

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,  
Plaintiff-Appellee,  
v.  
DAIRRAMEY MOORE,  
Defendant-Appellant.

S.CT. NO. 18-1877

APPEAL FROM THE IOWA DISTRICT COURT  
FOR CLINTON COUNTY  
HONORABLE MARY HOWES, JUDGE

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## **CERTIFICATE OF SERVICE**

On the 8th day of July, 2019, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Dairramey Moore, No. 6912068, Mt. Pleasant Correctional Facility, 1200 East Washington, Mt. Pleasant, IA 52641.

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## **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

**I. NO ONE SAW MOORE POSSESS A GUN LET ALONE FIRE A GUN. WHETHER THE CASE AGAINST MOORE FOR INTIMIDATION WITH A DANGEROUS WEAPON WITH INTENT AND RECKLESS USE OF A FIREARM IS MERELY SPECULATIVE?**

### **Authorities**

Iowa R. App. 6.907

State v. Sanford, 814 N.W.2d 611, 615 (Iowa 2012)

State v. Torres, 495 N.W.2d 678, 681 (Iowa 1993)

State v. McCullah, 787 N.W.2d 90, 93 (Iowa 2010)

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State v. Thomas, 561 N.W.2d 37, 39 (Iowa 1997)

State v. Barns, 791 N.W.2d 817, 823 (Iowa 2010)

**II. WHETHER THE DISTRICT COURT CANNOT DETERMINE MOORE HAS THE ABILITY TO PAY ATTORNEY FEES, COURT COSTS, AND CORRECTIONAL FEES BEFORE THE TOTAL AMOUNT OF RESTITUTION IS DETERMINED?**

### **Authorities**

State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994)

State v. Cooley, 587 N.W.2d 752, 754 (Iowa 1999)

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State v. Sallis, No. 17-1842, 2019 WL 325019, at \*4  
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State v. Jose, 636 N.W.2d 38, 45 (Iowa 2001)

**III. WHETHER THE DISTRICT COURT FAILED TO  
EXERCISE ITS DISCRETION IN IMPOSING A MANDATORY  
MINIMUM SENTENCE IN COUNT I PURSUANT TO IOWA  
CODE SECTION 902?**

**Authorities**

State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994)

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## **ROUTING STATEMENT**

This case should be transferred to the court of appeals because the issues raised involve applying existing legal principles. Iowa R. App. P. 6.903(2)(d) and 6.1101(3)(a).

## **STATEMENT OF THE CASE**

**Nature of the Case:** This is an appeal by the defendant-appellant, Dairramey C. Moore, from the judgment and sentence following appellant's convictions for the offenses intimidation with a dangerous weapon with intent in violation of Iowa Code section 708.6 (2017) (Count I) and reckless use of a firearm in violation of section 724.30(3) (2017) (Count III). The Honorable Patrick J. McElyea presided over the trial and the Honorable Mary Howes presided over sentencing in Clinton County District Court.

**Course of Proceedings in the District Court:** On May 22, 2018, Moore was charged by trial information with the offenses intimidation with a dangerous weapon with intent in violation of Iowa Code section 708.6 (2017) (Count I), going armed with intent in violation of section 708.8 (2017) (Count II),

and reckless use of a firearm in violation of section 724.30(3) (2017) (Count III). (Trial Information, 5/22/18)(App. pp. 4-6).

A jury trial commenced August 13, 2018. Moore moved for judgment of acquittal which was denied by the district court. (Tr. p.177 L.25-p.178 L.7, p.179 L.16-p.181 L.5). The motion was renewed at the close of the case and again denied. (Tr. p.203 L.4-17). The district court accepted the jury's verdict of guilty as to intimidation with a dangerous weapon with intent (Count I) and reckless use of a firearm (Count III), and verdict of not guilty as to going armed with intent (Count II). (Jury Trial Order, 8/15/18)(App. pp. 9-10).

No posttrial motions were filed.

On September 27<sup>th</sup>, Moore appeared in open court, with counsel, and was adjudged guilty of intimidation with a dangerous weapon with intent in violation of Iowa Code section 708.6 (Count I) and reckless use of a firearm in violation of section 724.30(3) (Count III). (Probation Revocation & Sentencing, 9/27/18)(App. pp. 11-14). For intimidation with a dangerous weapon with intent, Moore was sentenced to 10

years and fined \$1000. The fine was suspended. (Id. at 1) (App. p. 11). A five year mandatory minimum was also imposed. (Id. at 1)(App. p. 11). For the office reckless use of a firearm, Moore was sentenced to two years and fined \$625, the fine was suspended. (Id. at 1)(App. p. 11). In addition, Moore's probation was revoked in the matters of FECR073196 and AGCR073031. (Id. at 1-2)(App. pp. 11-12). After doing so the district court ordered Moore to pay up to \$2,500 in court-appointed attorney fees. (Id. at 2)(App. p. 12). Moore was also ordered to pay the costs of the actions, correctional fees, all other applicable surcharges, fees, and assessments deemed appropriate by the clerk of court. (Id. at 2)(App. p. 12).

