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IN THE SUPREME COURT OF IOWA
Supreme Court No. 18-0594

STATE OF IOWA,
Plaintiff-Appellee,

vs.

EVAN PAUL HEADLEY,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE ROBERT J. BLINK, JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court and summarily disposed of following the release of its opinions in *State v. Gordon*, No. 17-0395, 2018 WL 2084847 (Iowa Ct. App. May 2, 2018) and *State v. Guise*, No. 17-0589, 2018 WL 2084846 (Iowa Ct. App. May 2, 2018). At the time of writing, the supreme court accepted the State's application and ordered further review of both cases on July 23, 2018. The State's request for further review in both cases revolves around the question of whether the inclusion of an actuarial risk assessment within a presentence investigation report ("PSI") or consideration of department of correctional services ("DCS") recommendation within the PSI results in the district court's consideration of an impermissible sentencing factor. Other cases filed by the appellate defender now feature substantively similar arguments. *See State v. Brocksieck*, No. 17-1718 Appellant's Br. p.17–31; *State v. Houghmaster*, No. 17-1847 Appellant's Br. p.42–57; *State v. Paxston*, No. 17-2015 Appellant's Br. 24–73. Once the Iowa Supreme Court releases its opinion in *Gordon* and *Guise*, the resolution to these cases necessarily follows.

STATEMENT OF THE CASE

Nature of the Case

Evan Headley appeals his sentence after pleading guilty to burglary in the second degree in violation of Iowa Code sections 713.1 and 713.5 (2017) and domestic abuse assault enhanced second offense in violation of Iowa Code sections 708.1(2)(a) and 708.2A(3)(b). On appeal, he raises untimely challenges to the contents of the PSI and the district court's consideration of the same. He asserts the district court erroneously required him to pay restitution without determining he possesses a reasonable ability to pay. He challenges the district court's imposition of court costs. The Honorable Robert J. Blink presided over Headley's sentencing.

Facts and Course of Proceedings

On July 28, 2017, Headley entered S.H.'s home. Plea Tr. p.16 line 11–19. Headley and S.H. had previously been in a romantic relationship. Plea Tr. p.16 line 16–p.17 line 14. Headley's entry into the home violated a no-contact order between the two resulting from a previous domestic assault he committed against her. Sent. Tr. p.7 line 22–23; PSI p.54; Conf. App. 59. When she told him to leave, he refused and began an argument with her. Plea Tr. p.17 line 4–25; PSI

p.54; Conf. App. 59. Then he grabbed her shoulders, leaving swelling. Plea Tr. p.19 line 1–23.

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

ARGUMENT

I. A Sentencing Court may Properly Consider Risk Assessment Information; the Iowa Court of Appeals' Decision to the Contrary was Wrongly Decided.

Preservation of Error

Sentencing errors ordinarily 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). But this is not true for errors within the PSI. Where a defendant believes the PSI contains erroneous information or information the court should not consider in reaching sentence, the defendant is required to object and preserve error. *See State v. Grandberry*, 619 N.W.2d 399, 402 (Iowa 2000) (citing *State v. Witham*, 583 N.W.2d 677, 678 (Iowa 1998)); *see also State v. Hopkins*, 860 N.W.2d 550, 556 (Iowa 2015) (applying *Strickland* ineffective-assistance-of-counsel framework to claim defense counsel was required to object to use of PSI at sentencing).

In *State v. Gordon* and *State v. Guise*, the five-member majorities of the Iowa Court of Appeals sitting en banc concluded that the inclusion of a risk assessment—absent some undisclosed amount of foundation—within a PSI was an impermissible sentencing factor. *State v. Gordon*, No. 17-0395, 2018 WL 2084847, at *4, *9 (Iowa Ct. App. May 2, 2018); *State v. Guise*, No. 17-0589, 2018 WL 2084846, at *3–4 (Iowa Ct. App. May 2, 2018). In their view, this made it unnecessary for the defendant to object to the inclusion of a standardized risk assessment in a PSI because defendants "cannot predict the court's impermissible consideration of the assessments for sentencing." *See Gordon*, 2018 WL 2084847, at *3 n.4. The court analogized:

> Much like the defendant's race may be identified in a PSI, defense counsel would not envision that a court would rely upon race as a basis to imprison the defendant and feel a need to object to the PSI on that basis. And certainly no one would question that race would be an improper sentencing factor. Thus, we conclude Gordon's failure to object to the PSI does not raise an error preservation issue.

Id. This reasoning was mistaken and this Court should reject it.

As Judge McDonald pointed out in his dissenting opinion in *Gordon*, the inclusion of the risk assessment results in a PSI report is qualitatively different from other impermissible factors. It pointed out the majority's equivalency was inconsistent logically and had already been rejected by other authorities:

> I respectfully disagree that the district court's consideration of actuarial risk assessment information is the same as consideration of the defendant's race. The majority's position—that actuarial risk assessment information is a per se impermissible factor akin to race that need not be objected to—is contrary to the position taken by our sister States that have examined the issue, contrary to the position of the National Center for State Courts, contrary to the position of the National Conference of Chief Justices, and contrary to the position of the American Law Institute. In addition, the majority's position is inconsistent. If risk assessment information is per se an impermissible sentencing factor to which the defendant does not need to object, then no amount of foundation regarding the validity of the instrument would allow for its consideration. However, if, as the majority seems to suggest, sufficient foundation could be laid to allow for the use of risk assessments, then the failure to object bars the claim.

Id. at *12 (McDonald, J., dissenting). In fact, an earlier case had held that a challenge to a risk assessment within the PSI must be preserved. *See State v. Buck*, No. 14-0723, 2015 WL 1046181, at *3

(Iowa Ct. App. Mar. 11, 2015) (error unpreserved where defendant did not challenge to sexual adjustment inventory included in PSI during sentencing). *Buck* was consistent with earlier cases' conclusions that a challenge to impermissible considerations within a PSI must be preserved by timely objection. *See, e.g.*, *State v. Gonzalez*, 582 N.W.2d 515, 517 (Iowa 1998) (finding that district court properly relied on defendant's statements in the presentence investigation report which amounted to an admission of other criminal activity because the statements were not challenged by defendant when he was given an opportunity to do so); *see also State v. Thonethvaboth*, No. 05-1821, 2006 WL 1751295, at *1 (Iowa Ct. App. June 28, 2006) (finding error on "unproven" conduct was not preserved where defendant did not object to list of prior convictions within PSI).

Permitting Headley and other defendants to sandbag their challenge to information contained in the PSI will foster the very scenario the dissent depicted in *Gordon*. *See Gordon*, 2018 WL 2084847, at *16 (noting future district courts will read PSI reports as obligated but will simply omit discussion of risk assessments; "The end result of the majority opinion will be less transparency, less consistency, and less procedural fairness. The better position is to

conclude the district court can consider risk assessment information in making the decision to incarcerate an offender so long as the risk assessment information is not the determinative factor"). As with any other objection to a PSI's contents, if an objection were made, the parties could litigate the issue and build a useful appellate record. Requiring Headley to object to a sentencing court's use of the PSI's recommendation is not unfair. It may be unfair to require defendants to object and argue the district court is abusing its discretion when the same court is about to exercise that discretion and select a sentence. *See State v. Cooley*, 587 N.W.2d 752, 754 (Iowa 1998). But here, the district court invited Headley to object to the PSI *before* it relied on the PSI. Sent. Tr. p.3 line 13–24. He did not. Sent. Tr. p. 3 line 25. Error was not preserved. If this Court is to address Headley's claim, it should be through his ineffective-assistance-of-counsel variant. *See* Appellant's Br. 63–66.

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). This Court reviews sentencing decisions "for abuse of discretion or defect in the sentencing procedure." *Hopkins*, 860

N.W.2d at 553 (citing *State v. Thompson*, 856 N.W.2d 915, 918 (Iowa 2014)). "An abuse of discretion will only be found when a court acts on grounds clearly untenable or to an extent clearly unreasonable." *Id*. (quoting *State v. Leckington*, 713 N.W.2d 208, 216 (Iowa 2006)). Sentencing decisions receive a "strong presumption in their favor" and the burden is upon Headley to rebut this presumption. *Id*. (citing *State v. Loyd*, 530 N.W.2d 708, 713 (Iowa 1995)).

This Court reviews ineffective-assistance claims de novo. *Hopkins*, 860 N.W.2d at 554 (citing *State v. Velez*, 829 N.W.2d 572, 576 (Iowa 2013)). Headley must prove counsel breached an essential duty and that this breach prejudiced him. *Id*. at 556 (citing *State v. Fountain*, 786 N.W.2d 260, 265-66 (Iowa 2010)).

Merits

A. Due process does not foreclose the consideration of a risk assessment at sentencing, nor does it demand DCS inform the sentencing court of its appropriate uses.

Headley urges that the district court's consideration of the IRR and DROAR violated his due process rights. Appellant's Br. 36–58. Like the appellant's in *Guise* and *Gordon*, his brief relies in large part on judicial opinions from other states employing separate sentencing frameworks and which addressed risk assessments not at issue in this

case. *See* Appellant's Br. at 38–48 (discussing *Malenchik v. State*, 928 N.E.2d 564, 568 (Ind. 2010); *State v. Loomis*, 881 N.W.2d 749, 752-56 (Wis. 2016)). Headley's due process rights were not violated for four reasons. First, due process affords a sentencing court the ability to consider a wide and diverse array of relevant information. Second, whatever questions may exist as to assessment information use in sentencing, Headley was afforded an opportunity to challenge and rebut the assessments and their conclusions. Third, in no way was the district court actually bound by the assessments in making its final determination. Finally, authority Headley relies upon does not support the argument he presents to this Court. The State addresses these matters in turn.

