IN THE SUPREME COURT OF IOWA
Supreme Court No. 17–0460

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CHAD DENNIS VANCE,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR FLOYD COUNTY
THE HON. PETER B. NEWELL, DISTRICT ASSOCIATE JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

This case raises unique questions about magistrate courts' jurisdiction and the scope of the right of appeal that have not yet been resolved by the Iowa Supreme Court. As such, this case meets the criteria for retention. *See* Iowa R. App. P. 6.1101(2)(c), (f).

STATEMENT OF THE CASE

Nature of the Case

Chad Dennis Vance pled guilty to third-degree harassment, a simple misdemeanor, in violation of Iowa Code section 708.7(4). After sentencing, the court entered a no-contact order that prohibited Vance from having contact with the victim's family for one year. *See* Sentencing No-Contact Order (3/18/16); App. 2.

On January 24, 2017, the State requested an extension of that no-contact order under section 664A.8. A hearing was held before a magistrate judge, who granted a five-year extension. Order (2/15/17); App. 11. Vance appealed to the district associate court, which affirmed the magistrate's order. *See* Order (3/16/17); App. 28.

Vance now seeks discretionary review of that order. He argues (1) the magistrate court had no jurisdiction to modify or extend the no-contact order; (2) the district associate court acted illegally when it affirmed that order; (3) this court has jurisdiction over this appeal;

(4) section 664A.8 is unconstitutionally vague; (5) the court extended the no-contact order in violation of his right to due process; (6) courts cannot extend a one-year no-contact order for five years without any showing of a change in circumstances since entry of the original order; and (7) the evidence was insufficient to show that Vance continued to pose a threat to the victim family's safety that would warrant entry of the extended no-contact order.

Statement of Facts & Course of Proceedings

The State generally accepts Vance's description of the underlying facts and the course of proceedings. *See* Iowa R. App. P. 6.903(3). Additional facts will be discussed when relevant.

Jurisdiction

Regardless of whether there is a right of appeal from an order that extends a no-contact order under Iowa Code section 664A.8, the Iowa Supreme Court has already granted discretionary review in this particular case. *See* Order (3/22/17); Order (5/3/17); App. 33, 64. Therefore, this Court has jurisdiction. *See* Iowa Code § 814.6(2)(e); *State v. Davis*, 493 N.W.2d 820, 822 (Iowa 1992) (citing Iowa Const. art. V, § 4, *amended by* Iowa Const. amend. 21, § 1).

ARGUMENT

I. The Magistrate Had Subject Matter Jurisdiction to Rule on the Motion to Extend the No-Contact Order.

Preservation of Error

Vance did not challenge the magistrate's subject matter jurisdiction in the magistrate court, in the district associate court, or in his application for discretionary review. *See* Resistance (2/9/17); App. ---; Def's Appeal Brief (3/2/17); App. 13; Application for Discretionary Review (3/27/17); App. 35. However, challenges to subject matter jurisdiction may be raised at any point (and may be raised by this Court, *sua sponte*). *See Crowell v. State Pub. Defender*, 845 N.W.2d 676, 681 (Iowa 2014).

Standard of Review

"The question of whether a court has subject matter jurisdiction is purely legal question and our review is at law." *See State v. Bartley*, 797 N.W.2d 608, 610 (Iowa Ct. App. 2011).

Merits

"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." *State v. Erdman*, 727 N.W.2d 123, 125 (Iowa 2007) (quoting *Smith v. Smith*, 646 N.W.2d 412, 414 (Iowa 2002)).

Vance argues the magistrate court had no subject matter jurisdiction to extend this no-contact order. *See* Def's Br. at 12–14.

The Iowa Court of Appeals has twice stated that it was "not persuaded the legislature's grant of subject matter jurisdiction for magistrates to hold trials in simple misdemeanor cases impliedly confers unlimited jurisdiction for magistrates to extend no-contact orders arising in such cases for additional five-year terms, without limit on the number of modifications, under section 664A.8." *See State v. Pettit*, No. 15–1593, 2016 WL 3276851, at *2 (Iowa Ct. App. June 15, 2016) (quoting *State v. Sinclair*, No. 12–1151, 2013 WL 3458146, at *2 (Iowa Ct.App. July 10, 2013)). But section 602.6405 grants magistrates "jurisdiction of simple misdemeanors," without specifying trials as the extent of their jurisdiction over those cases. *See* Iowa Code § 602.6405(1). Additionally, simple misdemeanors are unambiguously within the scope of chapter 664A, which applies in all criminal cases where a defendant is charged with any "public offense for which there is a victim." *See* Iowa Code 664A.2(1). As used within chapter 664A, the term "court" must necessarily include magistrates properly exercising jurisdiction throughout all pre-trial and post-trial stages of a simple misdemeanor case, or it would not function properly

