STATE JUDICIAL NOMINATION COMMISSION
AND OFFICE OF THE GOVERNOR
JOINT JUDICIAL APPLICATION

Please complete this application by placing your responses in normal type, immediately beneath each request for information. Requested documents should be attached at the end of the application or in separate PDF files, clearly identifying the numbered request to which each document is responsive. Completed applications are public records. If you cannot fully respond to a question without disclosing information that is confidential under state or federal law, please submit that portion of your answer separately, along with your legal basis for considering the information confidential. Do not submit opinions or other writing samples containing confidential information unless you are able to appropriately redact the document to avoid disclosing the identity of the parties or other confidential information.

PERSONAL INFORMATION

1. State your full name.

Amy Marie Moore

2. State your current occupation or title. (Lawyers: identify name of firm, organization, or government agency; judicial officers: identify title and judicial election district.)

District Court Judge, Second Judicial District

3. State your date of birth (to determine statutory eligibility).

April 8, 1978

4. State your current city and county of residence.

Ames, Story County

PROFESSIONAL AND EDUCATIONAL HISTORY

5. List in reverse chronological order each college and law school you attended including the dates of attendance, the degree awarded, and your reason for leaving each school if no degree from that institution was awarded.

Creighton University School of Law, Omaha, Nebraska
Attended August 1999 – May 2002
Juris Doctor Awarded May 2002

Iowa State University, Ames, Iowa
Attended August 1996 – August 1999
Bachelor of Arts With Distinction Awarded August 1999

6. Describe in reverse chronological order all of your work experience since graduating from college, including:

a. Your position, dates (beginning and end) of your employment, addresses of law firms or offices, companies, or governmental agencies with which you have been connected, and the name of your supervisor or a knowledgeable colleague if possible.

District Court Judge, Second Judicial District
2019 – Present

Story County Justice Center
1315 South B Avenue
Nevada, IA 50201

Supervisor: The Honorable James Drew, Chief Judge,
Second Judicial District, (641) 456-5672

Judicial Magistrate, Story County
2016 – 2019

Ames City Hall
515 Clark Avenue
Ames, IA 50010

Supervisor: The Honorable Kurt Wilke, Former Chief Judge,
Second Judicial District, (515) 576-0581

Adjunct Instructor, Des Moines Area Community College
2016 – 2019

Ames Hunziker Center
1420 South Bell Avenue
Ames, Iowa 50010

Supervisor: Jeff Kelly, Coordinator, Ames Hunziker Center,
(515) 663-6708

Owner, Attorney, and Mediator, Mid-Iowa Mediation and Law PLLC
2012 – 2019

621 Main Street
Ames, Iowa 50010

Intake Attorney, Iowa Legal Aid Iowa City Regional Office
2007 – 2010

1700 South 1st Avenue
Iowa City, Iowa 52240

Supervisor: My supervisor was Jan Rutledge, the former Director of the Iowa Legal Aid Iowa City Regional Office. Ms. Rutledge passed away in 2021.

Owner and Operator, Olive and James Bakery
2006 – 2013

Iowa City, Iowa, and Ames, Iowa

Co-Owner, Two Tarts Cake Co.
2005 – 2006

Chicago, Illinois

Co-Owner: Melissa Miller, (847) 644-0276

Trial Attorney, Federal Defenders of Eastern Washington and Idaho
2002 – 2005

10 North Post Street, Suite 700
Spokane, Washington 99201

Supervisor: Roger Peven, Former Director,
Federal Defenders of Eastern Washington and Idaho, (509) 323-9000

Legal Intern, Federal Public Defender, District of Nebraska
2000 – 2002

222 South 15th Street, Suite 300N
Omaha, Nebraska 68102

Supervisor: Karen Shanahan, Assistant Federal Public Defender,
District of Nebraska, (402) 221-7896

Legal Intern, Federal Public Defender, Southern District of Iowa
2000

400 Locust Street, Suite 340
Des Moines, Iowa 50309

Supervisor: My supervisor was Nicholas Drees, former Federal Public Defender for the Southern District of Iowa. Mr. Drees passed away in 2011.

b. Your periods of military service, if any, including active duty, reserves or other status. Give the date, branch of service, your rank or rating, and present status or discharge status.

I have not served in the military.

7. List the dates you were admitted to the bar of any state and any lapses or terminations of membership. Please explain the reason for any lapse or termination of membership.

Iowa Supreme Court, 2002

United States District Court, Southern District of Iowa, 2002

United States District Court, Eastern District of Washington, 2002 (Inactive)

United States District Court, District of Idaho, 2002 (Inactive)

United States Court of Appeals, Ninth Circuit, 2002 (Inactive)

8. Describe the general character of your legal experience, dividing it into periods with dates if its character has changed over the years, including:

a. A description of your typical clients and the areas of the law in which you have focused, including the approximate percentage of time spent in each area of practice.

b. The approximate percentage of your practice that has been in areas other than appearance before courts or other tribunals and a description of the nature of that practice.

c. The approximate percentage of your practice that involved litigation in court or other tribunals.

d. The approximate percentage of your litigation that was: Administrative, Civil, and Criminal.

e. The approximate number of cases or contested matters you tried (rather than settled) in the last 10 years, indicating whether you were sole counsel, chief counsel, or associate counsel, and whether the matter was tried to a

jury or directly to the court or other tribunal. If desired, you may also provide separate data for experience beyond the last 10 years.

f. The approximate number of appeals in which you participated within the last 10 years, indicating whether you were sole counsel, chief counsel, or associate counsel. If desired, you may also provide separate data for experience beyond the last 10 years.

2019 – Present

On May 1, 2019, I began my service as a district court judge. Since my appointment, I have presided over approximately seventy trials to the court, seven civil jury trials, and seven criminal jury trials. I also preside over a weekly "court service day" where I typically handle all types of motions, as well as criminal guilty plea and sentencing hearings. While some motions may be quickly dealt with and my ruling filed, a considerable amount of my workload includes more complex motions, including motions for summary judgment. These matters often require significant time to review the case and the issues presented, conduct legal research, and ultimately draft a ruling. Without having exact statistics, I would estimate that the majority of my caseload involves family law, criminal law, and probate matters. The number and type of cases also varies from county to county.

2007 – 2019

Beginning in 2007, I worked for Iowa Legal Aid as an intake attorney in Iowa City. I opened my own general practice in 2012 in Ames. From 2007 through 2019, my typical clients included individuals from all walks of life and socioeconomic statuses as well as small businesses. I focused on family law, probate and estate planning, drafting contracts, employment law, juvenile law, criminal law, criminal appeals, and post-conviction relief actions. During this time period, litigation comprised anywhere from 50% to 70% of my practice. My litigation was approximately 5% administrative, 65% civil, and 30% criminal.

I completed training to become certified in collaborative practice, which is a voluntary legal process in which the parties agree to work collaboratively, along with their attorneys, to resolve disputes without litigation. I also became a certified mediator and served as mediator in cases including dissolution of marriage, custody, probate, employment law, elder care, juvenile matters, truancy, and other civil law disputes before, during, and after the litigation process. I served as a roster mediator for family law matters in Boone, Marshall, and Story Counties, as a roster mediator for the Fourth, Fifth, and Sixth Judicial Districts, and as a roster mediator for the Polk County Probate Mediation Pilot Program. I also served as the truancy mediator for Story County and Boone County.

In 2016, I was appointed as judicial magistrate for Story County. As the only magistrate in Story County, I handled all small claims actions and the majority of all forcible entry and detainer actions, municipal infractions, traffic and ordinance

violations, and involuntary commitment proceedings. During my tenure as magistrate, I presided over approximately seventy-five civil and criminal bench trials, and approximately five simple misdemeanor criminal jury trials.

In the last ten years, all of my cases were handled as sole counsel. I tried approximately thirty cases, four of which were jury trials. I participated as sole counsel in approximately fifteen appeals during this time period. I also contributed appellate research and writing support to other attorneys on a contract basis.

2002 – 2005

From 2002 through 2005, I represented indigent criminal defendants in proceedings in the United States District Court, the United States Court of Appeals for the Ninth Circuit, and the Supreme Court of the United States. I practiced solely in federal court, appearing in criminal trial and appellate matters, as well as civil post-conviction trial and appellate matters. My practice was devoted entirely to representing indigent criminal defendants charged with federal crimes or those that were seeking civil post-conviction relief. My practice was approximately 90% criminal and 10% civil (post-conviction relief).

I estimate I tried between twenty and thirty matters to conclusion as sole counsel, including jury and bench trials. During this time, all of my practice was comprised of appearances before trial and appellate courts.

2000 – 2002

From 2000 through 2002, I worked as a law clerk in two federal defender offices while in law school. I conducted research and drafted trial and appellate motions, briefs, and legal research memoranda for review by Assistant Federal Defenders and the Federal Defenders.

9. Describe your pro bono work over at least the past 10 years, including:

a. Approximate number of pro bono cases you've handled.

b. Average number of hours of pro bono service per year.

c. Types of pro bono cases.

Prior to my appointment as a district court judge, I handled approximately two hundred fifteen pro bono cases, averaging approximately one hundred hours of pro bono service per year. These cases included drafting contracts, small claims actions, dissolution of marriage and custody cases, criminal defense work, and mediation.

10. If you have ever held judicial office or served in a quasi-judicial position:

a. Describe the details, including the title of the position, the courts or other tribunals involved, the method of selection, the periods of service, and a description of the jurisdiction of each of court or tribunal.

District Court Judge, Second Judicial District, 2019 – Present

I have served as a district court judge for the Second Judicial District since my appointment by Governor Kim Reynolds on April 1, 2019. I currently serve with ten other district court judges in subdistrict 2B, which encompasses Boone, Calhoun, Carroll, Greene, Hamilton, Hardin, Humboldt, Marshall, Pocahontas, Sac, Story, and Webster counties. Of these counties, I primarily work in Story, Marshall, Boone, Hamilton, Hardin, and Webster.

The district court docket in subdistrict 2B is wide ranging in both civil and criminal matters. My cases include civil torts, breach of contract claims, employment law actions, criminal felonies and misdemeanors, applications for post-conviction relief, dissolution of marriage and paternity and custody actions, administrative child support proceedings, guardianships and conservatorships, probate and trust actions, administrative appeals, appeals of the decisions of district associate judges when they are presiding as a magistrate, and other civil, criminal, and administrative actions.

The jurisdiction of a district court judge includes "exclusive, general, and original jurisdiction of all actions, proceedings, and remedies, civil, criminal, probate, and juvenile, except in cases where exclusive or concurrent jurisdiction is conferred upon some other court, tribunal, or administrative body." Iowa Code section 602.6101.

Judicial Magistrate, Second Judicial District, Story County, 2016 – 2019

I was appointed by the Magistrate Nominating Commission for Story County in 2016 to fill an unexpired term following the resignation of my predecessor. I was re-appointed to the position in 2017 by the Commission. During my tenure, I served as the sole judicial magistrate for Story County.

As magistrate, I presided over civil and criminal judicial hearings and bench and jury trials including simple misdemeanors, county and municipal infractions, involuntary civil commitments, forcible entries and detainers, replevins, and small claims. I also issued search warrants and conducted initial appearances.

