IN THE SUPREME COURT OF IOWA

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| STATE OF IOWA, | ) | |
| | ) | |
| Plaintiff-Appellee, | ) | |
| | ) | |
| v. | ) | S.CT. NO. 17-1727 |
| | ) | |
| RONALD SKYLER STEENHOEK, | ) | |
| | ) | |
| Defendant-Appellant. | ) | |

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APPEAL FROM THE IOWA DISTRICT COURT
FOR BOONE COUNTY
HONORABLE TIMOTHY J. FINN AND
HONORABLE MICHAEL J. MOON, JUDGES

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# APPELLANT'S BRIEF AND ARGUMENT

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**CERTIFICATE OF SERVICE**

On May 22, 2018, 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 Ronald S. Steenhoek, 1322 Mamie Eisenhower, Boone, IA 50036.

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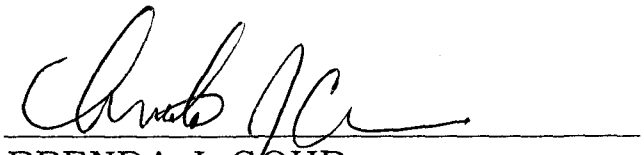

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## ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because the issues presented on appeal require clarification of existing Supreme Court precedent or overturning such precedent. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(c). Specifically, Steenhoek requests this Court clarify the existing law surrounding when the determination of the defendant's reasonable ability to pay is required to be made, and overturn State v. Van Hoff, 415 N.W.2d 647 (Iowa 1987), and State v. Kaelin, 362 N.W.2d 526 (Iowa 1985), and require the sentencing courts to explicitly state the reasons on the record considered by the court when determining the defendant's reasonable ability to pay.

## STATEMENT OF THE CASE

***Nature of the Case:*** Appellant Ronald Steenhoek appeals following his guilty plea, conviction, and sentence for: Theft in the Second Degree, a Class D felony, in violation of Iowa Code sections 714.1 and 714.2(2).

***Course of Proceedings:*** On May 19, 2017, the State charged Steenhoek with two counts of Robbery in the First Degree, a Class B felony, in violation of Iowa Code sections 711.1(1)(a) and 711.2. (Trial Information)(App. pp. 7-9).

On September 1, 2017, the State filed an amended trial information, charging Steenhoek with one count of Theft in the Second Degree, a Class D felony, in violation of Iowa Code sections 714.1 and 714.2(2). (Amended Trial Information) (App. pp. 10-11).

On September 5, 2017, Steenhoek pled guilty to the amended trial information pursuant to a plea agreement with the State. (Plea Tr. p. 2 L1-10; Record of Guilty Plea)(App. pp. 12-13). In exchange for his guilty plea, the State agreed to reduce the charges to one count of Theft in the Second Degree. The agreement further required Steenhoek to pay a fine of $750 plus surcharges, additional fines and fees, restitution and court costs; additionally, both sides would be able to make their own sentencing recommendations. The plea would

be based on the facts in the Minutes of Testimony. (Plea Tr. p. 15 L1-21).

On October 16, 2017, the Court found Steenhoek guilty of the charge and sentenced him to a prison term not to exceed five years, the minimum fine of $750 plus surcharges, court costs, and attorney fees. (Sent. Tr. p. 37 L5-p. 39 L21; Order of Disposition)(App. pp. 14-16).

On October 19, 2017, notice of appeal was filed. (Notice of Appeal)(App. pp. 17-18).

***Facts:*** The minutes of testimony establish the following: On or about January 30, 2017, in Boone County, IA, Steenhoek took, without permission, property valued at more than $1000, but less than $10,000 from Noah Dalgliesh and Tyrae Manns. Steenhoek took these items with the intent to dispose of it against their interests. (Plea Tr. p. 7 L13-p. 8 L22; Minutes of Testimony)(Conf. App. pp. 4-66).

Other relevant facts will be discussed below.

## ARGUMENT

### I. THE DISTRICT COURT ERRED IN ASSESSING FINANCIAL OBLIGATIONS TO STEENHOEK WITHOUT FIRST MAKING A CONSTITUTIONALLY MANDATED DETERMINATION OF HIS REASONABLE ABILITY TO PAY.

***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). The sentence in the instant matter is illegal by virtue of the fact that Steenhoek was ordered to pay court costs without any showing that he had the reasonable ability to repay those obligations. (Order of Disposition)(App. pp. 14-16).

The failure of the district court to note reasons for the sentence trigger the appellate court's inability to divine trial court's abuse of, or forbearance from exercising, its discretion. State v. Thompson, 856 N.W.2d 915, 919 (Iowa 2014).