in simple misdemeanor cases with victims in need of protection. *E.g.*, Iowa Code § 664A.3(3) (stating "[t]he no-contact order has force and effect until it is modified or terminated by subsequent court action" and "the court shall terminate or modify the no-contact order pursuant to section 664A.5" upon final disposition of the case, without making any distinction between magistrate courts and other criminal courts); Iowa Code § 664A.4 (requiring "[t]he clerk of the district court or other person designated by the court" to provide notice to victims). There is no reason to construe the term differently in section 664A.8; these statutes should be read *in pari materia*, and the term "court" should encompass magistrate courts in every section of chapter 664A. *See, e.g.*, *State v. Nail*, 743 N.W.2d 535, 540–41 (Iowa 2007) (noting "[t]he *in pari materia* approach is especially appropriate in the area of criminal law, where our legislature has established a number of code chapters with highly detailed, interconnecting provisions," because "we necessarily operate on the objective assumption that the legislature strives to create a symmetrical and harmonious system of laws").

Indeed, the legislature has shown no real aversion to authorizing magistrates to enter no-contact orders. *See* Iowa Code § 664A.3(1) (setting out specific conditions under which "the magistrate shall

enter a no-contact order" during an arrestee's initial appearance). Nor did the legislature exclude magistrate courts or simple misdemeanors when it granted Iowa courts the authority to "enter a no-contact order or continue the no-contact order already in effect for a period of five years from the date the judgment is entered or the deferred judgment is granted" when sentencing a defendant for *any* offense covered by chapter 664A. *See* Iowa Code § 664A.5. The legislature even chose to designate *violations* of no-contact orders in certain troubling cases as simple misdemeanors, which means the same magistrate court may hear a series of criminal cases arising out of repeated violations of specific types of no-contact orders. *See* Iowa Code § 664A.7(5). Upon pronouncing judgment for each subsequent violation, that magistrate would be authorized to enter *another* no-contact order for five years. *See* Iowa Code § 664A.5. This illustrates that the concerns articulated in *Pettit* and *Sinclair* were misplaced: if the legislature is content to grant magistrate courts the authority to extend no-contact orders that are repeatedly violated, it presumably views magistrate courts as judicial officers who are well-suited to assess whether a defendant continues to pose a threat to victim safety when he/she has *complied* with a no-contact order entered on a simple misdemeanor conviction.

Sections 602.6405 and 664A.8 must be read "in a reasonable fashion to avoid absurd results." *Brakke v. Iowa Dep't of Nat'l Res.*, 897 N.W.2d 522, 534 (Iowa 2017). It would be wildly inefficient to confiscate jurisdiction over the no-contact order from the magistrate that initially imposed it at sentencing (presumably after presiding over the earlier proceedings) and hand the case to a district court or district associate court that would have no working familiarity with the underlying facts—especially considering that prior proceedings before the magistrate would have involved a simple misdemeanor, and would therefore be accompanied by very little record material to establish what was proven in the underlying trial/plea/sentencing proceedings. *See, e.g.*, Iowa R. Crim. P. 2.54 (simple misdemeanors charged by complaint, rather than trial information with minutes); Iowa R. Crim. P. 2.67(9) ("The proceedings upon trial shall not be reported, unless a party provides a reporter at such party's expense."). When interpreting statutes, it is generally presumed that "[a] result feasible of execution is intended." *See* Iowa Code § 4.4(4). At best, stripping magistrate courts of jurisdiction over simple misdemeanors in this post-trial phase would mandate cumulative presentation of evidence, and amplify burdens on courts, witnesses, and victims.

There is no basis for the "magistrate court creep" concerns raised by *Pettit*, *Sinclair*, and Vance's brief. Litigation surrounding these no-contact orders does not occur in separate civil cases—this no-contact order is attached to the same simple misdemeanor that the magistrate was empowered to hear under section 602.6405(1), without any language that would limit the magistrate's jurisdiction over this post-trial litigation. Additionally, chapter 664A envisions that magistrates should play active roles in entering and modifying no-contact orders, both during initial appearances and when they exercise jurisdiction over simple misdemeanor cases. Accordingly, this Court should hold that magistrate courts have jurisdiction over motions to extend no-contact orders in simple misdemeanor cases, and it should reject Vance's challenge to the magistrate court's subject matter jurisdiction in this case.