Notice of appeal was timely filed. (Notice, 10/23/18) (App. p. 15).

**Facts:** On April 26, 2017, Moore and Zachary Broders wanted some beer but did not have sufficient money on them to buy beer at the bar. (Tr. p.40 L.19-25). Alan Wulf, who resided at 830 13<sup>th</sup> Avenue South, Clinton, owed money to each of them. (Tr. p.41 L.9-p.42 L.4). Broders was wearing a hat,

vest, and jeans. (Tr. p.42 L.8-11). Moore was wearing a hoodie and pants. (Tr. p.42 L.12-13).

Moore and Broders parked in the alley behind the house. (Tr. p.42 L.14-16). At the back door a woman came out, saw Moore, and gave him a hug and Moore told her he was looking for Wulf. (Tr. p.42 L.19-22). While Moore and the lady talked, Broders walked around. (Tr. p.43 L.8-15). Looking through a window on the side of the house, Broders saw a man (not Wulf) with some women. (Tr. p.43 L.16-p.44 L.6).

Broders returned and told Moore Wulf was not there so they should just leave. (Tr. p.44 L.9-12). Moore went and looked through the side window. (Tr. p.44 L.13-16). Broders returned to his car and started texting. (Tr. p.44 L.17-24). As he was texting he heard "some pops" that sounded like gun shots and ducked down. (Tr. p.44 L.21-p.45 L.3). When Broders looked up he saw shots coming from the windows of the house and Moore running away. (Tr. p.45 L.3-11, p.47 L.12-22). He thought he saw three "fireballs" come out of the window. (Tr. p.47 L.23-25). He was unsure of how many

shots he heard, maybe three or four. (Tr. p.48 L.1-4). Broders locked his doors and drove off. (Tr. p.45 L.5-13).

Broders testified he did not see Moore with a weapon let alone fire any weapon. (Tr. p.48 L.5-8, p.49 L.18-19). Nor did Broders have any contact with Moore after the shooting. (Tr. p.48 L.13-14). In fact, they did not see each other for a "long time" after the shooting. (Tr. p.48 L.13-14).

Tammy Oberdorf-Long was living at 830 13<sup>th</sup> Avenue South on April 26<sup>th</sup>. (Tr. p.51 L.7-11). At that time Tom Molitor and Wulf also lived at 830 13<sup>th</sup> Avenue South. (Tr. p.51 L.12-15). That night just before midnight the three of them were present along with three others: a woman named Sam, Fabio, and Shonna. (Tr. p.52 L.2-3). Oberdorf-Long heard the others talking about a problem with Moore, so she started watching the monitors in Wulf's room on the first floor. (Tr. p.52 L.4-19, p.59 L.22-23).

Oberdorf-Long testified she observed:

them walking up the side of the house with a couple other people that were out back then I heard somebody yell "get down" and I wasn't sure what was

going on till I heard the gun being shot.

(Tr. p.53 L.22-p.54 L.1). Oberdorf-Long hit the floor behind a chair. (Tr. p.54 L.4-7). She did not think any shots were fired from the inside of the house. (Tr. p.55 L.1-8, p.60 L.22-25). Oberdorf-Long did not see who shot at the house. (Tr. p.56 L.8-12, p.60 L.18-21). But she testified the shots came from the east, which was the other side of the living room. (Tr. p.56 L.13-16).

Wulf testified he had security cameras scattered around his property to protect against thefts. (Tr. p.62 L.7-19; Ex. 60 (location of 5 security cameras)). Wulf claimed that on April 26<sup>th</sup> he returned home and was told someone, who was unhappy with him, was outside and wanted to talk to him. (Tr. p.63 L.16-23, p.66 L.1-4). He claimed not to know who the person was or why he wanted to talk to him. (Tr. p.63 L.23-24). Wulf said he only knew Broders in passing and he did know Moore. (Tr. p.63 L.25-p.64 L.6, p.71 L.3-4).

