

IN THE SUPREME COURT OF IOWA
Supreme Court No. 22-1703

STATE OF IOWA,
Petitioner-Appellant,

vs.

IOWA DISTRICT COURT FOR EMMET COUNTY,
Defendant-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR EMMET COUNTY
THE HONORABLE JEFFREY A. NEARY, JUDGE

PETITIONER'S BRIEF

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

- I. The district court acted illegally by ordering the State to pre-pay a special master for the cost of reviewing a criminal defendant's emails for privilege.**

Authorities

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ROUTING STATEMENT

While no case has decided the exact question presented here—whether a district court can order the State to pre-pay the cost of a special master conducting privilege review of a criminal defendant’s emails—and it is an important question, “existing legal principles” provide the answer. Iowa Rs. App. P. 6.1101(2), (3). Transfer to the Court of Appeals is therefore appropriate.

STATEMENT OF THE CASE

Nature of the Case

The State petitioned for certiorari to review whether the district court could order the State to pre-pay the cost of a special master appointed to conduct privilege review of a criminal defendant’s emails obtained via search warrant.

Course of Proceedings and Facts

This matter arises out of a public-corruption prosecution. The district court approved a joint trial information charging Craig Juan Merrill—the former Armstrong Police Chief—with multiple felony offenses, including ongoing criminal conduct, theft in the first degree, assault with a dangerous weapon, and non-felonious misconduct in office. Second Am. Trial Info.; App. 16-21. Charges are also pending

against other former city officials. *See generally id.*; App. 16-21; Min. of Test.; Conf. App. 5-38.

During its investigation, the State—through the Emmet County Sheriff—obtained a search warrant for Merrill’s emails. Search Warrant (Attach. E to Cert. Petition); Conf. App. 142-144. In an abundance of caution, the prosecutor spoke with the warrant judge about the possibility that the email account could contain attorney-client privileged communications. Tr. Status Hr’g, 17:17 to 19:1. The prosecutor offered the warrant judge two options: (1) the State could assemble a “taint team” to segregate any potentially privileged emails and ensure no prosecutor or law enforcement officer prosecuting Merrill reviewed them; or (2) the warrant judge could conduct *en camera* review and segregate potentially privileged emails herself. *Id.* at 10:22 to 11:3, 17:17 to 19:1.

In consultation with and at the direction of the warrant judge, the State prepared a warrant authorizing *en camera* review by the court. *Id.* at 17:17 to 19:1; *see* Search Warrant (Attach. E to Cert. Petition); Conf. App. 142-144. The judge approved the warrant, and the sheriff executed it. Search Warrant (Attach. E to Cert. Petition); Conf. App. 142-144.

The warrant judge encountered technical difficulties conducting the privilege review that prevented her from completing the task. Tr. Status Hr’g, 7:19 to 10:16. The State discussed the matter with Merrill’s counsel. *Id.* at 11:8–12:22. Merrill was unwilling to have a State taint team review the seized evidence, so the parties proposed that Digital Intelligence (a technology firm) conduct the privilege review. *Id.*; Order (8/8/2022); App. 39-42. The parties disputed who should pay for that review. Tr. Status Hr’g, 11:25 to 12:22. The district court appointed Digital Intelligence to conduct the privilege review and ordered the parties to brief “who should bear this cost.” Order (8/8/2022); App. 39-42.

The State argued that the Iowa Judicial Branch should pay for Digital Intelligence’s review or, alternatively, that Merrill should pay. State’s Statement on Costs; App. 45-50. Merrill argued that the State should pay. Merrill’s Statement on Costs; App. 43-44.

The district court rejected the State’s argument. Order (9/16/2022); App. 51-52. It reasoned that there “is no precedent under Iowa law for the payment of these costs by the Iowa Judicial Branch.” *Id.*; App. 51-52. It then said that the “Court views the costs related to the privilege review of the computer hard drive as a cost of

prosecution that may be taxable at the conclusion of the case” before musing about “[w]hether such costs are prosecution costs.” *Id.*; App. 51-52. It ultimately ordered “the State of Iowa [to] first pay or advance the costs of Digital Intelligence in the conducting of the privilege review of the computer hard drive” while reserving the question of whether the costs could be taxed to the defendant after a guilty verdict. *Id.*; App. 51-52.

The State petitioned for certiorari, which the Iowa Supreme Court granted.

ARGUMENT

I. The district court acted illegally by ordering the State to pre-pay a special master for the cost of reviewing a criminal defendant’s emails for privilege.

Preservation of Error

The State argued that the district court lacked authority to order either party to pre-pay the costs of a special master reviewing Merrill’s emails for privilege but that if the district court had such authority then Merrill should pay. State’s Statement on Costs; App. 45-50. The district court rejected those arguments, preserving error. Order (9/16/2022); App. 51-52; *see Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

Standard of Review

“[R]eview is for errors at law.” *Davis v. Iowa Dist. Ct.*, 943 N.W.2d 58, 61 (Iowa 2020).