***Standard of Review:*** This Court reviews restitution orders for correction of errors at law. When reviewing a restitution order, the appellate court determines whether the

district court has properly applied the law. State v. Jenkins, 788 N.W.2d 640, 642 (Iowa 2010); State v. Klawonn, 688 N.W.2d 271, 274 (Iowa 2004). The Court's review of constitutional claims is de novo. State v. Dudley, 766 N.W.2d 606, 612 (Iowa 2009).

***Discussion:*** The issue raised by Steenhoek is whether the District Court had an affirmative obligation to **preemptively** make a determination regarding his reasonable ability to pay restitution (court costs, attorney fees, jail room and board, etc.) **before** issuing a plan of restitution. A brief history of the current state of the law is provided to help provide the Court with a better understanding of the confusing state of the law.

The Iowa Code establishes how restitution is to be applied in a criminal case. Section 910.2 sets forth when restitution applies:

> In all criminal cases in which there is a...verdict of guilty, ...the sentencing court shall order that restitution be made by each offender...

what restitution must be ordered:

> 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, ... **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...

and how that restitution is to be ordered:

> In structuring a plan of restitution, the court shall provide for payments in the following order of priority: victim, fines, penalties, and surcharges, crime victim compensation program reimbursement, public agencies, 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, contribution to a local anticrime organization, and the medical assistance program.

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

Iowa Code section 910.3 discusses how the amount of restitution is determined and when it applies:

> The county attorney shall prepare a statement of pecuniary damages to victims of the defendant, and, if applicable, any award by the crime victim compensation program...and shall provide the statement to the presentence investigator or submit the statement to the court at the time of sentencing. The clerk of court shall prepare a statement of court-appointed attorney fees...including the expense of a public defender, and court costs including correctional fees claimed by a sheriff or

> municipality pursuant to section 356.7, which shall be provided to the presentence investigator or submitted to the court at the time of sentencing.
>
> ***
>
> If pecuniary damages are not available at the time of sentencing, the county attorney shall provide a statement of pecuniary damages incurred up to that time to the clerk of court. The statement shall be provided no later than thirty days after sentencing.
>
> ***
>
> At the time of sentencing or at a later date to be determined by the court, the court shall set out the amount of restitution...and the persons to whom restitution must be paid. **If the full amount of restitution cannot be determined at the time of sentencing, the court shall issue a temporary order determining a reasonable amount for restitution identified up to that time.** At a later date as determined by the court, the court shall issue a permanent, supplemental order, setting the full amount of restitution. The court shall enter further supplemental orders, if necessary. **These court orders shall be known as the plan of restitution.**

Iowa Code § 910.3 (2017) (emphasis added).

Section 910.5 addresses the establishment of a "restitution plan of payment" for individuals committed "to the custody of the director of the Iowa department of corrections":

> d. ...the director or the director's designee shall prepare a restitution plan of payment or modify any existing plan of payment.

> (1) The new or modified plan of payment shall reflect the offender's present circumstances concerning the offender's income, physical and mental health, education, employment, and family circumstances.
>
> (2) The director or the director's designee may modify the plan of payment at any time to reflect the offender's present circumstances.

Iowa Code § 910.5 (2017).

Finally, section 910.7 addresses modifications to the plan of restitution or plan of payment:

> At any time during the period of probation, parole, or incarceration, the offender or the office or individual who prepared the offender's restitution plan may petition the court on any matter related to the plan of restitution or restitution plan of payment and the court shall grant a hearing if on the face of the petition it appears that a hearing is warranted.

Iowa Code § 910.7 (2017).

In Harrison, the Iowa Supreme Court first addressed the sentencing court's discretion when assessing restitution. State v. Harrison, 351 N.W.2d 526 (Iowa 1984). The Court discussed the difference between a "plan of restitution", which establishes the amounts and kind of restitution, and a "plan of payment", which is created by the department of corrections. Id. at 528-29. The Court held that "The order [at the time of

sentencing] therefore must include a plan of restitution setting out the amounts and kind of restitution in accordance with the priorities established in 910.2." Id. At 528.

The Court went on to interpret section 910.2 to require "the sentencing court to order restitution in the plan of restitution 'for court costs, court-appointed attorney fees or the expense of a public defender when applicable' only *'to the extent that the offender is reasonably able to [make such restitution].'*" Id. at 529. Finally, the Court indicated that the reasonable ability to pay is an "express condition on the determination of the amount of restitution for court costs and attorney fees." Id.

The Supreme Court addressed restitution in State v. Janz. State v. Janz, 358 N.W.2d 547 (Iowa 1984). When the court in Janz issued its plan of restitution there was an error in the amount owed. The issue addressed by the Court was whether Janz could directly appeal the error, or if she needed to apply for relief under 910.7. Id.