Wulf claimed after he was made aware of a possible issue, he “remembered hearing like a gun cocked at some point. You

know, the sound of a round being chambered, and I kind of yelled to get down.” (Tr. p.64 L.25-p.65 L.5). Initially, Wulf could not remember how many shots were fired, (Tr. p.65 L.5-7), but later he testified he thought maybe nine shots were fired. (Tr. p.67 L.2-4). And because the windows were open, he could not tell whether the shots were from the inside or outside. (Tr. p.65 L.8-19). He did see a silhouette of a person through a window to the outside. (Tr. p.65 L.20-22). Wulf never reviewed the security camera footage. (Tr. p.71 L.13-14).

Wulf claimed that he did not see anyone in the house fire a gun or even possess a gun. (Tr. p.66 L.13-20p.69 L.5-10).

Clinton Police Captain Joseph Raaymakers was dispatched April 26<sup>th</sup> to 826, 830, and 834 13<sup>th</sup> Avenue South. (Tr. p.72 p.9-21). The 830 13<sup>th</sup> Avenue South house had multiple bullet holes through the east window. (Tr. p.76 L.12-p.77 L.3; Exs. 6 (front 830), 7 (east window))(Ex. App. pp. 4-5). On the east side of 830 13<sup>th</sup> Avenue South, officers found seven 9 millimeter shell casings by the pink stucco wall. (Tr. p.78 L.19-p.79 L.18, p.81 L.15-21; Ex. 10 (7 markings for shell

casings))(Ex. App. p. 6). Just inside the window was a TV that was shot. (Tr. p.112 L.1-11; Ex. 27 (830 living room & TV))(Ex. App. p. 8).

East of 830 13<sup>th</sup> Avenue South is 826 13<sup>th</sup> Avenue South. (Tr. p.83 L.11-18, p.93 L.9-15). On the exterior west wall there were at least two bullet holes and possibly three bullet fragments. (Tr. p.85 L.5-p.87 L.4; Ex. 33 (west wall close-up of 826))(Ex. App. p. 9). The two bullet holes exited into the interior of the house. (Tr. p.86 L.1-25; Ex. 36 (interior 826 two bullet holes))(Ex. App. p. 10). A bullet fragment was found on the kitchen floor. (Tr. p.90 L.14-23; Ex. 38 (fragment on kitchen floor 826))(Ex. App. p. 11). Another fragment was found in the dining room. (Tr. p.92 L.2-22; Ex. 40 (fragment on dining room))(Ex. App. p. 12). Raaymaker believed that bullets were fired from 830 13<sup>th</sup> Avenue South into 826 13<sup>th</sup> Avenue South. (Tr. p.116 L.6-p.117 L.17; Ex. 36 (interior 826 two bullet holes))(Ex. App. p. 10). But no shell casings were collected from inside 830 13<sup>th</sup> Avenue South. (Tr. p.117 L.18-20).



Raaymaker next went to investigate the residence at 834 13<sup>th</sup> Avenue South which also reported their house had been shot. Facing 830 13<sup>th</sup> Avenue South, 834 was to the left, or the west. (Tr. p.93 L.16-20; Ex. 45 (834 13<sup>th</sup> Avenue South))(Ex. App. p. 15). On the west side of 830 13<sup>th</sup> Avenue South was a window with a fan. (Tr. p.93 L.21-p.94 L.25; Exs. 43 (window with fan), 44 (close up of window with fan))(Ex. App. pp. 13-14). In the lower left corner was a bullet hole and another in the center. (Tr. p.94 L.16-19, p.95 L.19-24). The bullet fragments discussed earlier were on the *opposite* side of 830 13<sup>th</sup> Avenue South. (Tr. p.94 L.1-4). The fan was in the window to Wulf's bedroom where all the surveillance monitors were. (Tr. p.111 L.6-14; Ex. 26 (Wulf's room))(Ex. App. p. 7).

The side of 834 13<sup>th</sup> Avenue South facing 830 13<sup>th</sup> Avenue South had a bullet lodged in the siding. (Tr. p.97 L.19-21, p.102 L.16-p.103 L.4; Ex. 47 (east side of 834 bullet hole by window))(Ex. App. p. 16). There was also a bullet hole in the window casing damaging the blinds. (Tr. p.97 L.22-p.98 L.9; Exs. 48 (east side of 834 bullet hole in window casing), 49 (close

up exhibit 48), 52 (close up of damaged blinds))(Ex. App. pp. 17, 18, 20). There was damage to the opposite wall indicating the bullet bounced off the wall. (Tr. p.101 L.2-p.102 L.7). A projectile was found a few feet into the living room and marked "31". (Tr. p.100 L.11-23; Exs. 51 (living room of 834 13<sup>th</sup> Avenue South), 54 (bullet hole above couch & marker 31))(Ex. App. pp. 19, 21). Also on the wall, higher and closer to the picture was a bullet fragment mark likely from the bullet marked 31. (Tr. p.102 L.8-15).

