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IN THE SUPREME COURT FOR THE STATE OF IOWA  
No. 20-0335

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**STATE OF IOWA,**  
Plaintiff-Appellee,

vs.

**THOMAS DESHAWN HOLMES,**  
Defendant-Appellant.

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

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DEFENDANT/APPELLANT'S FINAL BRIEF AND REQUEST FOR  
ORAL ARGUMENT

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**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that I e-filed the Defendant/Appellant's Final Brief with the Electronic Document Management System with the Appellate Court on the 12<sup>th</sup> day of November 2020. The following counsel will be served by Electronic Document Management System.

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*/s/ R. Ben Stone*

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## **STATEMENT OF ISSUES**

THE DISTRICT COURT HAS YET TO ISSUE A FINAL RESTITUTION ORDER THAT INCLUDES A DETERMINATION OF WHETHER THE DEFENDANT HAS THE REASONABLE ABILITY TO PAY ALL AMOUNTS OF CATEGORY II RESTITUTION, THUS A REMAND IS REQUIRED

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## **ROUTING STATEMENT**

Pursuant to Iowa Rule of Appellate Procedure 6.1101(3)(a), because this case presents an application of existing legal principles, it should be transferred to the Court of Appeals.

## **STATEMENT OF CASE**

### **Nature of the Case**

This is an appeal by the Defendant from a final order denying his Motion to Amend and Enlarge the Restitution Order Pursuant to Iowa Code §910.7 of the Honorable Bradley J. Harris. This appeal is a matter of right pursuant to Iowa Rules of App. P. 6.101(1)(b) and 6.103(1).

### **Procedural History**

On April 25, 2000, after a bench trial, the Defendant was convicted of Kidnapping in the First Degree, in violation of Iowa Code §710.2(3)(4)<sup>1</sup> and Robbery in the First Degree, in violation of Iowa Code §711.2 (1999). On

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<sup>1</sup> This section does not exist in the Code of Iowa, and never has existed. Both the sentencing transcript and the sentencing order reference this code section exclusively. The Iowa Court of Appeals also referenced this non-existent section in affirming Mr. Holmes' conviction. *State v. Holmes*, No. 00-950 2001 WL 1577584 (Iowa Ct. App. Dec. 12, 2001). Extensive litigation has taken place in regard to Mr. Holmes' conviction and sentencing under a non-existent code section, and it is anticipated that this litigation will continue in the federal courts. See *Holmes v. State*, 18-1467: Ruling Affirming Denial of Postconviction Relief (Iowa Ct. App. April 29, 2020); Appellant's Application for Further Review (filed May 19, 2020); Order Denying Further Review (Iowa June 23, 2020).

May 22, 2000, the court denied Defendant's Motion in Arrest of Judgment and Motion for New Trial. (Supplemental Order – Order of Restitution, App. 6). On May 24, 2000, the court sentenced Defendant to life in prison. ( App. 6). Defendant appealed. The appellate court later affirmed his convictions. *State v. Holmes*, No. 00-0950 2001 WL 1577584 (Iowa Ct. App. December 12, 2001).

On March 15, 2001, the court issued a Supplemental Order. (Supplemental Order, App. 6). The purpose of this single page order is described as “to determine amount of restitution ordered” and “TO RECEIVE (COURT COSTS, ETC.) WHICH WERE NOT AVAILABLE AT THE TIME OF SENTENCING.” ([capitalization in original], App. 6). The order further states “IT IS THE JUDGEMENT OF THE COURT that the Defendant is hereby ordered to make restitution pursuant to Iowa Code 910.2 and 910.3 in the amounts herein set forth:” (App. 6).

The amounts set by this Restitution Order are: “Victim Assistance Program: \$15,260.00; Court Costs \$6042.14; Attorney Fees \$25,453.60” (App. 6). The order contains no reference to whether the Defendant had a reasonable ability to pay any of the restitution amounts stated therein.

On March 18, 2004, a Restitution Plan was filed with the approval of the Warden of the Iowa State Penitentiary requiring the Defendant to make

payments with twenty (20) percent of all his institutional accounts. (Restitution Plan, App. 7). The order states that amounts due at that time were the following: \$4,542.14 for “Costs,” \$14,657 for “Restitution” [\$603 previously paid], and \$25,453.60 for “Other” [2.28 previously paid]. (App. 7).