Merits

- A. The district court lacked statutory authority to order the State to pre-pay a special master for conducting privilege review of a criminal defendant’s email, so the district court acted illegally.**

A syllogism resolves this case. Court costs are taxable only to the extent provided by statute. No statute authorizes a district court to order the State to pre-pay a special master in a criminal case. Therefore, the district court acted illegally by ordering the State to pre-pay the costs of a special master appointed to conduct privilege review of Merrill’s emails in this criminal case.

Caselaw confirms the major premise. In Iowa, court costs “are taxable only to the extent provided by statute.” *City of Cedar Rapids v. Linn Cnty.*, 267 N.W.2d 673, 673 (Iowa 1978); see also *State v. McMurry*, 925 N.W.2d 592, 598 (Iowa 2019); *City of Ottumwa v. Taylor*, 102 N.W.2d 376, 378 (Iowa 1960). Indeed, “[t]he district court lacks inherent power to tax court costs.” *Grant v. Iowa Dist. Ct.*, 492 N.W.2d 683, 685 (Iowa 1992).

Turning to the minor premise, no statute allows a district court to order a party to pre-pay the costs of a special master or referee in a criminal case. To start, the district court said that it “view[ed] the costs related to the privilege review of the computer hard drive as a cost of prosecution” Order (9/16/2022); App. 51-52. Yet it cited no authority in its order supporting that point or otherwise requiring the State to pre-pay the costs of the special master’s privilege review. *Id.*; App. 51-52.

The State is unaware of any statute authorizing a district court to order a party to pre-pay the cost of a special master or referee conducting privilege review in a criminal case. The statutes dealing with court costs in criminal cases do not support the district court’s order requiring the State to pre-pay the special master. The prosecution costs statute contains an express list of permissive costs for recovery, none of which apply to privilege review by a special master (or judge) following a search warrant. Iowa Code § 815.13. The criminal court costs statute is similarly inapplicable. Iowa Code § 602.8106. While the Iowa Rules of Civil Procedure allow courts to appoint special masters and order parties to pay them, the “civil rules ... do not apply to criminal proceedings.” *State v. Sallis*, 981 N.W.2d

336, 349 (Iowa 2022) (citing *State v. Russell*, 897 N.W.2d 717, 725 (Iowa 2017)); Iowa Rs. Civ. P. 1.935, 1.936; *see also* Fed. R. Civ. P. 53(g)(3). The Iowa Rules of Criminal Procedure offer no authority to appoint a special master or to order a party to pay a special master's costs. *See generally* Iowa Rs. Crim. P.

Turning to the statutes dealing with special masters, they suggest that special masters are judicial officers conducting judicial functions with salaries set by the judiciary. Iowa law allows judges to oversee special masters who are appointed to conduct judicial functions. Iowa Code § 602.6602. Those masters are paid salaries set by the Supreme Court. Iowa Code § 602.1508. And neither the prosecution nor defense pay the cost of judicial functions. *See* Iowa Code §§ 602.1302, 602.1501 (establishing funding and salaries for judicial branch and judges). Thus, special masters are judicial officers carrying out judicial functions. Nothing changes when a court must contract for services. The parties cannot pay a vendor to do what it could not pay the court to do. *See People v. Superior Ct. (Laff)*, 23 P.3d 563, 587 (Cal. 2001) (“The judicial determination of privilege claims is not a criminal investigation or prosecution, and the circumstance that the trial court appoints a special master to perform

subordinate judicial duties in such a proceeding does not transform this judicial function into a prosecutorial one.”).

Other states agree that the judicial branch bears the costs of a special master ordered to conduct privilege review. The Missouri Supreme Court has held that such costs cannot be assessed to the prosecution. *State ex rel. Merrell v. Carter*, 518 S.W.3d 798, 800 (Mo. 2017). There, the Missouri Supreme Court reversed a district court order apportioning the cost of a special master reviewing a defendant’s jail calls for privilege to the prosecution. *Id.* at 799. No Missouri statute authorized such an apportionment to the prosecution. *Id.* at 799–800. Because apportioning court costs is strictly statutory, the Missouri Supreme Court reversed the order requiring the prosecution to pay the costs of the special master’s review. *Id.*

California’s Supreme Court reached the same conclusion. *Laff*, 23 P.3d at 567. It applied essentially the same reasoning as the Missouri Supreme Court to conclude that the costs of a special master conducting privilege review cannot be taxed to the prosecution. *Id.* at 586–88. It also held that the judicial branch had to pay for such review. *Id.* at 587–88. As the California Supreme Court put it: “When

a court lacks the funds necessary to fulfill its constitutional obligations, the solution is not to require one or more of the parties (or their counsel) to fund the cost of discharging the court's judicial duties, but rather to seek additional public funds from the appropriate entity responsible for providing funds for that purpose.” *Id.* at 588. This Court should follow the reasoning of the Missouri and California Supreme Courts to reverse this illegal order.

