

IN THE SUPREME COURT OF IOWA  
Supreme Court No. 21-0102

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STATE OF IOWA,  
Plaintiff-Appellee,

vs.

DEMETRIAS ALAN MARTIN,  
Defendant-Appellant.

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APPEAL FROM THE IOWA DISTRICT COURT  
FOR SCOTT COUNTY  
THE HONORABLE TAMRA ROBERTS, JUDGE

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**APPELLEE'S BRIEF**

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FINAL

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John Monahan, *Violence Risk Assessment: Scientific and Evidentiary Admissibility*, 57 Wash. & Lee L. Rev. 901 (2000)..... 11

## STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

### I. Does the record show why the district court ought not have minimally considered the Iowa Risk Assessment?

#### Authorities

*McClesky v. Kemp*, 481 U.S. 279 (1987)  
*In re Behrend's Will*, 233 Iowa 812, 10 N.W.2d 651 (1943)  
*Jones v. University of Iowa*, 836 N.W.2d 127 (2013)  
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*State v. Pappas*, 337 N.W.2d 490 (Iowa 1983)  
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*State v. Thompson*, 856 N.W.2d 915 (Iowa 2014)  
*State v. Wickes*, 910 N.W.2d 554 (Iowa 2018)  
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Iowa Code § 902.12(3)  
Wayne R. LaFave, 6 Crim. Proc. § 26.4(b) (4<sup>th</sup> ed)  
Charlotte Hopkinson, *Using Daubert to Evaluate Evidence Based Sentencing*, 103 Cornell L. Rev. 723 (2018)  
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## **ROUTING STATEMENT**

The State agrees the Court should route this matter to the Court of Appeals. Iowa R. App. P. 6.1101(3).

### **STATEMENT OF THE CASE**

#### **Nature of the Case**

Demetrias Martin was convicted in Scott County District Court of first-degree robbery and willful injury resulting in bodily injury which merged. Iowa Code §§ 708.4(2), 711.1(1), 711.2 (2017).

Following a direct appeal, the Scott County District Court imposed a 25-year prison sentence with a 70% mandatory minimum term of incarceration before parole eligibility. *See id.* § 902.12(2A) (Supp. 2019). He contends the district court abused its discretion to consider the Iowa Risk Assessment. *Id.* § 901.11(2A).

The Honorable Tamra Roberts presided.

#### **Course of Proceedings and Statement of Facts**

The State does not contest the appellant's statement of the procedural history of the case or the facts. Iowa R. App. P. 6.903(3)

## ARGUMENT

### I. **The court properly considered the Iowa Risk Assessment Revised because the record does not show it is invalid.**

#### **Preservation of Error**

The State does not contest error preservation because the district court ruled on Martin’s objection to the use of the Iowa Risk Assessment Revised. Sent. Tr. p. 9, l. 23–p. 10, l. 18, p. 12, ll. 6–14, p. 14, ll. 1–12; *see State v. Guise*, 921 N.W.2d 26, 29 (Iowa 2018) (requiring objection to use of risk assessment at sentencing); *Lamasters v. State*, 821 N.W.2d 856, 862 (Iowa 2012)

#### **Standard of Review**

This Court reviews sentencing decisions “for abuse of discretion or defect in the sentencing procedure.” *State v. Hopkins*, 860 N.W.2d 550, 553 (Iowa 2015) (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). An abuse of discretion (or legal error) occurs when a court relies on an impermissible sentencing factor. *State v. Wickes*, 910 N.W.2d 554, 572 (Iowa 2018).

Sentencing decisions, however, carry a strong presumption of validity. *State v. Cheatheam*, 569 N.W.2d 820, 821 (Iowa 1997). The burden to overcome this presumption is “heavy, indeed.” *State v. Pappas*, 337 N.W.2d 490, 494 (Iowa 1983); accord *State v. Loyd*, 530 N.W.2d 708, 713 (Iowa 1995). A defendant therefore has the burden to provide a record showing that the court abused its discretion. *State v. Ayers*, 590 N.W.2d 25, 29 (Iowa 1999); *State v. Parsons*, 401 N.W.2d 205, 211 (Iowa 1986).

### **Merits**

The Court of Appeals remanded this case for resentencing to comply with what are now Iowa Code sections 901.11(3) and 902.12(3).<sup>1</sup> *State v. Martin*, No. 19-0409, slip op. 10–11 (Iowa Ct. App. Aug. 5, 2020). Together, they require district courts to consider, among other things, a “validated risk assessment” when deciding the mandatory minimum prison term for a person convicted of first-degree robbery. Martin objected but made no effort to show why the assessment was not valid. Sent. Tr. 9, l. 23–p. 10, l. 18. The district

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<sup>1</sup> These provisions were originally promulgated at Iowa Code sections 901.11(2A) and 902.12(2A) but then renumbered by the Code Editor. See 2019 Iowa Acts ch. 140, §§ 6, 8 (S.F. 589).



court therefore committed no error to consider it “minimally.” *Id.*  
p. 14, ll. 1–12.