II. The District Associate Court Might Have Been Able to Treat This Appeal from the Magistrate Court's Order as a Petition for a Writ of Certiorari—But It Did Not.

Preservation of Error

Again, challenges to subject matter jurisdiction may be raised at any point, and may be raised by this Court, *sua sponte*. *See Crowell*, 845 N.W.2d at 681. Error preservation is no obstacle to review.

Standard of Review

Again, "[t]he question of whether a court has subject matter jurisdiction is purely legal question and our review is at law." *Bartley*, 797 N.W.2d at 610.

Merits

The State's resistance to the application for discretionary review argued that, if *Pettit* and *Sinclair* were correct statements of the law, then the district associate court's order that affirmed the magistrate's order extending the no-contact order would still be valid because it, "in effect, granted the extension." *See* Resistance (4/10/17) at 2; App. 60. Now that the record of the proceedings has been fully compiled and made available, it has become clear that the district associate court was reviewing the magistrate's order on appeal under Rule 2.73(3), where "[f]indings of fact in the original action shall be binding on the judge deciding the appeal if they are supported by substantial evidence." *See* Iowa R. Crim. P. 2.73(3). The district associate court found that the magistrate court's decision was "supported by the evidence," and received no additional evidence beyond the record created during the proceedings before the magistrate court. *See* Order (3/16/17) at 1–2; App. 28–29. Indeed, the district associate court might have chosen to

order that additional evidence be presented, or it might have chosen to "enter judgment as if the case were being originally tried"—either would have likely foreclosed any possibility of a jurisdictional issue. *See State v. Bower*, 725 N.W.2d 435, 447–48 (Iowa 2006) (quoting Iowa R. Crim. P. 2.73(3)). But it did not do so; instead, it simply denied the defendant's appeal. *See* Order (3/16/17) at 2; App. 29. "[A] review on the record is not equivalent to a proceeding where the appellate court makes its own factual determinations or receives additional evidence before announcing its [decision]." *See Bower*, 725 N.W.2d at 448. If Vance is correct that the magistrate court had no jurisdiction to extend the no-contact order, the jurisdictional problem cannot be solved by ascribing that order to the district associate court. However, as discussed, the State believes the magistrate court *did* have jurisdiction under section 602.6405(1) and chapter 664A. Nothing in this section of Vance's brief pertains to the *appellate* jurisdiction by the district associate court. *See* Def's Br. at 15–20.

The next section will discuss appellate jurisdiction over orders that extend no-contact orders under section 664A.8. For now, note that Rule 2.73(1) states that a defendant may appeal to a district court "only upon a judgment of conviction," and it does not authorize any

discretionary review until an appeal properly taken under Rule 2.73 has already concluded. *See* Iowa R. Crim. P. 2.73(1), (6); *see also Matter of M.W.*, 894 N.W.2d 526, 532 (Iowa 2017) (noting that, in context of simple misdemeanors, "the Code prescribes appellate jurisdiction within the district court for certain parties and does not provide an avenue for appellants to bypass that jurisdiction"). This was not a judgment of conviction—this was an order that extended a collateral order that was entered at the same time as the sentence, but stood apart from it. *See, e.g., State v. Propps*, 897 N.W.2d 91, 96 (Iowa 2017) (quoting *Daughenbaugh v. State*, 805 N.W.2d 591, 595 (Iowa 2011)) ("[F]inal judgment in a criminal case means sentence."). So Vance had no right of appeal under Rule 2.73, nor any avenue for seeking discretionary review from any district court.

Review will sometimes be available through a writ for petition for certiorari, but there is no right to certiorari review. Certiorari may be filed as an original action in the Iowa Supreme Court (in that case, the defendant's petition for writ of certiorari would have gone straight to the Iowa Supreme Court). By the language of the appellate rules, that writ is only available to a party "claiming a district court judge, an associate district court judge, an associate juvenile judge, or an

associate probate judge exceeded the judge's jurisdiction or otherwise acted illegally"—but not a magistrate. *See* Iowa R. App. P. 6.107(1)(a). However, the Iowa Supreme Court has previously determined that it could review petitions for writs of certiorari that challenge actions taken by magistrates *without* requiring "certiorari exhaustion" in the district court because it could exercise "constitutional powers to issue writs to, and exercise supervisory and administrative control over, other judicial tribunals." *See State v. Davis*, 493 N.W.2d 820, 822 (Iowa 1992) (citing Iowa Const. art. V, § 4, *amended by* Iowa Const. amend. 21, § 1). So, appellate rules notwithstanding, Vance could seek review by filing a petition for a writ of certiorari in this Court.