The Court held: "If a defendant's time for appeal from the original judgment of conviction and sentence has expired, the defendant must initially obtain a ruling from the district court on a petition for modification before seeking modification on appeal." Id. at 549. The Court further specified in this case "that defendant's appeal from the final judgment was also a permissible appeal from all orders incorporated in that sentence, include the order of restitution here challenged." Id.

In Haines, the Supreme Court addressed a sentencing order that required Haines to pay restitution or perform public service, without a determination as to his reasonable ability to pay. State v. Haines, 360 N.W.2d 791 (Iowa 1985). The Court indicated that "the court must have the facts to determine the appropriate plan of restitution." Id. at 796. The Court went on to emphasize the statute's requirement that the court must "determine whether the defendant is reasonably able to pay and to sentence accordingly." Id.

In Van Hoff, the defendant filed for a modification of his plan of restitution under section 910.7, claiming he was

reasonably unable to pay the total amount. State v. Van Hoff, 415 N.W.2d 647 (Iowa 1987). The Supreme Court, citing to State v. Kaelin, 362 N.W.2d 526, 528 (Iowa 1985), placed the burden upon the defendant "to demonstrate either the failure of the court to exercise discretion or an abuse of that discretion." Van Hoff, 415 N.W.2d at 648. In addressing the long-term nature of Van Hoff's incarceration, the Court indicated that reasonableness "is more appropriately based on the inmates ability to pay the current installments than his ability to ultimately pay the total amount due." Id. at 649. In providing further explanation as to this determination of reasonableness, the Court said "These and other future events, all of which would bear on his ability to pay the full amount, are imponderables at the time of the restitution order." Id.

In Alspach, the Court was faced with the issue of when a defendant is entitled to a court-appointed attorney to assist with challenging a plan of restitution. State v. Alspach, 554 N.W.2d 882 (Iowa 1996). The Court held that a court-

appointed attorney is required when a challenge is raised under section 910.3, but not when a modification is requested under 910.7. Id. at 884.

In Blank, the Court addressed the timeliness of a challenge to a plan of restitution. State v. Blank, 570 N.W.2d 924 (Iowa 1997). The Court, in interpreting section 910.3, found that "[c]ourts are permitted under section 910.3 to delay entry of judgment for restitution when, for good cause, restitutionary sums are not ascertainable at the time of sentencing. A defendant, however, is granted no such statutory reprieve." Id. at 926. The Court held:

> To be considered an extension of the criminal proceedings, however, the defendant's petition under section 910.7 must be filed within thirty days from the entry of the challenged order. Failing that, or a timely appeal, a *later* action under section 910.7 would still provide an avenue for relief. But the action would be civil, not criminal, in nature.

Id.

Jackson and Swartz were decided on the same day. State v. Jackson, 601 N.W.2d 354 (Iowa 1999); State v. Swartz, 601 N.W.2d 348 (Iowa 1999). Both cases addressed

the issue of when the sentencing court must make a reasonable ability to pay determination. The Court held:

> First, it does not appear in the present case that the plan of restitution contemplated by Iowa Code section 910.3 was complete at the time the notice of appeal was filed. *Until this is done, the court is not required to give consideration to the defendant's ability to pay.* Second, Iowa Code section 910.7 permits an offender who is dissatisfied with the amount of restitution required by the plan to petition the district court for a modification. Unless that remedy has been exhausted, we have no basis for reviewing the issue in this court.

Jackson, 601 N.W.2d at 357 (citations omitted; emphasis added).

The Court in Goodrich again reasserted the constitutional requirement that "a court must determine a criminal defendant's reasonable ability to pay **before** entering an order requiring such defendant to pay criminal restitution pursuant to Iowa Code section 910.2." Goodrich v. State, 608 N.W.2d 774, 776 (Iowa 2000)(emphasis added).

In Jose, the Court was faced with the question of what defendant should do to challenge a plan of restitution when it is ordered after the notice of appeal has been filed. State v.

Jose, 636 N.W.2d 38 (Iowa 2001). The Court attempted to distinguish Jose from Swartz and Jackson when it stated "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." Id. at 45; See also State v. Campbell, No. 15-1181, 2016 WL 4543763, at *2 nt. 2 (Iowa Ct. App. Aug. 31, 2017). Further clarifying, the Court stated:

> Here, Jose challenges the *amount* of restitution, whereas in *Swartz* and *Jackson* the defendants only challenged the district court's failure to determine their *ability to pay*. The defendants in *Swartz* and *Jackson* were therefore challenging the 'restitution plan of payment,' rather than the actual 'plan of restitution'. Iowa Code § 910.7. At issue here is the plan of restitution, rather than the plan of payment.