1. A district court may consider risk assessments information at sentencing.

Precepts of due process do not preclude a sentencing court from considering risk assessment information. Neither federal nor state due process rights place significant limitations on the categories or sources of information a sentencing court may consider in crafting and imposing sentence. The United States Supreme Court has repeatedly held "a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may

consider, or the source from which it may come." *Roberts v. United States*, 445 U.S. 552, 556 (1980); *see also Pepper v. United States*, 562 U.S. 476, 488 (2011) (stating the sentencing court is allowed "to consider the widest possible breadth of information" in imposing sentence). Iowa is no different. Our district courts are authorized to consider a wide range of materials so long as they are relevant. Iowa Code § 901.5. For example, a district court may use an unsworn, out-of-court written statement from the victim to contribute to the sentencing calculus. *See* Iowa Code § 915.21; *see also Williams v. New York*, 337 U.S. 241, 246 (1949) (observing "both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law. . . . Out-of-court affidavits have been used frequently, and of course in the smaller communities sentencing judges naturally have in mind their knowledge of the personalities and backgrounds of convicted offenders"). Given the diverse sources and types of material a district court may consider

when reaching its sentence, due process is not violated because a district court considers a risk assessment.

2. Because he had the opportunity to challenge the PSI, Headley's sentencing hearing gave effect to his due process guarantees.

Second, Headly's right to due process was given proper effect. He was furnished the PSI prior to sentencing, and at the sentencing hearing was given an opportunity to object and make argument in favor of a more lenient sentence. Sent. Tr. p.8 line 12—p.12 line 17. Just as in *Guise,* here "[t]he risk assessment information was presented in a permissible presentence investigation report." *Guise*, 2018 WL 2084846, at *7 (McDonald, J., dissenting). Headley does not argue he was not timely furnished the PSI report. *See id.* When offered the opportunity to contest the validity of the PSI's contents, he saw no issue. Although for the first time on appeal Headley contests the "off label" use of the instruments, these arguments attack the weight that should be given to the assessments. Appellant's Br. 48–55. His due process rights were satisfied because a means of presenting such a challenge already existed below. *See Guise*, 2018 WL 2084846, at *7 (McDonald, J., dissenting) ("Constitutional due process does not require more than what was provided here.").

3. Headley makes several unfounded assumptions to support his due process argument.

Third, Headley's due process discussion allocates significant discussion to "evidence-based" sentencing, actuarial risk assessments, their "off-label use" in criminal sentencing, and the need for cautionary warnings to accompany their inclusion in a PSI. Appellant's Br. 48–56. Aside from ignoring Iowa courts' historical consideration of the materials, his discussion makes several questionable assumptions.

First, Headley argues our sentencing courts should not consider "non-culpable characteristics" and then urges using risk assessments violates due process because such instruments can take into account such characteristics. Appellant's Br. 53–55. He points out that assessment instruments often inquire into a defendant's education, addiction, employment, housing, interpersonal relationships, and gender. Appellant's Br. 53. But consider the statutory grounds the legislature identified a sentencing court should consider:

- The defendant's characteristics, family and financial circumstances, needs, and potentialities. Iowa Code § 901.3(1)(a).
- The defendant's criminal record and social history. Iowa Code § 901.3(b).

- Whether the defendant has a history of mental health or substance abuse problems. Iowa Code § 901.3(f).

The factors Headley has identified fit within these broad statutory grounds the PSI investigator is to inquire into and the court is to consider. His suggestion would unnecessarily constrict the district court's review of a defendant's characteristics and needs when rendering sentence. It appears to call Iowa Code section 901.3 and 901.5 into question. This Court should continue to defer to the legislature's determination of relevant sentencing factors. *See Malenchik*, 928 N.E.2d at 574 (rejecting claim that assessment results should be excluded as discriminatory because it examines "a person's family disharmony, economic status, personal preferences, or social circumstances;" noting that "considerations such as these, however, are already required by statute to be presented for judicial consideration in every pre-sentence investigation report").

Headley also urges that any inclusion of risk assessment data within the PSI must include cautionary labels. Appellant's Br. 55–57. But in doing so, he makes the implicit assumption a district court reading a PSI report containing un-cautioned risk assessment results will automatically adopt the assessment as true and will be unable to

make an independent judgment. This runs contrary to Iowa law. As the dissent in *Guise* noted "The sentencing court acts within its core competency in receiving the evidence, determining the appropriate inferences, if any, to be drawn from the evidence, and determining the weight of the evidence, all without cautionary instructions." *Guise*, 2018 WL 2084846, at *9; *see State v. Farnum*, 397 N.W.2d 744, 750 (Iowa 1986) (a sentencing court is free to weigh and apply expert testimony as it saw fit and "is not obliged to accept opinion evidence, even from experts, as conclusive"); *see generally State v. Matheson*, 684 N.W.2d 243, 244 (Iowa 2004) (noting that sentencing court had legal training that mitigated danger of unfair prejudice from its consideration of impermissible victim impact information; but vacating sentence on other grounds). The argument also flies in the face of this Court's own movement towards further inclusion of scientific data in the pre-trial release and sentencing calculi. *See* Chief Justice Mark S. Cady, Iowa Supreme Court, 2018 Iowa State of the Judiciary (Jan. 10, 2018), https://www.iowacourts.gov/static/media/cms/Final_2018_speech_with_cover_B650B18F74A4B.pdf; Iowa Code § 901.11; *State v. White*, 903 N.W.2d 331, 333–34 (Iowa 2017) ("In this case, the critical conclusions drawn by the district court at

the sentencing hearing were not grounded in science but rather based on generalized attitudes of criminal behavior that may or may not be correct as applied to juveniles. Juvenile sentencing is now driven in large part by the development of brain science, and more evidence was needed for the district court to properly conclude White was more mature and less impetuous because his three arrests gave him a greater appreciation of the risks and consequences of his actions.").

In sum, Iowa's district courts are capable of weighing and assessing information with the PSI without unnecessary cautionary instructions. This is especially true when Iowa's sentencing procedure offers every defendant an opportunity to challenge the contents of the PSI report.

4. Due process does not require any cautionary information as to the appropriate uses of risk assessment information

Headley complains the PSI did not contain enough "information about the assessment," did not provide sufficient cautions for and limitations of the risk assessment tool to allow the court to consider the results. Appellant's Br. 53–56. He implores this court to conclude that due process requires every PSI "to specifically

inform the sentencing court of the limitations of the assessment tools." Appellant's Br. 56. This Court should reject these concerns.

Headley's due process rights were not violated because, as discussed above, "[d]ue process does not restrict the district court from considering risk assessment information." *Guise*, 2018 WL 2084846, at *7 (McDonald, J., dissenting). And although not addressed by the majority opinion, this argument was exhaustively addressed and rejected by the dissent in *Guise*:

> Because the due process clause does not prohibit the district court from considering risk assessment information contained in the presentence investigation report, it follows *a fortiori* the due process clause does not prohibit the district court from considering risk assessment information contained in the presentence investigation report in the absence of the requested cautionary instructions. . . .
>
> . . . The [*Loomis*] court urged the use of cautionary instructions as a prophylactic measure to "avoid *potential* due process violations." [881 N.W.2d] at 760 (emphasis added). However, the court affirmed the defendant's prison sentence and held that even though "the circuit court was unaware of the cautions . . . the circuit court's consideration of [the risk assessment tool] . . . did not violate Loomis's due process rights." *Id.* at 771 (emphasis added) . . .

> . . . *Loomis* provides 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. 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. Indeed, the practice is to the contrary. Medical information and mental-health information is routinely provided to the district court at sentencing without guidance.

Id. at *7–9 (McDonald, J., dissenting). On a daily basis, Iowa's sentencing courts parse and consider medical, psychological, and other scientific information and weigh it without additional cautionary instruction. "The constitutional command of due process does not require [DCS] to instruct a sentencing court on the appropriate uses of" risk assessment information. *See id.* at *10. This Court should reject Headley's invitation to create such an unnecessary prerequisite.

5. Headley's authority supports the State's position.

As in *Guise* and *Gordon*, Headley relies on out-of-state caselaw which addressed risk assessments not at issue in this case from

jurisdictions with dramatically different sentencing systems. *See* Appellant's Br. at 38–41 (discussing *Malenchik*, 928 N.E.2d at 568).

Headley's reliance on *Malenchik* is misplaced. The case arose in a jurisdiction in which sentencing judges' discretion includes the length of the defendant's sentence, contrary to Iowa's indeterminate sentencing schema. Ind. Code §§ 35-50-2-4 –35-50-2-7 (creating "fixed" sentences for each level of crime); Iowa Code §§ 902.3, 902.9. And in fact, *Malenchik* authorized the use of risk assessments in determining whether to suspend or impose a sentence of incarceration:

> It is clear that neither the LSI–R nor the SASSI are intended nor recommended to substitute for the judicial function of determining *the length of sentence* appropriate for each offender. But such evidence-based assessment instruments *can be significant sources of valuable information for judicial consideration in deciding whether to suspend all or part of a sentence*, how to design a probation program for the offender, whether to assign an offender to alternative treatment facilities or programs, and other such corollary sentencing matters.