Alternatively, Vance could "commence a certiorari action" in the district court under Iowa Rule of Civil Procedure 1.1401, to advance his claim that "a judicial magistrate exceeded proper jurisdiction or otherwise acted illegally." Iowa R. Civ. P. 1.1401. But that would not enable review beyond those parameters. *See* Iowa R. Civ. P. 1.1403.

The upshot of this analysis is that Vance could have filed a petition for a writ of certiorari in the district court or in this Court, but he had no right of appeal and no route to discretionary review of the magistrate court's order in any district court or appellate court.

Certiorari review in the district associate court (exercising the judicial authority of a district court, as it did here) would have been conducted through different procedures, but the end result would have been the same: the district associate court would have found the magistrate court's order "was supported by the evidence and is in accordance with Iowa law." *See* Order (3/16/17) at 2; App. 29; *cf. State v. Iowa Dist. Ct.*, 750 N.W.2d 531, 534 (Iowa 2008) (quoting *Bousman v. Iowa Dist. Ct.*, 630 N.W.2d 789, 794 (Iowa 2001)) (noting writ of certiorari may be granted to correct illegality "when the court's ruling lacks 'substantial evidentiary support or when the court has not applied the proper rule of law'"). Some key procedural requirements associated with certiorari actions were not adhered to; indeed, one of Vance's challenges is that he was given no "meaningful opportunity to be heard" in the district associate court proceedings. *See* Def's Br. at 19–20; *see also* Iowa R. Civ. P. 1.1410 (requiring that, in certiorari actions, "the court shall fix a time and place for hearing"). But Vance's appeal could have easily been transformed into a petition for writ of certiorari, at any point. *See* Iowa R. Civ. P. 1.458; *see also* Official Comment to Iowa R. Civ. P. 1.1402 (discussing possibility of "amending some different actions, mistakenly chosen, into certiorari").

Although this Court has already granted discretionary review, that framework was chosen when it "appear[ed] that the defendant ha[d] filed an appeal from a district court order that upheld his simple misdemeanor conviction." *See* Order (3/22/17); App. 31. The State submits the certiorari approach is more appropriate here, for two reasons. First, that would enable this Court to moot questions of whether the district associate court had jurisdiction under Rule 2.73 or reviewed this as an improperly captioned petition for certiorari—instead, this court would be able to treat Vance's notice of appeal as a delayed petition for writ of certiorari *from the magistrate court*. *See* Iowa R. App. P. 6.108; *see also State v. Anderson*, 308 N.W.2d 42, 46 (Iowa 1981) (granting delayed appeal when circumstances showed "defendant has made a good faith effort to appeal and at all times clearly intended to appeal"). Indeed, mooting those questions might be the only way to enable this Court to review the underlying issues (including the jurisdictional issue that involves the magistrate court), notwithstanding jurisdictional problems with the subsequent appeal. *See, e.g.*, *State v. Nolte*, 249 N.W.2d 607, 607–08 (Iowa 1977) ("If the district court was without jurisdiction to entertain the appeal then we are likewise lacking jurisdiction.").

Second, certiorari is particularly appropriate for focusing review on "the lower court's jurisdiction or the legality of its acts," which are the pivotal parts of this case. *Bousman*, 630 N.W.2d at 794 (quoting *McKeever v. Gerard*, 368 N.W.2d 116, 119 (Iowa 1985)); *see also Iowa Dist. Ct.*, 750 N.W.2d at 534 (quoting *French v. Iowa Dist. Ct.*, 546 N.W.2d 911, 913 (Iowa 1996)) ("[R]elief through certiorari proceedings is strictly limited to questions of jurisdiction or illegality of the challenged acts."). This approach seems well-suited to address the questions set out in the order granting discretionary review, while limiting review of determinations properly left to the lower court. *See, e.g.*, *State v. Jones*, No. 12–0736, 2013 WL 5761822, at *4 (Iowa Ct. App. Oct. 23, 2013) (declining to grant discretionary review because "Jones does not argue anything more than that the court abused its discretion in setting restitution").

To summarize: Vance could have filed a petition for a writ of certiorari in the district court or in this Court, but he did not do so. Vance had no right of appeal and no route to discretionary review of the magistrate court's order in any district court. This Court should treat this appeal as a petition for writ of certiorari so that it can sidestep jurisdictional landmines in this case's procedural posture.

