IN THE SUPREME COURT OF IOWA
Supreme Court No. 20-0335

STATE OF IOWA,
Plaintiff-Appellee,

vs.

THOMAS DESHAWN HOLMES,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR BLACK HAWK COUNTY
THE HONORABLE BRADLEY J. HARRIS, JUDGE

APPELLEE'S BRIEF

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Santos v. Guam, 436 F.3d 1051 (9th Cir. 2006)
Danforth, Davis & Co. v. Carter, 1 Iowa 546 (1855)
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ROUTING STATEMENT

The Supreme Court retained *State v. Hawk*, Sup. Ct. No. 19-1814, which addresses the impact of Senate File 457 on pending restitution appeals and existing restitution orders. Because *Hawk* is likely to address that issue of first impression, it would be appropriate to transfer this case to the Court of Appeals for disposition under existing principles and any precedent set by *Hawk*.

STATEMENT OF THE CASE

Nature of the Case

The defendant, Thomas Holmes, seeks appellate review of an order denying his motion to enlarge or amend a ruling on his motion to modify restitution, made pursuant to Iowa Code section 910.7. His motion was denied by the Black Hawk County District Court, the Hon. Bradley J. Harris presiding.

In his "nature of the case" section, the defendant asserts this "appeal is as a matter of right." Defendant's Am. Proof Br. at 10. The State does not agree, and in fact moves to dismiss; the State addresses this issue in the argument section.

Course of Proceedings

The State generally accepts the course of proceedings contained in the defendant's amended proof brief: the defendant was convicted

of kidnapping in the year 2000 and has engaged in prolix litigation since then. *See* Defendant's Am. Proof Br. at 10–12. The district court found the defendant had the reasonable ability to pay attorneys' fees on October 9, 2019. Defendant's Am. Proof Br. at 12. The defendant filed a motion to enlarge and amend, which was subsequently denied, and then filed a notice of appeal. Defendant's Am. Proof Br. at 12–13.

Facts

The facts of conviction are not particularly relevant to the issue presented. The defendant beat, robbed, raped, and kidnapped a Waterloo woman and his convictions for first-degree kidnapping and first-degree burglary were affirmed on direct appeal. *State v. Holmes*, No. 00-950, 2001 WL 1577584, at *1 (Iowa Ct. App. Dec. 12, 2001).

ARGUMENT

I. This Court lacks authority to decide the defendant's restitution claim as a result of Senate File 457 and the Supreme Court's supervisory order on restitution.

Motion to Dismiss

The Supreme Court ordered the question of whether this case should be dismissed to be submitted with the appeal. 11/2/2020 Supreme Court Order. This Court should dismiss the action for two

reasons: first, new legislation eliminates the Court's authority to hear the case; and second, regardless of new legislation, a ruling on a 910.7 motion is not appealable as a matter of right.

Senate File 457 deprives this Court of jurisdiction or authority to hear this case.

As the Court of Appeals has recognized, the Governor and General Assembly have acted to restrict this Court's jurisdiction over certain restitution matters by enacting Senate File 457: "Because the Act removes our statutory authority to review or modify a plan of restitution before an offender exhausts the new district court remedies, we are unable to consider the issue raised on appeal." *State v. Williams*, No. 19-0152, 2020 WL 4497993, at *7 (Iowa Ct. App. Aug. 5, 2020). In other words, this Court lacks authority to hear the defendant's claim and thus dismissal is appropriate. *See id.*

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 … 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 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. According to the defendant, the restitution order at issue here lacks a reasonable-ability-to-pay finding for court costs. Defendant's Am. Proof Br. at 17. 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 the Supreme 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), p. 3, *available at* https://www.iowacourts.gov/collections/521/files/1139/embedDocument/. 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 new 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

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).

The Supreme 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 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, the Supreme 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. *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, Iowa Supreme Court 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, the 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).

Dismissal is also consistent with the Supreme Court's denial of the motion for a limited remand. *See* 8/27/2020 Supreme Court Order. Because the conversion procedure did not exist before June 25, 2020, litigation regarding conversion would require the defendant to raise a new issue that post-dates the notice of appeal. As a result, a limited remand is improper. *Cf. Goode v. State*, 920 N.W.2d 520, 526 (Iowa 2018).