Malenchik, 928 N.E.2d at 573 (emphasis added). *Malenchik* supports the State's position that risk assessments may validly be used in

determining whether to impose or suspend a defendant's sentence. The exact sentencing at issue here.

Likewise, *Loomis* supports the State's position. Like Indiana, a sentencing court in Wisconsin determines the length of the defendant's confinement in prison. *See* Wis. Stat. § 973.01(1)—(2). The Loomis court unsurprisingly held that a risk assessment should not determine the length of sentence imposed but ultimately affirmed the use of risk assessment information in sentencing generally, finding that the instruments were "helpful" and provided "the sentencing court with as much information as possible in order to arrive at an individualized sentence." *Loomis*, 881 N.W.2d at 765, 768. It noted that although the use of risk assessments must not be determinative of the court's sentencing decision, "they may be useful in identifying prison-bound offenders who are at low risk to reoffend for purposes of diverting them to non-prison alternatives and *aids in the decision of whether to suspend all or part of an offender's sentence*." *Id.* at 767 (emphasis added). It likewise found that risk assessment information could assist a district court in assessing a defendant's "risk to public safety and can inform the decision of whether the risk of re-offense presented by the offender can be safely

managed and effectively reduced through community supervision and services." *Id.* It rejected his due process challenges and affirmed his sentences. *Id.* at 765–67. *Loomis* too, supports the State's position that a district court may consider risk assessment information—alongside other materials—in determining whether to suspend a sentence.

6. Conclusion

This Court need not address Headley's unpreserved claim that a sentencing court's consideration of risk assessment data violates due process. This Court should reject Headley's claim because due process affords sentencing courts wide latitude in the sources of information they consider when reaching a sentence. It should reject his claim because Iowa's sentencing procedure builds in an opportunity to challenge information with the PSI report. It should reject his claim because it is based upon assumptions that are contrary to Iowa law and seeks to create an unnecessary barrier to relevant information. It should reject the claim because out-of-state of authority he relies upon reaches the opposite conclusion he promotes. This Court should affirm.

B. Risk assessments are not improper sentencing considerations.

As an alternative ground for reversal, Headley urges this Court to find that risk assessments may not be considered in determining a sentence because the Iowa Code has not explicitly authorized their consideration. Appellant's Br. 59–62. This was the position taken by the *Guise* majority when it found that consideration of the IRR was an abuse of discretion. *See Guise*, 2018 WL 2084846, at *2 n.1, *4 (analogizing IRR data to impermissible sentencing factor to overcome error preservation argument, and finding that sentencing decision amounted to an abuse of discretion).

But in his dissenting opinion, Judge McDonald noted the Iowa Code authorized the sentencing court to consider all pertinent information in making its sentencing decision. *Guise*, 2018 WL 2084846, at *11–12 ("It is clear from the Code and the case law that the district court may consider any information 'relevant' or 'pertinent' to sentencing" citing Iowa Code §§ 901.2(1), 901.5). He then examined the relevance and pertinence of risk assessment information in sentencing:

Actuarial risk assessment information is generally relevant to the sentencing function. A risk assessment estimates the probability that an individual will engage in violent or other criminal conduct in the future. One of the central historical functions of any sentencing court is to conduct a first-generation clinical risk assessment of the offender. That is, in crafting and imposing sentence, the sentencing court considers the risk the defendant will reoffend and whether the defendant is amenable to supervision in the community. Actuarial risk assessment information provides the sentencing court with evidence-based information relevant to both of these considerations. Risk assessment information speaks directly to the defendant's risk of recidivating, his amenability to supervision in the community, and thus his propensities and chances of his reform.

. . .

[T]he duty of a sentencing judge in every case is to consider all of the available sentencing options, to give due consideration to all circumstances in the particular case, and to exercise that option which will best accomplish justice both for society and for the individual defendant. The sentencing court's function is both backward-looking and forward-looking: backward looking in that the sentencing court must impose a sentence that provides justice in the individual case; forward looking in that the sentencing court must select a sentence that advances the societal goals of sentencing criminal offenders, which focus on rehabilitation of the offender and the protection of the community from further offenses.

Id. at *12-13 (McDonald, J., dissenting) (internal quotation marks, citations, and alterations omitted). "Evidence-based risk assessment information can assist the sentencing judge in overcoming the limits of personal experience by providing access to empirical evidence." *Gordon*, 2018 WL 2084847, at *16 (McDonald, J., dissenting). In fact, risk assessment information is not always aggravating, and can assist a court in recognizing that an offender may actually be at a low-risk of recidivism even when they had committed a serious offense. *See, e.g.*, *State v. Ladehoff*, No. 13-0586, 2014 WL 958028, at *1 (Iowa Ct. App. Mar. 12, 2014) (noting that a defendant's risk assessment "found him to be at a low risk to reoffend" after he was convicted of "child endangerment, aggravated assault, and operating while intoxicated" after an incident where he was "driving intoxicated with a child passenger, pursued another vehicle and lost control of his car, flipping it several times and ending up in a ditch").

In *Guise*, the Iowa Court of Appeals concluded that lacking statutory authorization the district court could not consider the IRR in determining sentence and observing that "virtually nothing has been written about the IRR assessment tool." *Guise*, 2018 WL 2084846, at *2. Because Headley failed to object to the inclusion of

either risk assessment in the PSI, neither the State nor DCS knew it needed to present evidence that may have assuaged the concerns addressed by the court of appeals. *See Guise*, 2018 WL 2084846, at *4 n.3 ("We do not suggest the IRR can never be used in sentencing. But, at a minimum, its use must be predicated on legislative or administrative authorization, scientific validation of the instrument, and an explanation of the underlying factors and scoring methodology.").

The state does not dispute that the district court considered the PSI. Sent. Tr. p.17 line 14–20. It was required to. Iowa Code § 901.5. But the district court did not indicate that it reached its sentence based the risk assessment information; the PSI author's recommendation was based on an array of information suggesting that Headley was a poor fit for probation. PSI p.23–24; Conf. App. 28–29. And Headley's criminal record and consistent failure on supervised release clearly was weighing in heavily in the district court's mind. Sent. Tr. p.12 line 18–p.14 line 18; p.15 line 10–p.16 line 24; p.17 line 8–20. Headley has not shown that the district court abused its discretion. This Court should affirm.

C. Headley has failed to prove his trial counsel was ineffective for failing to object to the inclusion of risk assessment data in the PSI report.

Because error was not preserved on this claim, this Court must address Headley's claims under the ineffective assistance framework. He cannot meet his burden. Addressed above, due process is not violated when a district court considers risk assessment data when sentencing. Nor is risk assessment data an improper sentencing factor that necessitates reversal. There is no breach of duty for failing to argue a meritless claim. *See State v. Graves*, 668 N.W.2d 860, 881 (Iowa 2003).

Even if this Court determines it was improper for the district court to consider the risk assessment under either the due process or improper sentencing consideration challenges, Headley's counsel could not have been expected to predict such a change in the law. "The use of actuarial risk assessment information is well established in Iowa," and their inclusion in PSI reports was not a new development. *See Guise*, 2018 WL 2084846, at *9 (McDonald, J., dissenting); *State v. Crawford*, No. 10-1296, 2011 WL 1818419, at *1 (Iowa Ct. App. May 11, 2011) ("The PSI reveals Crawford was screened on two sex offender risk assessments: one scored him in the low

moderate category of risk for sexual recidivism, and the other scored him in the medium level of sexual re-offending."). "[A]n attorney need not be a 'crystal gazer' who can predict future changes in established rules of law . . . ." *State v. Schoelerman*, 315 N.W.2d 67, 72 (Iowa 1982).

Finally, there was no prejudice from counsel's performance. Had Headley objected and challenged the inclusion of the risk assessment information, the State or DCS would have been able to lay the foundation necessary to overcome concerns of the purpose of the assessments and their validity, which the *Guise* court implied may be sufficient to permit its consideration. See *Guise*, 2018 WL 2084846, at *4 n.3. Alternatively, DCS may have simply provided the cautionary language Headley requests. Appellant's Br. 55–56.

Even had an objection been sustained, the sentencing court relied on numerous factors in making its determination. See Sent. Tr. p.17 line 8–20. Notably, aside from referencing the PSI and the author's recommendation generally, it did not refer to risk assessment results in explaining its sentence. Sent. Tr. p.17 line 8–20. And it is clear from the sentencing transcript that the district court

did not require risk assessment data to conclude that Headley was unlikely to succeed on another round of unsupervised probation:

> What this record shows, Mr. Headley, is you have never succeeded on probation. Every time the court has trusted you, you have breached that trust. Probation is a situation where a defendant makes a promise to a judge to change their behavior, to stop hurting other people. For ten years you have been making that promise. For ten years judges have provided what your lawyer would describe as leniency and mercy, and you have squandered it, every one.
>
> In addition to that, you are violent. You physically hurt other people repeatedly. And even in the face of that, the courts have tried to change your behavior through the framework of probation, and you have squandered that and continued to hurt people. In short, you're dangerous. You're dangerous to others. And I think it's clear that substance abuse is part and parcel of this. But person who is on drugs and physically attacks someone else causes injury as much as someone who is sober and attacks and injures someone else.
>
> . . .
>
> This is a very troubling case to me because you have generated a criminal record for such a young man in a relatively short period of time that includes violence. You're dangerous. What is there, as the court looks at your behavior in the past decade, that would cause a reasonable person to think that you're going to act differently? Nothing. And I am more than appreciative of the danger of

> addiction. There's no question about that and we see that frequently here. But this isn't a second chance that you're asking for. This is a tenth chance, a 12th chance, ten years of chances.
>
> . . .
>
> We have tried everything with you. Probation, jail, fines. We've even tried prison and that didn't work. I would like to be hopeful that if you went to the Fort Des Moines facility that a miracle would happen. But with all respect to you, I think that unlikely.
>
> . . .
>
> [B]ased on this record, I'm compelled to the conclusion that you have not been responsive to our efforts in the past to get you to change. And in the greater balance I have to protect the public. I can't in good conscious give you probation again.

