the defendant's reasonable ability to pay.

Curry proposes the following options for this Court to resolve this issue: (1) the determination of the reasonable ability to pay is made at sentencing for the total known amount of restitution, establishing a temporary plan of restitution; prior to any supplemental orders being issued, the

sentencing court must hold a hearing, with court-appointed counsel for the defendant, if required, to determine the reasonable ability to pay; or (2) an initial determination as to the reasonable ability to pay is made at sentencing, establishing a temporary plan of restitution; notice is provided to the defendant *at the time a request for supplemental restitution is filed* and the defendant is given an opportunity to be heard on the matter, prior to making the determination on the defendant's reasonable ability to pay and issuing the order. Both options are fraught with problems, which will briefly be explored below.

Option one may be the cleanest possible option. While in conflict with the Supreme Court decision in Van Hoff, that recommended looking at the payments made by the defendant not the total amount when making the determination on the reasonable ability to pay, it strictly interprets section 910.3's requirement that the determination must be made prior to the

issuance of the plan of restitution.[4] It also allows the court to establish a blanket amount to be paid by the defendant. For example, if a court considered the reasonable ability of the defendant to pay and determined that the defendant, while going to prison for an extended time, did have the ability to obtain a job while in prison, then it would be reasonable for the court to assess a portion of the defendant's prospective wages to go towards restitution. If and when any supplemental restitution applications were to be filed, the sentencing court would first be required to hold an additional hearing and give the defendant an opportunity to be heard on his reasonable ability to pay prior to establishing the order. This option is in line with both the Iowa Code and case precedent. See Harrison, 351 N.W.2d at 529; Haines, 360

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[4] The other issue with the premise established in Van Hoff is that it requires a plan of payment to be established prior to the determination being made. This is logistically and statutorily impossible. See Van Hoff, 415 N.W.2d at 649; Iowa Code § 910.5 (2017) ("When an offender is committed to the custody of the director of the Iowa department of corrections pursuant to a sentence of confinement, **the sentencing court shall forward to the director a copy of the offender's restitution plan**...")(emphasis added).

N.W.2d at 797; Van Hoff, 415 N.W.2d at 648; Goodrich, 608 N.W.2d at 776; Dudley, 766 N.W.2d at 615; Coleman, --N.W. --, 2018 WL 672132 at *16. While holding a sentencing hearing every time there is a *supplemental restitution order* is burdensome, it is necessary to protect the rights of the defendant.

Option two allows for the greatest flexibility, while protecting the rights of the defendant. The defendant is given procedural due process, if a defendant is provided notice of an application for restitution, such as one under section 356.7, with a clear statement that the defendant must request a hearing to provide the court with additional information for the court to consider regarding the defendant's reasonable ability to pay within 30 days of the notice. If the defendant fails to request a hearing, then defendant agrees to the court's initial determination as to the reasonable ability to pay at sentencing and its application to the supplemental order. For example, if the Court initially determined that the defendant was reasonably able to pay twenty percent of his wages at prison

for CVCP reimbursement, and then the sheriff's office submitted a request for reimbursement for room and board fees for his time spent in jail, the defendant could request a hearing and present the court with additional information to consider before issuing the order, or the defendant could not request a hearing and continue paying at twenty percent of his prison wages.

The problem with attempting to provide notice and an opportunity for a hearing is threefold: (1) the notice itself must be very carefully worded to properly advice the defendant of his rights; (2) most defendants will no longer have counsel representing them in district court at the time supplemental requests are filed and will not be able to obtain appropriate counsel on their options; and (3) it does not meet the constitutional requirements. The notice in this case is a great example of how the notice is not sufficient. It does not explain what the defendant can object to regarding the application for restitution. It does not inform him of his right to a court-appointed attorney to assist with this matter because it is a

part of sentencing. It does not advise him that at the hearing he would be able to present the court with evidence regarding his reasonable ability to pay the requested restitution. (Order for PSI; Order of Disposition) (App. pp. 10-11, 14-16). Another good example of why option two does not work well is Coleman. The sentencing court in Coleman provided the following notice:

> The Defendant is advised that if he/she qualifies for court appointed appellate counsel then he/she can be assessed the cost of the court appointed appellate attorney when a claim for such fees is presented to the clerk of court following the appeal. The Defendant is further advised that he/she may request a hearing on his/her reasonable ability to pay court appointed appellate attorney fees within 30 days of the issuance of the procedendo following the appeal. If the defendant does not file a request for a hearing on the issue of his/her reasonable ability to pay court appointed appellate attorney fees, the fees approved by the State Public Defender will be assessed in full to the Defendant.

