

IN THE SUPREME COURT OF IOWA  
Supreme Court No. 17-0589

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STATE OF IOWA,  
Plaintiff-Appellee,

vs.

MONTEZ GUISE,  
Defendant-Appellant.

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

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**APPLICATION FOR FURTHER REVIEW**  
(Iowa Court of Appeals Decision: May 2, 2018)

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## **QUESTION PRESENTED FOR REVIEW**

A sentencing court may consider all “pertinent” and “relevant” information when sentencing criminal offenders. Does the omission of specific legislative or administrative authority authorizing the use of an Iowa Risk Revised assessment in sentencing make risk assessment tools impermissible factors, as the Court of Appeals decided in a 5-4 opinion?

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## STATEMENT SUPPORTING FURTHER REVIEW

The Iowa Court of Appeals, sitting *en banc*, issued a deeply divided opinion vacating Guise’s sentence and remanding his case for resentencing based on the sentencing court’s consideration of an unobjected to Iowa Risk Revised (“IRR”) assessment included in the presentence investigation report (“PSI”) indicating supervision should be at an “intensive level.” *State v. Guise*, No.17-0589, 2018 WL 2084846 (Iowa Ct. App. May 2, 2018). The Court determined objection to the PSI content was not necessary to preserve error because the risk assessment result is an “impermissible sentencing factor” akin to “the defendant’s race.” *Guise*, slip opin., at 3-4 n.1.

Although foundation for the IRR was not challenged by Guise,<sup>1</sup> the Court further held, “at a minimum,” use of the IRR “must be predicated on legislative or administrative authorization, scientific validation of the instrument, and an explanation of the underlying factors and scoring methodology.” *Guise*, slip opin., at 8 n.3. The Court bypassed Guise’s due process challenge and request for creation of cautionary instructions and guidelines for use of the IRR

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<sup>1</sup> Due to the posture of this case, the State and Department of Corrections had no opportunity to develop a supporting record in the district court on the matters of validation, factors, and scoring methodology of the IRR.

in sentencing decisions, instead finding an abuse of discretion warranting resentencing. *Guise*, slip opin., at 4.

Further review should be granted because the Court of Appeals was divided in its opinion and has entered a decision on an important question of law as to the use of risk assessment tools in sentencing that should be settled by this Court. Iowa R. App. P. 6.1103(1)(b)(2). “Our state sentencing law provides virtually no limitation on the categories of sources of information to be used in sentencing.” *Guise*, slip opin., at 26-33 (McDonald, J., dissenting)<sup>2</sup>; see, e.g., *State v. Formaro*, 638 N.W.2d 720, 725 (Iowa 2003); *State v. Uthe*, 541 N.W.2d 532, 533 (Iowa 1995); *State v. Stanley*, 344 N.W.2d 564, 568 (Iowa Ct. App. 1983); Iowa Code §§ 901.2(1), 901.3(1)(a), 901.5, 901B.1(2, 3, 4), 901B.1(b)(3), 901B.1(3)(a), 901B.1(4)(a). Actuarial risk assessment information is generally relevant in sentencing decisions “because it provides evidence-based information regarding the offender’s risk of reoffending and amenability to supervision in the community.” *Id.*, slip opin., at 32. Its use is generally “not controversial and is nationally supported. *Id.*, slip opin., at 28-29.

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<sup>2</sup> See also *Guise*, slip opin., at 46-52 (Mullins, J., dissenting).

It is also important to point out that sentencing decisions are by nature “both backward-looking and forward-looking . . . .” *Guise*, slip opin., at 30-31 (McDonald, J., dissenting) (citing *Formaro*, 638 N.W.2d at 724). “[R]isk assessment information determines the level of supervision upon the continuum to which an offender will be placed, and the level of supervision provides the sentencing court with independently relevant information regarding the sanctions, programs, and services within the specific judicial district available to supervise the offender and to rehabilitate the offender.” *Id.*, slip opin., at 33. In addition, risk assessment tools such as the IRR “provide[] more uniformity in sentencing from one defendant to the next and from one judicial district to the next, across the state of Iowa,” and are “neutral measure of standard characteristics” that “can serve to ameliorate implicit biases in sentencing . . . .” *Guise*, slip opin., at 42 (Vogel, J., dissenting).

