IN THE SUPREME COURT OF IOWA
Supreme Court No. 17-1750

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MITCH BUESING,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR CERRO GORDO COUNTY
THE HONORABLE COLLEEN WEILAND, JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

Buesing requests that the Supreme Court retain this case because it involves a substantial issue of first impression: whether "the use of actuarial instruments in sentencing violates the Defendant-Appellant's constitutional due process rights[?]" Appellant's Brief, p. 12. Buesing also requests the Court to adopt guidelines to "ensure the use of actuarial instruments in sentencing proceedings comply with due process." Appellant's Brief, p. 12.

After Buesing filed his brief in this case, the Court of Appeals issued its decision in *State v. Guise*, No. 17-0589, 2018 WL 2084846 (Iowa Ct. App. May 2, 2018), wherein the identical due process issue was raised. The *Guise* majority bypassed the constitutional issue; however, it found the sentencing court abused its discretion in considering the Iowa Risk Revised (IRR) because its use was not authorized by statute or administrative rule. *Guise,* slip opin. at 7.[1] The IRR is the risk assessment tool used by the sentencing court in this case.

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[1] On the same day, the Court of Appeals issued its decision in *State v. Gordon,* No. 17-0395, 2018 WL 2084847 (Iowa Ct. App. May 2, 2018), in which it determined the district court abused its discretion in considering Static-99R and SOTIPS scores in sentencing the defendant. The State is also seeking further review in this case.

On May 22, 2018, the State filed its application for further review of the *Guise* decision, an *en banc* 5-4 case. Until the further review application is granted or denied, the State agrees the issues raised in this case present a substantial question of first impression and Supreme Court retention is appropriate. Iowa R. App. P. 6.1101(2).

STATEMENT OF THE CASE

Nature of the Case

The defendant, Mitch Buesing, appeals the sentence imposed upon his conviction, following guilty pleas, of first and second-degree theft in violation of Iowa Code sections 714.2(1) and 714.2(2). He argues (1) that the district court's use of the Iowa Risk Revised actuarial tool at sentencing violated his right to due process; and (2) that the district court abused its discretion in using this actuarial tool without an understanding of its purpose and limitations.

Course of Proceedings

The State accepts Buesing's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

Facts

On September 9, 2016, the State filed a trial information charging Buesing with second-degree theft (Count I) and second-

degree burglary (Count II). Trial Information (FECR025529); App. 4. When the State learned the value of the stolen property, it filed an amended trial information to charge Buesing with first-degree theft (Count I). Amended Trial Information (FECR025529); App. 7. On April 7, 2017, while Buesing was awaiting trial on the charges in FECR025529, the State filed a trial information charging him with second-degree theft. Trial Information (FECR026099); App. 13.

Although Buesing originally pleaded not guilty in both criminal cases, he ultimately pleaded guilty pursuant to a plea agreement. Written Arraignments and Pleas of Not Guilty (FECR025529) & (FECR026099); App. 11, 15. The agreement provided that in exchange for Buesing's guilty pleas to the theft counts, the State would dismiss the burglary charge, Count II in FECR025529, adopt the sentencing recommendation of the PSI preparer, and recommend Buesing's convictions be served concurrently with other sentences but consecutively with FECR026099. Written Plea of Guilty (9-12-2017); App. 17. On September 12, 2017, Buesing pleaded guilty to a one count of first-degree theft (Count I in FECR025529) and one count of second-degree theft (Count I in FECR026099); Count II, second-

degree burglary, was dismissed. Written Pleas of Guilty, Order of Dismissal (11-6-2017); App. 19, 21 --.

At sentencing, the State recommended the district court order Buesing's sentences in FECR025529 and FECR026099 be served consecutively to each other but concurrently with previous sentences. Sentencing Tr. p. 9, line 11 –p. 10, line 13. Buesing's counsel recommended the district court grant him a suspended sentence. Sentencing Tr. p. 11, line 4-p. 13, line 12.

The district court provided its reasons for sentence:

> . . . the law of Iowa requires that I consider your rehabilitation; that I consider the protection of society; and that I consider factors related to deterrence, both trying to convince you and other people not to commit criminal acts. Those are the three goals that I keep in mind when I'm looking at the specific information that I learn about you. In regard to learning about you, I do that through the case filed and from the pre-sentence investigation report, and then anything that you – the two attorneys and you have presented today. And then I try to pick a sentence within the parameters of the law that best provides for those three goals.
>
> I have considered all of those goals when I reviewed the pre-sentence investigation and the case file and considered what these two attorneys have told me and considered what you've allocated with.

