IN THE SUPREME COURT OF IOWA
Supreme Court No. 19-1814

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CHRISTOPHER C. HAWK,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR WAYNE COUNTY
THE HONORABLE PATRICK W. GREENWOOD, JUDGE

APPELLEE'S BRIEF & REQUEST FOR ORAL ARGUMENT

THOMAS J. MILLER
Attorney General of Iowa

TYLER J. BULLER
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
(515) 281-4902 (fax)
tyler.buller@ag.iowa.gov

ALAN WILSON
Wayne County Attorney

ATTORNEYS FOR PLAINTIFF-APPELLEE

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ROUTING STATEMENT

The defendant urges this Court to retain the case to decide the meaning of "good cause." Defendant's Proof Br. at 25. The State assumes *State v. Damme*, 944 N.W.2d 98, 105 (Iowa 2020), allows this appeal. Nonetheless, the Court should retain the case to evaluate the impact of June 2020 amendments to Chapter 910, concerning criminal restitution. Iowa R. App. P. 6.1101(2)(c), (f).

The dissent in this Court's June 5, 2020, restitution decision predicted that the "the legislature will be 'quite surprised' to learn that we have switched course after twenty-one years and reinterpreted the restitution statutes." *State v. Davis*, No. 19-0022, 2020 WL 3022758, at *10 (Iowa June 5, 2020) (McDonald, J. dissenting). This prediction turned out prescient. The General Assembly overhauled the restitution statutes eight days after *Davis*, overruling the case with a supermajority in the House and unanimous support in the Senate. *See* SF457 BillBook (88th Gen. Assemb.).[1] Governor Reynolds signed the bill into law on June 25, 2020 and the relevant provisions were immediately effective. *Id.*

[1] Available at https://www.legis.iowa.gov/perma/031420193689.

On July 7, 2020, this Court issued a supervisory order addressing some procedural aspects related to this legislation, including the conversion of existing temporary orders into permanent orders. *See In the Matter of Interim Procedures Governing Ability to Pay Determinations and Conversion of Restitution Orders* (July 7, 2020).[2] The order does not expressly address how the legislation impacts appellate review of pending cases.

The Court should retain this case to evaluate the impact of Senate File 457 on pending cases that involve unpreserved restitution challenges, like this one.

STATEMENT OF THE CASE

Nature of the Case

The defendant, Christopher Hawk, appeals a restitution order entered following his conviction for possession with intent to deliver methamphetamine, a Class C felony in violation of Iowa Code section 124.401(1)(c)(6) (2017). The defendant pled guilty in the Wayne County District Court. The Hon. Patrick Greenwood presided at sentencing.

[2] Available at https://www.iowacourts.gov/collections/521/files/1139/embedDocument/.

Course of Proceedings

Because the defendant admits he "does not challenge his plea of guilty," the only relevant proceedings concern sentencing. Defendant's Proof Br. at 26.

During allocution, the defendant said it was unfair to prosecute him due to his addiction issues, blamed his conduct on "severe ADHD," and accused the police officers of lying. Sent. tr. p. 7, line 14 — p. 9, line 11. He also admitted to absconding while on pre-trial release. Sent. tr. p. 8, lines 7–18.

The district court sentenced the defendant to 10 years in prison, citing the defendant's failure to rehabilitate with past interventions, his "extensive criminal record," and his failure to accept responsibility (including blame cast on family members, police officers, and an insurance company). Sent tr. p. 9, line 14 — p. 15, line 4; p. 16, lines 4–17. The court imposed the minimum fine and surcharge. Sent. tr. p 15, lines 5–9. The court also ordered the defendant pay $343.50 in court costs and the lesser of $250 or the actual cost of court-appointed attorneys, for a total of less than $600. Sent. tr. p. 15, line 13 — p. 16, line 3.

Facts

The defendant possessed nearly nine grams of methamphetamine, which he threw into a ditch when confronted by police. PSI, p. 11; Conf. App. 16; Minutes, pp. 1–2; Conf. App. 4–5.

ARGUMENT

I. The State assumes without conceding that *Damme* controls and this appeal can go forward, despite the 2019 amendments to section 814.6.

Preservation of Error

The defendant did not preserve any of the constitutional claims he presents regarding the 2019 amendments to section 814.6. This failure precludes relief on those grounds. *See, e.g.*, *State v. Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999).

Standard of Review

The defendant raises the constitutionality of amended section 814.6 for the first time on appeal. If the argument had been preserved, it would be reviewed de novo.