Raaymaker believed that two bullets fired from the east side of 830 went through the window, missed the TV, through the living room, then the bedroom, through Wulf's bedroom window, and into the side of 834 13<sup>th</sup> Avenue South. (Tr. p.118 L.4-p.119 L.18). No bullets or fragments were found inside 830 13<sup>th</sup> Avenue South. (Tr. p.119 L.19-p.120 L.3).

### **Surveillance Video**

Clinton Sergeant John Davis collected the surveillance equipment. (Tr. p.139 L.8-25, p.142 L.21). He did note the stated screen time was one hour behind and the day was off by

one. (Tr. p.139 L.14-p.140 L.23).

At 11:43 Wulf entered the back door. (Tr. p.147 L.13-21; Ex. 61 (1a 10:43), (1b 10:43)). Wulf talked to a woman known as Melissa Hartman, who officers were not able to locate during the investigation. (Tr. p.148 L.7-19). At 11:45, Moore and Broders appear at the backdoor of the house. (Tr. p.176 L.16-p.177 L.6; Ex. 61 (1a 10:45)). Moore was wearing a hooded sweatshirt and Broders was wearing a cap on backwards and sunglasses. (Tr. p.153 L.20-p.154 L.6). At 10:47 Broders peeked around the corner. (Tr. p.151 L.14-p.152 L.9; Ex. 61 (2a 10:47)). Broders actually goes all the way to the front of the house and peeks around the front corner. (Tr. p.155 L.16-p.156 L.6; Ex. 61 (3a 10:48:11)).

At 11:49, Moore and Broders walk along the east side towards the front of the house. (Ex. 61 (2a 10:49)). Moore's right hand was in his pocket, but his left hand was not. (Tr. p.150 L.19-p.151 L.2; Ex. 61 (1a 10:49)). Davis theorized that Moore had a gun because his hand was in his pocket. (Tr. p.150 L.25-p.151 L.2). But Broders testified that it was

extremely cold that night so it was not out of the ordinary to have one's hands in his or her coat pockets. (Tr. p.49 L.18-21).

At 11:50 Broders walked back to the alley. (Tr. p.158 L.17-p.159 L.1; Ex. 61 (1a 10:50)). Moore was not with him. Moore did not appear in the front surveillance camera. (Tr. p.160 L.17-p.161 L.3; Ex. 61 (3a 10:52)). Davis concluded that Moore was just outside of the view of the eastside camera (2) at the time of the shooting. (Tr. p.161 L.19-p.162 L.5). But at 11:51 he comes back in view of the eastside camera running to the alley. (Tr. p.13 L.1-7; Ex. 61 (2a 10:51)). Davis admitted that no gun was observed even though both hands were out of Moore's pockets. (Tr. p.169 L.18-p.170 L.7; Ex. 61 (2a 10:51:36-41)). In fact, no gun was seen in any of the videos. (Tr. p.170 L.4-5, p.172 L.10-19).

Davis testified that the shots coming from the east side of 830 13<sup>th</sup> Avenue South could have been fired within eight to ten seconds or even less if it was an automatic weapon. (Tr. p.172 L.20-p.173 L.5). Davis hypothesized the shots from inside 830 were fired shortly after shots were fired into 830. (Tr. p.172

L.6-15).

### **Moore's Testimony**

Moore testified he and Broders went to get money owed them from Wulf. (Tr. p.184 L.20-24). Hartman answered their knock at the back door. (Tr. p.185 L.2-12). Moore explained they wanted to see Wulf to get their money owed to them. (Tr. p.185 L.14-16). Hartman texted Wulf. (Tr. p.185 L.14-24). Then Hartman told Moore, Wulf was not coming out and then she left. (Tr. p.186 L.1-2).

Moore testified he then went around to the east window where Broders was talking to Fabian through the open window. (Tr. p.186 L.2-10, p.197 L.13-16). As they tried to negotiate for their money, a man known as "Tango" came up and started arguing with Wulf. (Tr. p.186 L.15-20, p.199 L.1-12). The argument started to escalate and then Tango and people in the house started firing guns. (Tr. p.186 L.19-22). Moore ran towards Broders' car and kept on running up the alley. (Tr. p.186 L.22-p.187 L.1).

Any further facts relevant to the appeal will be discussed

in the argument below.