Iowa Code section 902.12(3) provides a mandatory minimum prison term in a range of 50% to 70% of a person’s sentence for first-degree robbery. It states:

A person serving a sentence for a conviction for robbery in the first degree in violation of section 711.2 for a conviction that occurs on or after July 1, 2018, shall be denied parole or work release until the person has served between one-half and seven-tenths of the maximum term of the person’s sentence as determined under section 901.11, subsection 3.

Iowa Code § 902.12(3). Iowa Code section 901.1(3), in turn, provides:

At the time of sentencing, the court shall determine when a person convicted of robbery in the first degree as described in section 902.12, subsection 3, shall first become eligible for parole or work release within the parameters specified in section 902.12, subsection 3, based upon all pertinent information including the person’s criminal record, a validated risk assessment, and the negative impact the offense has had on the victim or other persons.

*Id.* § 901.11(3) (emphasis added).

On remand, the court received an amended presentence investigation report containing the following addendum:

On November 03, 2020, [t]he defendant was assessed utilizing the Iowa Risk Assessment Revised. The Iowa Risk Assessment Revised is a brief actuarial instrument used to estimate offenders' level of risks associated with them violently reoffending and their continuous victimization. The defendant is noted to have scored a High risk for violent recidivism, and a Moderate/High risk for continuous victimization, with an intensive level of recommended correctional supervision.

PSI (filed Nov. 4, 2020) p. 12; Conf. App. 15.

Defense counsel reviewed the new risk assessment's conclusion with Martin on December 7, 2020. Sent. Tr. p. 3, ll. 9–24, p. 4, ll. 10–22. Resentencing occurred a month later, on January 7, 2021. *Id.*

p. 1. Defense counsel argued that Martin had a right to be sentenced based on accurate information and the assessment was “just conclusory .... I don't feel that it's fair for that to be considered.” *Id.*

p. 10, ll. 11–18. He felt this way because,

I don't have the ability to cross-examine anybody as to why that is, what criteria were used, or standard, or questions, you know, what answers were given, whether it was norm to local populations.

*Id.*

This is not true, of course. The defense could have called the PSI writers to ask them, “what criteria was used? what questions and

answers were given? was the assessment normed to local populations?” *See, e.g., State v. Loomis*, 881 N.W.2d 749, 762–63 (Wis. 2016) (rejecting due process challenge to use of “COMPAS,” the risk assessment tool used in Wisconsin, notwithstanding developer’s unwillingness to disclose proprietary information). Defense counsel could have called an expert on actuarial risk assessments or other knowledgeable person. As it was, Martin did not muster an adequate challenge.

A “serious challenge,” Justice Appel has observed, a “full court press on the reliability of the risk assessment” would require an expert for the defense. *Guise*, 921 N.W.2d at 34 (Appel, J., concurring). Even a less-developed attack might include discussion of statistical factors such as “housing, employment, and level of educational attainment” and their impact on the assessment. *Id.* Martin did not make the requisite factual challenge to the validity of the risk assessment.

Established legal challenges do exist for such challenges. Even though the rules of evidence do not apply at sentencing, a party could make a *Daubert*-challenge to the assessment’s validity. *See id.* n.3 (citing John Monahan, *Violence Risk Assessment: Scientific and*

*Evidentiary Admissibility*, 57 Wash. & Lee L. Rev. 901, 912 (2000) and Charlotte Hopkinson, Note, *Using Daubert to Evaluate Evidence-Based Sentencing*, 103 Cornell L. Rev. 723, 733 (2018)). A due process challenge, for example, might include calling a representative of the test’s developer to ask whether its tools have been “re-normed for changing populations.” *Loomis*, 881 N.W.2d at 763.

Defendants bear an initial burden of proof in any sentencing challenge. *See, e.g.*, Wayne R. LaFave, 6 Crim. Proc. § 26.4(b) (4<sup>th</sup> ed) (discussing defendant’s initial burden of proving purposeful discrimination as held in *McClesky v. Kemp*, 481 U.S. 279 (1987)). They retain that burden when appealing. *See, e.g.*, *In re Behrend’s Will*, 233 Iowa 812, 818, 10 N.W.2d 651, 655 (1943) (“the burden rests upon the appellant not only to establish error but to further show that prejudice resulted”). A “bare assertion of prejudice based on inability to access all the evidence” is weak tea and, in the civil context, does not show reversible error. *Jones v. University of Iowa* 836 N.W.2d 127, 140–41 (2013).

Martin’s claim below was, in essence, a bare assertion that he could not challenge the risk assessment because he did not have

access all the evidence he wished. Instead, he could have called, at a minimum, the PSI writer who conducted it to show what questions were asked, whether it was “normed” to a local population, and the like. In the absence of facts impugning the risk assessment’s validity, the court could consider it.

### **CONCLUSION**

The Court should affirm Martin’s sentence.

### **REQUEST FOR NONORAL SUBMISSION**

The State agrees this matter does not require oral argument.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **1,407** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: July 16, 2021



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