Sent. Tr. p.14 line 11–p.16 line 24. Headley has failed to show that without the risk assessment information the outcome would have been different. See Appellant's Br. at 66. Headley has not established counsel was ineffective. *See State v. Lawson*, No. 17-1788, 2018 WL 3472047, at *2 (Iowa Ct. App. July 18, 2018) (finding counsel was not ineffective for failing to object that risk assessment data was included in the PSI because "there is no evidence the district court relied upon

or even considered risk-level scores in announcing Lawson's sentence"). This Court should reject his claim and affirm.

II. The District Court Could Consider the PSI Author's Sentencing Recommendation Because it was "Relevant" and "Pertinent" to the Ultimate Sentencing Decision.

Preservation of Error

Error was not preserved. Headley urges this Court to find that the district court impermissibly considered the PSI author's sentencing recommendation. Appellant's Br. 72. No such objection was raised below. Rather, both parties affirmed their receipt and review of the PSI and averred there were no additions, corrections, deletions, or modifications necessary, nor any legal reason why sentence could not be pronounced. 3/13/2018 Sent. Tr. p.3 line 5–p.4 line 4. Under longstanding Iowa law, Headley's lack of an objection to the PSI's conducts failed to preserve error on his present claim. *See Grandberry*, 619 N.W.2d at 402; *see also Hopkins*, 860 N.W.2d at 556 (applying *Strickland*-framework to claim counsel). Headley's brief acknowledges this precedent. *See* Appellant's Br. 78 n.10. He was burdened with preserving error on the contents of the PSI and failed to do so. *See Grandberry*, 619 N.W.2d at 402.

Standard of Review

This Court reviews sentencing decisions "for abuse of discretion or defect in the sentencing procedure." *Hopkins*, 860 N.W.2d at 553 (citing *State v. Thompson*, 856 N.W.2d 915, 918 (Iowa 2014)). "An abuse of discretion will only be found when a court acts on grounds clearly untenable or to an extent clearly unreasonable." *State v. Leckington*, 713 N.W.2d 208, 216 (Iowa 2006). Sentencing decisions receive a "strong presumption in their favor." *Hopkins*, 860 N.W.2d at 553 (citing *State v. Loyd*, 530 N.W.2d 708, 713 (Iowa 1995)).

This Court reviews ineffective-assistance claims de novo. *Id.* at 554 (citing *State v. Velez*, 829 N.W.2d 572, 576 (Iowa 2013)). Headley must prove breach and prejudice. *Id.* at 556 (citing *Fountain*, 786 N.W.2d at 265–66).

Merits

Headley argues "because there is no authority for the Department of Correctional Services (DCS) to provide a sentencing recommendation to the count and because the recommendation in the PSI . . . the district court's consideration of the recommendation was improper." Appellant's Br. 72. This is not so. Iowa courts may consider the contents of a PSI, including the author's ultimate

sentencing recommendation. Given the facts of this case, he cannot establish his trial counsel breached an essential duty nor prejudice.

A. The language of Iowa Code sections 901.2 and 901.5, the purpose of a PSI, and caselaw all suggest Iowa's district courts may consider a PSI author's sentencing recommendation.

1. Because a sentencing court may consider any information "relevant to the question of sentencing" and "pertinent information," it may validly consider the PSI author's sentencing recommendation.

Headley contends the Iowa Code does "not explicitly provide for DCS to make a recommendation to the district court regarding a defendant's sentence." Appellant's Br. 75. But the plain language of Iowa Code sections 901.2(1) and 901.5 each allow the district court to consider information that would assist the judge in exercising its discretion to reach a just sentence. This includes the PSI author's sentencing recommendation. The State considers sections 901.2(1) and 901.5 in turn.

Iowa Code section 901.2(1) provides that "[u]pon a plea of guilty . . . the court shall receive . . . from the judicial district [DCS] . . . any information which may be offered which is *relevant* to the question of sentencing." (emphasis added). A PSI author's recommendation is "relevant."

In preparing the report, the PSI author collects considerable information about the defendant. *See* Iowa Code § 901.3 (listing categories of information the PSI author must "promptly inquire into"). The PSI author spends time with the defendant and may collect additional information about the defendant a district court would not be exposed to during formal proceedings. Moreover, as a part of the judicial branch in the district where sentencing occurs, the PSI author is familiar with the available facilities, sentences, and DCS services. *See* Iowa Code §§ 901.2(1), 905.1(5), 905.2. Contrary to Headley's suggestion the PSI author's recommendation is relevant because it is made armed with knowledge on nearly all relevant parts of a sentencing decision. As Headley acknowledges, the non-statutory term "relevant" is broad. Appellant's Br. 76–77; *see also* Relevant, *Black's Law Dictionary* 1404 (9th ed. 2009) ("Having appreciable probative value—that is, rationally tending to persuade people of the probability or possibility of some alleged fact.").

And even though the rules of evidence do not apply at sentencing, analogizing to those rules again confirms the PSI author's recommendation is "relevant to the question of sentencing." *See* Iowa Code § 901.2(1). Evidence is relevant when it tends to make a

consequential fact more or less probable. Iowa R. Evid. 5.401. Both lay and expert opinions can help to determine facts in dispute. Iowa Rs. Evid. 5.701, 5.702. Here, the PSI author gave an opinion—based on the information collected—that incarceration was appropriate. PSI at 23–24; App.___; *see also* Iowa Code § 901.3. The district court could consider that opinion when formulating an appropriate sentence. Judges "should be in possession of the fullest information possible concerning the defendant's life and characteristics" at sentencing. *State v. Stanley*, 344 N.W.2d 564, 570 (Iowa Ct. App. 1983). Allowing courts to consider PSI authors' opinions comports with this policy.

Turning to section 901.5, it directs the district court to "receiv[e] and examin[e] all pertinent information, including the [PSI]." The PSI author's sentencing recommendation is pertinent information for the same reason it is relevant. After compiling extensive information about the defendant, the PSI author—who usually has significant experience interacting with defendants—is in a unique position to make an informed recommendation as to what sentence will best fulfill the goals of protecting the community and rehabilitating the defendant. See Iowa Code § 901.5. Because the PSI

author's recommendation is "pertinent information," Iowa Code section 901.5 authorizes the district court to consider it.

Also, section 901.5 explicitly directs the district court to "receiv[e] and examin[e]" the PSI. It does not direct district courts to ignore sentencing recommendation in PSIs even though it is common knowledge that PSIs include a sentencing recommendation. *Hopkins*, 860 N.W.2d at 556 (observing PSI reports "not only include[] relevant information concerning sentencing, but a sentencing recommendation"); Appellant's Br. at 78 n.10 (observing "[t]he inclusion of a recommendation by the [DCS] appears to be a historical practice" and collecting cases). Had the legislature wanted Iowa's district courts to disregard a sentencing recommendation within the PSI, it would have said so.

The State notes that the legislature has also authorized the district court to consider victim impact statements. Iowa Code §§ 901.5, 915.21. Although not statutorily authorized, such impact statements could include the lay victim's recommendation for a sentence. *See, e.g., State v. Sims*, No. 01-1842, 2002 WL 31310787, at *2 (Iowa Ct. App. Oct. 16, 2002) (noting that victim impact statement "only addressed the emotional impact of the incident on the victim

and her recommendation for prison"). Certainly a district court should be permitted to consider an authorized investigator's information-driven conclusion alongside a victim's grief-fueled opinion.

Headley observes that section 901.3 lists types of information "the investigator shall promptly inquire into," but that section does not include a sentencing recommendation. Appellant's Br. 73–75. This is not dispositive. First, the statute does not list what should be included within a PSI report; it lists what the author shall investigate. Iowa Code § 901.3. It makes sense the list omits a recommendation because the investigator cannot "inquire into" his or her recommendation. Rather, the author must make that recommendation as a result of an authorized investigation.

Second, and importantly, section 901.3 does not limit the scope of the PSI report to those topics stated in section 901.3. It does not explicitly exclude the author from making a recommendation. This Court should not rewrite the statute by inserting that language through judicial gloss. *See State v. Sailer*, 587 N.W.2d 756, 760 (Iowa 1998) ("We cannot, under the guise of construction, enlarge or

otherwise change the terms of the statute as the legislature adopted it." (quoting *Carolan v. Hill*, 553 N.W.2d 882, 887 (Iowa 1996))).