III. There Is No Right of Appeal from a Collateral Order Extending a No-Contact Order Under Section 664A.8.

Preservation of Error

Again, challenges to subject matter jurisdiction may be raised at any point, and may be raised by this Court, *sua sponte*. *See Crowell*, 845 N.W.2d at 681. Error preservation is no obstacle to review.

Standard of Review

Again, "[t]he question of whether a court has subject matter jurisdiction is purely legal question and our review is at law." *Bartley*, 797 N.W.2d at 610.

Merits

The Iowa Supreme Court directed the parties to brief the issue of "whether a right to appeal exists from the extension of a no-contact order in a simple misdemeanor case." *See* Order (5/3/17); App. 64. Vance concedes that "there is no right to appeal," but he maintains that discretionary review and certiorari are both still available. *See* Def's Br. at 20–27. As already discussed, the State agrees with Vance that he had the option to challenge the magistrate court's order by filing a petition for a writ of certiorari (either in the district court or in the Iowa Supreme Court).

While discretionary review is not appropriate here because of infirmities in the district associate court's appellate jurisdiction, it is generally a more suitable vehicle for typical challenges to extended no-contact orders. Unlike petitions for writ of certiorari, a litigant can apply for discretionary review without alleging jurisdictional defects or flagrant illegality—which makes discretionary review perfect for challenging the substantive reasoning behind the underlying decision. Moreover, the importance of interests implicated by no-contact orders ranges from constitutionally paramount to relatively immaterial, which dovetails with the Court's case-by-case approach to applications for discretionary review. *Compare State v. Dowell*, No. 13–1269, 2015 WL 4158758, at *1 (Iowa Ct. App. Jul9 9, 2015) (treating appeal from extended no-contact order as an application for discretionary review, and granting it because of "the serious interest at stake in a five-year extension of an order prohibiting contact with one's children"), *with* HearingTr. p.30,ln.7–p.32,ln.11 (both parties and magistrate court agreeing that Vance could attend the state wrestling tournament with his family to watch his son participate, even if protected parties were also attending/participating at the same tournament). That variability means discretionary review will usually be the preferable paradigm.

Cf. State v. Stessman, 460 N.W.2d 461, 464 (Iowa 1990) ("Allowing application for discretionary review of restitution orders in deferred judgment cases satisfies the need for a possible avenue of review, without upsetting the final judgment requirement imposed by statute and our prior cases."). And although there is typically no route to discretionary review from magistrates' actions that are not appealable under Rule 2.73(3), the Iowa Supreme Court may exercise "its article V constitutional power to grant discretionary review of decisions rendered by other judicial tribunals" on a case-by-case basis, when circumstances warrant such review. *See Davis*, 493 N.W.2d at 822.[1]

Iowa courts have granted discretionary review in similar cases. *See, e.g.*, *State v. Petro*, No. 16–1215, 2017 WL 1735894, at *2 (Iowa Ct. App. May 3, 2017) (treating Petro's notice of appeal as application

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[1] Indeed, curtailing appellate jurisdiction over criminal cases does not automatically violate due process. *See, e.g.*, *Waldon v. Dist. Ct. of Lee County*, 130 N.W.2d 728, 731 (Iowa 1964) (citing *Griffin v. Illinois*, 351 U.S. 12, 21 (1956)) ("Without statutory provisions therefor due process of law does not require a state to afford review of a criminal judgment."); *In re Durant Cmty. Sch. Dist.*, 106 N.W.2d 670, 676 (Iowa 1964) ("We have repeatedly held the right of appeal is a creature of statute. It was unknown at common law. It is not an inherent or constitutional right and the legislature may grant or deny it at pleasure."). So it is not constitutionally required for this Court to invoke its inherent constitutional powers to grant discretionary review in contravention of the applicable statutes and appellate rules—but it may still do so when it determines substantive review is truly necessary.