Pursuant to Iowa Code section 602.6405, magistrates "have jurisdiction of simple misdemeanors regardless of the amount of the fine, including traffic and ordinance violations, and preliminary hearings, search warrant proceedings, county and municipal infractions, and small claims." Magistrates also "have jurisdiction to determine the disposition of livestock or another animal, as provided in sections 717.5 and 717B.4, if the magistrate determines the value of the livestock or animal is less than ten thousand dollars." Magistrates also "have jurisdiction to exercise the powers specified in sections 556F.2 and 556F.12, and to hear complaints or preliminary informations, issue warrants, order arrests, make commitments, and take bail." Additionally, magistrates "have jurisdiction over violations of section 123.49, subsection 2, paragraph 'h'." Attorney magistrates also "have jurisdiction over all proceedings for the involuntary commitment, treatment, or hospitalization of individuals under chapters 125 and 229, except as otherwise provided under section 229.6A." Magistrates have jurisdiction to conduct hearings authorized under section 809.4. Magistrates also hear and determine violations of and penalties for violations of section 453A.2, subsection 2.

b. List any cases in which your decision was reversed by a court or other reviewing entity. For each case, include a citation for your reversed opinion and the reviewing entity's or court's opinion and attach a copy of each opinion.

Tim v. Tim, Story County case number SCSC056946

State v. Cruz, Story County case number FECR058425,
No. 20-1625, 2021 WL 5106448 (Iowa Ct. App. Nov. 3, 2021)

Hardy-Wilson v. Hadaway, Story County case number DACV051647,
No. 21-0336, 2021 WL 5475585 (Iowa Ct. App. Nov. 23, 2021)

c. List any case in which you wrote a significant opinion on federal or state constitutional issues. For each case, include a citation for your opinion and any reviewing entity's or court's opinion and attach a copy of each opinion.

I have addressed constitutional issues in numerous rulings, primarily involving search and seizure issues raised in criminal motions to suppress evidence as well as right to counsel issues raised in applications for post-conviction relief. However, I have never authored a ruling that has declared a statute or regulation to be unconstitutional, nor do I believe any of my rulings that addressed federal or state constitutional issues were "significant" beyond the significance to the involved parties.

11. If you have been subject to the reporting requirements of Court Rule 22.10:

a. State the number of times you have failed to file timely rule 22.10 reports.

I have never failed to file a timely rule 22.10 report.

b. State the number of matters, along with an explanation of the delay, that you have taken under advisement for longer than:

i. 120 days.

One, *Hansen v. Neill*, Story County case number SCSC056251. This matter was a small claims petition for a money judgment involving two former friends that I presided over as magistrate. By agreement of the plaintiff and the defendant, I agreed to hold the case open in order to afford the defendant to pay the amount owed to the plaintiff in installments. If the defendant were to default on the payments, I would enter judgment for the remainder owed. If the defendant paid the amount in full pursuant to the agreement, I would dismiss the case. Out of an abundance of caution, I included this matter on my Rule 22.10 reports, however, the delay in entering judgment was not caused by my inaction.

ii. 180 days.

None

iii. 240 days.

None

iv. One year.

None

12. Describe at least three of the most significant legal matters in which you have participated as an attorney or presided over as a judge or other impartial decision maker. If they were litigated matters, give the citation if available. For each matter please state the following:

a. Title of the case and venue,
b. A brief summary of the substance of each matter,
c. A succinct statement of what you believe to be the significance of it,
d. The name of the party you represented, if applicable,
e. The nature of your participation in the case,
f. Dates of your involvement,

g. The outcome of the case,
h. Name(s) and address(es) [city, state] of co-counsel (if any),
i. Name(s) of counsel for opposing parties in the case, and
j. Name of the judge before whom you tried the case, if applicable.

White v. Lambert, 370 F.3d 1002 (9th Cir. 2004).

This matter involved the appeal of the dismissal of a habeas corpus petition regarding the legality of my client, Joel White's, detention resulting from an administrative decision by state prison authorities in Washington. I represented Mr. White as sole counsel throughout the pendency of his appeal before the United States Court of Appeals for the Ninth Circuit.

This matter involved issues surrounding the utilization of private prison facilities by the state of Washington. This case was personally significant to me, and I will always remember this case for a number of reasons, not the least of which is that it was my first oral argument before the United States Court of Appeals for the Ninth Circuit. Although I did not prevail on the appeal, I received a letter commending my oral advocacy from M. Margaret McKeown, United States Circuit Judge. At this early stage in my legal career, I often would suffer from imposter syndrome, and Judge McKeown's letter gave me a much appreciated boost of confidence. I have never forgotten how much it meant to me as a young lawyer to receive such an accolade from a judge. Now that I am a judge myself, I make a point to reach out to new lawyers and provide positive feedback when I can.

Opposing counsel included Christine Gregoire and Paul Weisser of the Washington State Attorney General's Office. This matter was argued before the United States Court of Appeals for the Ninth Circuit.

State v. Bassett, Hamilton County case number FECR340855

In this case, the defendant, Zackery Bassett, was charged in November 2018 with the murder of his girlfriend. The case was specially assigned to another judge in our district, however, he reached the mandatory retirement age before the case could be tried. I inherited the special assignment in March of 2020 and ultimately conducted the trial in February of 2021, shortly after jury trials resumed after the Iowa Supreme Court's second suspension of jury trials due to Covid-19 had expired.

This case will always be significant to me as it was my first class A felony trial as a judge. The fact we were trying the case during a surge in Covid-19 cases coupled with the need to repeatedly address matters outside the jury's presence regarding admissibility of evidence also created logistical challenges. I am always grateful for the support that our judicial and clerk of court staff provide, however, they went above and beyond their normal job duties to make sure I was able provide a fair trial for all parties while at the same time protecting the health of everyone involved. The jury returned a verdict of

guilty to the charge of murder in the second degree. Mr. Bassett filed an appeal, the outcome of which is still pending.

The State of Iowa was represented by Assistant Attorneys General Keisha Cretsinger and Nicole Leonard. Mr. Bassett was represented by Paul Rounds and Michelle Wolf.

State v. Jimenez, Story County case number FECR058426

In this case, the defendant, Jacob Jimenez, pled guilty to first-degree robbery, first-degree burglary, and willful injury resulting in serious injury, following a home invasion, brutal assault, and robbery of an elderly woman. Mr. Jimenez and two other co-defendants were charged and all ultimately reached plea agreements with the State. At the time he committed the offenses, Mr. Jimenez was a seventeen-year-old juvenile.

In sentencing Mr. Jimenez, the State requested that I impose a combined sixty-year sentence, including the imposition of a seventeen-and-a-half-year mandatory minimum sentence. Mr. Jimenez's attorneys argued for a fifty-year sentence with a three-year minimum. I was required to conduct an individualized sentencing hearing that considered the factors enumerated in *State v. Miller*, *State v. Lyle*, and *State v. Roby.* The hearing took almost a full day, and I heard testimony from both the State's and Mr. Jimenez's experts in child developmental psychology, as well as Mr. Jimenez's adoptive mother, and the victim's impact statement.

This case was especially significant for me. Prior to taking the bench, I had conducted presentations and trainings related to the United States Supreme Court's and the Iowa Supreme Court's opinions on changes in juvenile sentencing as well as the science behind juvenile justice reform that focuses on brain development and the impact of early adverse childhood experiences. I was now in the position of applying this law to a specific person and a specific set of circumstances and imposing a lawful and appropriate sentence. In this case, there was no question that Mr. Jimenez had experienced profound childhood trauma and abuse from an early age. However, I ultimately determined that even when considering the specialized juvenile sentencing factors, a sentence of sixty years and a seventeen-and-a-half-year minimum was appropriate.

Mr. Jimenez appealed my application of the juvenile sentencing factors; my decision was affirmed by the Iowa Court of Appeals on September 22, 2021.
State v. Jimenez, No. 20-1086 (Iowa Ct. App. Sept. 22, 2021).

The State of Iowa was represented by Assistant Story County Attorneys Tyler Grimm and Tiffany Meredith. Mr. Jimenez was represented by Katherine Flickinger and Alessandra Marcucci.

13. Describe how your non-litigation legal experience, if any, would enhance your ability to serve as a judge.

In my service as a district court judge and as a judicial magistrate, I have found that my experience as a mediator has been exceedingly helpful. A mediator is required to afford all parties the opportunity to be heard and also requires that each party knows that they have been listened to and treated with respect. These skills are also required of any judge.

Throughout my career, I have also spent considerable time contributing towards legal education programs and volunteering my efforts towards improving judicial administration and access to justice. While with the Federal Defenders of Eastern Washington and Idaho, I conducted and assisted with both training and education for those practicing in the area of federal criminal defense, including drafting revisions and updates to *My Little Red Rules Book*. While in private practice, I conducted numerous trainings and presentations, many of which were focused on innovative approaches to legal disputes, including alternative dispute resolution and juvenile restorative justice. I also served as an adjunct instructor at Des Moines Area Community College, where I taught an introductory level three-hour business law course. I have continued to be involved in continuing education after being appointed as a district court judge by presenting on pertinent legal topics as well as serving on multiple judges' panels for bar association events.

I have also contributed my time and efforts towards improving judicial administration and our court system. As an attorney, I served on the Iowa Supreme Court's Family Case Processing Reform Task Force, and authored the Alternative Dispute Resolution Work Group's outline of proposed reforms. I also volunteered to help establish the first small claims mediation program in Story County. As a district court judge, when the Iowa Supreme Court ordered all judicial districts to implement mandatory mediation or judicial settlement conference procedures in family law cases, I quickly devised a program for the Second Judicial District, including policies, orders, and forms, at the request of the Chief Judge and District Court Administrator. Most recently, I have volunteered to serve on the Judicial Retirement Workgroup as the representative from the Second Judicial District.

I consider volunteering time to present continuing education and training programs and participation in efforts to improve judicial administration to be a duty we all share as members of the bench and bar. These experiences have also made me a better lawyer and judge and afforded me many opportunities to work with attorneys and judges across the state. If I were appointed as a judge on the Iowa Court of Appeals, I would continue to fulfill my obligation by continuing to volunteer in these capacities.

14. If you have ever held public office or have you ever been a candidate for public office, describe the public office held or sought, the location of the public office, and the dates of service.

I served as a City Councilor for the City of University Heights, Iowa, from 2007 through 2011. I was elected to two terms and resigned prior to the completion of my second term due to our family's relocation to Ames.

15. If you are currently an officer, director, partner, sole proprietor, or otherwise engaged in the management of any business enterprise or nonprofit organization other than a law practice, provide the following information about your position(s) and title(s):

a. Name of business / organization.
b. Your title.
c. Your duties.
d. Dates of involvement.

I currently serve as a board member of the Iowa Judges Association. I began my service on the board in June of 2022. I also serve as a board member of Story Theater Company, a nonprofit organization. I began my service on the board in March of 2022.

16. List all bar associations and legal- or judicial-related committees or groups of which you are or have been a member and give the titles and dates of any offices that you held in those groups.