> It is unusual for someone – for me to send someone to prison who has a relatively minimal criminal history. But I don't have to follow that. That's just the general – not even a guideline, but history, when I'm considering whether a person can be rehabilitated in the community, and whether or not their probation would serve as deterrence and protection of society, because it often does with somebody who does not have a criminal history.
>
> I do not feel that way about you. There is nothing in regard to these violations or the information in the pre-sentence investigation report that makes me think that supervision in the community will be successful in regard to your rehabilitation, in regard to – or in regard to deterrence. And you have shown us from these violations that when you are released in the community, the community is not safe. So I am not suspending the sentences as requested by you.

Sentencing Tr. p. 15, line 5-p. 16, line 12. The district court sentenced Buesing to a term of imprisonment not to exceed ten years upon his first-degree theft conviction and to a term not to exceed five years upon his second-degree theft conviction. Sentencing Tr. p. 15, line 5-p. 16, line 15, p. 17, lines 19-21.

The district court then explained its decision about whether these sentences would be served consecutively or concurrently:

> In the consideration of whether these two terms should be concurrent or consecutive, I

> have considered what I have already stated in regard for the reasons for imposing prison. I have also noted how poorly the supervision has gone in regard to the two other cases that we're here for today. Specifically, in regard to the seemingly taking very lightly drug testing, either taking lightly or flagrantly disregarding the need to monitor you through ankle monitoring by allowing the charging – or battery to be not charged on several occasions. The PSI would reflect a relatively flippant attitude towards being willing to be supervised and being willing to abide by terms of probation.
>
> Additionally, the fact that you're willing to offend in a similar way twice more when you're on probation. And then in regard to the final one, once more when you're on release from one – from a charge convinces me that your rehabilitation is going to be tough to come by and deterrence is going to be tough to come by with you. I am ordering that these two sentences be served consecutively.

Sentencing Tr. p. 18, lines 2-20. Finally, the district court observed that it had also considered "a validated risk assessment as reflected in the PSI showing Mr. Buesing to be at high risk." Sentencing Tr. p. 22, lines 6-11.

Additional facts will be set forth below as relevant to the State's argument.

ARGUMENT

I. The District Court's Consideration of a Risk Assessment Instrument, the Iowa Risk Revised (IRR), in Imposing Sentence Did Not Violate Buesing's Due Process Rights. The District Court Did Not Abuse Its Discretion in Considering the IRR Absent Explanatory Information About It.

Preservation of Error

"[E]rrors in sentencing may be challenged on direct appeal even in the absence of an objection in the district court. *State v. Lathrop*, 781 N.W.2d 288, 293 (Iowa 2010). However, Buesing did not object to the inclusion of his IRR score, in the presentence investigation report (PSI) or the lack of explanatory information surrounding the IRR, in the district court. Such an objection was necessary to preserve error. *State v. Buck*, No. 14-0723, 2015 WL 1046181, at *2 (Iowa Ct. App. March 11, 2015) (finding defendant did not preserve error where he did not object to court's use of sexual adjustment inventory (SAI) contained in PSI).

Because Buesing did not object to the sentencing court's use of the IRR, there is no record evidence from which this Court can establish guidelines for the use of actuarial risk assessment instrument at sentencing. "Without reliable information in the record," this Court "risk[s] making unsound decisions based on [its]

own inadequately informed understanding of the scientific questions involved, aided only by sources they uncover and their own assessments of the credibility of those sources." *State v. Childs*, 898 N.W.2d 177, 194–95 (Iowa 2017) (Mansfield, J., dissenting).

Standard of Review

The appellate courts "review constitutional due process claims de novo." *State v. Edwards*, 571 N.W.2d 497, 501 (Iowa Ct. App. 1997).

The Court reviews sentencing decisions for correction of errors at law. *State v. Formaro,* 638 N.W.2d 720, 724 (Iowa 2002). Reversal is not required absent an "abuse of discretion or defect in the sentencing procedure" such as the consideration of improper factors. *State v. Hopkins*, 860 N.W.2d 550, 553 (Iowa 2015) (citing *State v. Thompson*, 856 N.W.2d 915, 918 (Iowa 2014)).