Id. The Court also distinguished this case from Janz indicating "This case, however, is not a Janz case **because the restitution was not part of the sentencing order**." Id. at 47 (emphasis added). The Court remanded the case allowing Jose to obtain court-appointed counsel for a restitution hearing, if Jose filed the petition within 30-day of the Court's opinion. Id.

In Dudley, the Court was faced with the issue of assessing court costs against a defendant who was acquitted. State v. Dudley, 766 N.W.2d 606 (Iowa 2009). The Court held that "[a] cost judgment may not be constitutionally imposed on a defendant unless a determination is first made that the defendant is or will be reasonably able to pay the judgment." Id. at 615.

In Jenkins, the Court addressed the issue of the discretion of the sentencing court to determine a causal connection between restitution costs assessed and the defendant. State v. Jenkins, 788 N.W.2d 640 (Iowa 2010). The Court found that procedural due process related to restitution orders requires notice and an opportunity to be heard. Id. at 646. The Court also indicated that section 910.7 should not be used as a remedy for failure to provide appropriate due process because "this is a post-deprivation remedy where a hearing is a discretionary matter, not a matter of right. In addition, an offender is not entitled to appointed counsel as a matter of right." Id. at 646-647.

Finally, in Coleman, the sentencing court assessed appellate attorney fees against Coleman for the full amount unless Coleman requested a hearing regarding his reasonable ability to pay. State v. Coleman, --N.W.2d --, 2018 WL 672132 (Iowa Feb. 2, 2018). The Court did not specifically address the issue because the case was being remanded on different grounds; however, the Court stated:

> Nonetheless, when the district court assesses any future attorney fees on Coleman's case, *it must follow the law and determine the defendant's reasonable ability to pay the attorney fees without requiring him to affirmatively request a hearing on his ability to pay.*

Id. at *16 (emphasis added).

The confusion surrounding the current state of the law rests with how Iowa Code sections 910.2, 910.3, 910.5, and 910.7 apply to defendants, and how the constitutional determination of the defendant's reasonable ability to pay fits within that structure. Steenhoek suggests this Court return to a simple analysis of the code as was conducted in Harrison and Haines.

The cases all concur that the court is constitutionally required to make a determination as to the defendant's reasonable ability to pay. The question is **when** does this determination need to be made. Harrison, Haines, Van Hoff, Goodrich, Dudley, and Coleman all agree that the determination must be made **before** the order or plan of restitution is put into place. See Harrison, 351 N.W.2d at 529; Haines, 360 N.W.2d at 797; Van Hoff, 415 N.W.2d at 648; Goodrich, 608 N.W.2d at 776; Dudley, 766 N.W.2d at 615; Coleman, --N.W. --, 2018 WL 672132 at *16.

But the issue the sentencing court is faced with, when making the determination before the total amount of restitution is known, is how to make a determination when the entire set of circumstances is unknown. See Haines, 360 N.W.2d at 796; Van Hoff, 415 N.W.2d at 648-9. In an attempt to address this concern, the Court in Jackson stated that until the complete plan of restitution was completed by the court, "the court is not required to give consideration to the defendant's ability to pay." Jackson, 601 N.W.2d at 357. The

problem with this interpretation is that it is in direct conflict with section 910.2 and the cases discussed above. Additionally, the Court did not clarify what it considers a "complete plan of restitution." This is particularly concerning when considered in light of the extended amount of time it may take the court to complete the plan of restitution. While 910.3 requires the State to submit restitution applications within 30-days of sentencing, the Court of Appeals has interpreted that timeline to be a guideline. See State v. Bradley, 637 N.W.2d 206, 212-213 (Iowa Ct. App. 2001) (Failure by the State to meet the thirty-day requirement for restitution applications in 910.3 "is merely directory and not mandatory." Furthermore, "the State's failure to comply with the thirty-day requirement will not affect the validity of subsequent proceedings unless prejudice is shown.") (citations omitted).

The Jackson Court went further, requiring the defendant to request modification of the plan of payment under 910.7 prior to being able to appeal restitution. Jackson, 601 N.W.2d

at 357. The Court in Jose tried to further distinguish the issue, stating that the "reasonability to pay" is not a directly appealable issue because it is addressing the plan of payment not the plan of restitution. Jose, 636 N.W.2d at 45.