Finally, the defendant chose not to substantively confront any of these arguments in his resistance to the State's motion to dismiss. 9/21/2020 Resistance to Motion to Dismiss, pp. 1–2. He seemingly concedes that, by "operation of S.F. 457 and [the supervisory order]," there is now a "permanent restitution order" in this case. Resistance, ¶ 10–11. This requires the Court to dismiss the appeal, so that the defendant can pursue the only remedy available to him: filing a new 910.7 petition in the district court, utilizing the procedures set forth in Senate File 457 and the Supreme Court's supervisory order.

In short, the new legislation's preservation, exhaustion, waiver, and conversion provisions each independently preclude appellate

review at this time. Dismissal is required, as the Court of Appeals has previously recognized this type of claim cannot be reviewed. *See State v. Williams*, No. 19-0152, 2020 WL 4497993, at *7 (Iowa Ct. App. Aug. 5, 2020).

Regardless of the new legislation, a 910.7 order cannot be appealed as a matter of right.

Even if Senate File 457 did not wholly deprive the Court of authority to decide the case, this attempted appeal should still be dismissed because it is not authorized by statute.

"In Iowa the right of appeal is statutory and not constitutional." *State v. Hinners*, 471 N.W.2d 841, 843 (Iowa 1991). Iowa Code section 814.6 regulates criminal appeals and secures the defendant appeal as a matter of right from a "final judgment of sentence," subject to exceptions inapplicable here. Iowa Code § 814.6 (2019). A ruling on a 910.7 petition is not a "final judgment of sentence" and thus section 814.6 does not confer jurisdiction or authority on this Court to review the matter.

A close analogue in the case law is a ruling on a motion to correct an illegal sentence, which the Supreme Court has held cannot be appealed as a matter of right—only by certiorari. *State v. Propps*, 897 N.W.2d 91, 97 (Iowa 2017); *see also State v. Janz*, 358 N.W.2d

547, 549 (Iowa 1984) (analogizing a 910.7 petition to a motion to correct an illegal sentence).

In resisting the State's motion to dismiss, the defendant offers no response to this argument. 9/21/2020 Resistance, pp. 1–2. Even after the State moved to dismiss, this defendant has not petitioned for certiorari. *Id.* Appeal is not authorized, extraordinary review has not been sought and is not justified, and thus dismissal is warranted.

Preservation of Error

The State contests error preservation because the defendant's claim below is not the same as his claim on appeal. He did not preserve a claim that relates to whether there is an independent reasonable-ability-to-pay finding related to court costs.

The defendant filed a pro se "request for restitution hearing." 08/12/2019 Pro Se Request for Restitution Hearing; App. ---. A hearing was held and the district court described the defendant's argument as a claim "that he is not reasonably able to pay attorney fees previously assessed in the amount of $25,453.60." 10/9/2019 Order; App. 18. The court noted the defendant had successfully been following the payment plan arranged by the Department of Corrections and found "the defendant does have the reasonable

ability to pay those attorney fees previously assessed to him." 10/9/2019 Order; App. 18.

The defendant filed a pro se motion to enlarge and amend, asking whether the order previously entered was a "final order" and requesting the return of money he had already paid toward his restitution obligations. 10/15/2019 Pro Se Motion to Enlarge or Amend; App. 20–21. The district court denied the motion. 10/25/2019 Order; App. 22.

The defendant never specifically requested that the district court conduct a reasonable-ability-to-pay finding on court costs. He cannot complain that the district court did not make such a finding when he never asked for one. Error was not preserved. *See, e.g.*, *State v. Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999).

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 longstanding precedent and cannot be reconciled with the Iowa Constitution.

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 Supreme Court's longstanding case law, of course, also 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).

The Constitution and the case law weigh 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.

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

There is no viable issue presented for review. The State cannot offer any argument beyond the foregoing if this Court exceeds the authority granted to it by the Governor and General Assembly's enactment of Senate File 457.

The district court did not make an express reasonable-ability-to-pay finding regarding court costs because it was never expressly asked to do so.

To the extent the defendant relies on *Albright*, that decision was overruled by Senate File 457, which eliminated multiple provisions on which *Albright* relied, including the existence of "temporary" orders. *See generally* SF457, § 72 (88th Gen. Assemb.). Moreover, the law now expressly presumes the defendant is reasonably able to make payments toward his obligations and he has offered no justification for overcoming that presumption. *See* SF457, § 72 (88th Gen. Assemb.) [to be codified at new section 910.2A(1)].

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.

REQUEST FOR NONORAL SUBMISSION

This case should be decided on the briefs.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **3,153** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: November 10, 2020

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