Member, Iowa State Bar Association, 2002 – Present
Mock Trial Volunteer Judge, 2012 — Present

Member, Story County Bar Association, 2012 – Present
President, 2018 – 2019
Vice President, 2017 – 2018
Secretary, 2016—2017
Member, Annual Bench-Bar Conference Planning Committee, 2016 – 2019

Member, Hamilton County Magistrate Appointing Commission, 2021 – Present

Member, Boone County Magistrate Appointing Commission, 2019 – 2021

Member, Iowa Judges Association, 2019 – Present
Board Member, 2022 – Present
Member, Judicial Retirement Workgroup, 2022 – Present

Member, Iowa Supreme Court's Family Law Case Processing Reform Task Force, 2015 – Present
Member, Executive Steering Committee, 2015 – Present
Recorder, Alternative Dispute Resolution Work Group, 2015 – Present

17. List all other professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed above, to which you have participated, since graduation from law school. Provide dates of membership or participation and indicate any office you held. "Participation" means consistent or repeated involvement in a given organization, membership, or regular attendance at events or meetings.

Member, Iowa Department on Aging, Iowa Aging Issues Mediation Project, 2015 – 2019

Member, Iowa Association of Mediators, 2014 – 2019
Treasurer, 2014 – 2016

Iowa State University Alumni Association, Member, 1999 – Present

Presidents Club, University of Iowa, 2007 – 2019

Cyclone Club, Iowa State University, Member, Directors Level, 2009 – 2019

Gilbert Community Schools, Volunteer, 2012 – Present

Gilbert Education Foundation, Volunteer and Member, 2012 – Present

Creighton Society, Creighton University, Member, 2016 – 2019

Reggie's Sleepout, Ames, Event Sponsor, 2017 – 2019

18. If you have held judicial office, list at least three opinions that best reflect your approach to writing and deciding cases. For each case, include a brief explanation as to why you selected the opinion and a citation for your opinion and any reviewing entity's or court's opinion. If either opinion is not publicly available (i.e., available on Westlaw or a public website other than the court's electronic filing system), please attach a copy of the opinion.

Centurion Industries, Inc. d/b/a TFC Canopy v. State of Iowa, Story County case number LACV051669

This ruling is representative of my approach to civil motions for summary judgment. This case also involved a claim of sovereign immunity by the State. As I typically spend five to six months per year assigned to Story County, I often handle cases involving claims of governmental immunity due to the number of actions brought in Story County involving Iowa State University and the Iowa Department of Transportation. I am always cognizant of the fact that an appellate court may be reviewing my decision. With that in mind, I will address all issues raised by the parties even in cases where I might find that the motion could be decided on one issue without the necessity of reaching all the issues. This not only allows a reviewing court multiple opportunities to potentially affirm my decision,

but I believe also helps parties to know that I considered all the issues raised in reaching my decision. My ruling was appealed and the appeal was voluntarily dismissed.

In the Matter of the Paternity of Baby A, Story County case number DRCV051869

This case exemplifies one tenant of the judicial philosophy I strive to follow every day as a district court judge: "you are defined by who you are when no one is looking." There are many instances when serving as a judge when you could grant a party's requested relief without the proper statutory or common law authority to do so and your decision would never be subject to appellate review. This unusual case involved such a situation. The parties, who included a gestational surrogate, her husband, and the genetic parent of the baby being carried by the surrogate, all sought a declaratory judgment prior to the baby's birth naming the genetic parent as the parent of the baby on the baby's birth certificate, further ordering that the unknown egg donor had no parental rights to the baby, and directing the hospital to release the baby to the genetic parent after his or her birth. As the parties were all in agreement, I could have easily entered an order granting the requested relief and no one would have sought further review of my decision. However, I ultimately determined that I did not have the legal authority to enter such an order based upon the current law. My decision was not appealed. The parties were able to reassert their request for relief after the birth of the child, which I then granted.

Havlik v. Havlik, Story County case number CDDM013191

This case illustrates my approach to dissolution of marriage cases involving issues of child custody, child support, spousal support, and property distribution. In this particular matter, the petitioner wife was self-represented and both parties had accused the other of abusive behavior towards their children and towards each other. I wanted to make sure I included detailed findings of fact and credibility determinations so that the parties would understand how I had reached my decision. I also attempted to provide as much detail as possible regarding the practicalities of my ruling. This decision was not appealed.

19. If you have not held judicial office or served in a quasi-judicial position, provide at least three writing samples (brief, article, book, etc.) that reflect your work.

I currently hold judicial office.

OTHER INFORMATION

20. If any member of the State Judicial Nominating Commission is your spouse, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, father, mother, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister, state the Commissioner's name and his or her familial relationship with you.

I am not related to any member of the State Judicial Nominating Commission.

21. If any member of the State Judicial Nominating Commission is a current law partner or business partner, state the Commissioner's name and describe his or her professional relationship with you.

No member of the State Judicial Nominating Commission is a current law partner or business partner.

22. List the titles, publishers, and dates of books, articles, blog posts, letters to the editor, editorial pieces, or other published material you have written or edited.

I have not written or edited any articles, blog posts, letters to the editor, editorial pieces, or other published material.

23. List all speeches, talks, or other public presentations that you have delivered for at least the last ten years, including the title of the presentation or a brief summary of the subject matter of the presentation, the group to whom the presentation was delivered, and the date of the presentation.

Public remarks at the judicial investiture of the Honorable Derek Johnson,
Fort Dodge, Iowa, March 4, 2022

"Judges Panel: Technology Takeaways in Court from COVID-19 and Practice Pointers,"
Iowa State Bar Association Annual Meeting via videoconference, June 11, 2021

"Judges Panel," Story County Bar Association Bench-Bar Seminar via videoconference,
January 29, 2021

"Challenges to Jury Pools," co-presenter with the Honorable Jeffrey Neary,
Iowa Judicial Branch Fall Judges Conference via videoconference, October 6, 2020

"Lunch and Learn," Story County Bar Association, Nevada, Iowa, November 12, 2019

Public remarks at my judicial investiture, Ames, Iowa, May 23, 2019

"Creating and Enforcing Attorney's Liens Ethically,"
Iowa State Bar Association Annual Meeting, Des Moines, Iowa, June 20, 2018

"Recent Guardian Ad Litem Order: What You Need to Know,"
Iowa Association for Justice's Criminal Defense and Family Law Trial Lawyers
Conference, Coralville, Iowa, April 19, 2018

"The Basics of Commitments, Guardianships, and Conservatorships,"
Iowa State Bar Association Annual Meeting, Des Moines, Iowa, June 21, 2017

"Access and Visitation: Successful Outcomes Through Mediation,"

Youth and Shelter Services, Ames, Iowa, February 10, 2017

Katherine Finn Milleman Memorial Scholarship presentations at various Story County Bench-Bar Seminars, Ames, Iowa, 2017 – Present

"Introduction to Mediation," Communication Studies 218, Iowa State University, Ames, Iowa, 2016 – 2019

"Elder and Probate Mediation Training," Iowa State Bar Association, Des Moines, Iowa, March 1 – 2, 2016 and April 4 – 6, 2016

"Unbundling and Limited Scope Agreements: Practical and Ethical Considerations," Story County Bar Association, Ames, Iowa, March 7, 2016

"Building Peacemakers: Peer Mediation and Youth Restorative Justice," Variety AMP Camp, Des Moines, Iowa, July 24, 2015

"Rethinking Conflict: Mediation and Restorative Justice in Our Communities," Thirtieth Annual Risky Business Conference, Ames, Iowa, April 28, 2015

"Juvenile Mediation and Restorative Justice," Story County Bench-Bar Seminar, Ames, Iowa, January 23, 2015

"Access and Visitation: Successful Outcomes Through Mediation," Youth and Shelter Services, Ames, Iowa, July 29, 2014

24. List all the social media applications (e.g., Facebook, Twitter, Snapchat, Instagram, LinkedIn) that you have used in the past five years and your account name or other identifying information (excluding passwords) for each account.

I have not used any social media applications in the past five years.

25. List any honors, prizes, awards or other forms of recognition which you have received (including any indication of academic distinction in college or law school) other than those mentioned in answers to the foregoing questions.

Dean's Merit Full Tuition Scholarship, Creighton University School of Law

CALI Excellence for the Future Award, Creighton University School of Law

Phi Beta Kappa Honor Society, Iowa State University

Golden Key National Honor Society, Iowa State University

Phi Kappa Phi Honor Society, Iowa State University

Alpha Lambda Delta Honor Society, Iowa State University

Phi Eta Sigma Honor Society, Iowa State University

26. Provide the names and telephone numbers of at least five people who would be able to comment on your qualifications to serve in judicial office. Briefly state the nature of your relationship with each person.

The Honorable Gina Badding
(712) 792-9685

Judge Badding and I were appointed by Governor Kim Reynolds as district court judges in the Second Judicial District on the same day. She and I worked together as colleagues until her appointment to the Iowa Court of Appeals.

The Honorable James Drew
(641) 456-5672

Chief Judge Drew currently serves as Chief Judge of the Second Judicial District and is, along with Assistant Chief Judge Adria Kester, my administrative judicial supervisor.

The Honorable Adria Kester
(515) 386-2083

Judge Kester currently serves as Assistant Chief Judge of the Second Judicial District and is, along with Chief Judge James Drew, my administrative judicial supervisor. Judge Kester has also known me both personally and professionally for over twenty years.

The Honorable Jennifer Miller
(641) 751-0259

Judge Miller serves with me as a district court judge in the Second Judicial District and is a colleague and friend.

The Honorable Dale Ruigh
(515) 231-2735

Judge Ruigh is retired from his service as a district court judge in the Second Judicial District. I appeared in his court as an attorney and he has become an excellent resource and friend following my appointment as a district court judge.

Dr. Timothy Day
(515) 294-7100

Dr. Day has known me and my family since we moved to Ames in 2012. He is a friend and fellow community volunteer.

27. Explain why you are seeking this judicial position.

I do not seek to become a judge on the Iowa Court of Appeals simply because I view it as "the next step" in an advancement of my judicial career. I seek this position because it involves the work that I wish to focus on and that I have most enjoyed over the course of my legal career – research and writing. I have always enjoyed the fast pace of trial practice as both an attorney and as a judge. However, in my work as a judge, I always relish the opportunity to deeply entrench myself in the details of a case, research the applicable law, and then write a clear and concise decision that will allow the parties and any reviewing court to understand how I reached my factual and legal conclusions.

While many applicants are certainly well-qualified to serve as an appellate court judge, not every applicant is necessarily a good fit for the job. Many trial attorneys and trial judges, who typically interact with a number of people on a day-to-day basis, would find the work of an appellate judge to be isolating. While I would miss trial work and busy court days as well, I know that my legal and non legal volunteer work and my life outside my career is more than enough to make up for the difference were I to be appointed as a judge on the Iowa Court of Appeals. For me, the opportunity to do the work I most enjoy on a full-time basis outweighs the potential loss of the ability to preside over hearings and trials.

It is an honor to serve as a district court judge and I still am humbled every day that I have been given the opportunity to serve. While I truly enjoy my current position, I now seek to serve as a judge on the Iowa Court of Appeals not only because I believe I could serve ably and enhance the Court through my service, but also because it involves the work I wish to do for the remainder of my legal career. In considering my experience, temperament, and personality, I believe that I am not only uniquely qualified but also well-suited to serve on the Iowa Court of Appeals.

28. Explain how your appointment would enhance the court.

Many current and former judges on the Iowa Court of Appeals have been extremely generous with their time and have spoken with me regarding their experiences on the Court as well as what attributes they believe are important to serving successfully on the Court. All have emphasized the importance of experience, work ethic, and a collegial demeanor. I have a broad base of trial and appellate experience, both as an attorney and as a judge, that has prepared me well to serve as an appellate judge that handles cases from a variety of areas of the law. I also have, for many years, managed both my busy career and home life with the support of my family, and those skills would enable me to handle a heavy appellate caseload. I also possess the organization and drive to successfully work independently.