In addition to that confusion, the Court of Appeals has applied their own interpretation to this issue in some of its recent opinions, further mudding the waters.[1] In Kurtz, the Court of Appeals interpreted Harrison to require two parts to a "restitution order": the plan of restitution and the plan of payment. State v. Kurtz, 878 N.W.2d 469, 471 (Iowa Ct. App. 2016); See also State v. Johnson, 887 N.W.2d 178, 183 (Iowa Ct. App. 2016). It is unclear how the Court of Appeals reached this determination since the only place in Harrison where the phrase "restitution order" appears is in relation to the Court's decision of the case ("we vacate the restitution order..." and "We vacate and remand the restitution order..." Harrison, 351 N.W.2d at 327, 329), and neither section 910.2, 910.3, 910.4,

[1] Defendant does note that the Court of Appeals cases are not controlling law on this issue, and once again urges this Court to address this matter and clarify the law.

or 910.5 mentions the creation of a "restitution order" by the sentencing court.[2] See Iowa Code §§ 910.2, 910.3, 910.4, 910.5 (2017). The analysis portion of Harrison specifically refers to the two-part process of restitution: the plan of restitution ordered by the court, and the plan of payment established by the department of corrections or similar agency, but says nothing regarding a complete "restitution order". Harrison, 351 N.W.2d at 528-529. The Kurtz court found that until a defendant had both portions, the plan of restitution and the plan of payment, or the "restitution order", *prior to the notice of appeal being filed*, a direct appeal on restitution could

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[2] A review of the Supreme Court cases discussed above reveals the term "restitution order" used for the first time in Janz. It appears the Court uses the term "restitution order" interchangeably with the phrase "plan of restitution." Janz, 358 N.W.2d at 548 ("The State's fallback position is that a **plan of restitution or restitution order** is never appealable because there is no specific authority for such an appeal in Iowa Code section 814.6 (1983).")(emphasis added). The use of the phrase "restitution order" in both Van Hoff and Kaelin also seem to use the term interchangeably with "plan of restitution." Kaelin, 362 N.W.2d at 327-328; Van Hoff, 415 N.W.2d at 648-649.

not occur.[3] Kurtz, 878 N.W.2d at 472. The Court of Appeals in Alexander provided a succinct statement of this position:

> Our rule regarding the ability to appeal a restitution order can be summarized as follows: A restitution order is not appealable until it is complete; the restitution order is complete when it incorporates both the total amounts of the plan of restitution and the plan of payment. A defendant must also petition the court for a modification before they challenge the amount of restitution. If the above requirements are met, our Constitution requires the court to make a finding of the defendant's reasonable ability to pay.

State v. Alexander, No. 16-0669, 2017 WL 510950, at *3 (Iowa Ct. App. Feb. 8, 2017).

The current state of the law is inapposite of the Iowa Code and the constitutionally mandated requirement that the Court determine the defendant's reasonable ability to pay prior to creating the plan of restitution. To require a defendant to

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[3] The issue with this position is the unlikelihood that a defendant will have both the plan of restitution and plan of payment prior to the notice of appeal being filed. While a defendant has 30-days from the date of sentencing to file his notice of appeal, most file their notice of appeal immediately or shortly thereafter sentencing. Furthermore, the State has a minimum of 30-days in which to file for restitution. See Bradley, 637 N.W.2d at 212-213. In this case, the defendant filed his notice of appeal three days after sentencing. (Order of Disposition; Notice of Appeal)(App. pp. 14-18).

obtain a "complete plan of restitution" or a "complete restitution order" **and** to first request modification under 910.7, before being able to directly appeal the plan of restitution is a shirking of the sentencing court's responsibilities established by the Iowa Legislature. A sentence is inherently illegal, and thus directly appealable, if the sentencing court ordered restitution without making a determination as to the defendant's reasonable ability to pay.

Steenhoek proposes the following options for this Court to resolve this issue: (1) the determination of the reasonable ability to pay is made at sentencing for the total known amount of restitution, establishing a temporary plan of restitution; prior to any supplemental orders being issued, the sentencing court must hold a hearing, with court-appointed counsel for the defendant, if required, to determine the reasonable ability to pay; or (2) an initial determination as to the reasonable ability to pay is made at sentencing, establishing a temporary plan of restitution; notice is provided to the defendant *at the time a request for supplemental*

*restitution is filed* and the defendant is given an opportunity to be heard on the matter, prior to making the determination on the defendant's reasonable ability to pay and issuing the order. Both options are fraught with problems, which will briefly be explored below.