Third, district courts consider things at sentencing not explicitly provided for by statute. There is no statutory authorization for a court to consider the State's or the defendant's sentencing recommendation. But no one could plausibly suggest a district court considers an impermissible factor by hearing and considering them. That same reasoning is apposite here. Sentencing procedure is not so rigid and formulaic that the sentencing court may only consider those things explicitly provided for in the Iowa Code or Constitution. *See State v. Knutson*, 234 N.W.2d 105, 108 (Iowa 1975) (holding a district court did not "abandon[] [its] discretion in following the [PSI] investigator's sentencing recommendation" and that the court could, but did not have to, obtain psychiatric recommendations for sentencing). Iowa's sentencing courts are not always swayed by expert testimony, and a PSI author's recommendation is no different. *See Eickelberg v. Deere & Co.*, 276 N.W.2d 442, 447 (Iowa 1979) ("The trier of fact is not bound to accept expert testimony, even if uncontradicted . . . ").

2. Considering the PSI author's recommendation is consistent with the PSI's purpose.

"The purpose of the [PSI] is to provide the court pertinent information for purposes of sentencing . . . ." Iowa Code § 901.2(4). And as already discussed, sentencing courts should possess "the fullest information possible" about the defendant to reach a just sentence. *Stanley*, 344 N.W.2d at 570.

Considering a PSI author's sentencing recommendation is entirely consistent with that purpose. By allowing an expert on sentencing options, defendants generally, and the particular defendant being sentenced to render an opinion, the court gains valuable information pertinent to deciding what sentencing option will best satisfy the goals of sentencing. The district court is not obligated to follow such a recommendation, it is simply additional information in the collection of data informing its final sentence. *See State v. Miglio*, No. 15-0169, 2016 WL 7075833, at *4 (Iowa Ct. App. Nov. 12, 2016) (citing *Hopkins*, 860 N.W.2d 550 and observing "although the court is not bound to follow the sentencing recommendation reached by an officer of the department of correctional services, the PSI report's recommendation is a factor that could influence the sentencing decision"). This Court should decline

to undercut the very purpose of the PSI by blocking district courts from considering PSI authors' sentencing recommendations.

3. Caselaw supports the district court's consideration of a PSI sentencing recommendation.

Iowa caselaw offers two additional reasons to affirm. First, it supports concluding that a district court can consider a PSI author's sentencing recommendation. Second, Headley's failure to object to that recommendation provides another basis for considering it.

First, the Iowa Supreme Court has stated "[t]he PSI report not only includes relevant information concerning sentencing, but [also] a sentencing recommendation." *Hopkins*, 860 N.W.2d at 556 (citing Iowa Code §§ 901.2-.3). The Court of Appeals has agreed. *State v. Miglio*, No. 15-0169, 2015 WL 7075833, at *4 (Iowa Ct. App. Nov. 12, 2015) ("[T]he PSI report's recommendation is a factor that could influence the sentencing decision." (citation omitted)). As do other jurisdictions. For example, in Wyoming, the statutes mandating the creation of a PSI do not explicitly provide for a sentencing recommendation. *See* Wyo. Code. Ann. § 7-3-303; Wyo. R. Crim. P. 32. Yet the PSIs created with that state often contain sentencing recommendations and the district court may consider them. *See, e.g.*,

Noeller v. State, 226 P.3d 867, 871 (Wyo. 2010) ("A sentencing recommendation contained in a PSI is one of the factors that a court may properly consider in determining the appropriate sentence to impose." (citation omitted)); *cf.* Fed. R. Crim. P. 32(e)(3) (providing for a sentence recommendation in the presentence report).

Second, "[i]n determining a defendant's sentence, a district court is free to consider portions of a [PSI] report that are not challenged by the defendant." *Grandberry*, 619 N.W.2d at 402 (citing *Witham*, 583 N.W.2d at 678); *Miglio*, No. 15-0169, 2015 WL 7075833, at *4. Headley did not challenge the PSI report's sentencing recommendation. The district court could, therefore, consider it.

4. Headley's assertion the PSI "unfairly allowed the government to give two sentencing recommendations" is misplaced.

Headley argues reversal is appropriate because by considering the PSI author's sentencing recommendation, the State was "unfairly allowed . . . to give two sentencing recommendations." Appellant's Br. at p.78. This concern is misplaced.

Even with the PSI's sentencing recommendation, the State—in the sense of the prosecution—made a single recommendation. *See* Sent Tr. p.6 line 16–p.8 line 11. As a part of each judicial district, DCS

is part of the judicial, not executive, branch. *See* Iowa Code §§ 901.2(2), 905.1(5), .2, .12. Asserting that the State got two sentencing recommendations is akin to saying the State also got to make the sentencing decision because the sentencing judge is part of the State.

Second, it assumes a court would be unfairly persuaded because it heard two recommendations in favor of incarceration rather than one. The suggestion is dubious; Iowa's district courts are capable of exercising independent judgment. No party's sentencing recommendation is binding upon the court. *See State v. Grgurich*, 253 N.W.2d 605, 606 (Iowa 1977); *see, e.g.*, *State v. Ladehoff*, No. 13-0586, 2014 WL 958028, at *1–2 (Iowa Ct. App. Mar. 12, 2014) (rejecting claim that district court improperly rejected PSI recommendation). Additionally, PSI authors' sentencing recommendations are frequently different—and often more lenient—from county attorneys' recommendations. *See, e.g.*, *State v. Dearden*, No. 15-0937, 2017 WL 1735610, at *1 (Iowa Ct. App. May 3, 2017) (acknowledging prosecutor recommended defendant "should go to prison, and he should not be granted any sort of opportunity for probation" yet PSI author recommended probation).

In addition, public policy supports allowing courts to use PSI authors' sentencing recommendations. The DCS investigators that draft PSIs and make sentencing recommendations have considerable experience with criminal defendants. DCS has substantial institutional knowledge, including sentencing options allowable to each offender. And the investigator drafting the PSI report has collected a wealth of information on the offender being sentenced. To fulfill the goal of making an informed sentencing decision, district courts should be allowed to consider the recommendations in PSIs.

5. Conclusion

In sum, Iowa's district courts can and should consider PSI authors' sentencing recommendations. They should do so because the plain language of Iowa Code sections 901.2(1) and 901.5, the policy goals underlying the creation of the PSI, and Iowa's caselaw all allow it. This Court should reject Headley's request for reversal.

B. The PSI author's recommendation is not invalid because it was based in part on actuarial risk assessments.

Attempting to piggy-back on his arguments in the portions of his brief attacking the consideration of risk assessments, Headley urges that because DCS's "recommendation was based, at least in

part, on Headley's risk assessment scores" "it was improper for the district court to consider the PSI recommendation." Appellant's Br. 80. The State disagrees.

In *Gordon*, the Iowa Court of Appeals found it was an abuse of discretion for the sentencing court to consider risk assessment information. *See* 2018 WL 2084847, at *9. Yet, even the *Gordon* majority recognized it was appropriate for DCS to utilize risk assessments when determining their sentencing recommendation: "we are not convinced Gordon or his attorney could have envisioned that what was proper for the PSI writer to consider in making a recommendation for probation considerations would be improperly used by the district court as a basis to imprison the defendant." *Id*. at *3 n.4.

Headley's argument on risk assessments deals with the complaint it was improper for the sentencing court to directly consider such matters without prior cautionary instructions, in part because the court may not be "full[y] aware of the limitations and purposes of any risk assessment scores contained in the PSI." Appellant's Br. at 61–62. But the extension of this argument to the PSI writer is illogical. The PSI author is necessarily trained in the use

and implementation of risk assessment tools. If Headley believes the PSI author to be capable of giving cautionary instructions to the sentencing court before it can rely on risk assessment information, then the author by must also be aware of the uses and limitations of those assessments in making their recommendation. A PSI report author's utilization of risk assessment tools does not make their sentencing recommendation an improper consideration, and Headley provides no authority to support his claim to the contrary. Appellant's Br. 79–80. This Court should reject the argument.

C. Headley has failed to prove his trial counsel was ineffective for failing to object to the inclusion of a DCS recommendation in the PSI report.

Addressed above, the district court could consider the PSI author's recommendation. Counsel did not breach an essential duty by failing to object to the court's consideration of the recommendation.

But even if objecting could have prevented the court from considering the recommendation, counsel still breached no duty. For counsel to breach a duty, the attorney must act below the standard of a reasonably competent attorney. If counsel breached a constitutionally imposed duty here, then almost every member of the

Iowa defense bar has acted in a constitutionally deficient by allowing district courts to consider sentencing recommendations in PSIs. Many have brokered plea agreements for their clients in which the State agrees its sentencing agreement will be *bound* by the author's ultimate recommendation. *See, e.g.*, *Moore v. State*, No. 15-1592, 2016 WL 6902327, at *1 (Iowa Ct. App. Nov. 23, 2016) (observing that State agreed to endorse whatever sentence recommended by PSI author). The test for ineffective assistance is objective based upon a "prevailing professional norms;" it is impossible that under this standard every attorney is incompetent. *See State v. Clay*, 824 N.W.2d 488, 495 (Iowa 2012); *Strickland v. Washington*, 466 U.S. 668, 688 (1984). This Court should hesitate before holding that all criminal defense lawyers in Iowa routinely offer constitutionally deficient performance at sentencing.