for discretionary review, and granting it because of "the consequences connected with the existence and violation of a no-contact order"). But there is no *right* of appeal from an extended no-contact order—even when one is entered in a case involving a conviction for a felony, an aggravated misdemeanor, or a serious misdemeanor—because it is not a final judgment of conviction/sentence. *See State v. Aumann*, 236 N.W.2d 320, 321 (Iowa 1975); *cf. State v. Wiederien*, 709 N.W.2d 538, 543 (Iowa 2006) (Cady, J., dissenting) (noting no-contact orders "are collateral matters to the underlying criminal proceeding"). There may have been a final judgment of sentence entered with the *original* no-contact order issued under section 664A.5, which could enable a contemporaneous challenge to that order on appeal. *See State v. Janz*, 358 N.W.2d 547, 549 (Iowa 1984) ("[D]efendant's appeal from the final judgment was also a permissible appeal from all orders incorporated in that sentence, including the order of restitution here challenged."); *cf.* Iowa Code § 903.2 ("[F]or the purposes of appeal a judgment of conviction is a final judgment when pronounced."); *State v. Clayton*, 217 N.W.2d 685, 687 (Iowa 1974) ("The final judgment in a criminal case means sentence. The sentence is the judgment."). But nothing in the rules of appellate procedure nor in section 814.6 would grant a

right of appeal from this type of collateral extension order, entered months or even years after the final judgment of conviction/sentence. And section 814.6(1)(a) expressly limits defendants' right of appeal to final judgments *of sentence*. *See* Iowa Code § 814.6(1)(a). This must be read as an intentional phrasing, resulting from a deliberate choice not to endorse a right of appeal from any collateral rulings rendered long after the sentence was finalized. *See Staff Mgmt. v. Jimenez*, 839 N.W.2d 640, 649 (Iowa 2013) (quoting *Meinders v. Dunkerton Cmty. Sch. Dist.*, 645 N.W.2d 632, 637 (Iowa 2002)) (discussing principle of *expressio unius est exlusio alterius*—"legislative intent is expressed by omission as well as by inclusion, and the express mention of one thing implies the exclusion of others not so mentioned").

"In Iowa the right of appeal is statutory and not constitutional." *State v. Hinners*, 471 N.W.2d 841, 843 (Iowa 1991). Appellate courts "cannot in effect enact new appellate rules by extending them beyond their clearly defined limitations." *See Decatur-Moline Corp. v. Blink*, 283 N.W.2d 347, 349 (Iowa 1979). Because the Iowa Code and the Iowa Rules of Appellate Procedure do not create any right of appeal from an order extending a no-contact order under section 664A.8, such a right of appeal does not exist.

IV. Section 664A.8 Is Not Unconstitutionally Vague.

Preservation of Error

Vance argues error was preserved because "[a] no-contact order, if contained in the original sentencing order, is part of the sentence and can be challenged at any time as an illegal sentence." *See* Def's Br. at 27 (quoting *Pettit*, 2016 WL 3276851, at *2). This was, at best, an imprecise statement. That portion of *Pettit* cites *Hall*, which dealt with a claim that a no-contact order "was not authorized by statute"—which is a bona-fide "illegal sentence" claim that can never be subject to waiver or to any meaningful error preservation rule. *State v. Hall*, 740 N.W.2d 200, 202 (Iowa Ct. App. 2007). This is not such a claim, even though Vance argues that section 664A.8 is unconstitutional. *See, e.g.*, *State v. Kinkead*, 570 N.W.2d 97, 102 (Iowa 1997) ("Kinkead failed to preserve error on the vagueness issue and thus is barred from presenting the issue on appeal."); *State v. McCright*, 569 N.W.2d 605, 607 (Iowa 1997) ("Issues not raised before the district court, including constitutional issues, cannot be raised for the first time on appeal."); *cf. Prell v. Wood*, 386 N.W.2d 89, 91–92 (Iowa 1986) (declining to reach void-for-vagueness challenge because "we cannot review an issue which was not presented to the trial court").

Pettit was right that failure to preserve error on a challenge during sentencing does not preclude a defendant from raising that challenge on direct appeal from that sentence. *See Hall*, 740 N.W.2d at 202 (quoting *State v. Cooley*, 587 N.W.2d 752, 754 (Iowa 1998)) ("It strikes us as exceedingly unfair to urge that a defendant, on the threshold of being sentenced, must question the court's exercise of discretion or forever waive the right to assign the error on appeal."). But that is not what happened here; this order was entered after collateral litigation, months later, on the State's motion to extend the no-contact order—and there is no comparable rule that could apply in this context to waive generally applicable error preservation rules.

Vance never raised this void-for-vagueness argument below, and neither the magistrate court nor the district associate court ever considered it or ruled upon it. *See* Resistance (2/9/17); App. ---; HearingTr. (2/15/17); Def's Appeal Brief (3/2/17); App. 15; Order (3/16/17); App. 28. As such, error was not preserved for this claim. *See generally Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012).