Option one may be the cleanest possible option. While in conflict with the Supreme Court decision in Van Hoff, that recommended looking at the payments made by the defendant not the total amount when making the determination on the reasonable ability to pay, it strictly interprets section 910.3's requirement that the determination must be made prior to the issuance of the plan of restitution.[4] It also allows the court to establish a blanket amount to be paid by the defendant. For example, if a court considered the reasonable ability of the

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[4] The other issue with the premise established in Van Hoff is that it requires a plan of payment to be established prior to the determination being made. This is logistically and statutorily impossible. See Van Hoff, 415 N.W.2d at 649; Iowa Code § 910.5 (2017) ("When an offender is committed to the custody of the director of the Iowa department of corrections pursuant to a sentence of confinement, **the sentencing court shall forward to the director a copy of the offender's restitution plan**...")(emphasis added).

defendant to pay and determined that the defendant, while going to prison for an extended time, did have the ability to obtain a job while in prison, then it would be reasonable for the court to assess a portion of the defendant's prospective wages to go towards restitution. If and when any supplemental restitution applications were to be filed, the sentencing court would first be required to hold an additional hearing and give the defendant an opportunity to be heard on his reasonable ability to pay prior to establishing the order. This option is in line with both the Iowa Code and case precedent. See Harrison, 351 N.W.2d at 529; Haines, 360 N.W.2d at 797; Van Hoff, 415 N.W.2d at 648; Goodrich, 608 N.W.2d at 776; Dudley, 766 N.W.2d at 615; Coleman, --N.W. --, 2018 WL 672132 at *16. While holding a sentencing hearing every time there is a supplemental restitution order is burdensome, it is necessary to protect the rights of the defendant.

Option two allows for the greatest flexibility, while protecting the rights of the defendant. The defendant is given

procedural due process, if a defendant is provided notice of an application for restitution, such as one under section 356.7, with a clear statement that the defendant must request a hearing to provide the court with additional information for the court to consider regarding the defendant's reasonable ability to pay within 30 days of the notice. If the defendant fails to request a hearing, then defendant agrees to the court's initial determination as to the reasonable ability to pay at sentencing and its application to the supplemental order. For example, if the Court initially determined that the defendant was reasonably able to pay twenty percent of his wages at prison for CVCP reimbursement, and then the sheriff's office submitted a request for reimbursement for room and board fees for his time spent in jail, the defendant could request a hearing and present the court with additional information to consider before issuing the order, or the defendant could not request a hearing and continue paying at twenty percent of his prison wages.

The problem with attempting to provide notice and an opportunity for a hearing is threefold: (1) the notice itself must be very carefully worded to properly advise the defendant of his rights; (2) most defendants will no longer have counsel representing them in district court at the time supplemental requests are filed and will not be able to obtain appropriate counsel on their options; and (3) it does not meet the constitutional requirements. A good example of why option two does not work well is Coleman. The sentencing court in Coleman provided the following notice:

> The Defendant is advised that if he/she qualifies for court appointed appellate counsel then he/she can be assessed the cost of the court appointed appellate attorney when a claim for such fees is presented to the clerk of court following the appeal. The Defendant is further advised that he/she may request a hearing on his/her reasonable ability to pay court appointed appellate attorney fees within 30 days of the issuance of the procedendo following the appeal. If the defendant does not file a request for a hearing on the issue of his/her reasonable ability to pay court appointed appellate attorney fees, the fees approved by the State Public Defender will be assessed in full to the Defendant.

Coleman, --N.W.2d--, 2018 WL 672132, at *16. This Court found that the sentencing court needed to follow the law and determine the defendant's reasonable ability to pay without forcing him to request a hearing. Id.

Either of the options would still maintain the authority under section 910.7 to allow for *modification* of the plan of restitution by either the State or defendant upon petition to the court if either party believed circumstances had changed that warranted a review. Iowa Code § 910.7 (2017); See also Jenkins, 788 N.W.2d at 646-7 ("While the offender may bring a claim under Iowa Code section 910.7, this is a post-deprivation remedy where a hearing is a discretionary matter, not a matter of right. In addition, an offender is not entitled to appointed counsel as a matter of right.").

Steenhoek urges this Court to establish option one as the standard for assessing restitution against a criminal defendant. At the very least, Steenhoek encourages this Court to require the sentencing courts to follow sections 910.2 and 910.3 and make an initial determination as to the reasonable

ability to pay, and create a temporary plan of restitution at the time of sentencing. Iowa Code §§ 910.2, 910.3 (2017). The court should consider the factors that may influence the defendant's ability to pay, such as prior employment, property owned by the defendant, any skills the defendant may have, the health of the defendant, and any expense the defendant may have such as child support or alimony. See State v. Storrs, 351 N.W.2d 520, 522 (Iowa 1984); Kaelin, 362 N.W.2d at 528; Van Hoff, 415 N.W.2d at 649. The court should also consider whether the defendant is going to be incarcerated for a long period of time. See Van Hoff, 415 N.W.2d at 649. Preferably this decision would be made in writing to allow the appellate courts to review the district court's discretionary

action. See Kaelin, 362 N.W.2d at 528.[5]

In practice, sentencing courts engage in a "reasonable ability to pay" determination all the time before total amounts have been submitted to the Court. Typically, this occurs regarding attorney fees and the defendant's reasonable ability to pay court-appointed attorney fees. Steenhoek urges this Court to adopt a new clear standard for how sentencing courts must address the determination of the defendant's reasonable ability to pay with regards to restitution.