Likewise, Headley has not established prejudice. He has pointed out that the district court considered the PSI and concluded "Had counsel objected . . . the sentencing proceeding would not have contained the error." Appellant's Br. 83. But this amounts to a cursory assumption of prejudice. This Court has long held prejudice is not proven based upon assumptions, it must be affirmatively

demonstrated. *See State v. Hopkins*, No. 13–1103, 2014 WL 3511820, at *4 (Iowa Ct. App. July 16, 2014) (holding that to prove prejudice from counsel's failure to object to PSI, she must show "had counsel objected to use of the outdated PSI, the court would have delayed resentencing, ordered an updated PSI, and that subsequent reliance on an updated PSI would have resulted in a more lenient sentence"). The district court's statement of reasons for the sentence listed several factors that weighed in its analysis. It made clear Headley's long string of failures on supervised probation was one of many reasons why a prison sentence was appropriate.

> I reached this conclusion for the reasons I've stated in the record, the separate and serious nature of the offenses, all the attempts we have made to get you to change, and to carry out the plea agreement between the parties, and the fact that your criminal behavior continued even while you were on probation to the court.

Sent Tr. p.17 line 8–13. The PSI author's recommendation was one star in a constellation of facts against suspending sentence. Sent. Tr. p.17 line 8–20; PSI p.23–24; Conf. App. 23–24. Lacking breach or an essential duty, Headley's claim collapses and this Court should affirm.

III. Headley's "Reasonable Ability to Pay" Restitution Claim is Unripe and Unexhausted.

Ripeness, Exhaustion, and Preservation of Error

There are two ways by which a defendant may challenge a restitution order. A criminal defendant may challenge restitution at the time of sentencing and/or may file a timely appeal in the criminal case of any subsequent restitution order. *State v. Jenkins*, 788 N.W.2d 640, 644 (Iowa 2010) (citing *State v. Blank*, 570 N.W.2d 924, 925-26 (Iowa 1997)). Additionally, pursuant to Iowa Code section 910.7, "[a]t any time during the period of probation, parole, or incarceration, the offender . . . may petition the court on any matter related to the plan of restitution or restitution plan of payment." Iowa Code § 910.7(1). If the district court determines that a hearing should be held, the court has authority to modify the plan of restitution, the plan of payment, or both. Iowa Code § 910.7(2). Headley has not utilized any method to obtain district court review, and his claim is unreviewable for several reasons.

First, it is unripe. At the time he filed his notice of appeal, the plan of restitution was not complete. 3/13/2018 Sentencing Order p.3; 3/26/2018 Notice of Appeal; App. 25–26. No restitution amounts aside from court costs had been included in the sentencing

order. *See* 3/13/2018 Sentencing Order p.3 "Defendant is ordered to make restitution in the amount of $TBD."); App. 21. Until the district court has "at a minimum, an estimate of the total amount of restitution," it had no obligation to assess Headley's ability to pay the costs. *See State v. Campbell*, No. 15-1181, 2016 WL 2181568, at *4 (Iowa Ct. App. 31, 2016) (finding sentencing court should not have made affirmative finding of reasonable ability to pay where "the clerk of court had not yet compiled a statement of court-appointed attorney fees and other costs" pursuant to Iowa Code § 901.3).

Headley's claim is also unexhausted. The order imposing the correctional fees he challenges was filed on June 12, 2018—almost three months after he was sentenced, and after the filing of the notice of appeal. 6/12/2018 Order; App. 28. Because the amount of restitution was not known and was not ordered until after judgment was entered, he must raise and exhaust the matter pursuant to Iowa Code section 910.7 prior to seeking this Court's intervention. *See* Iowa Code § 910.7; *See State v. Swartz*, 601 N.W.2d 348, 354 (Iowa 1999); *State v. Jackson*, 601 N.W.2d, 354, 357 (Iowa 1999). *Swartz* is controlling in this respect. There, the defendant challenged the fact that the district court had ordered restitution without considering his

reasonable ability to pay. This Court found that he could not make the challenge because:

> it does not appear that the plan of restitution contemplated by Iowa Code section 910.3 was complete at the time the notice of appeal was filed. 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. Until that remedy has been exhausted we have no basis for reviewing the issue that defendant raises.

Swartz, 601 N.W.2d at 354.

The order Headley challenges was filed after the notice of appeal, was a collateral issue within the district court's jurisdiction notwithstanding the appeal, and Headley took no action to contest his ability to pay. *See State v. Jose*, 636 N.W.2d 38, 46 (Iowa 2001) (finding that a petition to modify restitution is collateral and remain within the district court's jurisdiction during the pendency of an appeal); *compare State v. Kurtz*, 878 N.W.2d 469, 472–73 (Iowa Ct. App. 2016) (distinguishing *Swartz* and *Jackson* and finding that because the sentencing order contained restitution amounts and plan of payment, Kurtz could challenge the district court's failure to consider his reasonable ability to pay restitution at time of sentencing). This Court need not address the claim.

This is not a harsh outcome, even as this appeal proceeds, means of litigating his ability to pay these amounts remain available. *See* Iowa Code § 910.7. The State notes that in recent cases the Iowa Court of Appeals has remanded the case to the district court for hearing when the district court determines the defendant has a reasonable ability to pay before a plan of restitution is entered. *See State v. Johnson*, 887 N.W.2d 178, 184 (Iowa Ct. App. 2016) (sentencing court made finding in its written order that Johnson was reasonably able to pay court-appointed counsel's fees, the finding was "incorporated in the sentence" and was directly appealable); *State v. Pace*, No. 16-1785, 2018 WL 1629894, at *3 (Iowa Ct. App. April 2, 2018) (same). The State respectfully submits these cases are inapplicable here. The district court's written order indicated that because the restitution amounts were not available at the time of sentencing, "a supplemental order will follow." 3/13/2018 Sentencing Order p.3; App. 21. Unsurprisingly, because the plan of restitution and the restitution plan of payment were incomplete, the district court's sentencing order contained no finding of whether Headley possessed a reasonable ability to pay. The issue is unpreserved.

In sum, Iowa law forecloses Headley's attempt to tether this claim into his direct appeal. His claim is unripe, unexhausted, and thus, unpreserved. He must exhaust his remedies in the district court before this Court will intervene. This Court may affirm.

Standard of Review

This Court reviews "restitution order[s] . . . for correction of errors at law." *State v. Coleman*, 907 N.W.2d 124, 134 (Iowa 2018) (quoting *State v. Klawonn*, 688 N.W.2d 271, 274 (Iowa 2004)). A defendant bears the burden of proof when challenging a restitution order. *State v. Storrs*, 351 N.W.2d 520, 522 (Iowa 1984). "[A] defendant who seeks to upset an order for restitution of court costs and attorney fees has the burden to demonstrate a failure of the trial court to exercise discretion or abuse of discretion." *Id*.

The Court reviews constitutional issues de novo. *State v. Dudley*, 766 N.W.2d 606, 612 (Iowa 2009).

Merits

This Court need not address Headley's claim. However, even if the claim were properly before this Court, the district court did not err when it complied with Iowa Code section 356.7. A brief

background discussion of relevant portions of Iowa's restitution law is appropriate.

A. The district court was not required to consider Headley's ability to pay at the time it sentenced him.

Restitution in Iowa is defined by Iowa Code section 910.1. It includes fees related to pretrial detention. Iowa Code section 356.7 provides that a county sheriff "may charge a prisoner who is eighteen years of age or older and who has been convicted of a criminal offense . . . for room and board provided to the prisoner while in custody of the county sheriff or municipality, and for any medical aid provided to the prisoner under section 356.6." Iowa Code § 356.7. Thus, such "court costs including correctional fees approved pursuant to section 356.7" are included under the definition of "restitution." Iowa Code § 910.1(4). The sentencing court "shall order" the defendant pay these correctional fees as restitution "to the extent that the offender is reasonably able to pay" the correctional fees. Iowa Code § 910.2(1). Where the request for correctional fees pursuant to Iowa Code section 356.7 is filed after the imposition of sentence, the district court must approve the request for restitution. *Abrahamson*, 696 N.W.2d 589, 593 (Iowa 2005).

A district court's order for a defendant to pay restitution consists of two parts:

> the plan of restitution and the restitution plan of payment. The plan of restitution sets out the amounts and kind of restitution in accordance with the priorities established in section 910.2. The restitution plan of payment is the next step that sets out the schedule for the offender to carry out the terms of the plan of restitution.

State v. Kurtz, 878 N.W.2d 469, 471 (Iowa Ct. App. 2016) (internal citations omitted).

A sentencing court "is not required to give consideration to the defendant's ability to pay" until the "plan of restitution contemplated by Iowa Code section 910.3 [i]s complete . . . ." *Jackson*, 601 N.W.2d at 357; *Swartz*, 601 N.W.2d at 354. If the district court sets forth the full amount of restitution and payment plan in the sentencing order, it should make a finding as to the defendant's reasonable ability to pay at that time. *See Harrison*, 351 N.W.2d at 529; *Van Hoff*, 415 N.W.2d at 649. In that case, the defendant may directly appeal the finding. *See State v. Kurtz*, 878 N.W.2d 469, 472 (Iowa Ct. App. 2016).

But if the district court postpones entry of the plan of restitution because the amount is not available, a defendant must wait until such time as the amount is available and the plan of payment is determined before taking action. *See* Iowa Code §§ 910.2, 910.3, 910.7. This is because:

> 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.