I would also strive to maintain the collegiality the Court is known for, even when disagreements on the appropriate outcome of a case occur amongst the assigned judges. If those conflicts cannot be resolved, I have the confidence and independence to reach my own legal conclusions on the merits of an appeal and author a dissent if warranted. Ultimately, the work of a judge on the Iowa Court of Appeals requires the ability to reach the correct decision promptly, to clearly articulate the reasons for that decision, and to do so in a high number of cases, all while maintaining the professional respect of your fellow judges on the Court and the diligent staff. I know that I have the attributes necessary to do this work and to do it well.

29. Provide any additional information that you believe the Commission or the Governor should know in considering your application.

I am a native of central Iowa and I am proud that my values and common sense, both of which strongly influence my personal and professional conduct, were honed in small-town Iowa. I am a proud Iowan and I am committed to enhancing the reputation of our community, both at the local and state level, in everything that I do. If I were to be appointed as a judge on the Iowa Court of Appeals, I would continue my work to enhance the reputation of our judiciary with those to which we are beholden – the citizens of Iowa.

I hereby certify all the information in this joint judicial application is true and correct to the best of my knowledge.

Signed: _____ Date: August 29, 2022

Printed name: Amy M. Moore

Question 10b

Reversed Decisions

IN THE IOWA DISTRICT COURT FOR STORY COUNTY

UDOYARA TIM, Plaintiff, v. HAZEL TIM, Defendant.	CASE NO. SCSC056946 ORDER

This matter comes before the Court for scheduled trial upon Plaintiff's Petition for Forcible Entry and Detainer. Plaintiff Udoyara Tim personally appeared, along with his attorney, Stephen Humke. Defendant Hazel Tim personally appeared, representing herself.

The court heard testimony and took other evidence at the hearing. Plaintiff and Defendant have resided at 1407 Jefferson Street in Ames, Iowa, since a decree dissolving their marriage was entered in Story County District Court in 2004. Plaintiff was awarded possession of the property which is now the subject of this action. Defendant has resided at the property since the dissolution, and no lease agreement was ever entered into with Plaintiff.

Plaintiff does not contend that Defendant is a tenant under the meaning of Iowa Code Chapter 648, nor that a tenancy at will has been created between Plaintiff and Defendant. Instead, Plaintiff asserts that Defendant is a licensee pursuant to a license granted by Plaintiff to occupy his residence; Plaintiff is thus entitled to relief pursuant to *Bernet v. Rodgers*, 519 N.W.2d 808 (Iowa 1994).

The Iowa Code is explicit as to the actions and claims that may be heard as small claims. Forcible entry and detainer actions may be heard as small claims only in the following instances:

1. Where the defendant has by force, intimidation, fraud, or stealth entered upon the prior actual possession of another in real property, and detains the same.
2. Where the lessee holds over after the termination of a lease.
3. Where the lessee holds contrary to the terms of the lease.
4. For the nonpayment of rent, when due.

Iowa Code §§ 631.1(2), 648.1. Without proof to establish a claim under one of these four situations, a small claims court does not have jurisdiction to hear the case. *Robinson v. Black*, 607 N.W.2d 676, 677-78 (Iowa 2000).

There is no contention that Defendant by force, intimidation, fraud, or stealth entered upon the prior actual possession of Defendant. Plaintiff also does not assert that a landlord and tenant relationship exists between the parties. Plaintiff's cause of action pursuant to *Bernet* does not fall under any of the recognized permissible actions under Iowa Code § 631.1(2). Thus, this Court does not have jurisdiction, and the matter must be dismissed.

Therefore, Plaintiff's petition is hereby dismissed with costs assessed to Plaintiff.

IT IS SO ORDERED.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
SCSC056946	UDOYARA TIM VS. HAZEL TIM

So Ordered

Amy M. Moore, Magistrate
Second Judicial District of Iowa

D2 - Magistrate Amy M Moore

E-FILED 2017 APR 06 11:55 AM STORY - CLERK OF DISTRICT COURT

IOWA DISTRICT COURT FOR STORY COUNTY

UDOYARA TIM, Plaintiff, v. HAZEL TIM, Defendant.	Case No. SCSC0556946 **RULING ON APPEAL AND ORDER**

This matter came before the court on April, 2017. The hearing was audio recorded. Plaintiff/Appellant appeared personally and with counsel, Mr. Stephen Humke. Defendant did not appear. The matter proceeded without presentation of additional evidence. The court has considered the plaintiff's brief and argument.

An action in FED is statutory in nature. A remedy in an action for FED must be properly grounded per Iowa Code Chapter 648. Grounds for the remedy of FED are found at Iowa Code Section 648.1. The burden of proof is on the plaintiff. However, the statute is to be interpreted liberally and broadly to affect the purpose of peaceably returning real property to the rightful possessor[1]; it is tried as an equitable action[2]; and, it may not necessarily be limited to landlord/tenant issues.[3]

Plaintiff and defendant are former spouses. Their marriage was dissolved in 2004. The subject property was awarded to the plaintiff in the dissolution by the district court but the defendant continued to live their despite contrary to the objections of the plaintiff. The plaintiff has repeatedly asked the defendant to remove herself from the property over the years and she has ignored or refused those requests.

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[1] Petty v. Faith Bible Christian Outreach Center, Inc., 584 N.W.2d 303 (1998); Steele v. Northup, 168 N.W.2d 785 (1969); and, Crawley v. Price, 692 N.W.2d 44 (Court of Appeals 2004)
[2] Iowa Code Section 648.5(1)
[3] Capital Fund 85 Ltd. Partnership v. Priority Systems LLC, 670 N.W.2d 154 (2003)

Like these proceedings, dissolution of marriage proceedings are equitable in nature. The district court has balanced the equities relative to the parties in awarding the property to the plaintiff. Defendant has no legal or equitable claim to the property. The dissolution was not appealed by either party. The plaintiff seeks possession of property that is legally and equitably his to own and possess. He may rightfully possess the property to the exclusion of the defendant. He has attempted informal, non-judicial means to peaceably coax the defendant from the property without success.

The defendant is not a guest or tenant. She remains on the property by operation so fact, not by operation of law. She is the former spouse of the plaintiff and former owner of the property. Her marriage and claim to the property were extinguished by operation of law, yet she remained on the property by simply refusing to leave following the parties dissolution of marriage proceedings. Given the plaintiff's objection to her presence and attempts to informally and peaceably have her leave it is also difficult to conclude she is a licensee. Under these facts she is a mere trespasser.

The statute refers to parties against whom an action in FED is brought both as tenants and/or defendants. As such the statute contemplates persons wrongfully in possession of property who may not be limited to just tenants. Licensees and trespassers may also be subject to removal by an action in FED. Id.

In construing the facts of this case, the court finds that grounds for FED exist pursuant to Iowa Code Section 648.1. Defendant has remained on the property by force. Her force is not one of superior numbers over the plaintiff; violence or threat of violence; nor breach of the peace. Her force is simply one of will, or rather, willful disobedience to the plaintiff's rightful, legal, equitable, and exclusive possession. It

could also be seen as contrary to the property award of the district court. The court reads the term "force" in the statute liberally and broadly to include a trespasser who simply refuses to leave. The force needed to remain unlawfully may include a simple refusal to physically and voluntarily remove oneself.

The court finds it has jurisdiction to issue a writ of forcible entry and detainer. The court also finds factual grounds exist supporting the petition. Therefore, the ruling of the magistrate is overturned. Judgment will be entered in favor of the plaintiff and against the defendant. Costs will be entered at trial and on appeal against the defendant.

IT IS THEREFORE ORDERED AS FOLLOWS:

1. The order of the magistrate dismissing the petition is overturned.
2. The plaintiff has proven grounds and cause for issuance of a writ of forcible entry and detainer and the same will be issued by this court separately.
3. Court costs of trial and appeal are taxed to the defendant.

Clerk to Provide Copies to:
Plaintiff's Counsel—Stephen Humke, Esq.
Defendant

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
SCSC056946	UDOYARA TIM VS. HAZEL TIM

So Ordered

Stephen A. Owen, District Associate Judge,
Second Judicial District of Iowa

IN THE IOWA DISTRICT COURT FOR STORY COUNTY

STATE OF IOWA Plaintiff, v. LUIS A. CRUZ, Defendant.	CASE NO. FECR058425 JUDGMENT ENTRY AND SENTENCING ORDER

DATE: November 30, 2020

CHARGE(S): Count II**:** Robbery in the First Degree, in violation of Iowa Code Iowa Code §§ 711.1(1)(a), 711.1(1)(b), 711.2, 703.1, and 703.2, a class "B" felony

Count III: Burglary in the First Degree, in violation of Iowa Code §§ 713.1, 713.3, 703.1, and 703.2, a class "B" felony

Count IV: Willful Injury Resulting in Serious Injury, in violation of Iowa Code §§ 708.4(1), 703.1, and 703.2, a class "C" felony

Count VII: Theft in the Second Degree, in violation of Iowa Code §§ 714.1(1)(b), 714.2(2), 7031, and 703.2, a class "D" felony

Defendant previously entered a plea of guilty to the above charge(s) and the court previously accepted Defendant's guilty plea to the charge(s). A hearing incidental to the imposition of judgment and sentence was held on the above date. The State of Iowa appeared by and through Assistant Story County Attorney Tyler Grimm. Defendant appeared personally along with counsel, Jennifer Frese. No Motion in Arrest of Judgment was filed and no legal cause existed to show why the court could not proceed to judgment and sentence. The court fully complied with Iowa Rule of Criminal Procedure 2.23 and all other laws applicable to the sentencing portion of this criminal prosecution.

IT IS THE ORDER OF THE COURT AS FOLLOWS:

1. Defendant is adjudicated guilty of the above-described crime(s) and pursuant to Iowa Code Chapter 902.

2. With respect to Count II, Defendant is hereby sentenced as follows:

> Defendant is hereby committed to the Director of Adult Corrections for a period not to exceed twenty five (25) years. Defendant shall serve a minimum sentence of seventeen and a half (17.5) years. This prison sentence shall run consecutively to the sentences imposed in Counts III, IV, and VII. Defendant is entitled to credit toward Defendant's sentence for the number of days served in confinement in jail prior to sentencing.

3. With respect to Count III, Defendant is hereby sentenced as follows:

> Defendant is hereby committed to the Director of Adult Corrections for a period not to exceed twenty five (25) years. This prison sentence shall run consecutively to the sentences imposed in Counts II, IV, and VII. Defendant is entitled to credit toward Defendant's sentence for the number of days served in confinement in jail prior to sentencing.

4. With respect to Count IV, Defendant is hereby sentenced as follows:

> Defendant is hereby committed to the Director of Adult Corrections for a period not to exceed ten (10) years. This prison sentence shall run consecutively to the sentences imposed in Counts II, III, and VII. Defendant is entitled to credit toward Defendant's sentence for the number of days served in confinement in jail prior to sentencing.
>
> Defendant is ordered to pay Category A restitution as defined in Iowa Code § 910.1(01), which includes a fine in the amount of $1,000 and a crime services surcharge of 15%.