Should this Court decide not to follow the proposed course of action, then Steenhoek requests this Court to follow Kurtz and Johnson and find that at the time of sentencing a plan of restitution and a plan of payment were both in existence, and that the sentencing court failed to determine his reasonable ability to pay. While the Order of Disposition itself does not set forth an exact amount of restitution owed at

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[5] Arguably, because restitution *is* a part of sentencing, the district court is already required to articulate its explanation for the decision it makes regarding the reasonable ability to pay. See Iowa R. Crim. P. 2.23(3)(d) (2017); State v. McGonigle, 401 N.W.2d 39, 43 (Iowa 1987); State v. Johnson, 445 N.W.2d 337, 343 (Iowa 1989).

the time of sentencing, the Combined General Docket Report indicates that at the time of sentencing the Clerk of Court had restitution amounts totaling $160 owed by Steenhoek.[6] (Order of Disposition; Comb. Gen. Docket Report)(App. pp. 14-16; 19-27). The sentencing order did establish a payment plan in the Order of Disposition: "All fines, costs, and fees are due immediately and shall be considered delinquent if not paid within 30 days of today's date." (Order of Disposition)(App. pp. 14-16).

Under the current case law "a defendant who seeks to upset a restitution order, however, has the burden to demonstrate either the failure of the court to exercise

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[6] As of February 15, 2018, the amount of restitution owed by Steenhoek has increased to $2929.50; although it is unclear where the additional restitution amounts come from because no additional filings have been made with the Court. See Iowa Courts Online Financials for case number FECR111198, https://www.iowacourts.state.ia.us. (Steenhoek asks the court to take judicial notice of Steenhoek's financial obligations, as shown by the financial information found on Iowa Courts Online. See Iowa R. Evid. 5.201(f). See, e.g., State v. Hopper, No. 15-1855, 2017 WL 936085, at *3 (Iowa Ct. App. Mar. 8, 2017) (taking judicial notice of the financial information found in the underlying case on Iowa Courts Online); State v. Colvin, No. 16-1110, 2017 WL 936173, at *2 n.4 (Iowa Ct. App. Mar. 8, 2017) (same)).

discretion or an abuse of that discretion." Van Hoff, 415 N.W.2d at 648. A review of Steenhoek's financial circumstances shows someone who is unable to reasonably pay for restitution. Steenhoek is clearly indigent, as indicated by his application for counsel that was approved. (App. for Counsel; Hearing for Initial Appearance)(App. pp. 4-6). Furthermore, a review of his financial history contained within the presentence investigation report (PSI) shows someone with a significant amount of debt and very little income. (PSI) (Conf. App. pp. 67-85). Steenhoek also has a history of medical problems, and substance abuse that may limit his ability to obtain employment, especially while serving up to five years in confinement. (PSI)(Conf. App. pp. 67-85). The Court abused its discretion when it failed to make a determination as to Steenhoek's reasonable ability to pay before ordering the payment of court costs and attorney fees.

## II. THE COURT ABUSED ITS DISCRETION WHEN IT SENTENCED STEENHOEK TO FIVE YEARS CONFINEMENT.

***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)(Improper reliance on parole policies in fashioning sentence.).

***Standard of Review:*** A sentence imposed by the district court is reviewed for errors at law. Iowa R. App. P. 6.4; 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 or a defect in the sentencing procedure. State v. Wright, 340 N.W.2d 590, 592 (Iowa 1983).

***Discussion:*** The district court abused its discretion in imposing judgment. In exercising its discretion, "the district court is to weigh all pertinent matters in determining a proper sentence including the nature of the offense, the attending circumstances, the defendant's age, character, and

propensities or chances of reform." State v. Loyd, 530 N.W.2d 708, 713 (Iowa 1995)(quoting State v. Johnson, 513 N.W.2d 717, 719 (Iowa 1994)).

Sentencing decisions of the district court are cloaked with a strong presumption in their favor. Where, as here, a defendant does not assert that the imposed sentence is outside the statutory limits, the sentence will be set aside only for an abuse of discretion. An abuse of discretion is found only when the sentencing court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. State v. Thomas, 547 N.W.2d 223, 225 (Iowa 1996)(citations omitted).

"When a sentence is not mandatory, the district court must exercise its discretion in determining what sentence to impose." Thomas, 547 N.W.2d at 225. In considering sentencing options the court is to determine, in its discretion, which of the authorized sentences will provide both the maximum opportunity for the rehabilitation of the defendant and for the protection of the community from further offenses

by the defendant and others. Iowa Code § 901.5; State v. Hildebrand, 280 N.W.2d 393, 395 (Iowa 1979). The courts owe a duty to the public as much as to defendant in determining a proper sentence. State v. August, 589 N.W.2d 740, 744 (Iowa 1999). The punishment should fit both the crime and the individual. Id.