Merits

The defendant first argues "good cause" and seeks to litigate the constitutionality of the 2019 amendments to section 814.6. Defendant's Proof Br. at 28–86. The State assumes without conceding that *Damme* controls, as the defendant solely challenges

the restitution ordered as part of a final judgment of sentence and appealed pursuant to section 814.6. *See State v. Damme*, 944 N.W.2d 98, 105 (Iowa 2020) (finding "good cause" for appeal challenging discretionary sentence, rather than plea itself). As discussed in the following Division, the State does not agree the claims are properly before the Court, regardless of section 814.6.

The Court need not address any of the arguments presented in Division I of the defendant's brief.

II. This Court lacks authority to decide the defendant's unpreserved and un-exhausted restitution claim. The claim is without merit, under both old case law and new legislation.

Preservation of Error

The defendant did not object to the court's reasonable-ability-to-pay determination below. *See generally* sent. tr. Error was not preserved and the claim cannot be heard. *Rutledge*, 600 N.W.2d at 325.

Although this Court has sometimes reviewed un-preserved challenges to restitution amounts on appeal, the Court should not and cannot continue that practice. Deciding unpreserved challenges erodes this Court's longstanding precedent and cannot be reconciled with the Iowa Constitution. And even if the case law or Constitution

supported deciding unpreserved restitution claims, the General Assembly has deprived the Court of authority to do so.

As Chief Justice Cady put it, "Error preservation is a fundamental principle of law with roots that extend to the basic constitutional function of appellate courts." *State v. Harrington*, 893 N.W.2d 36, 42 (Iowa 2017) (citing Thomas A. Mayes & Anuradha Vaitheswaran, *Error Preservation in Civil Appeals in Iowa: Perspectives on Present Practice*, 55 Drake L. Rev. 39, 43 (2006)). This is especially true in Iowa, where the Constitution establishes the Supreme Court as "a court for the correction of errors at law." Iowa Const. art. V, § 4. This constitutional text does not empower the Court to modify judgments based on unpreserved error: "If a litigant fails to present an issue to the district court and obtain a ruling on the same, it cannot be said that we are correcting an error at law." *State v. Tidwell*, No. 13-1080, 2013 WL 6405367, at *2 (Iowa Ct. App. Dec. 5, 2013) (McDonald, J.). The Court's longstanding case law, of course, supports the importance of error preservation. *See, e.g.*, *State v. Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999); *Danforth, Davis & Co. v. Carter*, 1 Iowa 546, 553 (1855). This weighs heavily against reaching any unpreserved error, such as the reasonable-ability-to-pay

challenge the defendant raises for the first time on appeal here. Deciding unpreserved restitution claims under the guise of an illegal sentence is incompatible with the Iowa Constitution.

Regardless of whether this Court voluntarily halts its practice of deciding unpreserved restitution claims, however, the Governor and General Assembly have restricted the Court's authority in this area. Among other changes, Senate File 457 eliminates appellate jurisdiction to decide restitution claims unless an offender has preserved error and exhausted his remedies in the district court:

> An appellate court shall not review or modify an offender's plan of restitution[3] ... unless the offender has exhausted the offender's remedies under [section 910.7] and obtained a ruling from the district court prior to the issue being raised in the appellate courts.

SF457, § 80 (88th Gen. Assemb.) [to be codified at new section 910.7(4)]. The new legislation also provides that a defendant who does not request a determination of his reasonable ability to pay "waives all future claims regarding the offender's reasonable ability to

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[3] "'Plan of restitution' means a permanent restitution order, restitution plan of payment, any other court order relating to restitution, or any combination of the foregoing." SF457, § 69 (88th Gen. Assemb.) [to be codified at new section 910.1(3C)]. This new definitional provision appears to codify the common understanding of the term.

pay, except as provided by section 910.7." SF457, § 72 (88th Gen. Assemb.) [to be codified at new section 910.2A(3)(b)].

The procedures established by Senate File 457, including the preservation, exhaustion, and waiver provisions, apply to all pending cases—including this appeal. The restitution order here did not include a final statement of all amounts, as the final attorneys' fee amount was not known to the district court at the time of sentencing and the court instead conditionally ordered payment in the lesser of $250 or whatever amount of attorney fees was claimed. Sent. tr. p. 15, line 13 — p. 16, line 3. The record does not affirmatively disclose the total amount of fees claimed. As a result, under old case law, this would have been a "temporary" restitution order. *See State v. Davis*, No. 19-0022, 2020 WL 3022758, at *4 (Iowa June 5, 2020).