Merits

Buesing first argues that the district court's consideration of the IRR violated his constitutional due process right to be sentenced only upon accurate information. *Townsend v. Burke,* 334 U.S. 736, 741 (1948) ("A defendant has a due process right to be sentenced on accurate information."). Buesing does not specify what, if any,

information surrounding the calculation of his score on the IRR is inaccurate. Next, Buesing contends the district court both violated his right to due process and abused its discretion in considering his IRR score in sentencing him because it was not provided with sufficient cautions for guiding and limiting its use.

Buesing relies upon two out-of-state cases in making his due process challenge, *Malenchik v. State,* 928 N.E.2d 564 (Ind. 2010) and *State v. Loomis*, 881 N.W.2d 749 (Wis. 2016). In *Malenchik v. State*, 928 N.E.2d 564, (Ind. 2010), the Indiana Supreme Court examined the use of actuarial risk assessment instruments at sentencing. It found that because they were "statistically valid, reliable, and effective in forecasting recidivism, the assessment tool scores may, and if possible should, be considered to supplement and enhance a judge's evaluation, weighing, and application of the other sentencing evidence in the formulation of an individualized sentencing program appropriate for each defendant." *Malenchik,* 928 N.E.2d at 573.

Buesing relies upon this case because the *Malenchik* Court limited the district court's use of actuarial risk assessment tools at sentencing. It found that they could not be used as "aggravating or

mitigating circumstances" and could not be used to "determine the gross length of sentence[.]" *Id.,* at 575. However, these limitations were imposed in the "context of finding aggravating and mitigating circumstances within Indiana's determinate sentencing scheme. *State v. Gordon,* No. 17-0395, 2018 WL 2084847, slip opin. at 29-20, (Iowa Ct. App. May 2, 2018) (McDonald, J., dissenting). The *Malenchik* Court "made clear that risk assessment information can be considered in the initial decision to incapacitate the defendant or suspend sentence." *Id.*

In *Loomis,* the Wisconsin Supreme Court rejected a defendant's claim that the sentencing court's consideration of a risk assessment tool, the COMPAS, to determine whether or not he should be sentenced to prison violated his right to due process. *Loomis,* 881 N.W.2d at 771. However, the Court, concluded that the following caveats should be included in a PSI containing COMPAS scores: "first, the 'proprietary nature of COMPAS' prevents the disclosure of how risk scores are calculated; second, COMPAS scores are unable to identify specific high-risk individuals because these scores rely on group data; third, although COMPAS relies on a national data sample, there has been 'no cross-validation study for a Wisconsin population';

fourth, studies 'have raised questions about whether [COMPAS scores] disproportionately classify minority offenders as having a higher risk of recidivism'; and fifth, COMPAS was developed specifically to assist the Department of Corrections in making post-sentencing determinations." *Criminal Law-Sentencing Guidelines-Wisconsin Supreme Court Requires Warning Before Use of Algorithmic Risk Assessments in Sentencing-State v. Loomis, 881 Wis.2d 749 (Wis. 2016),* 130 Harv. L. Rev. 1530, 1533 (2017) (quoting *Loomis,* 881 N.W.2d at 769).

Further, the Court in *Loomis* reiterated that the district court may not use a COMPAS risk assessment "(1) to determine whether an offender is incarcerated; or (2) to determine the severity of the sentence." *Loomis,* 881 N.W.2d at 769. Finally, the Court found that "the risk scores may not be used as the determinative factor in deciding whether an offender can be supervised safely and effectively in the community." *Id.* These warnings are also suggested in a National Center for State Courts (NSCS) report, *Using Offender Risk*

and Needs Assessment Information at Sentencing: Guidance for Courts from a National Working Group (2011).[2]

Buesing argues that the lack of similar caveats about the IRR operated to violate his due process right to be sentenced upon accurate information. However, as the dissent in *Guise* noted, unlike the COMPAS, the IRR is "non-proprietary in nature and the defendant would have had the ability to challenge the instrument and its result at sentencing if chose to do so." *Guise,* slip opin. at 19 (McDonald, J., dissenting). Like the defendant in *Guise,* Buesing chose not to challenge the IRR and its result at sentencing.

Moreover, the *Guise* dissent reasoned that the *Loomis* Court "provide[d] no compelling rationale why cautionary instructions regarding the use of risk assessment information are necessary to satisfy the dictates of due process when the general rule is the sentencing court can access any category or source of information without any significant limitation." *Id.* The dissent continued:

> There is no historical practice of requiring a provider of information in a sentencing proceeding to also instruct the sentencing court on the appropriate and inappropriate inferences to be drawn from the information.