5. With respect to Count VII, Defendant is hereby sentenced as follows:

> Defendant is hereby committed to the Director of Adult Corrections for a period not to exceed two (2) years. This prison sentence shall run consecutively to the sentences imposed in Counts II, III, and IV. Defendant is entitled to credit toward Defendant's sentence for the number of days served in confinement in jail prior to sentencing.
>
> Defendant is ordered to pay category "A" restitution as defined in Iowa Code § 910.1(01), which includes a fine in the amount of $625 and a crime services surcharge of 15%.

6. Defendant is ordered to pay pecuniary damages as defined in Iowa Code § 910.1(3). The State of Iowa filed an Amended Statement of Pecuniary Damages herein. Based upon the Amended Statement, Defendant shall be jointly and severally liable with any other defendant(s) found to be jointly and severally liable for damages in the amount of $1,997.22.

7. Defendant is ordered to pay Category B restitution in this matter, including the costs of this action. With respect to Category B restitution items, Defendant may request the court to determine whether he has the reasonable ability to pay the full amount of those items. If Defendant fails to make such a request within thirty (30) days from the date of this Order, Defendant shall be ordered to pay the full amount of Category B restitution items without further order of this court.

8. Pursuant to Iowa Code § 901.5(8A) and Chapter 81, Defendant shall submit a DNA sample for DNA profiling. Defendant shall comply with all directions for submitting a DNA sample for profiling so that the DNA sample is collected in the manner referenced in Iowa Code § 81.4.

9. No contact orders concerning the victim of these offenses shall be issued by separate order.

10. The court publicly announced and/or hereby publicly announces that Defendant's term of incarceration may be reduced from the maximum sentence because of statutory earned time, work credits, and program credits and that Defendant may be eligible for parole before the sentence is discharged.

11. Upon motion of the State of Iowa, and pursuant to the plea agreement, the remaining charges pending against Defendant in this matter are hereby dismissed. Any costs associated with the dismissed charges are assessed to Defendant.

12. The court grants this sentence because it provides for Defendant's rehabilitation and the protection of the community. The court has considered the sentencing recommendation of the parties and the circumstances of the case, as well as the other factors stated on the record at hearing.

13. APPEAL RIGHTS:

If You Plead Guilty: Defendant is advised he has no right of appeal of a guilty plea. However, if you allege good cause and/or a defect in this plea proceeding, or improper denial of a motion in arrest of judgment, you have thirty (30) days to file a written Application for Permission to Appeal and an Application to Authorize a Transcript to be Prepared at State Expense. The appellate courts will determine whether your application is granted or denied or under what conditions it will proceed, if any.

Your Sentence: Defendant is advised that if he determines to appeal the sentence/judgment, a written notice of appeal must be filed within thirty (30) days. A plea of guilty with an agreed-upon sentence may be subject to the Application for Permission to Appeal requirement procedure mentioned above.

Attorney and Transcript on Appeal: Defendant may be entitled to court-appointed counsel to represent him/her in an appeal and preparation of a transcript of the proceedings at state expense.

Appellate Costs: Defendant is advised that if he qualifies for court-appointed appellate counsel and/or preparation of the transcript at state expense, then s/he can be assessed the cost of the court-appointed appellate attorney and transcript preparation cost when a claim for such fees is presented to the Clerk of Court following the appeal. If unsuccessful, Defendant may be assessed court costs.

14. As Defendant has been adjudicated guilty of a forcible felony, no appeal bond will be set.

15. Any cash bail posted by Defendant or on Defendant's behalf by a third party that has acknowledged or agreed that the money posted can be applied toward Defendant's financial obligations shall be applied toward Defendant's financial obligations. All cash bail remaining, if any, after payment of Defendant's financial obligations and all cash bail posted by a third party that has not acknowledged or agreed that the money posted can be applied toward Defendant's financial obligations is hereby exonerated and shall be returned to the person posting the cash bail. All non-cash bail bonds posted, if any, are hereby exonerated.

Clerk Shall Furnish Copies To:
Tyler Grimm, Assistant Story County Attorney
Tiffany Meredith, Assistant Story County Attorney
Chad Frese, Attorney for Defendant
Jennifer Frese, Attorney for Defendant
Department of Correctional Services
Story County Sheriff

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
FECR058425	STATE OF IOWA VS CRUZ, LUIS A

So Ordered

Amy M Moore, District Court Judge
Second Judicial District of Iowa

IN THE COURT OF APPEALS OF IOWA

No. 20-1625
Filed November 3, 2021

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LUIS A. CRUZ,
Defendant-Appellant.

Appeal from the Iowa District Court for Story County, Amy M. Moore, Judge.

Luis Cruz appeals the sentences imposed upon his convictions relating to conduct when he was a juvenile. **SENTENCES VACATED AND REMANDED WITH INSTRUCTIONS.**

Chad R. Frese of Kaplan & Frese, LLP, Marshalltown for appellant.

Thomas J. Miller, Attorney General, and Timothy M. Hau, Assistant Attorney General, for appellee.

Considered by Mullins, P.J., May, J., and Danilson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2021).

MULLINS, Presiding Judge.

Luis Cruz appeals the sentences imposed, following guilty pleas,[1] upon his criminal convictions relating to crimes he committed when he was sixteen years old. He argues the sentencing court abused its discretion by improperly weighing and considering the sentencing factors for youthful offenders.

I. Background Facts and Proceedings

In conjunction with his guilty plea, Cruz admitted entering the residence of an eighty-two-year-old woman with two others, M.B.[2] and J.J., with the intent to commit theft. The trio sprayed the woman in the eye with bug spray and one of the others began beating the woman while Cruz held her. The woman was also tied up. The spraying, beating, and tying resulted in serious injuries—protracted and prolonged loss of eye function, bleeding of the brain, and rope burns. They also stole property from the residence, Cruz stealing a watch.

According to a sworn statement by M.B. that was admitted as evidence at the sentencing hearing, he and Cruz visited J.J.—who was high on methamphetamine—to obtain drugs, and the pair consumed alcohol and drugs (not methamphetamine) during the evening in question. The three then went to Kelley, Iowa to get money. They eventually ended up at the victim's residence—which J.J. advised was occupied by his family—and entered the garage, upon which J.J. handed the other two gloves to put on. M.B. "could just tell it was not going to be good, like, the outcome of whatever was about to go down." J.J. also

[1] The State agrees Cruz has good cause to appeal because he is challenging the sentences imposed as opposed to his pleas. *See* Iowa Code § 814.6(1)(a)(3) (Supp. 2019); *State v. Damme*, 944 N.W.2d 98, 105 (Iowa 2020).
[2] M.B. is Cruz's cousin.

obtained a can of bug killer before entering the residence. The trio approached a window in the rear of the residence, and J.J. directed M.B. to go cause a distraction around the front of the home, so M.B. went and rang the doorbell. When he returned to the rear of the home, J.J. and Cruz had already entered through a window. Then, M.B. heard a woman screaming. After a few minutes of silence, M.B. entered the home and, upon entry into the living room, observed J.J. and Cruz hovering over the victim, who was seated on the couch and had blood dripping from her face. J.J. eventually tied the victim to a chair and began making demands to the victim and ordered Cruz and M.B. to "look after her" and "watch her" while he looked for things throughout the house. M.B. also observed J.J. slap the victim across the face. Mortified, M.B. exited the home, and Cruz followed suit shortly thereafter. J.J. directed the others to wait for him outside and give him a few more minutes. Both Cruz and M.B. were "in shock." J.J. eventually came out, and the trio ultimately left the area in a vehicle, which J.J. had the keys to and advised the others belonged to his grandfather.

In relation to the foregoing, Cruz entered guilty pleas to several charges. A presentence investigation report (PSI) was completed and a psychologist interviewed Cruz and submitted an expert report. The PSI disclosed his age; his unstable family and home environment that involved criminally-inclined, drug-using, and domestically violent relatives and others as well as a largely absent father; his own alcohol and drug abuse; lack of education and employment history; and mental-health issues. The expert report assessed "the five factors to be considered in the sentencing process" for youthful offenders—"age of offender and youthful behavior, family and home environment, circumstance of crime,

challenges for youthful offenders and possibility of rehabilitation/capacity for chance." As to age and youthful behavior, the report detailed Cruz's criminal history, drug abuse, behavioral issues, and exposure to negative influences. The report also detailed Cruz's family and home life surrounding his youth. As to the circumstances of the crimes, the report noted Cruz "was drunk and high and just went along with the peers that he was with at the time. . . . [I]t was impulsive and unplanned and [] he regrets it." As to challenges for youthful offenders, the report noted Cruz has never been given an opportunity to participate in substance-abuse or mental-health services, education was never emphasized, and there was no structure or discipline in the family home. As to Cruz's possibility for rehabilitation and capacity for change, the report noted Cruz was taking advantage of services offered by the criminal justice system and he wants to be a better person and citizen in the future.

The PSI recommended Cruz be sentenced to indeterminate terms of imprisonment not to exceed twenty-five years on counts two and three, ten years on count four, and five years on count seven, all to be served concurrently. Based on her consideration of the sentencing factors, the psychologist recommended Cruz's sentence involve a mandatory minimum term of imprisonment for eight years. The State recommended that, between negligible and overwhelming mitigative value, the *Lyle* factors be accorded weight "somewhere in the middle." The State highlighted Cruz's age, the challenges he faced in relation to his family and home environment, the fact that he was a follower as opposed to the ringleader as to his participation in the crimes, his lack of personal experience in navigating the criminal justice system, and the hope that Cruz had a capacity to change. The

State recommended imposition of indeterminate terms of imprisonment not to exceed twenty-five years on count two with a mandatory minimum of eight years, twenty-five years on count three, ten years on count four, and two years on count seven, all to be served consecutively. The defense concurred with the State's recommendation.

In announcing its sentencing decision, the court noted its consideration of the expert report and detailed its assessment of the *Lyle* factors. In considering Cruz's "age at the time of the offenses and the feature of youthful behavior such as immaturity, impetuosity, and failure to appreciate risks and consequences," the court concluded the crimes were impulsive and "[t]he evidence supports the contention that [Cruz is] less able to appreciate the risks and consequences" of his criminal acts. The court found this factor to be "slightly mitigating at best." The court found Cruz's home and family life to also be "slightly mitigating at best." As to "the circumstances of the particular crime relating to youth that may have played a role in the commission of the crime[s]," the court found this factor more relevant given the fact that the crimes were committed by a group, but the court concluded the crimes were "utterly heinous" and, while Cruz was under the influence, he still knew what he was doing was wrong and peer pressure did not play a role. The court likewise found this factor "slightly mitigating at best." Considering "the challenges for youthful offenders in navigating through the criminal justice process," the court acknowledged juveniles are less competent than adults, but concluded Cruz appeared to be able to assist in his own defense. The court assigned this factor no mitigative value. Considering the "possibility of rehabilitation and the capacity for change, the court agreed "[t]his factor typically

favors mitigat[ion] because juveniles are generally more capable of rehabilitation than adults." The court found this factor "somewhat mitigating." The court went on to note its consideration of other statutory sentencing factors.

Ultimately, the court sentenced Cruz to indeterminate terms of imprisonment not to exceed twenty-five years on count two with a mandatory minimum of seventeen and one-half years, twenty-five years on count three, ten years on count four, and two years on count seven, all to be served consecutively. Cruz appeals.