## **ARGUMENT**

### **I. NO ONE SAW MOORE POSSESS A GUN LET ALONE FIRE A GUN. THE CASE AGAINST MOORE FOR INTIMIDATION WITH A DANGEROUS WEAPON WITH INTENT AND RECKLESS USE OF A FIREARM IS MERELY SPECULATIVE.**

**Preservation of Error:** Error was preserved by defendant's motion for judgment of acquittal and the district court's denial thereof. (Tr. p.177 L.25-p.178 L.7, p.179 L.16-p.181 L.5, p.203 L.4-17). Defendant denied being the person who fired the gun into 830 13<sup>th</sup> Avenue South. (Tr. p.178 L.1-7).

**Scope of Review:** A motion for judgment of acquittal is a means for challenging the sufficiency of the evidence. This court reviews sufficiency of evidence claims for a correction of errors at law. Iowa R. App. 6.907; State v. Sanford, 814 N.W.2d 611, 615 (Iowa 2012). The jury's finding of guilt will not be disturbed if there is substantial evidence to support the finding. State v. Torres, 495 N.W.2d 678, 681 (Iowa 1993). Substantial evidence is evidence that would convince a rational

trier of fact the defendant is guilty beyond a reasonable doubt. State v. McCullah, 787 N.W.2d 90, 93 (Iowa 2010) (quoting State v. Jorgensen, 758 N.W.2d 830, 834 (Iowa 2009)). The evidence must at least raise a fair inference of guilt as to each element of the crime. Id. at 93. The ultimate burden is on the State to prove every fact necessary to constitute the crime with which a defendant is charged. State v. Gibbs, 239 N.W.2d 866, 867 (Iowa 1976)(citing In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 1075, 25 L.Ed.2d 368, 375 (1970)). The record is viewed in the light most favorable to the State. Torres, 495 N.W.2d at 681. This court considers all the evidence in the record, not just the evidence supporting the finding of guilt. Id. Evidence which merely raises suspicion, speculation, or conjecture is insufficient. McCullah, 787 N.W.2d at 93; State v. Thomas, 561 N.W.2d 37, 39 (Iowa 1997).

**Merits:** The issue here is whether there was sufficient evidence to support Moore's convictions for intimidation with a dangerous weapon with intent in violation of Iowa Code section 708.6 (Count I) and reckless use of a firearm in violation of

section 724.30(3) (Count III). Interestingly, Moore was acquitted of going armed with intent in violation of Iowa Code section 724.30(3) (Count II). Moore's defense was simply he was not the shooter and did not even possess a firearm.

Both intimidation with a dangerous weapon with intent and reckless use of a firearm require the use of a dangerous weapon/firearm. In order to find Moore guilty of intimidation with a dangerous weapon with intent, the State had to prove:

1. On or about the 26th day of April, 2018, the *defendant shot a firearm*: at a building which was occupied by another person.
2. A firearm is a dangerous weapon, as explained in Instruction No. 23.
3. Another person actually experienced fear of serious injury and his/her fear was reasonable under the existing circumstances.
4. The defendant shot the dangerous weapon with the specific intent to injure or cause fear or anger in another person.

(Instr. No. 15 (marshaling intimidation))(App. p. 7).

In order to prove Moore guilty of reckless use of a firearm, the State had to prove the following elements:



1. On or about the 26th day of April, 2018, the defendant *intentional[ly] discharged a firearm.*
2. He did so in a reckless matter; and
3. Property damage occurred due to the discharge of the firearm.

(Instr. No. 21 (marshaling reckless use of firearm))(App. p. 8).

There was no evidence that Moore even possessed a firearm. No one ever saw Moore with a firearm. Even Moore's friend Broders, who was with him throughout the evening, did not see Moore with a firearm. (Tr. p.48 L.5-8, p.49 L.18-19). The police speculated that Moore had a firearm because his hand was in his pocket. But Broders testified that it was extremely cold that night so it was not out of the ordinary to have one's hands in his or her coat pockets. (Tr. p.49 L.18-21).

Further, when Moore was running from the scene, both hands were out of his pockets. There was no weapon in either hand. No weapon was ever found. So if Moore was the shooter, then the weapon had to leave with him. However, he was not holding a weapon as he fled. It seems unlikely in the midst of gun fire that a person would stop, conceal his weapon,

and then flee the scene. Quite the contrary, if someone was firing shots at you, you immediately run holding whatever was in your hands at the time.

In the same line of argument, there was no testimony by anyone who actually saw Moore fire a weapon. Broders was with Moore, but back in his car. He testified he did not see Moore fire a weapon. Neither Wulf nor Oberdorf-Long, who were in the house, testified to seeing Moore with a weapon. (Tr. p.56 L.8-12, p.60.18-21; p.64 L.25-p.65 L.5). And none of the residents east and west of 830 13<sup>th</sup> Avenue South saw Moore fire a weapon.