Further review is also appropriate because the Court of Appeals opinion implicates “an issue of broad public importance that the supreme court should ultimately determine.” *See Iowa R. App. P. 6.1103(b)(4)*. If actuarial risk assessments are appropriate for use by juvenile court officers and juvenile courts, use for parole and work-

release decisions, and use in civil commitment proceedings—why not also for pretrial release decisions and in sentencing. *See Guise*, slip opin., at 21-22 (McDonald, J., dissenting). Going forward, is it also an abuse of discretion to consider medical, mental health, and substance abuse information or reports as part of sentencing without legislative or administrative authority? What about factors such as lack of remorse or demeanor at trial or at sentencing? *See State v. Knight*, 701 N.W.2d 83, 88 (Iowa 2005) (“a defendant's lack of remorse is highly pertinent to evaluating his need for rehabilitation and his likelihood of reoffending”). Such a result is contrary to the long-held and reasonable view that a sentencing court should have “the fullest information possible” in determining the appropriate sentence for a particular offender. *Stanley*, 344 N.W.2d at 570. The Court of Appeals’ opinion “raise[s] serious practical considerations for our sentencing judges” and may lead to the unnecessary resentencing of numerous offenders. *Id.*, slip opin., at 42-43 (Vogel, J., dissenting).

The State asks this Court to grant further review to address the above issues and concerns raised by the Court of Appeals' decision.<sup>3</sup>

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<sup>3</sup> The Court of Appeals issued a similar divided opinion in *State v. Gordon*, No.17-0395, 2018 WL 2084847 (Iowa Ct. App. May 2, 2018), striking consideration of the STATIC-99R risk assessment in sentencing a sex offender. The State also seeks further review of *Gordon*.



## STATEMENT OF THE CASE

### Nature of the Case

The Court of Appeals vacated Guise's sentence on his guilty plea to second-degree burglary and remanded for his case for resentencing without consideration of the IRR. The State seeks further review of that decision banning consideration of risk assessment tools in sentencing absent express legislative or administrative authority.

Iowa R. App. P. 6.1103.

### Facts

The minutes of testimony reflect that Mason City officers were dispatched to 1419 North Federal Avenue, apartment 3, for a welfare check shortly before 7 p.m. on December 31, 2016. *See generally* Minutes (police reports); Conf. App. 7-10, 23. A friend or neighbor had received text messages from a female in apartment 3, Gloria Gualpa, stating she was in danger. *Id.* Defendant Guise was reportedly in Melissa Shepard-Jones's apartment with Gloria in violation of a no-contact order ("NCO") in which Melissa, a former girlfriend, is the protected party. *Id.* Upon officers' arrival Guise refused to allow Melissa to answer the door and pushed or dragged her into the bedroom. *Id.*

Officers posted outside the building observed Guise attempt to come out the bedroom window and ordered him back inside. *Id.* Officers then entered the apartment and took Guise into custody; Guise was sweating and volunteered that he had used methamphetamine that day. *Id.*; *see also* Conf. App. 23.

Gloria told officers that Guise had been in the apartment earlier that day and thrown glass items against the wall and stolen Melissa's rent money from her wallet. Minutes (police reports); Conf. App. 7-10, 24-25. Guise had returned later, kicked open the locked apartment door, and started breaking and throwing dishes and glassware prompting Gloria to text a friend for help. *Id.* Neighbors could hear Guise yelling. *Id.*

Guise told officers that Gloria "wanted to get him into trouble" because he believed she was taking advantage of Melissa. Minutes (police reports); Conf. App. 7-10. Guise said he had been in the apartment six hours and had a key, denying he forced his way in. *Id.* Guise also denied keeping anyone from leaving the apartment. *Id.*

Both Gloria and Melissa provided written statements. *See* Minutes; Conf. App. 24-27. Melissa stated that every time she tried to

open the door for officers, Guise would grab her and prevent her from opening it. *Id.* pp.26-27.

In exchange for Guise's guilty plea to the burglary charge (count I), the State agreed to dismiss the serious misdemeanor charge (count II) and related simple misdemeanors, and to refrain from asserting the habitual offender enhancement. Written Plea p.2; App. 7. The State further agreed to recommend a suspended sentence. *Id.*

On the written guilty plea form, Guise admitted to the elements of second-degree burglary and that he was in violation of a NCO involving Melissa. Written Plea p.1; App. 6. Guise repeated his admissions at the plea hearing. Plea Tr.p.15, line 15-p.16, line 20. Guise also agreed the court could rely on the minutes of testimony "to the extent necessary to establish a factual basis for the charge to which" he was pleading guilty. Plea Tr.p.16, line 21-p.17, line 8. The court accepted Guise's guilty plea as knowing, voluntary, and supported by a factual basis. Plea Tr.p.17, lines 9-21.