On September 27, 2017, the Defendant, acting *pro se*, filed a Request for Hearing on the Inability to Pay Attorney Fees. (Request for Hearing on the Inability to Pay Attorney Fees, App. 8). On October 5, 2017, the court found by order that the Defendant did not have the reasonable ability to pay attorney fees. (Order, App. 9).

On August 12, 2019, the Defendant, acting *pro se*, filed a Request for Restitution Hearing pursuant to Iowa Code §910.7. (Request for Restitution Hearing, App. 11). On October 9, 2019 -- after a hearing on September 23, 2019 -- the court denied the Defendant’s request to find he did not have the reasonable ability to pay *attorney fees*. (Order, App. 18) (emphasis supplied). No reference is made in the order to whether the Defendant has the reasonable ability to pay “court costs” or “restitution.”

On October 15, 2019, the Defendant filed a Motion to Enlarge and Amend. (Motion to Amend and Enlarge, App. 20). On October 25, 2019, the court denied this motion. The Defendant filed notice of appeal on November 4, 2019.

On March 20, 2020 the undersigned was appointed to represent the Defendant in this appeal.

### **STATEMENT OF THE FACTS**

When restitution was initially ordered in this case in 2001, the court made no determination as to the reasonable ability of the Defendant to pay any of his restitution costs, including the \$25,454 assessed for attorney fees. Over the course of the last two decades, the Defendant has paid twenty (20) percent of his institutional income toward this restitution.

In March of 2019, the Iowa Supreme Court issued its ruling in *State v. Albright*, 925 N.W.2d 144 (2019). In this decision, the Court directed that district courts were required to make a determination at the final restitution hearing as to the reasonable ability of defendants to pay what is now referred to as Category II restitution in its entirety. *Id.* at 162 (emphasis supplied).

In response to this court decision, the Defendant in August of 2019 filed a Request for Restitution Hearing. (Request for Restitution Hearing, App. 11). In this motion, the Defendant, acting *pro se*, cited to an October 5, 2017 order stating that he does not have the reasonable ability to pay his attorney fees. (App. 11-12). After a hearing on September 23, 2019, the district court ruled that the Defendant “does have the reasonable ability to pay those attorney fees....” (Order, App. 18). Citing to the fact “the defendant has been paying

from his inmate account since the time of his conviction in this matter,” the court noted “that the *attorney fees previously ordered* in this matter are within that amount determined to be acceptable by [the] state public defender for the three attorneys which defendant utilized prior to his conviction in this case,” and further noted that the “defendant has successfully followed the plan of payment arranged by the Department of Corrections during defendant’s incarceration.” (Order, App. 18) (emphasis supplied).

The court’s order makes no reference to Defendant’s reasonable ability to pay any other Category II restitution, to wit: Court Costs and Restitution.

The Defendant then filed a *pro se* Motion to Amend and Enlarge. (Motion to Amend, App. 20). In this filing, the Defendant argues that the October 9 ruling was erroneous in using his conduct *since* the 2001 restitution order to assert he has the reasonable ability to pay. Further -- and particularly relevant to this appeal -- Defendant asked the Court to state whether its October 9 order was a “final restitution order” under *Albright*. (Motion to Amend; App. 20). The court did not respond to this inquiry, instead simply denying the Defendant’s motion on October 15. (Order denying motion, App. 22).

Throughout the course of this case, no court has ever issued a final restitution order that includes a finding that the Defendant has a reasonable

ability to pay restitution as a part of the analysis necessary to issue a final restitution order that is consistent with Defendant's constitutional rights under *Albright*. Further, his reasonable ability to pay ALL his Category II restitution costs – including the Victim Assistance Program/Restitution and Court Costs – has never been considered.

Relevant additional facts will be set forth below.