Standard of Review

Any ruling on this argument would be reviewed de novo. *See State v. Reed*, 618 N.W.2d 327, 331 (Iowa 2000).

Merits

There are many problems with applying the void-for-vagueness doctrine in this particular case. For one thing, section 664A.8 never defines a crime (instead, it defines a standard for a particular finding that a court must decline to make before it orders the specified relief), so there is no danger that vagueness will "trap the innocent by not providing fair warning" of an offense. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Moreover, section 664A.8 expressly states that a no-contact order must be extended "unless the court finds that the defendant no longer poses a threat to the safety of the victim, persons residing with the victim, or members of the victim's family." Iowa Code § 664A.8. This is amply sufficient to "provide those clothed with authority sufficient guidance to prevent the exercise of power in an arbitrary or discriminatory fashion." *See Nail*, 743 N.W.2d at 539.

A statute will survive a vagueness challenge if its meaning is "fairly ascertainable by reference to similar statutes, prior judicial determinations, reference to the dictionary, or if the questioned words have a common and generally accepted meaning." *See State v. Millsap*, 704 N.W.2d 426, 436 (Iowa 2005) (quoting *State v. Aldrich*, 231 N.W.2d 890, 894 (Iowa 1975)). In *Pettit*, the Iowa Court of Appeals

held "the word 'threat' is a word of ordinary meaning the fact-finder may apply based on the facts presented," and it "decline[d] to find section 664A.8 void for vagueness." *Pettit*, 2016 WL 3276851, at *4. Vance offers no argument that could overcome that intuitive logic.

Vance cites to *Wiederien*, which invalidated a no-contact order that was extended after the defendant was *acquitted* on the charge. *See Wiederien*, 709 N.W.2d at 539–42. The statute did not authorize extension of a no-contact order after an acquittal—which meant that lower courts attempting to extend no-contact orders in those cases were flying blind, which created "an arbitrary and discriminatory enforcement of the statute on an ad hoc and subjective basis." *See id.* at 542. Here, unlike in *Wiederien*, section 664A.8 expressly authorizes extended no-contact orders and provides express guidance on when such extensions are appropriate, in readily understandable terms. *See Pettit*, 2016 WL 3276851, at *4; *see also State v. Milner*, 571 N.W.2d 7, 15 (Iowa 1997) (rejecting void-for-vagueness challenge to statute criminalizing threats of arson because "the terms 'threaten' and 'explosive device' as used in section 712.8 have their ordinary and common meanings"). Therefore, even if Vance had preserved error on this argument, his claim would still fail on the merits.

V. There Was No Due Process Violation Here.

Preservation of Error

Vance concedes this issue was "not raised as a constitutional challenge" before the magistrate or the district associate court. *See* Def's Br. at 31. Vance's sufficiency challenge will be addressed in Division VII, but that is *not* the same as a due-process argument. "Issues not raised before the district court, including constitutional issues, cannot be raised for the first time on appeal." *McCright*, 569 N.W.2d at 607. Error was not preserved for this argument.

Standard of Review

A due process challenge to the constitutionality of the extended no-contact order or section 664A.8 would be reviewed de novo. *See, e.g.*, *State v. Seering*, 701 N.W.2d 655, 661 (Iowa 2005) (quoting *State v. Hernandez-Lopez*, 639 N.W.2d 226, 233 (Iowa 2002)).

Merits

Vance's argument here is the same void-for-vagueness claim made in the previous division. *See* Def's Br. at 31–34. He cannot show the term "no longer poses a threat" is not readily understandable, both to legal professionals and to members of the public. While this language is certainly flexible, it is far from unconstitutionally vague.

VI. Section 664A.8 Does Not Require a Change in Circumstances Before a No-Contact Order Can Be Extended—It Requires a Change in Circumstances Before a Court Can *Deny* a Request for an Extension.

Preservation of Error

Vance argues that error was preserved when he asserted that "[i]f [he] had posed the kind of threat that would have warranted a five-year term, then the prosecuting attorney and/or the Magistrate should have and would have imposed the No Contact Order for a period of five years in the first place." *See* Def's Br. at 34 (quoting Def's Appeal Brief (3/2/17) at 5; App. 19). There are two problems with this. First, that statement appeared in an argument challenging the magistrate's order as a violation of the plea agreement—this is not the same as the statutory interpretation argument he now advances. *See* Def's Appeal Brief (3/2/17) at 3–5; App. 17–19. Second, even if Vance had advanced this argument for the first time before the district associate court, he would have *still* failed to preserve error—he needed to present this argument before the magistrate court and receive a ruling on that claim in order for error to be preserved for the district associate court to consider the argument upon its review. *See, e.g.*, *State v. Wasson*, No. 12–1554, 2013 WL 6686489, at *2 (Iowa Ct. App. Dec. 18, 2013). Thus, error was not preserved for this claim.