Prior to the scheduled sentencing hearing, the State alleged Guise had violated the conditions of his release by twice violating the NCO and failing to appear for a probation appointment. Pre-trial Report of Violation (2/23/17); App. 11-12. Guise resisted arrest on

the NCO violations and was to be charged with interference with official acts and possession of drug paraphernalia. *Id.*

Additional relevant facts from the sentencing record will be discussed as part of the State’s argument.

## **ARGUMENT**

### **I. The Court Appeals Erred in Finding the District Court Improperly Considered and Relied on an Iowa Risk Revised Assessment Along with Other Pertinent Evidence in Determining the Appropriate Sentence.**

#### **Preservation of Error**

Defendant Guise asserted alternative sentencing challenges—that the district court’s consideration of an unobjected to IRR result in the PSI either violated due process because it lacked guidelines, cautionary instructions, and/or limitations, or that the court abused its discretion in considering the risk assessment result deeming it an improper factor. Guise did not challenge the foundation or any of the factors used in the IRR assessment in the district court or on appeal.

#### **Standards for Review**

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)); see also *State v. Hill*, 878 N.W.2d 269, 272 (Iowa 2016); *State v. Washington*, 832 N.W.2d 650, 660 (Iowa 2013); *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996).

When exercising its sentencing discretion, “the court should [w]eigh and consider all pertinent matters in determining proper sentence, including the nature of the offense, the attending circumstances, defendant’s age, character and propensities and chances of his [or her] reform.” *Leckington*, 713 N.W.2d at 216 (citations omitted); see also Iowa Code § 901.5; *Hopkins*, 860 N.W.2d at 554-55; *Formaro*, 638 N.W.2d at 724-25; *State v. August*, 589 N.W.2d 740, 744 (Iowa 1999). The sentencing court considers similar factors in deciding whether or not suspension of sentence or deferral of judgment or sentence along with probation is warranted. Iowa Code § 907.5(1)(a-g).

### **Merits**

Defendant Guise argued below that the sentencing court’s consideration of and reliance on an Iowa Risk Revised (“IRR”) assessment result in the presentence investigation report (“PSI”) as

part of its determination was either a violation of his right to due process or an abuse of discretion. Relying on authorities from other jurisdictions and other commentators, Guise urged that the PSI should disclose limitations for use of the IRR in sentencing, and the Court should further adopt specific guidelines or cautionary instructions for use of such risk assessments in sentencing. However, the Court of Appeals held that consideration of the risk assessment information without express authority to do so was an abuse of discretion warranting resentencing. The State disagrees.

**A. Additional Facts.**

The PSI prepared for Guise's sentencing hearing includes sixteen pages of detailed information. *See generally* PSI; Conf. App. 35-51. Guise's criminal history includes three prior burglary convictions as well as convictions for threats, receiving stolen property, assault, interference with official acts, trespass, possession of methamphetamine, and domestic abuse assault. PSI pp.3-4; Conf. App. 37-38. Guise has been placed on probation and parole and revoked five times. *Id.* Guise was on probation for the domestic assault when he committed the current burglary. PSI p.4; Conf. App. 38.

Guise attended school through the eleventh grade and was unemployed and relying on his girlfriend for support. PSI pp.5-7; Conf. App. 39-41. He admits to smoking meth daily and was under the influence at the time of this burglary. PSI pp.10-11; Conf. App. 44-45. Guise has never had a substance abuse evaluation or treatment, and has not had any recent mental health treatment. PSI p.11; Conf. App. 45.

As to his version of the offense, Guise believes he should only have been charged with disorderly conduct or simple domestic, but admits to using drugs and kicking in the victim's door. PSI p.12; Conf. App. 46. Guise believes he has helped Melissa out and should be more careful about who he helps. *Id.* Notably, when asked what he needed "to live a law abiding life and be successful," Guise responded that he needs "*intensive probation, Drug Court, an ankle monitor, filing for social security disability,*" along with substance abuse and mental health treatment, housing, and food stamps. PSI pp.12-13 (emphasis added); Conf. App. 46-47.