### **ARGUMENT**

THE DISTRICT COURT HAS YET TO ISSUE A FINAL RESTITUTION ORDER THAT INCLUDES A DETERMINATION OF WHETHER THE DEFENDANT HAS THE REASONABLE ABILITY TO PAY ALL AMOUNTS OF CATEGORY II RESTITUTION, THUS A REMAND IS REQUIRED

#### **Standard of Review and Issue Preservation.**

The review of restitution orders is for correction of errors at law. *State v. Albright*, 925 N.W.2d 144, 158 (Iowa 2019). The reviewing court is to “determine whether the court’s findings lack substantial evidentiary support, or whether the court has not properly applied the law.” *State v. Klawonn*, 688 N.W.2d 271, 274 (Iowa 2004).

The Defendant, acting *pro se*, preserved this issue when he asserted that the State of Iowa had “failed to comply with Chapter 910, in that the Applicant’s Restitution plan of payment was not modified to comply with” Iowa law. (Request for Restitution Hearing, App. 11). As a *pro se* party filing



his own pleadings in the district court, the Defendant is “entitled to a liberal construction” of his pleadings. *Abbenhaus v. Flannegan*, 756 N.W.2d 481 at \*1 (Iowa Ct. App. 2008)(quoting *Munz v. State*, 382 N.W.2d 693, 697 (Iowa Ct. App. 1985)).

In addition, this issue was preserved when the Defendant subsequently referenced a failure to make “any determination on whether defendant had a reasonable ability to pay” restitution while also asking the court to render a “final order of restitution” consistent with *State v. Albright*, 925 N.W.2d 144 (Iowa 2019) (Motion to Amend and Enlarge, App. 20).

Preservation was further established when the defendant asked in his Motion to Amend and Enlarge for the court to declare that its October 9 order was, in fact, a final restitution order. (App. 20). Finally, the Defendant filed notice of appeal. (Notice of Appeal, App. 24).

## **ARGUMENT**

*State v. Albright* requires that the district court make a determination regarding a defendant’s reasonable ability to pay restitution prior to the issuance of a final order of restitution. 925 N.W.2d at 162 (emphasis supplied). In fact, until a final restitution order is issued, any prior restitution orders are “nonappealable or unenforceable.” *Id.* at 161.

In Mr. Holmes' case, the only final restitution order was filed 18 years before any district court even discussed whether the Defendant had the reasonable ability to pay the previously ordered restitution. From the day the order regarding restitution was issued on March 15, 2001, no final order of restitution has been filed subsequent to a determination of Defendant's reasonable ability to pay. After Judge Harris had determined the defendant had the reasonable ability to pay "those attorney fees previously assessed to him," the defendant asked Judge Harris to declare his October 2010 order a "final restitution order." Judge Harris declined to do so. Therefore, under *Albright*, the October 9 order of Judge Harris finding the defendant has the reasonable ability to pay the previously ordered restitution amount for attorney fees is unenforceable until a final restitution order is issued. For this reason, a remand is required.

Numerous decisions since *Albright* have required remand for determination of reasonable ability to pay prior to the final restitution order being filed. *State v. Headley*, 926 N.W.2d 545 (Iowa 2019); *State v. Covell*, 925 N.W.2d 183 (Iowa 2019); *State v. Petty*, 925 N.W.2d 190 (Iowa 2019); *State v. Davis*, 2020 WL 3022758 (Iowa June 5, 2020); *State v. Staake*, 2020 WL 3022759 (Iowa June 5, 2020); *State v. Hering*, 942 N.W.2d 610 (Iowa Ct. App. January 23, 2020); *State v. Leonard*, 943 N.W.2d 66 (Iowa Ct. App.