State v. Alexander, No. 16-0669, 2017 WL 510950, at *3 (Iowa Ct. App. Feb. 8, 2017). The Iowa Code anticipates such events; it authorizes the filing of restitution requests after sentencing, and the creation and filing of a post-sentencing plan of restitution repayment. *See* Iowa Code §§ 901.3, 901.4. It also provides a means for defendants to challenge those post-judgment amounts. *See* Iowa Code §§ 901.3, 901.7.

Headley contends that the district court did not consider his ability to pay his correctional fees when imposing judgment and again failed to consider his ability to pay prior to imposing the post-

sentencing restitution order; rendering his sentence illegal. Appellant's Br. 85–86, 92. But he ignores several key procedural facts which undermine his claim.

First, the amount of restitution was not known at the time of sentencing. It was not included within the district court's original sentencing order. 3/13/2018 Sentencing Order p.3; App. 21. It was not filed until June 8, 2018. 6/08/2018 Application; App. 27. The sentencing court did not have cause to consider his reasonable ability to pay a particular amount of restitution.

Headley may not appeal the findings until challenging them in the district court under Iowa Code section 910.7. *See Jackson*, 601 N.W.2d at 357; *see also State v. Delacy*, No. 17-1501, 2018 WL 34772198, at *2 (Iowa Ct. App. July 18, 2018) (rejecting defendant's due process violation claim where the record indicated "Delacy did not file a petition under section 910.7(1)—within thirty days or at all. Delacy took no action to challenge the restitution order until he filed his notice of appeal on September 22, 2017").

There is no incongruence between the fact the district court imposed an obligation on Headley to pay the cost of his room and board in the Polk County jail and its decision to suspend payment of

his fines, thirty-five percent surcharge, and court-appointed attorney's fees. Appellant's Br. 93. At the sentencing hearing, the district court indicated that it felt imposition of those fines and fees was unnecessary given the length of the incarceration ordered. Sent. Tr. p.17 line 21–p.18 line 9. The sentencing court did not make a determination of Headley's ability to pay restitution. Because there was no cause to exercise its discretion at that time, it did not abuse it.

The State now turns to Headley's assertion that this Court's intervention is necessary because Iowa's law on the "reasonable ability to pay is conflicting and confusing." Appellant's Br. 89–92. The State respectfully disagrees. The answers Headley seeks are already available.

B. This Court need not address Headley's hazy claim that Iowa's restitution law is "conflicting and confusing."

Contrary to Headley's assertion, there is no conflict between this Court's cases of *Coleman*, *Haines*, and *Harrison* and *Blank*, *Swartz*, *Jackson*, and *Jose*. Appellant's Br. 89–92. Rather, the cases respond to specific claims and tender claim-specific responses. A critical current within this Court's restitution cases is that a delayed restitution order creates a temporal bifurcation of the district court's

"reasonable-ability-to-pay" analysis. Where the total restitution amounts are *known* at the time of sentencing, the district court is statutorily required to make a finding that the defendant possesses the reasonable ability to pay prior to imposing the costs. *State v. Haines*, 360 N.W.2d 791, 797 (Iowa 1985) (district court's order of restitution "in cash *or* do community service" indicated a failure to exercise discretion and determine his reasonable ability to pay); *State v. Harrison*, 351 N.W.2d 526, 529 (Iowa 1984).

Thus, *Harrison* and *Haines* address *whether* the district court exercised its discretion *when* the amount of restitution was known. *Coleman*, by comparison addresses *whether* the district court could may a "reasonable-ability-to-pay" determination when the amount of appellate attorneys' fees is not known. *See Coleman*, 907 N.W.2d 149.

The portions of *Blank* and *Van Hoff* Headley highlights do not address the same exercise of discretion issues resolved in *Harrison*, *Haines*, and *Coleman*. Instead, the selected portions of these cases touch on *how* a district court makes the "reasonable ability to pay" decision; what factors should be considered when the determining a defendant's reasonable ability to pay a known amount. *See Blank*, 570 N.W.2d at 927 ("The defendant's request for a hearing also included

the assertion that he was unable to pay the restitution. . . . The focus is not on whether a defendant has the ability to pay the entire amount of restitution due but on his ability to pay the current installments."); *Van Hoff*, 415 N.W.2d at 649 ("We do not believe Van Hoff's 'reasonable' ability to pay the restitution is necessarily determined by his ability to pay it in full during the period of his incarceration, as held by the court of appeals, although that might be one of the factors to be considered. A determination of reasonableness, especially in a case of long-term incarceration, is more appropriately based on the inmate's ability to pay the current installments than his ability to ultimately pay the total amount due."). These cases instruct that a large restitution amount may not be dispositive in the "reasonable-ability-to-pay" analysis, and that for some individuals with long sentences, the current installment amount is the more relevant factor.

Swartz, *Jackson*, and *Jose* do not address the concerns raised in *Harrison*, *Haines*, or *Coleman*, or *Blank* and *Van Hoff*. In *Swartz*, the defendant challenged the district court's failure to consider his reasonable ability to pay restitution. The Iowa Supreme Court rebuffed the argument, noting that "plan of restitution"—the total amount owed—was not known at the time Swartz filed his notice of

appeal. It required Swartz to exhaust his remedies pursuant to Iowa Code 910.7 prior to an appellate court's intervention.

Like *Swartz*, *Jackson* involved a situation in which the district court did not consider the defendant's reasonable ability to pay at sentencing. The Iowa Supreme Court reiterated such a determination need not be made when the amount of restitution is not known. *See Jackson*, 601 N.W.2d at 357 ("[I]t 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."). Both cases are consistent with *Coleman*; a district court should not make a determination of the defendant's ability to pay an unknown amount. *See Coleman*, 907 N.W.2d at 149.

Finally, *Jose* addresses a distinct question. There, the court resolved the question of whether an appellate court could address on direct appeal a challenge to the *amount* of—rather than whether the defendant possessed a "reasonable ability to pay"—restitution where that amount was not known at sentencing but was filed after the notice of appeal. Distinguishing the two challenges, this Court indicated that a challenge to the *amount* of restitution not known at

the time of sentencing pursuant to section 910.7 was a collateral issue the district court could have resolved as the appeal proceeded. 636 N.W.2d at 46.

Headley concludes this portion of his brief with a question: "Must the sentencing court determine a defendant's reasonable ability to pay criminal restitution for court costs, attorney fees, and correctional fees at the time the order is entered?" Appellant's Br. 91. As this Court's prior holdings indicate, the answer is context specific. If the amount is known and a plan of restitution repayment is on file, then the district court must conduct the reasonable ability to pay analysis. *See Harrison*, 351 N.W.2d at 529. Where the amount is not known, the decision may not be made and must be deferred until all the information is ready for the district court's consideration. *See Coleman*, 907 N.W.2d 149. The district court prior to Headley's notice of appeal did not have this information. It was not required to consider his reasonable ability to pay. Because he had already filed his notice of appeal, once his order of restitution was ultimately completed, a proceeding pursuant to Iowa Code section 910.7 was necessary.

Headley's request to overrule *Swartz* and *Jackson* is unfounded and unnecessary. Appellant's Br. 92. As laid out in *Swartz* and *Jackson*, a defendant may litigate his reasonable ability to pay where the supplemental restitution order is filed after a notice of appeal is filed. That decision may then be appealed. This is the statutorily approved method of contesting post-sentencing restitution issues. Headley need only take advantage of these procedural means still available as this appeal is proceeds.

Nor should this Court give weight to his assertions that a defendant's right to counsel will be chilled by the amount of restitution ordered. Appellant's Br. 92. If a defendant is indigent, that individual will receive counsel. *See* United States Const. Amend. 6; Iowa R. Crim P. 2.28. To the extent he asks that the total amount of restitution also be a part of the "reasonable-ability-to-pay" calculus, it already is. Appellant's Br. 92; *see Van Hoff*, 415 N.W.2d at 649 ("We do not believe Van Hoff's 'reasonable' ability to pay the restitution is necessarily determined by his ability to pay it in full during the period of his incarceration, as held by the court of appeals, *although that might be one of the factors to be considered*." (emphasis added)).

C. Conclusion

This Court should not reach this unripe, unexhausted, and unpreserved claim. The district court was not required to consider Headley's reasonable-ability-to-pay at the time of sentencing, and was not required to do so prior to his filing of the notice of appeal. This Court need not overrule its longstanding law; Headley need only comply with its dictates. This Court should affirm.

IV. District Court's Imposition of Court Costs was not Illegal.

Preservation of Error

Generally applicable rules of error preservation do not apply. An illegal sentence may be challenged at any time. Iowa R. Crim. P. 2.24(5)(a); *State v. Bruegger*, 773 N.W.2d 862, 871–72 (Iowa 2009).

Standard of Review

Assessment of court costs falls within the broader category of restitution, and restitution orders are reviewed for correction of errors at law. *See State v. Poyner*, No. 06–1100, 2007 WL 4322193, at *1 (Iowa Ct. App. Dec. 12, 2007) (citing *State v. Petrie*, 478 N.W.2d 620, 622 (Iowa 1991)).

Merits

Headley challenges the language in the district court's sentencing order that he "pay court costs on any dismissed counts/cases." 3/13/2018 Sentencing Order p.4; App. 22; Appellant's Br. 94–95. Noting that the State's recitation of the plea agreement did not make an allocation that he would pay the costs of the dismissed counts, he argues that the district court's order requiring him to so violates the Iowa Supreme Court's opinion in *State v. Petrie*, 478 N.W.2d 620, 622 (Iowa 1991) and makes his sentence illegal. The State respectfully disagrees. Each of the dismissed counts was filed under one case—FECR307959— apportionment was unnecessary.