The PSI preparer identified a number of "needs" and recommended Guise serve a prison sentence. PSI pp.13-16; Conf. App. 47-50. The preparer noted "*an Iowa Risk Revised was*

*completed indicating the Defendant should be supervised at an intensive level.”* PSI p.15 (emphasis added); Conf. App. 49.

In support of her recommendation she explained:

The defendant has a long history of drug abuse and has an adult criminal history dating from 2009. He has been incarcerated in the State of Minnesota a total of 4 times for burglary charges and terroristic threats, and was most recently incarcerated in 2014. He has continued to commit crimes and now has incurred a new Burglary charge, which involved the victim of his domestic assault. The defendant was also on probation for approximately 1 month for the domestic assault charge before it was revoked due to new criminal charges, including violations of the No Contact Order that is in place. The defendant is demonstrating he is a continued public safety risk to his victim, as well as those who are around her. He has demonstrated that despite interventions being put in place by the Court, he has continued to place the victim in danger.

Since the instant offense the defendant has been arrested for charges that involve violence, including fighting with Officers when he was arrested at the Probation Office, as well as fighting with an inmate at the Cerro Gordo County Jail. Those matters . . . speak to the defendant’s pattern of behavior.

PSI p.16; Conf. App. 50.

At the sentencing hearing, the prosecutor complied with the plea agreement to recommend a suspended prison term and fine as to



the burglary charge, and made similar statements as to Guise's conviction for interference with official acts. Sent. Tr.p.8, line 9-p.9, line 16. Defense counsel urged the court to accept the plea agreement, noting Guise needed drug and mental health treatment and could remain sober until placement in a program. Sent. Tr.p.10, line 15-p.11, line 16. Guise told the court he wanted to change his life and was "tired of being in jail." Sent. Tr.p.11, line 24-p.13, line 2.

After reviewing the PSI and file, the court declined to accept the parties' recommendations under the plea agreement for a suspended sentence, stating:

Mr. Guise, Miss Flander has probably talked to you about the three goals that I am supposed to aim for when I am deciding a sentence for you. They are your rehabilitation, protection of society, and deterrence, meaning trying to convince you and other people not to perform criminal acts, so those three goals I keep in mind when I apply what I've learned about you from the case file, from the presentence investigation, and from what you folks have told me today.

The whole of that information convinces me that you cannot be rehabilitated in the community and that you are a danger to society if we keep you in the community. You may well have a good heart, I have no reason to think otherwise, but both things can be true. You can be dangerous to us, you can be difficult to rehabilitate in the community

when you still have a good heart because sometimes intentions are not enough. Your criminal history is significant in itself but includes a number of probation and parole revocations. When you were on pretrial release for this matter, you had a new charge and resisted arrest—or interfered with official acts, I should say, when the police tried to execute a warrant for you when you had been released when you'd been convicted for this. That doesn't bode well for us being able to help you with treatment and the other things that you need in society and in the community. The presentence investigator also noted that you need intensive—I don't want to say supervision. I have to get the right word that they used. It is supervision. *That your risk level is such that you should be supervised at an intensive level.* So for that reason, I'm not accepting the plea agreement.

Sent. Tr.p.13, line 7-p.14, line 14 (emphasis added). The court then ordered Guise to serve up to ten years in prison but suspended the minimum fine on the burglary charge. Sent. Tr.p.14, line 15-p.15, line 17; *see also* Judgment and Sentence; App. 13-15.

## **B. Discussion.**

On appeal Guise argued that the court's consideration of and reliance on "inaccurate information" in the PSI violated his right to due process.<sup>4</sup> Appellant's Brief pp.27-30. He further urged it was improper to consider or rely on the risk assessment result because the

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<sup>4</sup> It is unclear what information Guise deems inaccurate.

court was unaware of “the intended purpose or limitations” of the IRR tool and lacked specific guidelines for use of such assessments. *Id.* The Court of Appeals declined to address the due process issue instead holding that consideration of the IRR without express authorization was an abuse of discretion warranting resentencing. The State disagreed with Guise’s due process claim arguing the authorities Guise relied on were distinguishable and/or not applicable in his case involving the IRR. This Court should grant further review of the Court of Appeals’ analysis and conclusion.