February 5, 2020); *State v. Zimmerman*, 943 N.W.2d 70 (Iowa Ct. App. February 5, 2020); *State v. Lofstuen*, 2020 WL 1054439 (Iowa Ct. App. March 4, 2020); *State v. Stoner*, 2020 WL 1054088 (Iowa Ct. App. March 4, 2020); *State v. Smeltser*, 928 N.W.2d 858 (Iowa Ct. App. 2019); *State v. Northern*, 928 N.W.2d 860 (Iowa Ct. App. 2019); *State v. Wiggins*, 2020 WL 2478674 (Iowa Ct. App. May 13, 2020); *State v. Gooden*, 2020 WL 2060301 (Iowa Ct. App. April 29, 2020); *State v. Nagel*, 942 N.W.2d 611 (Iowa Ct. App. January 23, 2020); *State v. Chapman*, 941 N.W.2d 595 (Iowa Ct. App. 2019); *State v. Gillen*, 941 N.W.2d 602 (Iowa Ct. App. (2019)); *State v. Moore*, 939 N.W.2d 645 (Iowa Ct. App. 2019); *State v. Shackford*, 942 N.W.2d 4 (Iowa Ct. App. January 9, 2020); *State v. Comly*, 940 N.W.2d 441 (Iowa Ct. App. 2019); *State v. Lester*, 929 N.W.2d 277 (Iowa Ct. App. 2019); *State v. Meyers*, 929 N.W.2d 876 (Iowa Ct. App. 2019); *State v. Devolt*, 940 N.W.2d 449 (Iowa Ct. App. 2019); *State v. Singleton*, 928 N.W.2d 667 (Iowa Ct. App. 2019); *State v. Bridges*, 943 N.W.2d 70 (Iowa Ct. App. February 5, 2020); *State v. Maresch*, 928 N.W.2d 868 (Iowa Ct. App. 2019); *State v. Shultsev*, 2020 WL 2988274 (Iowa Ct. App. June 3, 2020); *State v. Wedgwood*, 2020 WL 2988405 (Iowa Ct. App. June 3, 2020); *State v. Chamberlin*, 2020 WL 2487893 (Iowa Ct. App. May 13, 2020); and *State v. Dessinger*, 2020 WL 2487899 (Iowa Ct. App. May 13, 2020).

In several other instances a remand was ordered to specifically deal with a district court's failure to issue a final restitution order despite having previously made some type of determination as to defendant's reasonable ability to pay. *State v. Oliver*, 2020 WL 2487610 (Iowa Ct. App. May 13, 2020)(sentencing court determined reasonable ability to pay on attorney fees, but did not yet have court costs and correctional fees before it, so remand necessary); *State v. Hampton*, 2020 WL 2968342 (Iowa Ct. App. June 3, 2020)(sentencing court determined ability to pay only as to attorney fees, so remand necessary); *State v. McGilvrey*, 2020 WL 2066303 (Iowa Ct. App. April 29, 2020)(district court found defendant unable to pay attorney fees, but required him to pay court costs without a reasonable-ability-to-pay determination); and *State v. Green*, 2020 WL 1551138 (Iowa Ct. App. April 1, 2020).

The absence in the record of a final restitution order procedurally compliant with *Albright* compelled a similar remand in *State v. Brocksieck*, 942 N.W.2d 608, 608 (Iowa Ct. App. January 23, 2020) as well as in *State v. Barker*, 942 N.W.2d 609 (Iowa Ct. App. January 23, 2020).

Finally, there are instances where the absence of a clear record revealing the court's intention that a final restitution order has been entered is enough to compel a remand. In *State v. Tillman*, the appellate court felt it

necessary to remand for another proceeding because “it is unclear from the record whether the district court intended the sentencing order to be considered the ‘final restitution order.’” 942 N.W.2d 610, at \*4 (Iowa Ct. App. January 23, 2020).

These cases support the necessity of a remand in this case. The Defendant’s case is procedurally in violation of *Albright* in that there is yet to be a final restitution order that includes the proper determination of his reasonable ability to pay all Category II restitution amounts.

### **CONCLUSION**

The only final restitution order in this case was issued on March 15, 2001. At that time, the court had made no effort to determine whether the defendant had the reasonable ability to pay the restitution amounts ordered. Therefore, the Court must remand to the district court so a final restitution hearing can be held to determine whether the defendant has the reasonable ability to pay the all restitution amounts previously ordered, or whether adjustments to those amounts are necessary consistent with defendant’s reasonable ability to pay at the time.

### **REQUEST FOR ORAL ARGUMENT**

Counsel requests to be heard in oral argument.

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS**

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) (no more than 14,000 words) because this brief contains 2,462 words, excluding the parts of the brief exempted by Rule 6.903(1)(g)(1), which are the table of contents, table of authorities, statement of the issues, and certificates.

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in font size 14, Times New Roman.

/s/ R. Ben Stone  
R. Ben Stone

Date: November 12, 2020