Senate File 457 eliminates "temporary" restitution orders and converts all previously temporary orders into "permanent restitution orders." SF457, § 73 (88th Gen. Assemb.) [to be codified at new section 910.2B]. Pursuant to this Court's supervisory order of July 7, 2020, the conversion process is automatic, "as of June 25, 2020." *In the Matter of Interim Procedures Governing Ability to Pay Determinations and Conversion of Restitution Orders (*July 7,

2020),[4] p. 3. Thus, the order at issue here has been converted to a "permanent restitution order" within the meaning of the new legislation. This conversion can only be challenged through the filing of a petition pursuant to section 910.7. SF457, § 73 (88th Gen. Assemb.) [to be codified at new section 910.2B(3)]. All provisions of the new legislation "apply to a challenge to the conversion of an existing restitution order in the district court **and on appeal**." SF457, § 73 (88th Gen. Assemb.) [to be codified at new sections 910.2B(3), (3)] (emphasis added). Finally, such a challenge may be heard only in the district court, and only within one year of June 25, 2020. SF457, § 73 (88th Gen. Assemb.) [to be codified at new sections 910.2B(4)]. By operation of law, the combination of the supervisory order and the legislative text requires that this Court apply the waiver, exhaustion, and preservation limitations, as well as the limitations on challenging the conversion of existing orders, to the claim made in this appeal.

Even without the supervisory order, the legislation would still apply to all pending cases. The General Assembly "deemed [these

[4] Available at https://www.iowacourts.gov/collections/521/files/1139/embedDocument/.

provisions] of immediate importance" and directed that they "take effect upon enactment." SF457, § 83 (88th Gen. Assemb.). The changes are procedural because the legislation does not outright deny the judiciary authority to review a restitution order, but instead regulates the machinery by which the Court may do so. *See Hannan v. State*, 732 N.W.2d 45, 51 (Iowa 2007) (amendment to section 814.7 was procedural because it regulated the machinery of raising ineffective-assistance claims). Because the legislation merely changes the tribunal that decides a restitution claim in the first instance (by requiring the district court to first rule on the issue), it does not deny any substantive right to the defendant. *Santos v. Guam*, 436 F.3d 1051, 1056 (9th Cir. 2006) (Wallace, J., concurring) ("[E]very relevant case has made it clear that a change in the number of tribunals authorized to hear a litigant's arguments does not implicate the litigant's substantive rights.") (also collecting cases).

This Court has expressly held that statutes regulating procedures and presumptions apply to pending cases, even if the newly enacted statute establishes that failure to object waives claim. *State ex rel. Buechler v. Vinsand*, 318 N.W.2d 208, 210 (Iowa 1982) (statute with presumption regarding admissibility of expert report

applied to all pending cases, including requirement that objection be made pre-trial; defendant's failure to object was waiver). That principle separately requires this Court to apply the new legislation to pending cases. *See also State v. Thompson*, 836 N.W.2d 470, 481 (Iowa 2013) (legislative amendments to section 622.10, intended to supersede the *Cashen* protocol, took effect upon enactment and applied to pending cases)

Also, this Court has focused its analysis of whether new legislation applies to pending litigation by focusing on what event the legislation regulates and determining if the event in any particular case pre- or post-dates the legislation's effective date. *See State v. Macke*, 933 N.W.2d 226, 231–36 (Iowa 2019) (relevant event was the taking of an appeal, which pre-dated the effective date of the new statute; as a result, the new statute did not apply). This understanding of *Macke* finds support in other cases, including Justice Scalia's special concurrence in *Landgraf*: "the purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power—so that the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised." *Landgraf v. USI Film Prod.*, 511 U.S. 244, 293 (1994)

(Scalia, J., specially concurring). The majority opinion in *Landgraf* similarly recognizes that statutes regulating jurisdiction, like new section 910.7(4) in SF457, "speak to the power of the court," not "the rights or obligations of the parties." *Id.* at 274 (internal citation and quotation omitted). The event regulated by the new preservation and exhaustion provisions is when the "appellate court" is asked to "review or modify an offender's plan of restitution"—when this Court decides the case. SF457, § 80 (88th Gen. Assemb.) [to be codified at new section 910.7(4)].

Unlike the 2019 amendments to section 814.6, which regulated the taking of an appeal, the amendment to section 910.7 at issue here regulates the exercise of appellate jurisdiction, by specifying "[a]n appellate court shall not review or modify…" SF457, § 80 (88th Gen. Assemb.) [to be codified at new section 910.7(4)]. This is clearly and directly a provision aimed at the appellate courts' jurisdiction, not the ability of a party to take an appeal. *Contra James v. State*, 479 N.W.2d 287, 290 (Iowa 1991) (statute regulating ability of inmate to appeal disciplinary rulings).