Coleman, --N.W.2d--, 2018 WL 672132, at *16. This Court found that the sentencing court needed to follow the law and determine the defendant's reasonable ability to pay without forcing him to request a hearing. Id.

Either of the options would still maintain the authority under section 910.7 to allow for *modification* of the plan of restitution by either the State or defendant upon petition to the court if either party believed circumstances had changed that warranted a review. Iowa Code § 910.7 (2017); See also Jenkins, 788 N.W.2d at 646-7 ("While the offender may bring a claim under Iowa Code section 910.7, this is a postdeprivation remedy where a hearing is a discretionary matter, not a matter of right. In addition, an offender is not entitled to appointed counsel as a matter of right.").

Curry urges this Court to establish option one as the standard for assessing restitution against a criminal defendant. At the very least, Curry encourages this Court to require the sentencing courts to follow sections 910.2 and 910.3 and make an initial determination as to the reasonable ability to pay, and create a temporary plan of restitution at the time of sentencing. Iowa Code §§ 910.2, 910.3 (2017). The court should consider the factors that may influence the defendant's ability to pay, such as prior employment, property

owned by the defendant, any skills the defendant may have, the health of the defendant, and any expense the defendant may have such as child support or alimony. See State v. Storrs, 351 N.W.2d 520, 522 (Iowa 1984); Kaelin, 362 N.W.2d at 528; Van Hoff, 415 N.W.2d at 649. The court should also consider whether the defendant is going to be incarcerated for a long period of time. See Van Hoff, 415 N.W.2d at 649. Preferably this decision would be made in writing to allow the appellate courts to review the district court's discretionary action. See Kaelin, 362 N.W.2d at 528.[5] In practice, sentencing courts engage in a "reasonable ability to pay" determination all the time before total amounts have been submitted to the Court. Typically, this occurs regarding attorney fees and the defendant's reasonable ability to pay court-appointed attorney fees.

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[5] Arguably, because restitution *is* a part of sentencing, the district court is already required to articulate its explanation for the decision it makes regarding the reasonable ability to pay. See Iowa R. Crim. P. 2.23(3)(d) (2017); State v. McGonigle, 401 N.W.2d 39, 43 (Iowa 1987); State v. Johnson, 445 N.W.2d 337, 343 (Iowa 1989).

The sentencing court in this case attempted to follow its own interpretation of Iowa Code sections 910.2 and 910.3. After the guilty plea was accepted by the court, the court issued an order setting forth the date for sentencing along with ordering the presentence investigation report (PSI). The Court also ordered:

> [T]hat the County attorney shall promptly prepare a statement of pecuniary damages to victims of Defendant's criminal activity, if any. The attorney for the Defendant, if court appointed, shall promptly prepare a statement for services rendered to the Defendant, current to date filed, which shall be filed with the Clerk no later than fifteen days before the date set for pronouncement of judgment and sentence. The Clerk of Court shall promptly prepare a statement of court-appointed attorney fees or expenses of a public defender, if any, and court costs in connection with this matter. All statements shall be promptly provided to the presentence investigator.
>
> At the time of sentencing restitution will be ordered in the amount set out in the statement of pecuniary damages filed ***unless the Defendant gives notice of any objections thereto in writing prior to sentencing.***

(Order for PSI) (emphasis added) (App. pp. 10-11).

The first paragraph is an accurate enforcement of section 910.3, requiring statements to be filed with the Clerk of Court

and the presentence investigator prior to sentencing to afford the Court the ability to prepare a plan of restitution at sentencing. See Iowa Code § 910.3 (2017). In actuality, none of the parties followed the order of the Court. At the time the PSI was created, no court costs were available. (PSI) (Conf. App. pp. 8-17).

While no restitution was claimed prior to sentencing in this case, the Court's order that required the defendant to file objections in writing, in advance of sentencing, is another good example of why the second option suggested above fails to work. There is nothing in the Iowa Code or case law that requires the Defendant to object to restitution in writing and in advance of sentencing. Furthermore, the statement disregards the Court's obligation to affirmatively make a determination regarding the defendant's reasonable ability to pay.