"The nature of the offense alone cannot be determinative of a discretionary sentence." State v. Dvorsky, 322 N.W.2d 62, 67 (Iowa 1982). However, the district court enjoys the latitude to place greater importance on one sentencing consideration over others. Wright, 340 N.W.2d at 593. "The application of these goals and factors to an individual case, of course, will not always lead to the same sentence." State v. Valin, 724 N.W.2d 440, 445 (Iowa 2006). In determining whether the district court considered pertinent matters in imposing a particular sentence, we look to all parts of the record to find supporting reasons. State v. Jason, 779 N.W.2d 66, 76 (Iowa Ct. App. 2009).

In this case the district court sentenced Steenhoek to five years confinement. (Sent. Tr. p. 39 L1-3; Order of Disposition) (App. pp. 14-16). The Court indicated that it considered the following:

> When I looked at the PSI before I came in, I frankly—every judge makes kind of a initial call in their mind what they think is appropriate. I looked at your fairly lengthy criminal record and I have to say that prison seemed to me to be a logical choice to make.
>
> I looked at the nature of the crime here. It appeared to me that it was particularly violent, although there was no one injured apparently, but to pull someone over in a road and rob them essentially. I guess that wasn't the charge you pled guilty to but theft in the second degree, particularly violent. Okay.
>
> So that kind of shifted me towards thinking prison was the appropriate sentence here.
>
> Then I heard your side of this and you make a good argument why that should not be done.
>
> So I don't want to get your hopes up that I'm not going to send you to prison because I am; and the reason is that the nature of the offense, your prior record, and the fact that what you're pleading guilty to is a relatively insignificant crime. I know it carries with it a five year prison term but the fact of the matter is what I know and you probably know is that if I send you to prison, you're probably going to spend less than two years there, two and a half years the way things are set up.
>
> And I would think that if you conduct yourself in prison the way you presented yourself here,

> that's going to be less than that. I can't guarantee that. That's out of my hands.
>
> What I do is sentence you to a term not to exceed five years. I think that's the appropriate sentence here for these reasons.
>
> One is that you have a very lengthy criminal record. That you have been given numerous opportunities to rehabilitate yourself by treatment for drug addiction and those factors kind of mitigate against giving you a sentence that keeps you in the community.
>
> The other thing I need to mention is that at age forty-four, that is an age my experience suggests that if you're ever going to change, that's probably about the age you're going to change. That's something that happens to people, men in particular, when they get past forty, that they tend to think about the things that are a little more long-term in nature.
>
> And so that's why I don't feel bad about sending you to prison.

(Sent. Tr. p. 37 L7-p. 39 L1).

The Court abused its discretion by focusing primarily on one factor, Steenhoek's prior criminal record, and not taking into consideration the mitigating factors present. Steenhoek's lack of offenses between 2013 and the current offense indicate an individual who is working towards becoming better and avoiding criminal misconduct. Steenhoek's prior successful experiences with parole indicate someone who is a good choice

for probation. Additionally, his recent marriage to a woman who is well established in a job and the community reflects positively on him and his determination to make positive personal changes. (Sent. Tr. p. 13 L11-p. 19 L3; PSI)(Conf. App. pp. 67-85). The Court did not give adequate consideration to these factors in denying Steenhoek probation.

It is within this Court's power to determine that the District Court abused its discretion and to vacate an unfair and excessive sentence. Wright, 340 N.W.2d at 592. In this case, Steenhoek should have received probation. Steenhoek's sentence should be vacated and the case remanded for re-sentencing.

## CONCLUSION

For the reasons argued above, Steenhoek respectfully requests this Court vacate his sentence and remand his case for re-sentencing. Steenhoek requests this Court clarify the law regarding restitution and require sentencing courts to determine the defendant's reasonable ability to pay at sentencing. Steenhoek further requests this Court to overturn

Van Hoff and Kaelin and require sentencing courts to explicitly state their reasons for determining the defendant's reasonable ability to pay on the record.

**NONORAL SUBMISSION**

Oral submission is not requested.

**ATTORNEY'S COST CERTIFICATE**

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $ 4.83, and that amount has been paid in full by the Office of the Appellate Defender.

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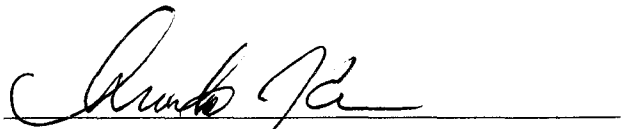

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