II. Standard of Review

"If the sentence imposed is within the statutory limits, as it is here, we review for an abuse of discretion." *State v. Majors*, 940 N.W.2d 372, 385 (Iowa 2020).

> A discretionary sentencing ruling . . . may be [an abuse of discretion] if a sentencing court fails to consider a relevant factor that should have received significant weight, gives significant weight to an improper or irrelevant factor, or considers only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence that lies outside the limited range of choice dictated by the facts of the case.

Id. (quoting *State v. Roby*, 897 N.W.2d 127, 138 (Iowa 2017)). "Sentencing decisions of the district court are cloaked with a strong presumption in their favor." *Id.* at 385–86 (quoting *State v. Crooks*, 911 N.W.2d 153, 171 (Iowa 2018)). "[O]ur task on appeal is not to second guess the decision made by the district court, but determine if it was unreasonable or based on untenable grounds." *State v. Seats*, 865 N.W.2d 545, 553 (Iowa 2015) (quoting *State v. Formaro*, 638 N.W.2d 720, 724–25 (Iowa 2002)). That said, "while the review is for abuse of discretion, it is not forgiving of a deficiency in the constitutional right to a reasoned sentencing decision based on a proper hearing." *Roby*, 897 N.W.2d at 138. "[T]here is a

presumption against minimum terms of incarceration for juvenile offenders." *Majors*, 940 N.W.2d at 387. For juvenile offenders, district courts are allowed "to impose minimum terms of incarceration after a complete and careful consideration of the relevant mitigating factors of youth. Indeed, we [have] stated that if the mandatory minimum period of incarceration is warranted, we command[] our judges to impose the sentence." *Id*. at 386 (altered for readability).

III. Analysis

On appeal, Cruz argues the sentencing court abused its discretion by improperly weighing and considering the sentencing factors for youthful offenders. Those factors are:

> (1) the age of the offender and the features of youthful behavior, such as "immaturity, impetuosity, and failure to appreciate risks and consequences"; (2) the particular "family and home environment" that surround the youth; (3) the circumstances of the particular crime and all circumstances relating to youth that may have played a role in the commission of the crime; (4) the challenges for youthful offenders in navigating through the criminal process; and (5) the possibility of rehabilitation and the capacity for change.

Id. at 379 (quoting *State v. Lyle*, 854 N.W.2d 378, 404 n.10 (Iowa 2014)); *accord Miller v. Alabama*, 567 U.S. 460, 477–78 (2012).

Cruz argues: "There was not a complete and careful consideration on any one of the five [youthful offender] factors, specifically because the sentencing judge either failed to discuss relevant evidence or ignored relevant evidence when analyzing each factor—which if properly analyzed would have resulted in more mitigative weight." *See Roby*, 897 N.W.2d at 144 (noting "the factors generally serve to mitigate punishment, not aggravate punishment").

We choose to begin with the court's consideration of the third factor, the circumstances of the crime. Cruz complains the court abused its discretion in concluding peer pressure did not play a role. On this factor, "attention must be given to the juvenile offender's actual role and the role of various types of external pressure" and, thus, "this factor is particularly important in cases of group participation in a crime." *Id.* at 146. Under this factor, the court acknowledged its duty to "consider the circumstances of the particular crime relating to youth that may have played a role" and Cruz's "actual role in these crimes and the role any type of external pressure may have played." The court noted its conclusion the group crime was "utterly heinous," and went on to assign this factor slight mitigative value despite Cruz being under the influence, because he knew what he was doing and peer pressure did not play a role.

But the record before the sentencing court discloses peer pressure did play a role. Specifically, the expert concluded Cruz was under the influence "and just went along with his peers," Cruz "wasn't really thinking," he was influenced by an older co-defendant, and he was not the ringleader. At the plea hearing, Cruz stated his participation in the crimes was initiated by one of his-codefendants asking him for his assistance at the time of the crimes. The sworn account provided by M.B. confirms the foregoing. J.J. took Cruz and M.B. to a home he advised belonged to a relative. Neither of the latter two participants knew what was going to happen. The record discloses, once in the home, J.J. directed Cruz to hold the victim, with which Cruz complied, and J.J. proceeded to assault the victim. Then, J.J. directed Cruz and M.B. to look after the victim while he searched for items to steal. And

Cruz being under the influence no doubt made him more susceptible to peer pressure.

> The sentencing factors for youthful offenders
>
> > cannot be applied detached from the evidence from which they were created and must not be applied solely through the lens of the background or culture of the judge charged with the responsibility to apply them. Perceptions applicable to adult behavior cannot normally be used to draw conclusions from juvenile behavior.

Roby, 897 N.W.2d at 147. Here, the sentencing court's conclusion that peer pressure played no role in Cruz's participation was detached from the evidence, resulted in this factor not receiving the mitigative value it was entitled, and was therefore an abuse of discretion.

Next, we focus on the district court's analysis of the fifth factor and its explanation for imposing the maximum mandatory minimum:[3]

> Under the fifth factor, I must consider the possibility of rehabilitation and the capacity for change. This factor typically favors mitigating because juveniles are generally more capable of rehabilitation than adults.
>
> I like to think that this factor also would weigh in your favor, sir, but I am troubled by the limited amount of empathy that you have shown for [the primary victim] and the other victims of these offenses.
>
> However, you are still a young adult. You will continue to experience developmental changes well into your twenties. Taken as a whole then, I find this factor to be somewhat mitigating.
>
> In addition to these factors that I have just discussed, I must also consider deterrence, retribution, and incapacitation. In

[3] *See* Iowa Code §§ 702.11(1) (including felonious robbery as a forcible felony); 703.1 (criminalizing aiding and abetting); .2 (criminalizing joint criminal conduct); 711.2 (classifying first-degree robbery as a class "B" felony); 902.9 (directing the maximum sentence for a class "B" felony shall be no more than twenty-five years); .12(1)(e) (requiring a person serving a sentence for first-degree robbery to be denied parole or work release until service of seventy percent of the maximum sentence, which is seventeen and one-half years for a maximum sentence of twenty-five years); *Majors*, 940 N.W.2d at 386 (noting mandatory minimums are only allowed "after a complete and careful consideration of relevant mitigating factors of youth." (quoting *Roby*, 897 N.W.2d at 148).

> considering all of the sentencing options available to me provided under the Iowa Code, my judgment relative to sentence is based upon all of the permissible factors that I have just discussed.
>
> And in determining a sentence for you, I have also considered your education, your prior criminal history, prior employment, nature of the offense committed, and the harm to the victim, facts upon which the charge was based, whether a weapon or force was used in the commission of the offense, the need to protect the community, the State and defense counsel's recommendation to the Court, the recommendation of the presentence investigations report, your statements here today, your character, propensities and needs and potential for rehabilitation, the need to deter you and others similarly situated to you from committing offenses of this nature, your substance abuse history, and other permissible factors that are supported by the record.

In *Roby*, our supreme court explained the fifth factor and the potential use of expert testimony:

> The final factor is the possibility of rehabilitation and the capacity for change. This factor supports mitigation for most juvenile offenders because delinquency is normally transient, and most juveniles will grow out of it by the time brain development is complete. Additionally, juveniles are normally more malleable to change and reform in response to available treatment. The seriousness of the crime does not alter these propositions. Thus, judges cannot necessarily use the seriousness of a criminal act, such as murder, to conclude the juvenile falls within the minority of juveniles who will be future offenders or are not amenable to reform. Again, *any such conclusion would normally need to be supported by expert testimony*.

Id. at 147 (altered for readability) (emphasis added).

More recently, the supreme court decided the case of an incarcerated adult who was resentenced years after having been sentenced for a crime he committed while a minor and again addressed the use of an expert's opinion:

> Under the fifth factor, the sentencing court must consider the possibility of rehabilitation and the capacity for change. This factor typically favors mitigation because juveniles are generally more capable of rehabilitation than adults. Here, the district court appropriately gave weight to *expert testimony on Majors' lack of empathy and remorse from his initial arrest to the present*. And the

> district court properly considered Majors' prison disciplinary violations, which as Dr. Clemmons explained were not attributable to his youth because he continued to accrue violations as an adult. Even at age thirty-three, and on the same day as his 2018 resentencing, Majors committed another disciplinary violation. The record supports the district court's determination that the fifth factor is, at best, "weakly" mitigating for Majors.

Majors, 940 N.W.2d at 390 (altered for readability) (emphasis added).

In the present case, a Ph.D. psychologist provided expert opinions by written report, offered by the State and admitted into evidence at the sentencing hearing. The report shows the expert reviewed records in the case, interviewed Cruz, and focused on the five factors to be considered in sentencing a youthful offender. The report states:

> [Cruz] is trying to take advantage of any classes and treatment that he can while incarcerated. He does think that he needs substance-abuse treatment and could benefit from anger management classes. He reports that these things were not suggested, recommended or imposed on him previously and there were not opportunities to complete treatment.

The report indicates Cruz has taken classes while incarcerated "and plans to take more"; he "wants to do positive things and his parents are supportive"; "he has plans for the future to get a job, continue school, develop a positive and structured routine and resist negative influences"; "he does believe that he needs classes for substance abuse and anger management and that it is hard to change without positive support and help." "He reported feeling bad after the crimes and 'being mentally messed up.' He felt guilty and his conscience was eating him up . . . . He wants to be a better person and citizen in the future."

The expert's conclusion was:

> [T]he examiner recommends a mandatory minimum of eight years and believes that [Cruz] is able to make positive and substantial

> changes if he takes advantage of the opportunities in the corrections system. He has verbalized a desire to change and move forward and recognize his past issues and how several things contributed to his behavior.

The PSI recommended incarceration for Cruz, with all sentences to run concurrently, and made no reference to a mandatory minimum. The State recommended the same mandatory minimum of eight years as the expert, but added a recommendation for consecutive sentences not to exceed 62 years. Defense counsel recommended a mandatory minimum of eight years and a lengthy indeterminate term, and said Cruz "asks the Court to address how very sorry he is that he has been involved in this offense." When Cruz was asked if he wanted to make a statement, he said:

> Yeah. I just would like to apologize to the victim and the victim's family. Nothing I say can take back the physical and emotional damage that I have caused; but I just hope that one day everybody that this has affected, that I can be forgiven one day. I will come out a changed man.

We do not find any information in the record to support the district court's conclusion that it was "troubled by the limited amount of empathy that you have shown for [the primary victim] and the other victims of these offenses." Cruz's statement quoted above certainly does not. And the expert's report stated, "He reported feeling bad after the crimes and 'being mentally messed up.' He felt guilty and his conscience was eating him up . . . . He wants to be a better person and citizen in the future." The court did not indicate why it rejected Cruz's statement or the expert's report of his feelings of guilt.

Consistent with the supreme court's directives, an expert witness reviewed the records in this case and interviewed Cruz before giving her opinions. *See,*

e.g., *Roby*, 897 N.W.2d at 147. A sentencing court's decision to impose on a youthful offender the highest mandatory minimum allowed by law normally requires expert testimony in support of that decision. *Id*.