At sentencing, the Court addressed restitution allowing the State an additional thirty days to submit a statement of pecuniary damages. The Court also assessed sentencing costs

to Curry; however, no amount was established and no determination as to his reasonable ability to pay was made. (Sent. Tr. p. 9 L17-20). The Court did, however, make such a determination when it came to attorney fees; finding that "[b]ecause Mr. Curry is being sent to prison, I am waiving reimbursement of attorney fees due to his incarceration and indigency." (Sent. Tr. p. 9 L22-24).

In the written order, the Court allowed the State the additional 30-days to file the statement of pecuniary damages, and required Curry to "file any objections with the Clerk of this District Court within 20 days of the service of the Statement of Pecuniary Damages upon Defendant's attorney. Any objections will be set for hearing." (Order of Disposition) (App. pp. 14-16). The Court addressed court costs and attorney fees, again making the determination of the defendant's reasonable ability to pay regarding attorney fees, but not court costs. (Order of Disposition) (App. pp. 14-16). Finally, the Court ordered all payments due by August 30, 2017. (Order of Disposition) (App. pp. 14-16).

Admittedly, while not controlling law, the Court of Appeals has found that when a sentencing court made a determination as to the defendant's reasonable ability to pay attorney's fees, but was silent regarding court costs, that the appellate court is unable to determine if the sentencing court reasonably exercised its discretion, and the sentence has been vacated and remanded for a new hearing. See Johnson, 887 N.W.2d at 184; Kurtz, 878 N.W.2d at 472.

Curry encourages this Court to view this issue similarly to that in State v. Hill, 878 N.W.2d 269 (Iowa 2016). In Hill, the sentencing court articulated reasons on the record for the term of confinement adjudged; however, the sentencing court failed to explain why it ordered the sentences to be consecutive versus concurrent. Id. at 274. The Supreme Court discussed the existing precedent that allowed the sentencing courts to infer the same reasons for applied to both the terms of the sentence and whether the terms were consecutive or concurrent, and overruled those cases. Id. The issue here is almost identical, in that the sentencing court

articulated reasons for one part of its sentence (attorney fees) but failed to articulate the reasons for the other part of the sentence (court costs). This Court should overrule Kaelin and VanHoff and require the sentencing courts to make a determination regarding the defendant's reasonable ability to pay for all portions of restitution on the record.

Should this Court decide not to follow the proposed course of action, then Curry requests this Court to follow Kurtz and Johnson and find that at the time of sentencing a plan of restitution and a plan of payment were both in existence, and that the sentencing court failed to determine Curry's reasonable ability to pay. While the Order of Disposition itself does not set forth an exact amount of restitution owed at the time of sentencing, the Combined General Docket Report indicates that at the time of sentencing the Clerk of Court had restitution amounts totaling $260 owed by Curry. (Order of Disposition; Comb. Gen. Docket Report) (App. pp. 14-16, 19-27). The sentencing order did establish a payment plan in the Order of Disposition: "All sums due and

payable by August 30, 2017." (Order of Disposition) (App. pp. 14-16).

Under the current case law "a defendant who seeks to upset a restitution order, however, has the burden to demonstrate either the failure of the court to exercise discretion or an abuse of that discretion." Van Hoff, 415 N.W.2d at 648. A review of Curry's financial circumstances shows someone who is unable to reasonably pay for restitution. Curry is clearly indigent, as indicated by his application for counsel that was approved. (App. for Counsel; Hearing for Initial Appearance) (Conf. App. p. 4, App. 4-6). Furthermore, a review of his financial history contained within the PSI shows someone with some preexisting court debt and very little income. (PSI) (Conf. App. pp. 8-17). Curry also received social security disability for a learning disability. (PSI) (Conf. App. pp. 8-17). The Court abused its discretion when it failed to make a determination as to Curry's reasonable ability to pay before ordering the payment of court costs.

II. THE COURT ABUSED ITS DISCRETION WHEN IT SENTENCED CURRY TO THE MAXIMUM MANDATORY SENTENCE.

Preservation of Error: The general rule of error preservation is not applicable to void, illegal or procedurally defective sentences. State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994)(Improper reliance on parole policies in fashioning sentence.).

Standard of Review: A sentence imposed by the district court is reviewed for errors at law. Iowa R. App. P. 6.4; State v. Thomas, 547 N.W.2d 223, 225 (Iowa 1996). A sentence imposed in accordance with applicable statutes will be overturned only for an abuse of discretion or a defect in the sentencing procedure. State v. Wright, 340 N.W.2d 590, 592 (Iowa 1983).