Finally, the context surrounding the enactment of Senate File 457 also establishes an intent to immediately intervene and correct

judicial decisions that would affect pending cases. For 21 years, this Court's case law contained an exhaustion requirement that was functionally similar to the exhaustion provision to be codified at new section 910.7(4). *See State v. Jackson*, 601 N.W.2d 354, 357 (Iowa 1999); *State v. Swartz*, 601 N.W.2d 348, 354 (Iowa 1999). On June 5, 2020, this Court overruled those cases. *State v. Davis*, No. 19-0022, 2020 WL 3022758, at *5 (Iowa June 5, 2020). Justice McDonald, in dissent, observed that the "the legislature will be 'quite surprised' to learn that we have switched course after twenty-one years and reinterpreted the restitution statutes." *State v. Davis*, No. 19-0022, 2020 WL 3022758, at *10 (Iowa June 5, 2020) (McDonald, J. dissenting). Apparently so, as the General Assembly passed the preservation and exhaustion provisions to be codified at section 910.7(4) only eight days after *Davis*, with a supermajority in the House and unanimous support in the Senate. *See* SF457 BillBook (88th Gen. Assemb.). This, particularly combined with the language used and the immediate effective date, demonstrates legislative intent to apply the relevant restitution provisions of Senate File 457 to all pending cases. *Cf. Thompson*, 836 N.W.2d at 481 (legislative

amendments intended to supersede *Cashen* decision applied to pending cases).

Because the defendant did not preserve error, both this Court's constitutional role as "a court for the correction of errors at law" and the new legislation's preservation, exhaustion, and waiver provisions preclude review. This Court should dismiss the appeal or summarily affirm.

Standard of Review

The district court has a mandatory duty to impose restitution, which triggers review for correction of errors at law. *See State v. Hagen*, 840 N.W.2d 140, 149 (Iowa 2013); *State v. Bonstetter*, 637 N.W.2d 161, 165 (Iowa 2001).

If the defendant had objected, the court's determination of the amount he was reasonably able to pay would be reviewed for an abuse of discretion, under both old case law and the new legislation. *See State v. Kaelin*, 362 N.W.2d 526, 528 (Iowa 1985); SF457, § 72 (88th Gen. Assemb.) [to be codified at section 910.2A(5)]. Both old case law and the new legislation similarly provide that a district court need not state its reasons for exercising that discretion on the record. *Kaelin*, 362 N.W.2 at 528 ("Although we believe judges should state their

reasons as defendant suggests, we refuse to hold that their failure to do so will invalidate a restitution order."); SF457, § 72 (88th Gen. Assemb.) [to be codified at section 910.2A(5)] ("A court is not required to state its reasons for making a determination [on reasonable ability to pay].").

Merits

The defendant's second challenge on appeal complains about the district court capping but not eliminating his restitution obligations for court costs and court-appointed attorney fees. Defendant's Proof Br. at 86–95. The district court found that the defendant was able to pay court costs in the amount of $343.50 and capped the amount of court-appointed attorney fees he would owe at the lesser of $250 or the actual amount paid. Sent. tr. p. 15, line 13 — p. 16, line 3. The court explained that its reasons for ordering repayment in these amounts were that that the defendant "does have the capacity to work and he has some employment history," and thus "given time" he would be able to make payments on a payment plan. Sent. tr. p. 15, line 13 — p. 16, line 3.

If this Court reaches the merits of the claim, despite the defendant's failure to preserve error or exhaust his remedy under

section 910.7 below, the defendant is not entitled to relief. Under either old case law or the new legislation, the district court appropriately exercised its discretion.

A. The district court exercised its discretion appropriately under case law that pre-dates Senate File 457.

As the older case law recognizes, "incarceration creates no obstacle to performance under the restitution plan." *Walters v. Grossheim*, 525 N.W.2d 830, 832 (Iowa 1994). The focus is on whether the defendant is able to "pay the current installments" rather "than his ability to ultimately pay the total amount due." *State v. Van Hoff*, 415 N.W.2d 647, 649 (Iowa 1987).

This Court has repeatedly affirmed district courts' reasonable-ability-to-pay determinations when offenders are currently indigent but capable of earning wages in the future. *See State v. Kaelin*, 362 N.W.2d 526, 528 (Iowa 1985) (defendant was "indigent but has several skills that should enable him to earn income"); *State v. Storrs*, 351 N.W.2d 520, 522 (Iowa 1984) (defendant "was unemployed and had no income" but "had training and experience as a beautician" and "had worked as a real estate broker"); *see also State v. Wagner*, 484 N.W.2d 212, 219 (Iowa Ct. App. 1992) (defendant's "meager" earnings

did not require reducing monthly payment, even though it would take 5,046 years to pay total restitution; it was "likely that his wages will increase in the future" and "there is always the possibility he may come into money from some other source").