As a final point, the State observes that the district court's order is inconsistent on what it believed to be the dispositive point. The court said it “views the costs related to the privilege review of the computer hard drive as a cost of prosecution” Order (9/16/2022); App. 51-52. Two sentences later the court reversed itself, saying “[w]hether such costs are prosecution costs ... need not be determined at this time as the matter has not been concluded.” *Id.*; App. 51-52. If the district court's reason for assessing this cost to the prosecution is that it is a prosecution cost, then the district court needed to decide that issue. As it stands, the district court ordered the State to pre-pay a cost that, in the district court's analysis, may or may not be a prosecution cost.

No legal authority allowed the district court to order the State to pre-pay the cost of a special master conducting privilege review of a criminal defendant's emails. The district court acted illegally in doing so. This Court should sustain the writ and reverse.

B. If the district court could tax the costs of the special master to a party, it should have taxed them to Merrill.

If the district court could order a party to pre-pay the costs of Merrill's privilege review, it erred in assessing those costs to the State because it failed to realize it could have required Merrill to pay them. The district court explained that it "viewed the costs related to the privilege review ... as a cost of prosecution" that "the State must pay." Order (9/16/2022); App. 51-52. Explaining that the State "must pay" for the privilege review shows that the district court did not believe it could order Merrill to pay for that review.

The district court's belief that it could order only the State to pay for Merrill's privilege review was error. As explained, the district court lacked statutory authority to require either party to pre-pay for the special master's privilege review. Thus, any authority to order a party to pay for the privilege review must have been inherent. It stands to reason that if the district court had inherent authority to

order a party to pre-pay for the special master's privilege review, it had inherent authority to order either party, or both parties, to pre-pay for that review. If it could order either party to pre-pay for the special master's review, the district court erred in believing it must tax that cost to the State. *See State v. Hager*, 630 N.W.2d 828, 836 (Iowa 2001) ("A court abuses its discretion when it fails to exercise any discretion.").

If it could have ordered either party to pre-pay the for the special master's review, the court should have ordered Merrill to pre-pay. The privilege review conducted by the special master was solely for Merrill's benefit. Had the records been in Merrill's control and sought by subpoena, he likely would have conducted privilege review himself before turning them over to the prosecution. *See In re Grand Jury Subpoenas*, 454 F.3d 511, 516 (6th Cir. 2006) (describing typical practice for privilege review of documents when requested by subpoena). The district court erred by shifting Merrill's litigation cost to the State.

Before the district court, Merrill cited a federal district court case assessing to the United States the cost of a special master reviewing documents responsive to a search warrant for privilege.

Merrill’s Statement on Costs at 1; App. 43 (citing *United States v. Abbell*, 914 F. Supp. 519, 520 (S.D. Fla. 1995)). But in that case, no analysis preceded assessing those costs. *Abbell*, 914 F.Supp. at 520. That is perhaps understandable given that the United States Department of Justice has made a policy decision to authorize payment to special masters in cases initiated by the United States. *See* United States Attorneys’ Manual, §3-8.400. In any event, this case is unlike *Abbell* because the State did not execute a search warrant on a criminal attorney’s law office—an action that predictably raises issues of privilege. *Abbell*, 914 F. Supp. at 519–20; *see also* *United States v. Gallego*, No. CR-18-01537-001-TUC-RM, 2018 WL 4257967, at *1 (D. Ariz. Sept. 6, 2018) (observing that “searches of law offices should be executed with ‘special care,’ ... because such searches implicate unique concerns regarding privileged materials and constitutional rights”). Instead, the search warrant here merely sought Merrill’s emails. Search Warrant (Attach. E to Cert. Petition); Conf. App. 142-144.

The Sixth Circuit, in contrast, has said that the costs of a special master reviewing documents responsive to a grand jury subpoena ought to be taxed to the party that would ordinarily be responsible for

the review. *In re Grand Jury Subpoenas*, 454 F.3d at 524. In other words, it reasoned that a party bears the cost of its own privilege review. *Id.* *In re Grand Jury Subpoenas* is better reasoned than *Abbell*. To the extent costs are assessable to any party here, this Court should follow *In re Grand Jury Subpoenas*.

If the district court had the authority to order a party to pre-pay the costs of the special master's privilege review, the district court erred by concluding that that party must be the State. It should have ordered Merrill to pay for his privilege review.

CONCLUSION

For the foregoing reasons, the State requests that this Court sustain the writ of certiorari and reverse the district court's illegal order requiring the State to pre-pay the cost of a special master reviewing Merrill's emails for privilege.

REQUEST FOR NONORAL SUBMISSION

This case is appropriate for nonoral submission.

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:

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