Discussion: The district court abused its discretion in imposing judgment. In exercising its discretion, "the district court is to weigh all pertinent matters in determining a proper sentence including the nature of the offense, the attending circumstances, the defendant's age, character, and

propensities or chances of reform." State v. Loyd, 530 N.W.2d 708, 713 (Iowa 1995)(quoting State v. Johnson, 513 N.W.2d 717, 719 (Iowa 1994)).

Sentencing decisions of the district court are cloaked with a strong presumption in their favor. Where, as here, a defendant does not assert that the imposed sentence is outside the statutory limits, the sentence will be set aside only for an abuse of discretion. An abuse of discretion is found only when the sentencing court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. State v. Thomas, 547 N.W.2d 223, 225 (Iowa 1996)(citations omitted).

"When a sentence is not mandatory, the district court must exercise its discretion in determining what sentence to impose." Thomas, 547 N.W.2d at 225. In considering sentencing options the court is to determine, in its discretion, which of the authorized sentences will provide both the maximum opportunity for the rehabilitation of the defendant and for the protection of the community from further offenses

by the defendant and others. Iowa Code § 901.5; State v. Hildebrand, 280 N.W.2d 393, 395 (Iowa 1979). The courts owe a duty to the public as much as to defendant in determining a proper sentence. State v. August, 589 N.W.2d 740, 744 (Iowa 1999). The punishment should fit both the crime and the individual. Id.

"The nature of the offense alone cannot be determinative of a discretionary sentence." State v. Dvorsky, 322 N.W.2d 62, 67 (Iowa 1982). However, the district court enjoys the latitude to place greater importance on one sentencing consideration over others. Wright, 340 N.W.2d at 593. "The application of these goals and factors to an individual case, of course, will not always lead to the same sentence." State v. Valin, 724 N.W.2d 440, 445 (Iowa 2006). In determining whether the district court considered pertinent matters in imposing a particular sentence, we look to all parts of the record to find supporting reasons. State v. Jason, 779 N.W.2d 66, 76 (Iowa Ct. App. 2009).

A person convicted of robbery in the second degree must serve between one-half and seven-tenths of the maximum term of the person's prison sentence. Iowa Code § 902.12(3) (2017). In considering the mandatory sentence, the court must consider "all pertinent information including the person's criminal record, a validated risk assessment, and the negative impact the offense has had on the victim or other persons." Iowa Code § 901.11(3) (2017).

In this case the Court stated the following reasons for imposing the minimum sentence in this case:

> Additionally, pursuant to Iowa Code Sections 901.11(3), 902.12, and –excuse me, 902.12(3), I have considered the presentence report, the validated risk assessment prepared by the Sixth Judicial District Department of Corrections which concludes that Mr. Curry scores high for violence and moderate high for victimization, considered the nature of this offense and including the fact that it was a violent crime, and I conclude that Defendant shall serve a minimum sentence of at least seven-tenths of the maximum term of his prison sentence, his ten-year sentence, before being eligible for parole or work release. The reasons cited are the same reasons for the imposition of the ten-year prison term, along with the fact it is mandatory under our forcible felony categories.

(Sent. Tr. p. 8 L17-p. 9 L6). The Court abused its discretion when it failed to consider the mitigating factors present. Curry not only finished high school while incarcerated pending trial, he also became a father. (Sent. Tr. p. 6 L14-21; Sent. Tr. p. 7 L23-p. 8 L5; PSI) (Conf. App. pp. 8-17). Curry expressed a desire to change and told the Court that he was hopeful that therapy within prison would be beneficial to him. (Sent. Tr. p. 6 L22-p. 7 L8). The Court did not give adequate consideration to these factors when it sentenced Curry to the maximum percentage of time to be served before he would be eligible for parole or work release.

It is within this Court's power to determine that the District Court abused its discretion and to vacate an unfair and excessive sentence. Wright, 340 N.W.2d at 592. In this case, Curry should have received one-half of his mandatory prison sentence set as the minimum instead of seven-tenths. Curry's sentence should be vacated and the case remanded for re-sentencing.

CONCLUSION

For the reasons argued above, Curry respectfully requests this Court vacate his sentence and remand his case for re-sentencing. Curry requests this Court clarify the law regarding restitution and require sentencing courts to determine the defendant's reasonable ability to pay at sentencing. Curry further requests this Court to overturn Van Hoff and Kaelin and require sentencing courts to explicitly state their reasons for determining the defendant's reasonable ability to pay on the record.

NONORAL SUBMISSION

Oral submission is not requested.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $4.18, and that amount has been paid in full by the Office of the Appellate Defender.

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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:

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