**1. Background in Iowa.**

The Iowa Department of Corrections (“DOC”) defines the IRR as a “screening tool for assessing risk,” which considers

several factors; for example—age, criminal history, gang affiliation, prior revocations in the community. The assessment helps determine risk of violence and victimization as well as predicting general recidivism. It includes several dynamic factors not included in the IVVI—employment, housing instability, substance abuse, prior revocations.

Iowa Board of Corrections Agenda, April 7, 2017, attached handouts, p.40, available at [https://doc.iowa.gov/sites/default/files/documents/2017/04/april\\_7\\_2017\\_board\\_of\\_corrections\\_handouts\\_-\\_mpcf\\_1.pdf](https://doc.iowa.gov/sites/default/files/documents/2017/04/april_7_2017_board_of_corrections_handouts_-_mpcf_1.pdf). Similarly, the IVVI, Iowa Violence and Victimization

Assessment, is a “static tool for assessing risk” helping to “determine risk of violence and victimization as well as predicting general recidivism for prisons.” *See id.* p.41. The IRR includes four community stability factors not included in the IVVI.

The Iowa Corrections Offender Network system, “an electronic offender management system” for corrections staff includes risk and needs assessment tools such as the IRR that “assist in developing offender case plans, levels of supervision, and treatment programs;” such “[a]utomated scoring saves staff time and improves accuracy.” *See* Legislative Services Agency Budget Unit Brief FY 2017, Iowa Corrections Offender Network, Rev. 09/06/2016, available at <https://www.legis.iowa.gov/docs/publications/FT/15690.pdf>.

In a 2011 presentation to the Iowa Board of Corrections concerning using risk assessments in PSI reports, the Justice Reform Consortium (“JRC”) pointed out that the PSI already includes a “narrative discussion of the factors included in the Level of Service Inventory-Revised or LSI-R . . . .” Presentation to the Iowa Board of Corrections: Risk Assessments in Presentence Investigations p.1, available at <http://justicereformconsortium.org/wp-content/>

[uploads/2011/11/BOC\\_LSIR1.pdf](#).<sup>5</sup> Because sentencing judges are already considering those statutorily required factors including “a score and risk category in the PSI then would provide a standardized, objective risk measure.” *Id.* p.1.

The JRC further noted that the “Iowa Board of Parole has been required in Iowa law for decades to implement a risk assessment program” for use in making parole decisions.<sup>6</sup> *Id.* p.1; *see* Iowa Code § 904A.4(8). The LSI-R was validated for use on Iowa offenders in 2006 and “found to be a valid predictor of recidivism.” *Id.* Based on a study of Minnesota sentencing guidelines the JRC urged that the “use of objective risk assessment at sentencing may [ ] promote fairer sentences for all” races. *Id.* p.1.

A 2012 validation study conducted by the Iowa Division of Criminal and Juvenile Justice Planning (“CJJP”) for the board of parole risk assessment instrument and the LSI-R found that both “instruments were better than chance at predicting all measures of recidivism except for technical violations,” and useful “in determining the timing of release” though modifications could strengthen the

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<sup>5</sup> *See* Iowa Code § 901.3(1).

<sup>6</sup> The Department of Corrections has proposed a revision to Iowa Administrative Code 201-41.2(1), not yet published, that would address inclusion of a validated risk assessment in PSI reports.

predictive abilities. 2012 Iowa Board of Parole Risk Assessment Validation, March 20, 2012, p.15, available at [https://humanrights.iowa.gov/.../BOP Risk Assessment Validation Report 2012%5B1](https://humanrights.iowa.gov/.../BOP_Risk_Assessment_Validation_Report_2012%5B1).

## **2. Relevant Authorities.**

In 2002, the Court of Appeals upheld the admission of expert testimony in a sexually violent predator (“SVP”) case concerning results from four actuarial risk assessment instruments, the RRASOR, Static-99, and two Minnesota sex offender screening tools. *In re Detention of Holtz*, 653 N.W.2d 613, 619-20 (Iowa Ct. App. 2002). The Court found no abuse of discretion in admitting the expert’s testimony noting the instruments were not used alone, were “used in conjunction with a full clinical evaluation,” and relevant “limitations were clearly made known to the jury.” *Id.*; see also *In re Detention of Pierce*, 748 N.W.2d 509, 513-14 (Iowa 2008); *In re Detention of Bugley*, No.11-2092, 2013 WL 1223692, at \*1 (Iowa Ct. App. March 27, 2013); *In re Detention of Meyers*, No.07-0024, 2008 WL 2042608, at \*3 (Iowa Ct. App. May 14, 2008); *In re Detention of Shearer*, No.05-0048, 2006 WL 130705, at \*3-\*4 (Iowa Ct. App. Jan. 19, 2006). The IRR assessment instrument was not at issue in the above cases addressing use of other instruments in SVP proceedings.

