

IN THE SUPREME COURT OF IOWA

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STATE OF IOWA, )  
 )  
 Plaintiff-Appellee, )  
 )  
 v. ) S.C.T. NO. 18-1877  
 )  
 DIARRAMEY MOORE, )  
 )  
 Defendant-Appellant. )

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APPEAL FROM THE IOWA DISTRICT COURT  
FOR CLINTON COUNTY  
HONORABLE PATRICK A. McELYEA, JUDGE  
AND  
HONORABLE MARY HOWES, JUDGE

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APPELLANT'S REPLY BRIEF AND ARGUMENT

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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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SLK/lr/07/19

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**STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

**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.**

No Authorities

**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.**

**Authorities**

State v. Albright, 925 N.W.2d 144, 158-62 (Iowa 2019)

State v. Rankin, No.18-1033, 2019 WL 2372142, at \*1 n.1 (Iowa Ct. App. June 5, 2019)

State v. Rawl, Jr., No. 10-0882, 2019 WL 2145722, at \*2 (Iowa Ct. App. May 15, 2019)

**III. 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. Wooten, No. 18-0023, 2018 WL 670223, \*2 (Iowa Ct. App. Dec. 19, 2018)

Iowa Code § 901.10(2)

Iowa Code § 901.10(3)

Iowa Code § 901.10(1)

Kucera v. Baldazo, 745 N.W.2d 481 (Iowa 2006)

## 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 Iowa Code 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.

## 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.**

Moore stands on his initial brief.

**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.**

The State argues that the issue is not ripe for this court to rule upon because the district court has not filed a final restitution order. This argument was implicitly rejected in State v. Albright when the supreme court ruled on the issue of whether the district court properly determined Albright's reasonable ability to pay. 925 N.W.2d 144, 158-62 (Iowa 2019). It was the sentencing order from which Albright appealed and the supreme court vacated the restitution portion of the sentencing order. Id. at 162. Ripeness is not at issue here. See State v. Rankin, No.18-1033, 2019 WL 2372142, at \*1 n.1 (Iowa Ct. App. June 5, 2019) (State made a ripeness argument in Albright and it was implicitly rejected); State v. Rawl, Jr., No. 10-0882, 2019 WL 2145722, at \*2 (Iowa Ct. App. May 15, 2019)(same). That makes sense because the final restitution order would adopt what was in the sentencing order.



Thus, it is appropriate to challenge the district court's ruling in the sentencing order.

Therefore, this court can rule upon the restitution issue even though there is not a final restitution order.

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

The State argues that just because it is not explicitly shown that the court did not exercise its discretion under Iowa Code section 901.10(1) does not mean the district court did not exercise its discretion. However, the discussion between the judge and the attorneys clearly demonstrates that everyone thought the district court was required to impose a 5 year mandatory sentence on count I. State claimed "Iowa Code Section 902.7...require[s] a mandatory minimum five years based on the use of a dangerous weapon." (9/27/18 tr. p.3 L.16-19). Defense counsel responded "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). Then later the district

court ordered that “based on a weapon being used,” Moore would be sentenced “to a mandatory minimum of five years...” (9/27/18 tr. p.5 L.21-24). There was absolutely no discussion of Iowa Code section 901.10(1) which grants the district court discretion to impose a term less than that required under section 902.7. Any presumption the district court exercised its discretion was overcome by the discussion on the record.

The State also argues any error was harmless citing State v. Wooten. “Under a harmless-error analysis, we presume prejudice and reverse unless the record affirmatively establishes the defendant suffered no prejudice.” State v. Wooten, No. 18-0023, 2018 WL 670223, \*2 (Iowa Ct. App. Dec. 19, 2018). Wooten is distinct from the present case. In Wooten the defendant argued the court did not consider other sentencing alternatives because the court concluded the matter was a forcible felony. Id. The court of appeals found the error harmless because the district court stated on the record that “it would have imposed the same sentence regardless of its determination that attempt to disarm a police officer was a

forcible felony.” There is no such statement in the present case.

The State also argues that section 901.10 requires the defendant either pleads guilty or cooperated with the government. However, those requirements are only for drug related sections 124.401D and 124.413. See Iowa Code §§ 901.10(2) (delivery, etc. of amphetamine or methamphetamine to person under 18), (3) (mandatory minimum sentences). This requirement was not part of Iowa Code section 901.10(1). “[L]egislative intent is expressed by omission as well as by inclusion, and the express mention of one thing implies the exclusion of others not so mentioned.” Kucera v. Baldazo, 745 N.W.2d 481 (Iowa 2006)(citations omitted). The limitations placed on subsections 124.401D and 124.413 implies the legislature did not intend for them to be applied to section 902.7.

The State finally argues no mitigating circumstances were stated on the record. First, we don’t what the district court would have considered because it did not exercise its discretion.

Second, there was nothing explicitly offered because the district and the attorneys did not recognize the court's authority under section 901.10.

Therefore, the district court failed to exercise its discretion. Moore's sentence for Count I should be vacated and the matter remanded for resentencing.

### **CONCLUSION**

For the reasons stated in Division I of the initial brief, 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, in the initial brief and 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, in the initial brief and 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).

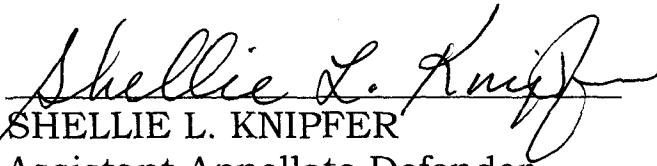
**ATTORNEY'S COST CERTIFICATE**

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was \$ 1.50, and that amount has been paid in full by the Office of the Appellate Defender.

**CERTIFICATE OF COMPLIANCE WITH TYPEFACE  
REQUIREMENTS AND TYPE-VOLUME LIMITATION  
FOR BRIEFS**

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because:

[X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 985 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).



Dated: 7/1/19

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