[2] http://www.ncsc.org/-/media/Microsites/Files/CSI/RNA%20Guide%20Final.ashx.

> Indeed, the practice is to the contrary. Medical information and mental-health information is routinely provided to the district court at sentencing without guidance. Is due process violated when the sentencing court considers a presentence investigation report that contains a substance-abuse evaluation when the evaluation is not accompanied by adequate foundation establishing the credentials of the evaluator and the method of evaluation, cautionary instructions regarding the limitation of the substance-abuse evaluation, and instructions regarding the appropriate and inappropriate inferences to be drawn from the substance abuse evaluation? Mental-health evaluations? Medical-history information? The answer is clearly not. The defendant's argument to the contrary is simply *ipsie dixit*.

Id., slip opin. at 19-20 (McDonald, J., dissenting).

"Risk assessment is not a new concept. It is used in a variety of contexts, including insurance and medicine, among others. With respect to criminal justice, 'since shortly after the Civil War, American stats have relied upon some inchoate notion of risk assessment in applying criminal sanction.'" *Guise,* slip opin. at 20 (McDonald, J., dissenting). Moreover, because the Iowa Supreme Court has found actuarial instruments admissible in civil commitment proceedings, it is difficult to justify the restrictions Buesing suggests for their use at sentencing. *See In re Detention of Holtz*, 653 N.W.2d 613, 619 (Iowa 2002) (agreeing with the majority of jurisdictions that actuarial risk

assessment tools are admissible at sexually violent predator proceedings). "Actuarial risk assessment information is not science fiction; it is actuarial science." *Guise,* slip opin. at 21 (McDonald, J., dissenting). In fact, "[t]he legislature now *requires* the use of a risk assessment '[a]t the time of sentencing' to set the minimum sentence for certain drug, child endangerment, and robbery offenses." *Guise,* slip opin. at 22 (McDonald, J., dissenting).

"The constitutional command of due process does not require an information provider to instruct a sentencing court on the appropriate use of the information provided." *Id.,* slip opin. at 23 (McDonald, J. dissenting). The district court's use of the IRR in sentencing did not violate Buesing's due process rights.

Next, Buesing contends that the district court's consideration of his IRR score was an abuse of discretion. As set forth above, if the *Guise* decision stands, the district court's use of an actuarial risk assessment tools is an abuse of discretion because it is not explicitly authorized by statute or administrative rule. *Guise,* slip opin. at 7.

However, the State argued in its application for further review that *Guise* was wrongly decided. Iowa Code section 901.2 provides that "the court shall receive from the state, from the judicial district

department of correctional services, and from the defendant any information which may be offered which is relevant to the question of sentencing. The court may consider information from other sources." "Actuarial risk assessment information is relevant, generally, to the sentencing function because it provides evidence-based information regarding the offender's risk of reoffending and amenability to supervision in the community." *Guise,* slip opin. at 32-33 (McDonald, J., dissenting). "Evidence-based risk assessment information can assist the sentencing judge in overcoming the limits of personal experience by providing access to empirical evidence." *Gordon,* slip opin. at 35 (McDonald, J., dissenting). "[N]othing prohibits the district court from considering risk assessment information contained in an unchallenged presentence investigation report in the absence of [a defendant's] requested cautionary instructions." *Guise*, slip opin. at 33 (McDonald, J., dissenting).

In short, a "sentencing judge should be in possession of the fullest information possible concerning the defendant's life and characteristics and should not be denied an opportunity to obtain pertinent information by rigid adherence to restrictive rules of evidence properly applicable to trial." *State v. Stanley*, 344 N.W.2d

564, 570 (Iowa Ct. App. 1983). The district court did not unduly rely upon the risk assessment instruments in imposing sentence, it considered them. The district court referred to its consideration of Buesing's IRR scores only after it had given numerous other reasons for imposing sentence and ordering his sentences to be served consecutively. The district court did not abuse its discretion in considering Buesing's IRR scores in imposing sentence.

CONCLUSION

For all the reasons set forth above, the State respectfully requests this Court to affirm the sentence imposed upon Buesing's convictions of first and second-degree theft.

REQUEST FOR NONORAL SUBMISSION

The State believes that this case can be resolved by reference to the briefs without further elaboration at oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **3,105** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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