"Criminal restitution is a creature of statute." *State v. Watson*, 795 N.W.2d 94, 95 (Iowa Ct. App. 2011). Iowa Code section 910.2(1) requires a sentencing court to order a convicted defendant to make restitution. This restitution includes payment of court costs. *See* Iowa Code § 910.1(4). Likewise, "A defendant is responsible for court costs associated with the particular charge to which he pleads or is found guilty." *State v. Lam*, No. 14–1582, 2015 WL 4935707, at *3 (Iowa Ct. App. Aug. 19, 2015) (citing Iowa Code § 910.2 (2014)). In *Basinger*, the Iowa Supreme Court noted it "has long been committed to the

rule that costs are not apportioned in criminal cases," and concluded that statutes authorizing equitable apportionment of costs among partially successful parties "do not apply to criminal prosecutions." *See State v. Basinger*, 721 N.W.2d 783, 786 (Iowa 2006) (citing *City of Cedar Rapids v. Linn Cnty.*, 267 N.W.2d 673, 674 (Iowa 1978); *State v. Belle*, 60 N.W. 525, 526 (Iowa 1894)). The court determined that because "each defendant here had a case file with a separate case number . . . for which a court reporter was used," each defendant was individually responsible for paying the full amount of the statutorily required reporting fee. *Id.*

This emphasis on cases rather than charges was also recognized as outcome-determinative in *State v. McFarland*, where one criminal defendant was convicted on eight counts that were grouped and tried in three separate cases. *See McFarland*, 721 N.W.2d at 793–94. The *McFarland* court referenced the "long-standing rule that court costs are not apportioned in criminal cases" in refusing to apportion the reporting fees between the defendant's three cases. *See id.* at 794–95 (citing *Basinger*, 721 N.W.2d at 786). Under the *McFarland* court's rationale, a defendant could not be required to pay the reporting fee for each of the eight individual charges; the bright-line rule that each

"case file with a separate case number" incurred a separate fee would also prevent the State from "trying to recover multiple times for the same costs." *Id.* at 795 (quoting *Basinger*, 721 N.W.2d at 786–87).

Treating these particular court costs as case-specific—rather than charge-specific—comports with the statutory language that bestows the authority to assess them. The Iowa Code sets filing fees at a flat $100 "for filing and docketing *a criminal case*." Iowa Code § 602.8106(1)(a) (emphasis added). The subsection also provides that "[w]hen judgment is rendered against the defendant, costs collected from the defendant shall be paid . . . to the extent necessary for reimbursement of fees paid." *Id.* This reimbursement provision contains no exception for cases where the judgment against the defendant does not entail a conviction on every count charged. Similarly, the flat fee assessed for a court reporter's services is fixed by statute: "The clerk of the district court shall tax as a court cost a fee of forty dollars per day for the services of a court reporter." *See* Iowa Code § 625.8(2). This, too, has been interpreted to set out "a court reporter fee . . . for each *case*." *McFarland*, 721 N.W.2d at 794 (emphasis added). And the restitution provisions of the Iowa Code set out that those court costs are taxed against defendants "[i]n all

criminal *cases* in which there is a plea of guilty, verdict of guilty, or special verdict upon which a judgment of conviction is rendered." *See* Iowa Code § 910.2(1) (emphasis added).

The Iowa Court of Appeals has accepted this logic and held that requiring a defendant to pay the costs of filing the action where some counts were dismissed does not violate *Petrie*:

> The fact that some counts were dismissed does not automatically establish that a part of the assessed court costs are attributable to the dismissed counts. Here, the record shows just the opposite. The combined general docket report prepared by the district clerk of court on December 10, 2015, two days after Johnson filed his notice of appeal, shows a total of $210 in court costs accrued as of that date. These costs would have been the same even had the State not charged Johnson with the counts later dismissed. Moreover, the record shows none of the assessed charges are clearly attributable or discrete to the dismissed counts. We therefore conclude the total court costs are clearly attributable to the counts to which Johnson pled guilty and, therefore, fully assessable to him.

See State v. Johnson, 887 N.W.2d 178, 182 (Iowa Ct. App. 2016) (footnotes omitted); *see also State v. Young*, No. 16–0154, 2017 WL 935071, at *4 (Iowa Ct. App. Mar. 8, 2017) ("The fact that count II was dismissed does not automatically establish that a part of Young's assessed court costs are clearly attributable to the dismissed count. . . .

These costs would have been the same even had the State not charged Young with the later dismissed count II. Young makes no allegation to the contrary. We conclude the total assessed court costs are clearly attributable to the counts for which Young was found guilty and, therefore, fully assessable to him."); *State v. Jenkins*, No. 15–0589, 2015 WL 8367810, at *6–7 (Iowa Ct. App. Dec. 9, 2015) ("The amount of the filing and docketing fee would have been the same even if the State had not charged Jenkins with a third count. The same is true for the court reporter fees assessed. . . . Unlike the situation in *Petrie*, the record before us shows the court costs taxed to Jenkins are clearly attributable to the charges to which Jenkins plead guilty."). *Johnson* is a published decision that provides a much-needed course correction; Headley cites to *State v. Hill*, No. 03–0560, 2004 WL 433844 (Iowa Ct. App. Mar. 10, 2004) and *State v. Wheeler*, No. 11–0827, 2012 WL 3026274 (Iowa Ct. App. July 25, 2012) but neither of those cases retains any continuing vitality after *Johnson* correctly identified the problem with the specific type of challenge Headley presently raises. *See* Appellant's Br. at 96–97. Indeed, *Johnson* clearly aimed to close the floodgates on this "raft" of claims, which misapply *Petrie* for fringe benefit and have the undesirable consequence of "creating

much additional work for the parties' attorneys, district courts, and clerks of court." *See Johnson*, 887 N.W.2d at 180–81 & n.2.

Headley urges the district court "entered an illegal sentence in assessing the costs of the dismissed charges to Headley." Appellant's Br. 94–95. But the assessed costs in this case were "clearly attributable" to the charges Headley pleaded guilty to. Like *Johnson*, the costs would have been incurred even if the dismissed charges had never been filed. *See Johnson*, 887 N.W.2d at 182 (noting that the costs of the action "would have been the same even had the State not charged Johnson with the counts later dismissed); *see also Petrie*, 478 N.W.2d at 622 (record clearly indicated that costs were incurred with respect to the dismissed charges). A case that charged Headley burglary in the second degree, and domestic abuse assault enhanced second offense—with no other counts—would still cost $100 to file and $40 for a court reporter's services at each proceeding. *Cf. State v. Klindt*, 542 N.W.2d 553, 555–56 (Iowa 1996) (holding "the apportionment rule is not applicable" when "the costs in Klindt's trial . . . would have been the same regardless").

And the docket reflects a combined $14,103.80 in court costs: $100 from the filing fee; $40 for a court reporter during the

December 26 plea hearing; $40 for a court reporter during the March 13 sentencing hearing; $128.80 in transporting fees; $13,695 in room and board fees; and $100 for a domestic violence surcharge.[1] *See* Iowa Courts Online 05771 FECR307959 (POLK), https://www.iowacourts.state.ia.us/ESAWebApp/TrialSimpFrame; Conf. App. 61–62. These costs were each correctly assessed against Headley because costs "are to be taxed by the case, that is, one fee for each case"—accordingly, because the $100 filing cost addresses all of the counts within FECR307959, they are not clearly attributable to Headley's dismissed charges. *See Johnson*, 887 N.W.2d 182; *see also Basinger*, 721 N.W.2d at 786; *State v. McFarland*, 721 N.W.2d 793, 794–95 (Iowa 2006).

This is not a situation where "the defendant was found not guilty or the action [was] dismissed," where it would be justified to require the State to bear the costs of an ill-advised prosecution. *See* Iowa Code § 815.13. This is a case "in which there is a plea of guilty . . . upon which a judgment of conviction is rendered." *See* Iowa Code §

[1] Notably, Headley's criminal fine, 35% surcharge, and trial attorneys fees were suspended on account of his incarceration. The district court did impose the $125 law enforcement initiative surcharge which is reflected in the docket as a $125 surcharge. Conf. App. 61–62.

910.2(1). Applying *Petrie* to apportion these types of costs based on dismissal of individual charges within a larger case does not comport with the statutory language in these particular provisions, and does not track the rationale behind *Basinger* and *McFarland*. It is in contravention of the court of appeals' opinion. *Johnson*, 887 N.W.2d at 182.

CONCLUSION

This Court should reject each of Headley's arguments. Due process affords the district court wide discretion in the materials is relies upon in reaching a fair sentence and does not forbid the use of risk assessment information nor a PSI author's sentencing recommendation. Consideration of such materials is not an improper factor. Because it was unknown at the time of sentencing and Headley's notice of appeal, the question of his ability to pay restitution cannot be litigated in this appeal. The Court costs he was ordered to pay were clearly attributable to the charges he pleaded guilty to. This Court should affirm Headley's sentences.

REQUEST FOR NONORAL SUBMISSION

The State does not request oral submission. Upon the release of the Iowa Supreme Court's opinions in *Guise* and *Gordon* this case will be appropriate for summary disposition. In the event this Court orders oral argument, the State would be heard.

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:

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