In 2010, the Indiana Supreme Court upheld a sentencing court's consideration of the results of two risk assessment instruments, the LSI-R and SASSI, because the "sentencing decision was clearly based on factors apart from" the defendant's test results and not relied on "as an independent aggravating factor . . . ."

*Malenchik v. State*, 928 N.E.2d 564, 566-68 (Ind. 2010). Following a lengthy analysis the court held that neither instrument is

intended or 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. The scores do not in themselves constitute an aggravating or mitigating circumstance because neither the data selection and evaluations upon which a probation officer or other administrator's assessment is made nor the resulting scores are necessarily congruent with a sentencing judge's findings and conclusion regarding relevant sentencing factors.

*Id.* at 573.

After determining the assessment tool scores to be "statistically valid, reliable, and effective in forecasting recidivism," the Indiana

court indicated they should be “considered to supplement and enhance a judge’s evaluation,” and to aid “in the formulation of an individualized sentencing program appropriate for each defendant.” *Id.* The court noted trial judges could properly determine the appropriate weight to give such evidence. *Id.* The court concluded by advising such evaluations “and their scores are not intended to serve as aggravating or mitigating circumstances nor to determine the gross length of sentence, but a trial court may employ such results in formulating the manner in which a sentence is to be served.” *Id.* at 575. Stated another way, sentencing courts should consider not only the risk of recidivism and likely success of community supervision, but also all other relevant factors including the purpose of punishment.

More recently, the Wisconsin Supreme Court considered challenges to the use of the COMPAS risk assessment tool in sentencing decisions. *State v. Loomis*, 881 N.W.2d 749, 754, 757 (Wis. 2016).<sup>7</sup> The court began by noting “the American Bar

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<sup>7</sup> See also Pamela M. Casey et al., National Center for State Courts, Using Offender Risk and Needs Assessment Information at Sentencing: Guidance for Courts from a National Working Group (2011), found at <http://www.ncsc.org/Services-and-Experts/~/>



Association has urged states to adopt risk assessment tools in an effort to reduce recidivism and increase public safety.” *Id.* at 752 & n.4. Risk assessment tools were originally “used only by probation and parole departments to help determine the best supervision and treatment strategies for offenders” but their use has extended to sentencing. *Id.* at 752 & n.7-8. Use in sentencing “is more complex because the sentencing decision has multiple purposes, only some of which are related to recidivism.” *Id.* at 753 & n.9.

Defendant Loomis had challenged the risk assessment portion of COMPAS arguing that he had a right to be sentenced on accurate information, right to individualized sentencing, and it improperly used gender as a factor. With respect to Loomis’s individualized claim, the court held that use of the risk assessment in sentencing “along with other supporting factors is helpful in providing the sentencing court with as much information as possible in order to arrive at an individualized sentence.” *Id.* at 765. Following a lengthy analysis, the court set forth specific limitations for the use of COMPAS risk scores in sentencing and several cautions. *Id.* at 769-70. The court ultimately upheld the use of COMPAS risk scores in

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[media/Files/PDF/Services%20and%20Experts/Areas%20of%20expertise/Sentencing%20Probation/RNA%20Guide%20Final.ashx.](#)

sentencing Loomis and rejected Loomis's due process claim. *Id.* at 770-71. The *Loomis* court's holding concerning COMPAS was later confirmed. *State v. Jones*, No.2015AP2211-CRNM, 2016 WL 8650489, at \*1, \*5 (Wisc. Ct. App. Nov. 29, 2016). The IRR used in Guise's case is unlike COMPAS, which is a proprietary risk assessment instrument.