Moore's conviction was based upon his mere presence at the scene. There must be something more than mere presence at a crime scene. State v. Barns, 791 N.W.2d 817, 823 (Iowa 2010)("mere presence at the time and place of the crime" is not enough to prove guilt). The evidence in the present case does not go beyond mere speculation. The evidence was insufficient to prove Moore guilty of intimidation with a dangerous weapon and reckless use of a firearm.

Moore's convictions should be reversed.

**II. THE DISTRICT COURT CANNOT DETERMINE MOORE HAS THE ABILITY TO PAY ATTORNEY FEES, COURT COSTS, AND CORRECTIONAL FEES BEFORE THE TOTAL AMOUNT OF RESTITUTION IS DETERMINED.**

**Preservation of Error:** The general rule of error preservation is not applicable to void, illegal, or procedurally defective sentences. State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994). Review of sentencing is properly before this court upon direct appeal despite the absence of objection in the trial court. State v. Cooley, 587 N.W.2d 752, 754 (Iowa 1999).

**Scope of Review:** This court reviews a restitution order for abuse of discretion. State v. Morris, 858 N.W.2d 11, 14 (Iowa 2015). "When the district court exercises its discretion on grounds or for reasons that were clearly untenable or unreasonable, an abuse of discretion occurs." State v. Thompson, 856 N.W.2d 915, 918 (Iowa 2014). This court will reverse when an abuse of discretion occurs. Id. "When reviewing a restitution order, we determine whether the court's

findings lack substantial evidentiary support, or whether the court has not properly applied the law. Statutory construction is reviewed for correction of errors at law.” Morris, 858 N.W.2d at 14 (internal quotation marks and citations omitted).

**Merits:** The problem here is the district court ordered Moore to pay attorney fees, court costs, and correctional fees without any determination of whether he had the ability to pay. Further, the order imposing restitution was premature given that the total amount of restitution and court costs was unknown at the time of sentencing. This court should vacate the sentencing order, and remand with orders the district court vacate the orders for attorney fees, court costs, and correctional fees until the total amount of restitution is determined.

“A constitutional prerequisite for a restitution order is the court's determination of a defendant's reasonable ability to pay.” State v. Van Hoff, 415 N.W.2d 647, 648 (Iowa 1987). “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.” Id. at 649.

“By statute, incarceration creates no obstacle to performance under the restitution plan.” Walters v. Grossheim, 525 N.W.2d 830, 832 (Iowa 1994) (citing Iowa Code § 910.5(1)). “Nevertheless the restitution plan of payment is required to reflect individualized factors bearing on the inmate's ability to pay.” Id. (recognizing provisions in § 910.5(1) addressing “...income, physical and mental health, education, employment and family circumstances”).

When a criminal defendant contests an order of restitution he “...has the burden to demonstrate a failure of the trial court to exercise discretion or abuse of discretion.” State v. Storrs, 351 N.W.2d 520, 522 (Iowa 1984). However, this burden is not insurmountable. “In an extreme case this burden may be met on appeal through a record showing a defendant's indigency and disability from earning income.” State v. Kaelin, 362 N.W.2d 526, 528 (Iowa 1985).

The Iowa Code section 815.9(5) codifies the constitution requirement for court appointed counsel:

If the person receiving legal assistance is convicted in a criminal case, the total costs and fees incurred for legal assistance shall be ordered paid when the reports submitted pursuant to subsection 4 are received by the court, and the court shall order the payment of such amounts as restitution, *to the extent to which the person is reasonably able to pay*, or order the performance of community service in lieu of such payments, in accordance with chapter 910.

Iowa Code § 815.9(5)(as amended 2017)(emphasis added).

Iowa Code section 910.2 codifies the constitutional requirement for also for crime victim assistance reimbursement, restitution to certain public agencies, court costs including correctional fees, and court-appointed attorney fees:

In 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, the sentencing court *shall order that restitution* be made by each offender to the victims of the offender's criminal activities, to the clerk of court *for fines, penalties, surcharges, and, to the extent that the offender is reasonably able to pay, for crime victim assistance reimbursement, restitution to public agencies* pursuant to section 321J.2, subsection 13, paragraph "b", *court costs including correctional fees approved pursuant to section 356.7, court-appointed attorney fees* ordered pursuant to section 815.9, including the expense of a public defender, when applicable, contribution to a local anticrime organization, or restitution to the medical assistance program pursuant to chapter 249A.

Iowa Code § 910.2(1) (2017) (emphasis added).