This defendant's most recent yearly income was $12,000 and his only monthly payments are "$300 rent" and "fines" in an unknown amount. 9/04/2018 Financial Affidavit; App. 8. He was employed prior to his arrest, including 12 years at Mahaska Farms. Defendant's Proof Br. at 91. He told the PSI writer that, if granted probation, he had a job ready in Des Moines. PSI, p. 4; Conf. App. 9. Although the defendant's criminal conduct may affect his future employment prospects, his ability to earn wages has not been eliminated and he will have some income in the future (whether through inmate employment, prison commissary deposits, idle-pay allowances, a windfall, or traditional employment upon parole or release). The district court considered the competing interests when exercising its discretion and ordering the defendant to pay court costs and a capped amount of attorneys' fees, for a total of less than $600 restitution. Sent. tr. p. 15, line 13 — p. 16, line 3. The defendant has not carried his burden to show an abuse of discretion, particularly

given that he has the ability to request the court order a monthly payment plan and has not elected to do so.

B. By operation of law, new legislation bars relief to the defendant by imposing a presumption he has the reasonable ability to pay and mandating waiver for unpreserved claims.

The defendant's claim also fails under the new legislation. At minimum, the Court should apply the portions of Senate File 457 that establish a presumption that an offender is capable of making payments toward the total amount of restitution imposed. *See State ex rel. Buechler v. Vinsand*, 318 N.W.2d 208, 210 (Iowa 1982) (statute with presumption regarding admissibility of expert report applied to all pending cases); *accord Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1325, 194 L. Ed. 2d 463 (2016) ("a statute does not impinge on judicial power when it directs courts to apply a new legal standard to undisputed facts"); *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 438 (1992) (permissible to "replace[] legal standards" in pending lawsuits); *Nat'l Coal. to Save Our Mall v. Norton*, 269 F.3d 1092, 1096 (D.C. Cir. 2001) (permissible to "chang[e] the rule of decision in a pending case, or (more narrowly) chang[e] the rule to assure a pro-government outcome").

As a result, when evaluating the defendant's claim under the new legislation, "An offender is presumed to have the reasonable ability to make restitution payments for the full amount of category 'B' restitution."[5] SF457, § 72 (88th Gen. Assemb.) [to be codified at new section 910.2A(1)]. The defendant has not overcome that presumption. This ends the analysis.

If the Court believes further consideration of the defendant's claim is necessary, he runs into additional barriers. Under the new legislation, reasonable-ability-to-pay relief is only available after a defendant files a request for a hearing supported by a financial affidavit. SF457, § 72 (88th Gen. Assemb.) [to be codified at new section 910.2A(2)]. Although it is understandable the defendant did not file a financial affidavit here, his failure to contest the restitution amount below (by requesting a separate hearing or even challenging it in the same hearing) bars relief. *Vinsand,* where this Court applied 1981 legislation to a pending action brought in 1979, controls. *See Vinsand*, 318 N.W.2d at 209–10. Among other things, the legislation in *Vinsand* provided that an expert report "shall be admitted at trial

[5] Category B restitution includes the court costs and court-appointed attorney fees at issue here. *See* SF457, § 69 (88th Gen. Assemb.) [to be codified in section 910.1 after internal renumbering].

unless a challenge to the testing procedures or the results … has been made before trial." *Id.* at 209. This Court applied the 1981 legislation to the pending action and concluded that, "because no pretrial objection was urged by the respondent, he lost the right to object on any other ground to admissibility of the results." *Id.* at 210. The same reasoning applies here: Senate File 457 applies, including the provisions regarding waiver for failure to object, and the defendant's claim cannot be heard. *See id.*

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In the end, whether the Court applies the old case law, the new legislation, or some combination, this defendant is not entitled to relief on appeal. Having not objected below, the defendant cannot ask the Court to correct any error. The defendant's remedy, if anywhere, is a section-910.7 petition in the district court.

CONCLUSION

This Court should dismiss the appeal as barred by Senate File 457. If the Court does not dismiss the appeal, it should affirm on the merits.
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REQUEST FOR ORAL ARGUMENT

Given the somewhat complex interactions of old case law, new legislation, and the Court's July 7, 2020 supervisory order, the State believes oral argument will assist the Court.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

TYLER J. BULLER
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
tyler.buller@ag.iowa.gov

CERTIFICATE OF COMPLIANCE

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

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **3,942** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: July 27, 2020

TYLER J. BULLER
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
tyler.buller@ag.iowa.gov