Another commentator studying "evidence-based correctional practices and efforts" to implement them notes that much about them "deserves praise." Cecelia Klingele, *The Promises and Perils of Evidence-Based Corrections*, 91 *Notre Dame L. Rev.* 537, 580-81 (2015). Such practices have been linked "to modest-but-real reductions in correctional populations." *Id.* at 581. Klingele advises that "[s]cholars, policymakers, and practitioners should recognize the potential of evidence based practices to improve the quality and effectiveness of correctional interventions, while remaining equally alert to their potential for coercion and abuse." *Id.* at 583.<sup>8</sup>

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<sup>8</sup> See also *Offender Risk and Needs Assessment Instruments: A Primer for Courts*, National Center for State Courts, 2014, available at [www.ncsc.org/.../bj%20rna%20final%20report\\_combined%20files%208-22-14.ashx](http://www.ncsc.org/.../bj%20rna%20final%20report_combined%20files%208-22-14.ashx)

### **3. Analysis.**

The risk assessment instruments evaluated in *Malenchik* and *Loomis* are not the same as the IRR used for sentencing Guise. From the DOC descriptions set out above, it is clear that the IRR includes many of the same factors required to be in a PSI. Iowa Code § 901.3(1). Aside from “predicting general recidivism,” the IRR factors are individualized and not based on group data. In addition, section 901.5 provides that sentencing courts are to consider “all pertinent information, including the presentence investigation report and victim impact statements, if any . . . .” Iowa Code § 901.5.

The PSI prepared with Guise’s input was lengthy and detailed. *See generally* PSI; Conf. App. 35-51. It highlights Guise’s extensive criminal history, including a number of failed attempts at probation or parole, along with his limited education, lack of employment, unstable housing, and substance abuse with mental health problems. *Id.* Not surprisingly, the PSI preparer recommended Guise be sentenced to prison and not treated out in the community, and the court agreed rejecting the joint recommendation for a suspended sentence. PSI p.16; Sent. Tr.p.13, line 7-p.15, line 12; Conf. App. 50.

Guise does not accept full responsibility for his actions but recognizes he needs substance abuse and mental health treatment. PSI p.12; Conf. App. 46. Notably, Guise agrees he needs “intensive probation.” *Id.* His only complaint about the PSI is the “Iowa Risk Revised” finding indicating that he “should be supervised at an intensive level” and the court’s reference to that recommendation prior to imposing sentence. PSI p.15; Sent. Tr.p.14, lines 1-14; Conf. App. 49.

Guise does not otherwise identify what is lacking or improperly included in the IRR that should or should not have been considered in sentencing. It is well established that a sentencing court “is free to consider portions of a [PSI] that are not challenged by the defendant.” *Guise*, slip opin., at 36-38 (McDonald, J., dissenting) (collecting cases); *see also State v. Buck*, No.14-0723, 2015 WL 1046181, at \*3 (Iowa Ct. App. March 11, 2015) (defendant waived error as to the sentencing court’s consideration of a sexual adjustment inventory). Guise’s focus on appeal was simply the fact that there are no guidelines or limitations spelled out for use of the IRR in sentencing decisions. *See Loomis*, 881 N.W.2d at 767-70. The State reiterates that it had no opportunity to develop a record in the district court on

the grounds upon which the Court of Appeals relied in ordering resentencing. *Guise*, slip opin., at 52-54 (Mullins, J., dissenting).

While it may be beneficial to have guidelines and/or limitations for some or all risk assessment instruments that may be used in sentencing, the State submits use of the IRR result in *Guise*'s case does not warrant resentencing. Considering *Guise*'s personal background, criminal history, nature of the offense, failures on probation and parole, and proclivity for violence—it is unlikely the court would have suspended *Guise*'s sentence had the IRR score or result been omitted or guidelines existed. The court's statement of reasons reflects its consideration of all pertinent factors, and that it did not rely on the IRR as an aggravating or determining factor choosing an appropriate sentence. Sent. Tr.p.13, line 7-p.15, line 17.

Accordingly, this Court should find no due process violation or abuse of discretion warranting resentencing. For the same reasons, defendant *Guise* received effective assistance of counsel at sentencing.

## CONCLUSION

The State respectfully requests that this Court grant the application for further review, vacate the Court of Appeals opinion, and affirm the defendant's conviction and sentence.

### REQUEST FOR NONORAL SUBMISSION

The State believes given the lack of a developed record below and the divided Court of Appeals decision that oral argument would not be of material assistance in resolving the question presented.

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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