**Any Imposition of Restitution Fees is Premature.**

A sentencing court must impose restitution to the victims of a crime and to the clerk of court for fines, penalties, and surcharges. State v. Sallis, No. 17-1842, 2019 WL 325019, at \*4 (Iowa Ct. App. Jan. 23, 2019); Iowa Code § 910.2(1) (2017). But, as discussed above, attorney fees, court costs and correctional fees are subject to a defendant's reasonable ability to pay. Iowa Code § 910.2(1).

The court's determination of a defendant's ability to pay is separate and distinct from the sentencing.

"The ability to pay is an issue apart from the amount of restitution and is therefore not an 'order [ ] incorporated in the sentence' and is therefore not directly appealable as such."

State v. Jose, 636 N.W.2d 38, 45 (Iowa 2001)(alteration in original)(cited in Sallis, No. 17-1842, 2019 WL 325019, at \*4).

The sentencing court is not required to consider a defendant's ability to pay until the plan of restitution contemplated by Iowa Code section 910.3 is completed. Id.

At the time of sentencing the amount of restitution was not known and the restitution hearing had yet to be scheduled. (Probation Revocation & Sentencing Order, p.2, 9/27/18)(App. p. 12). Any *imposition* of court ordered fees is premature until the total amount of restitution is known. Sallis, No. 17-1842, 2019 WL 325019, at \*5. However, the court should be able to waive fees if it deems appropriate since waiver of fees will not negatively impact a defendant in the ability to repay restitution.

The sentencing court ordered Moore to pay attorney fees up to \$2500, any court costs, and correctional fees for the present case without making any finding that he had the reasonable ability to pay these fees on top of his other restitution costs. (Sent. tr. p.6 L.1-8; Probation Revocation & Sentencing Order, p.2)(App. p. 12). The sentencing court ordered Moore also to pay all applicable surcharges, fees, and assessments as deemed appropriate by the Clerk of Court. ((Probation Revocation & Sentencing Order, p.2)(App. p. 12). The sentencing court had no idea what theses restitution amounts were. The district court must know the total amount



of restitution before it can make a determination the defendant has the reasonable ability to pay. See Sallis, No. 17-1842, 2019 WL 325019, at \*4 (“Until a plan of restitution contemplated by Iowa Code section 910.3 is completed, the court is not required to give consideration to the defendant’s ability to pay.”).

In addition, Moore is a veteran with a history of posttraumatic stress disorder (PTSD), anxiety, depression, and traumatic brain injury. (Sent. tr. p.4 L.15-21). Moore takes “some pretty heavy medications.” (Sent. tr. p.4 L.19-23).

There was no discussion of the impacts of those costs on Moore and his ability to pay restitution. In fact, the district court was hostile to Moore’s claim of PTSD.

Also, you know, being a veteran that was involved in battles is *no excuse for your behavior*. I mean, there is a number of veterans walking around who *I happen to be related to [someone] who saw various wars, including Afghanistan and Iraq, and they aren't abusing people or hurting people, so that's just a cop-out in my opinion.*

There's a lot of veterans groups out there available for help. I'm not gonna say you don't have PTSD. That's very possible, but just like any extreme

stressor in your life, you have to find a way to deal with it in a constructive way.

(9/27/18 tr. p.12 L.21-p.13 L.6). Regardless, the district court should also consider Moore's medical costs in treating his PTSD.

Interestingly, in the probation revocation of Clinton County Nos. FECR075580 and AGCR073031 that took place immediately following Moore's sentencing for the present case, the district court found Moore indigent and ordered he did not have to pay attorney fees. (Sent. tr. p.14 L.4-7). It makes no sense that Moore would be found indigent in the probation revocation matters such that he did not have to pay attorney fees but ordered earlier to pay attorney fees for the present case. But we do not know the basis for the district court's conflicting orders because it never engaged in any analysis as to Moore's reasonable ability to pay.

The district court abused her discretion. Any order imposing restitution for attorney fees, court costs, and correctional fees was premature because the court did not have

available the total amount of Moore's restitution debt.

Further, the district court did not engage in any analysis as to whether Moore had the reasonable ability to pay. Therefore, any imposition of attorney fees, court fees, and correctional fees was premature and should be vacated.

**III. THE DISTRICT COURT FAILED TO EXERCISE ITS DISCRETION IN IMPOSING A MANDATORY MINIMUM SENTENCE IN COUNT I PURSUANT TO IOWA CODE SECTION 902.**

**Preservation of Error:** Review of sentencing is properly before this Court upon direct appeal despite the absence of objection in the trial court. State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994). The Court considers the district court's failure to exercise its discretion a defect in the sentencing procedure to which the error preservation rules do not appeal. State v. Ayers, 590 N.W.2d 25, 27 (Iowa 1999).