In this case, the expert made clear she recommended incarceration but with a minimum term of incarceration of eight years because she believed Cruz "is able to make positive and substantial changes if he takes advantage of the opportunities in the corrections system. He has verbalized a desire to change and move forward and recognize his past issues and how several things contributed to his behavior." The district court made no mention of the expert's opinion while announcing its sentencing decision. Thus, the court provided no reasons for ignoring the expert's opinion and imposing a minimum sentence greater than twice that recommended by the expert. Clearly, the court was not bound by the expert's opinion. But, equally clear from *Lyle* and the line of cases following that decision is there is a presumption against minimum terms in sentencing youthful offenders. Based on the evidence, that presumption was overcome, at least to the extent of eight years.[4] Further, in our focus on the fifth factor—"the possibility of rehabilitation and the capacity for change"—we note a sentencing court may not use only the seriousness of the crime as a factor to support a minimum sentence but must rely on expert testimony or some other reliable evidence to conclude the offender has limited possibility of rehabilitation or is not amenable to change. *Id*. The district court gave the typical, somewhat standardized list of rationale for

[4] This conclusion is based on the evidence presented in this case and is not intended to suggest an expert must recommend a specific term of incarceration or that the district court is limited in the exercise of its discretion to any particular recommendation by an expert.

imposing its sentence but, in youthful offender cases, we think our supreme court's decisions require—at the least—reference to the expert's opinion and some rationale for rejecting the expert's stated optimism for Cruz's prospects for rehabilitation. Instead, there was no reference to the expert, at all.

On the sentencing record, and in particular the reasons given by the district court for imposing the mandatory minimum sentence, we conclude the district court failed to give sufficient (any) weight to the expert opinion, failed to rebut or even acknowledge the expert opinion, failed to state it concluded Cruz was not likely to be rehabilitated and not malleable for change or any reason why that factor did not weigh in the decision, as well as apparently disregarding the other mitigative factors it identified but of which it made no reference in its sentencing rationale.

To be clear, we understand the deference given to district court judges in making sentencing decisions. And, sentencing decisions are cloaked with a presumption the district court properly exercised its discretion. But, youthful offender cases clearly have some different layers: the presumption against mandatory minimums, the five factors to consider in evaluating possible mitigation, the preference or necessity of expert opinion, and the analysis of all those layers in the sentencing decision. Without the benefit of the district court's identification or rejection of any of the mitigative factors in its sentencing decision on the mandatory minimum, we cannot determine whether they were properly applied. Without the benefit of the district court's reference to or rejection—if that is what it did—of the expert's opinion, we have nothing to review on the question of rehabilitation. And with the court's finding Cruz showed no remorse, without reference to the source or reason for that conclusion, and record evidence to the

contrary from Cruz and the expert, the record does not support a conclusion the court properly exercised its discretion in ordering the mandatory minimum sentence it imposed. Therefore, we conclude the imposition of the maximum term of imprisonment allowed by law was an abuse of discretion.

Accordingly, we vacate the sentences imposed and remand for resentencing before a different judge.[5] We find it unnecessary to separately address whether the court abused its discretion in considering the remaining factors, as the court abused its discretion in considering the third and fifth factors in reaching its sentencing decision concerning the mandatory minimum.

IV. Conclusion

We conclude the district court abused its discretion in relation to the third and fifth sentencing factors for juvenile offenders, and abused its discretion in its analysis and conclusion to impose the maximum mandatory minimum sentence. We vacate the sentences imposed and remand for resentencing before a different judge.

SENTENCES VACATED AND REMANDED WITH INSTRUCTIONS.

[5] Our role in determining whether the district court abused its discretion is just that—no more, no less—as set forth above in our standard of review. Our role is not to decide what the sentence should be—whether maximum or minimum or something in between. We offer no opinion as to what sentence the district court on remand should impose.

IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	**Case Title**
20-1625	State v. Cruz

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Form 4.4: Cancellation, Modification, or Extension of Chapter 236 Order

ORDER OF PROTECTION AMENDED This order can be verified during business hours with the STORY County Clerk of Court at (515) 382-7420 or any time with the STORY County Sheriff's office at (515) 382-6566	**02851 DACV051647** Judge: County: **STORY** State: **IOWA** **CANCELLATION, MODIFICATION, OR EXTENSION OF CHAPTER 236 ORDER** **ISSUE DATE: February 10, 2021**

PETITIONER/PROTECTED PARTY:
GAYLENE FAYE HARDY WILSON
VS.
RESPONDENT/DEFENDANT:
THOMAS O HADAWAY

Other Protected Persons:

RESPONDENT's Date of Birth:
Address for Respondent (not shared with Protected Party):

CAUTION: ☐ If checked, FIREARMS WARNING for LAW ENFORCEMENT

THE COURT HEREBY FINDS: It has jurisdiction over the parties and subject matter, and the respondent has been provided with reasonable notice and opportunity to be heard. **Additional findings are set forth below.**

THE COURT HEREBY ORDERS:

☐ The previous order is hereby canceled as of (date): .

☐ This modified order expires on (date): .

Additional terms of this order are as set forth below.

WARNINGS TO RESPONDENT: This order shall be enforced, even without registration, by the courts of any state, the District of Columbia, any U. S. Territory, and any tribal jurisdiction (18 U.S. C 2265). Crossing state, territorial, or tribal boundaries to violate this order may result in federal imprisonment (18 U.S.C. 2262).

Federal and state laws provide penalties for possessing, transporting, shipping, or receiving any firearm or ammunition (18 U.S.C. s.922(g)(8)); Iowa Code section 724.26(2)(a).

Only the court can change this order.

On 02/10/2021, this matter comes before the court regarding the Chapter 236 Temporary, Final or Consent order entered on **12/28/2020**.

The court FINDS that:

- ☐ Protected party requests order be dismissed.
- ☐ Protected party failed to appear for hearing.
- ☐ There is insufficient evidence.

☑ Petitioner Gaylene Hardy-Wilson appears with counsel Michael Lewis. Respondent Thomas Hadaway appears without counsel. The court finds sufficient evidence to grant Petitioner's Motion to Extend Protective Order Pursuant to Iowa Code section 236.5(2).

The court ORDERS as follows (check the appropriate option(s) below):

☐ (1) If checked, the order is hereby **canceled**. The Petition for Relief from Domestic Abuse is dismissed without prejudice.

☐ (2) If checked, the order is **modified** as follows: The modification is effective ☐ immediately. ☐ upon service. To the extent not inconsistent herewith, the prior protective order shall also remain in force.

☑ (3) If checked, the order is hereby **extended**.

☑ (4) If checked, court costs are assessed against respondent.

(5) The clerk of court shall reflect this change in status on the domestic abuse registry and shall notify law enforcement regarding this order.

☑ The **Story** County Sheriff shall serve and return service of this order upon the respondent.
☐ Respondent was personally served with a copy of this order by the court.

The clerk of court shall provide copies of this order to the parties and law enforcement agencies, pursuant to Iowa Code sections 236.5(5) and 664A.4.

If you need assistance to participate in court due to a disability, call the disability coordinator at (641) 421-0990 or information at https://www.iowacourts.gov/for-the-public/ada/. Persons who are hearing or speech impaired may call Relay Iowa TTY (1-800-735-2942). **Disability coordinators cannot provide legal advice.**

State of Iowa Courts

Case Number	**Case Title**
DACV051647	GAYLENE HARDY-WILSON VS TOM HADAWAY
Type:	Order GRANTING Motion to Extend Protective Order/NCO

So Ordered

Amy M Moore, District Court Judge
Second Judicial District of Iowa

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IN THE COURT OF APPEALS OF IOWA

No. 21-0336
Filed November 23, 2021

GAYLENE FAYE HARDY-WILSON,
Plaintiff-Appellee,

vs.

THOMAS HADAWAY,
Defendant-Appellant.

Appeal from the Iowa District Court for Story County, Amy Moore, Judge.

A former husband appeals the extension of a domestic abuse protection order in favor of his ex-wife. **REVERSED.**

Thomas Hadaway, Madrid, self-represented appellant.

Michael Lewis of Lewis Law Firm, P.C. (until withdrawal), Cambridge, for appellee.

Gaylene Hardy-Wilson, Colo, self-represented appellee.

Considered by Bower, C.J., and Vaitheswaran and Schumacher, JJ.

VAITHESWARAN, Judge.

A former husband appeals the extension of a domestic abuse protection order in favor of his ex-wife.

The husband and wife divorced in 2019. A week after the dissolution decree was filed, the ex-wife filed a petition for relief from domestic abuse. The district court entered a temporary protective order restraining the ex-husband "from committing further acts of abuse or threats of abuse" and "from any contact with" the ex-wife. Following an unreported hearing, the district court filed a protective order by consent agreement without a finding of domestic abuse. The order was to "remain in effect for" a year "unless it [was] modified, terminated, extended, or superseded by written order of the court, or until the dismissal of the case."

At the expiration of the one-year period, the ex-wife moved to extend the protective order. She alleged her ex-husband "remain[ed] antagonistic toward [her] and she fear[ed] him and for her safety should the protective order be lifted." The district court extended the protective order on a form used for petitions for relief from sexual abuse but later vacated the order and referred the matter to another judge "for appropriate disposition of the plaintiff's request for an extension of the consent order." Following an evidentiary hearing, the court extended the domestic abuse protective order for one year.

The ex-husband filed a motion to reconsider and a notice of appeal. The district court declined to consider the reconsideration motion in light of the appeal.

Meanwhile, the ex-wife moved to dismiss the appeal. She argued her desire "to withdraw her motion to extend protective order" would render the appeal

moot. The supreme court denied the motion. The case was transferred to this court for disposition.

The ex-husband argues (1) the district "court lacked subject matter jurisdiction" to extend the protective order; (2) there was insufficient evidence to support a finding that he continued to pose a threat to the safety of his ex-wife; and (3) the district court erred in assessing "all court costs" to him.

I. Subject-Matter Jurisdiction

"Subject matter jurisdiction refers to the power of the court to hear and determine cases of the general class to which the proceeding in question belongs." *Vance v. Iowa Dist. Ct. for Floyd Cnty.*, 907 N.W.2d 473, 477 (Iowa 2018). Subject matter jurisdiction is distinct from "[j]urisdiction of the case," which "refers to a court's 'authority to hear the particular case.'" *Ney v. Ney*, 891 N.W.2d 446, 453 (Iowa 2017) (citation omitted). The ex-husband's jurisdictional argument encompasses several sub-arguments.

First, he contends his ex-wife filed her motion to extend the protective order at 5:01 p.m. on the final effective date of the original order, rendering it untimely. *See* Iowa Code § 4.1(34) (2019); *accord Lane v. Spencer Mun. Hosp.*, 836 N.W.2d 666, 667 (Iowa Ct. App. 2013) ("[U]nder our rule for computing time, 'the first day shall be excluded and the last included.'"). He overlooks an Iowa Court rule stating "[a] document is timely filed if it is filed before midnight on the date the filing is due." Iowa Ct. R. 16.309(c). Because the extension motion was filed before midnight on the final effective date of the original order, it was timely.

Second, the ex-husband contends that "the Motion to extend Mutually Agreed to [protective order] was not filed by an attorney of record at the time Motion

was filed." He bases his assertion on the appearance of an attorney before his first was allowed to withdraw. We are hard pressed to discern how the involvement of two attorneys deprived the court of subject matter jurisdiction.

Third, the ex-husband asserts the protective order "clearly does not meet the statutory requirements" because "[t]here was never a required finding . . . [of] domestic abuse." The court of appeals addressed this claim in *Wendt v. Mead*, No. 16-0928, 2017 WL 510972, at *1–2 (Iowa Ct. App. Feb. 8, 2017). There we stated "[t]he identified defects in the order of protection and extension implicate the district court's authority to act and not its jurisdiction," rendering the protective order voidable rather than void and requiring any challenge to the court's authority to be raised in the district court. Because the ex-husband consented to entry of the protective order without a finding of domestic abuse, he waived his right to challenge the court's authority to issue the order without a domestic abuse finding.

Fourth, the ex-husband takes issue with the district court's original sexual abuse protective order. As noted, the court corrected that mistake.

Finally, the ex-husband argues the order was entered after "ex parte conversations with the Judge." He does not cite any portion of the record to support the assertion and provides no authority holding an ex parte conversation deprives a court of subject matter jurisdiction. The issue is waived. See Iowa R. App. P. 6.903(2)(g)(3).

II. Sufficiency of the Evidence

Once a protective order under the domestic abuse statute has been entered, the protected party may apply for an extension of the protective order. *See* Iowa Code § 236.5(2). The court may extend the order if it finds "the

defendant continues to pose a threat to the safety of the victim, persons residing with the victim, or members of the victim's immediate family." *Id*.

The ex-wife began by describing the event that precipitated her filing of a petition for relief from domestic abuse. Under the dissolution decree, she had "possession of the house and property" for a little over a month. Shortly after the decree was filed, she returned home to find her ex-husband "loading up things and taking them." She told him "he was not to be on the property." "Words were exchanged," and she "turned to walk into the house. She "could feel him walking fast behind" her so she "started running." She "got inside the door and . . . tried to shut it and he headbutted [her] to get into the door, entered the house and verbally abused [her]." She clarified that headbutting meant "[h]e smacked his face into [her] mouth," causing "a cut inside [her] lip." As discussed, the ex-husband consented to entry of a protective order.

Turning to the request for an extension, the ex-wife testified her ex-husband continued to pose a threat to her "[b]ecause [she] lived with him for six years and [she saw] him do many things with his temper." When asked if she saw "examples of his temper since the order was entered," she responded, "No." At the same time, she voiced her belief that she would have to deal with his aggression again if the order were not extended. She stated that she locked her doors "every time [she came] in and out of the house because" she was "scared" and she did not "trust that he would stay away if this wasn't in place."

We have no reason to question the ex-wife's fear of her ex-husband. But "trepidation, standing alone, is not enough to prove he continues to pose a threat to her safety." *Clark v*. *Pauk*, No. 14-0575, 2014 WL 6682397, at *3 (Iowa Ct. App.

Nov. 26, 2014). While a new incident of domestic abuse is not required, to obtain an extension, there must be proof "the domestic abuser 'continues' to pose a threat to the victim's safety." *Id*. at *4 (quoting Iowa Code § 236.5(2)).

In *Clark*, there was evidence that the defendant "moved to a residence in Clark's neighborhood," walked by her house, and, as a driving instructor, had "an ostensibly legitimate purpose to drive by her house at any time of day." *Id*. Here, the ex-husband testified he did not even know where the ex-wife lived until her address was elicited at the extension hearing. *See Fettkether v*. *Kaster*, No. 11-0373, 2012 WL 170692, at *3 (Iowa Ct. App. Jan. 19, 2012) (noting that the parties lived "approximately seventy-five miles apart" and the defendant "never violated the protective order"). The ex-wife did not dispute this testimony. The ex-husband also did not threaten violence after the consent protective order was filed. *See Doyle v*. *Doyle*, No. 13-0753, 2013 WL 6405474, at *3 (Iowa Ct. App. Dec. 5, 2013) (noting "[t]here were no threats of violence in any of the unwanted communications" postdating the original protective order). Finally, the ex-husband did not follow, call, or otherwise attempt to contact his ex-wife after the protective order was filed. *Cf*. *Sims v*. *Rush*, No. 10-0237, 2010 WL 3503943, at *4 (Iowa Ct. App. Sept. 9, 2010) (affirming extension "[b]ased on Sims's existing fear" and the defendant's "behaviors while the protective order was in existence," specifically, calls to her and gestures while he drove past); *In re Alatorre*, No. 01-0045, 2002 WL 576171, at *2 (Iowa Ct. App. Feb. 20, 2002) (considering the respondent's threat to beat up the petitioner's cousin and his comment to their daughter that the "no-contact order was set to expire," and concluding his "behavior, . . . violations of the protection order, and [the respondent's] fearful demeanor during the hearing"

established the need for an extension of the protective order). In the absence of any conduct that could be objectively deemed a threat, we conclude the ex-wife failed to establish the need for an extension of the protective order. *See Wendt*, 2017 WL 510972, at *2 ("The text of the statute indicates this is an objective inquiry rather than a subjective inquiry."). On our de novo review of the record, we reverse the extension of the protective order.

III. Costs

The ex-husband contends the district court erred in assessing "all district court cost[s]" to him. In his view, "the original protective order should have been equitably shared between both parties since both wanted and agreed to a consensual protective order from the court."

The consent protective order stated "[t]he parties appeared and each consented to the entry of this order." The order stated, "[C]ourt costs are assessed against" the ex-husband. The same day, a statement of costs was filed, stating in part: "Obligor: . . . Balance Due: $384." Because the ex-husband consented to having court costs taxed to him, he cannot complain about them on appeal.

REVERSED.

Bower, C.J., concurs; Schumacher, J., dissents in part and specially concurs in part.

SCHUMACHER, Judge (dissenting in part and specially concurring in part).

I respectfully dissent from the majority opinion that finds reversal of the extension of an order of protection, pursuant to Iowa Code chapter 236, is required and specially concur on the assessment of court costs against the ex-husband from the original proceeding.

I. Sufficiency of the Evidence

The statute that affords the extension of a no-contact order requires proof by a preponderance of the evidence that "the defendant continues to pose a threat to the safety of the victim, persons residing with the victim, or members of the victim's immediate family." Iowa Code § 236.5(2). As this court has noted:

> The text of the statute indicates this is an objective inquiry rather than a subjective inquiry. Other states have reached similar conclusions regarding similar statutes. *See, e.g.*, *Ritchie v. Konrad*, 10 Cal. Rptr. 3d 387, 397 (Cal. Ct. App. 2004) ("We conclude that in California, as in the rest of the country, an objective test must be satisfied before a protective order is renewed in contested cases."); *Giallanza v. Giallanza*, 787 So. 2d 162, 164 (Fla. Dist. Ct. App. 2001) (requiring showing of either additional domestic violence or that victim "has a continuing reasonable fear of being in imminent danger of becoming the victim of domestic violence"); *Baird v. Baird*, 234 S.W.3d 385, 388 (Ky. 2007) (holding "there must be some showing of a continuing need" for a protective order); *Iamele v. Asselin*, 831 N.E.2d 324, 330 (Mass. 2005) ("Typically, the inquiry will be whether a plaintiff has a reasonable fear of 'imminent serious physical harm.'" (citation omitted)); *but see Forehand v. Forehand*, 767 S.E.2d 125, 128 (N.C. Ct. App. 2014) (considering plaintiff's "subjective fear of defendant").

Wendt v. Mead, No. 16-0928, 2017 WL 510972, at *2 (Iowa Ct. App. Feb. 8, 2017).

Our record here is somewhat limited. However, it contains sufficient evidence to establish Hadaway posed a continuing threat. Hadaway's ex-wife testified she remained in fear of Hadaway. *See Clark v. Pauk*, No. 14-0575, 2014 WL 6682397, at *3 (Iowa Ct. App. Nov. 26, 2014) (considering victim's "concern[]

about [abuser's] violent past"); *Doyle v. Doyle*, No. 13-0753, 2013 WL 6405474, at *3 (Iowa Ct. App. Dec. 5, 2013) (considering whether "a real sense of fear existed"); *Sims v. Rush*, No. 10-0237, 2010 WL 3503943, at *4 (Iowa Ct. App. Sept. 9, 2010) (affirming extension "[b]ased upon Sims's existing fear"); *In re Alatorre*, No. 01-0045, 2002 WL 576171, at *2 (Iowa Ct. App. Feb. 20, 2002) (considering victim's "fearful demeanor during the hearing").

> A history of domestic abuse, in and of itself, under some circumstances may be enough to establish a continuing threat. *See Cueto v. Dozier*, 193 Cal. Rptr. 3d 663, 671 (Cal. Ct. App. 2015) ("As the *Ritchie* court recognized, the facts supporting the initial restraining order 'often will be enough in themselves to provide the necessary proof to satisfy the test.'" (citing *Ritchie*, 10 Cal. Rptr. 3d at 387)); *Cruz-Foster v. Foster*, 597 A.2d 927, 930 (D.C. 1991) (stating "the past history of the case is critical to the determination whether" victim proved her case by preponderance of the evidence); *Sims*, 2010 WL 3503943, at *3 (considering testimony about abuse prior to parties' separation); *Gehrke*, 115 A.3d at 1257 ("In this context, a court's consideration of evidence of earlier abuse is appropriate, particularly when preceding orders were entered without the court making particularized factual findings or were entered by agreement of the parties without any finding of abuse.").

Wendt, 2017 WL 510972, at *2.

Here, the original protective order, entered by consent, was based on Hardy-Wilson's allegation that her ex-husband came onto her property and head-butted her, causing a cut to the inside of her lip. As noted by the majority, Hadaway consented to the order of protection. Consequently, there was no finding of domestic abuse.

In the instant record, the district court entered the extension on a form order, indicating, "The court finds sufficient evidence to grant Petitioner's Motion to Extend Protective Order Pursuant to Iowa Code section 236.5(2)." While we lack findings of fact, we have the transcript of proceedings that evidences Hardy-

Wilson's fear of her ex-husband. Testimony established the parties have another hearing pending. Hadaway has been confrontational with Hardy-Wilson's attorney, to a point where Hardy-Wilson thought he would strike her attorney in the courthouse hallway.[1] The protected party testified to her belief that the only thing that had protected her in the past was the previously entered no-contact order. She added that from the date of the original incident that prompted the no-contact order, "I have locked my door every time I come in and out of the house because I am scared. I have put up cameras at my new residence at both doors." On this record, Hardy-Wilson "has a continuing reasonable fear of being in imminent danger of becoming the victim of domestic violence." I would affirm the extension of the no contact order.

II. Court Costs

I concur with the majority that determines the costs of the original hearing were appropriately assessed to Hadaway. However, my analysis varies. The order entering the protective order was filed on December 23, 2019. A notice of costs due was filed the same day. Hadaway did not file his appeal until March 3, 2021, well beyond the statutory time for an appeal. The jurisdictional requirement of Iowa Rule of Appellate Procedure 6.101(1)(b) was not met. Rule 6.101(1)(b) requires "[a] notice of appeal must be filed within 30 days after the filing of the final order or judgment." Iowa R. App. P. 6.101(1)(b); *see also Freer v. DAC, Inc.*, 929 N.W.2d 685, 687 (Iowa 2019).

[1] Although the record is not clear, this appears to have occurred around the time of the entry of the original protective order. Hardy-Wilson was present for this event.

While Hadaway consented to the original protective order, we do not have the transcript of the hearing. The order entered in December 2019 does not indicate a consent to the assessment of costs. Hadaway's appeal concerning the assessment of costs on the original proceeding is untimely.

IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	**Case Title**
21-0336	Hardy-Wilson v. Hadaway

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