**Standard of Review:** A sentence imposed by the district court is reviewed for errors at law. Iowa R. App. P. 6.907; State v. Thomas, 547 N.W.2d 223, 225 (Iowa 1996). A sentence imposed in accordance with applicable statutes will be

overturned only for an abuse of discretion. When a sentencing court has discretion, it must exercise that discretion. State v. Ayers, 590 N.W.2d at 27. Failure to exercise that discretion calls for a vacation of the sentence and remand for re-sentencing. State v. Lee, 561 N.W.2d 353, 354 (Iowa 1997).

**Merits:** Moore was convicted of intimidation with a dangerous weapon with intent. A class “C” felony. The State argued for a five year mandatory minimum applied under Iowa Code section 902.7. (9/27/18 tr. p.3 L.12-19). A conviction for intimidation with a dangerous weapon “necessarily admit[s] to the facts necessary to impose the sentencing enhancement for use of a dangerous weapon.” State v. Lyke, No. 16-1473, 2017 WL 3067421, at 3 (Iowa Ct. App. July 19, 2017).

Iowa Code section 902.7 provides:

At the trial of a person charged with participating in a forcible felony, if the trier of fact finds beyond a reasonable doubt that the person is guilty of a forcible felony and that the person represented that the person was in the immediate possession and control of a dangerous weapon, displayed a dangerous weapon in a threatening manner, or was armed with a dangerous weapon while participating in the forcible felony the convicted

person shall serve a minimum of five years of the sentence imposed by law. A person sentenced pursuant to this section shall not be eligible for parole until the person has served the minimum sentence of confinement imposed by this section.

Iowa Code § 902.7 (2017). However, under some circumstances the sentencing court has discretion in the imposition of the section 902.7 five-year minimum sentence.

A court sentencing a person for the person's first conviction under section 124.406, 124.413, or 902.7 may, at its discretion, sentence the person to a term less than provided by the statute if mitigating circumstances exist and those circumstances are stated specifically in the record.

Iowa Code § 901.10(1) (2015).

The record shows the district court parties believed the court did not have discretion in the imposition of the five-year mandatory minimum sentence pursuant to Iowa Code section 902.7. During the sentencing hearing, the State argued "the State would also note Iowa Code Section 902.7, which would require a mandatory minimum five years based on the use of a dangerous weapon." (9/27/18 tr. p.3 L.16-19). In response to the district court's request for argument, defense counsel

stated “Well, we don’t have too much wiggle room here.” (9/27/18 tr. p.4 L.7-13). The court replied “no.” (9/27/18 tr. p.4 L.14). The later the district court ordered that “based on a weapon being used,” sentenced Moore “to a mandatory minimum of five years...” (9/27/18 tr. p.5 L.21-24).

Moore has not previously been convicted under section 902.7. (PSI, Arrest Record, pp 2-6)(Conf. App. pp. 5-9). Therefore, under Iowa Code section 901.10, the district court had the discretion to order Moore to serve less than the five-year mandatory minimum sentence required by section 902.7. Iowa Code § 901.10(1) (2015); State v. Ayers, 590 N.W.2d 25, 26 (Iowa 1999).

A trial court need not give reasons for rejecting particular sentencing options. State v. Thomas, 547 N.W.2d at 225. However, the record must reveal the sentencing court, in fact, exercised discretion with respect to the options it had. Id. The record here shows a failure to exercise discretion with respect to the imposition of the section 902.7 five-year mandatory minimum sentence in Count II. A remand for

resentencing is required where a court fails to exercise discretion because it believes it has no discretion. State v. Sandifer, 570 N.W.2d 256 (Iowa Ct. App. 1997). Moore's five-year mandatory minimum sentence should be vacated and remanded for a hearing for the court to exercise its discretion in accordance with Iowa Code section 901.10(1).

### **CONCLUSION**

For the reasons stated in Division I, above, the defendant respectfully requests this court to reverse his convictions for intimidation with a dangerous weapon with intent (Count I) and reckless use of a firearm (Count III).

For the reasons stated in Division II, above, the defendant respectfully requests this court to vacate the sentence and remand (1) to determine defendant does not have the reasonability to pay, or (2) to withhold determination until all restitution costs are reported.

For the reasons stated in Division III, above, defendant respectfully requests his five-year mandatory minimum sentence be vacated and remanded for a hearing for the court to

exercise its discretion in accordance with Iowa Code section 901.10(1).

**NONORAL SUBMISSION**

Counsel does not request to be heard in oral argument.

**ATTORNEY'S COST CERTIFICATE**


The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was \$ 4.15, and that amount has been paid in full by the Office of the Appellate Defender.



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