Standard of Review

Generally, "matters of statutory construction" are reviewed for errors at law. *State v. Johnson*, 528 N.W.2d 638, 640 (Iowa 1995).

Merits

Vance argues that "[a]bsent a change in circumstances or a violation of the no contact order, the legislature did not intend for a no contact order for a term of less than five years to be extended for an additional five years." *See* Def's Br. at 36. This is easily disproven by referring to the plain text of section 664A.8, which states:

> Upon the filing of an application . . . , the court shall modify and extend the no-contact order for an additional period of five years, unless the court finds that the defendant no longer poses a threat to the safety of the victim, persons residing with the victim, or members of the victim's family.

Iowa Code § 664A.8. An application for an extended no-contact order must be granted *unless* the court finds that a change in circumstances has nullified the threat presented by the defendant and his/her prior conduct towards any and all potential victims. "We do not search for legislative intent beyond the express language of a statute when that language is plain and the meaning is clear." *See McGill v. Fish*, 790 N.W.2d 113, 118 (Iowa 2010) (citing *Voss v. Iowa Dep't of Transp.*, 621 N.W.2d 208, 211 (Iowa 2001). This should end the inquiry.

Vance argues that "[l]ogic dictates that if the defendant's conduct merits a five-year no contact order, then the court should impose the five-year term in the first instance." *See* Def's Br. at 36. But there may be rational reasons for imposing a no-contact order with a shorter duration, with the intent of re-assessing the situation at a later date to determine if a limited "cooling off" period was enough to defuse tensions and neutralize the threat. Indeed, sentencing courts may take a similar approach in ordering "shock probation," which the Iowa Supreme Court has called an "extraordinary and useful tool." *See Tindell v. Iowa Dist. Ct.*, 600 N.W.2d 308, 310 (Iowa 1999).[2]

Vance cites to *State v. Olney*, No. 13–1063, 2014 WL 2884869 (Iowa Ct. App. June 25, 2014), but that case cuts against his position for two reasons. First, the statements in *Olney*'s last footnote pertain to the "substantial change in circumstances" that "may be required" for a defendant to prevail on a "motion to dissolve, vacate, or modify" an extended no-contact order if he/she had already been afforded an opportunity to contest the motion for extension under section 664A.8.

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[2] It is also worth noting that there is no constitutional problem with limiting review of "shock probation" reconsideration rulings to petitions for writ of certiorari, since "the legislature made clear that trial courts' judgment calls in these reconsiderations were not subject to our second guesses" on traditional appellate review. *See Tindell*, 600 N.W.2d at 310. This reinforces the State's view on jurisdiction.

See Olney, 2014 WL 2884869, at *3 n.4. Rather than establishing that *the State* needs to prove a change in circumstances, this clarifies that *the defendant* must prove that he is no longer a threat to any victims in order to be entitled to cessation of a no-contact order, at any point. Second, the availability of analogous remedies that let issuing courts "modify or vacate the [no-contact order] if, over time, there has been a substantial change in the facts or law" helps to diminish the need for appellate review of extensions issued under section 664A.8. *See Bear v. Iowa Dist. Ct.*, 540 N.W.2d 439, 441 (Iowa 1995); *see also Wiederien*, 709 N.W.2d at 545 (Cady, J., dissenting) (noting statute intends to empower reviewing courts to "decide if the no-contact order should be modified or terminated in accordance with those standards applicable to continuing, modifying, or dissolving other injunctions").[3]

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[3] If Vance were to challenge the extended no-contact order through a motion to dissolve, vacate, or modify it, he would be "required to prove by a preponderance of the evidence that the defendant no longer poses a threat of safety to the victim or others who are protected by the order." *Olney*, 2014 WL 2884869, at *3 n.4. That standard is not specified in section 664A.8 or in chapter 664A, but that is not inherently problematic—"due process is not offended because the statute fails to specify a specific standard to support the continuance of a no-contact order under one circumstance . . . , while it can rely on the criminal burden of proof to support the continuance of a no-contact order under another circumstance." *Wiederien*, 709 N.W.2d at 543 (Cady, J., dissenting).

Vance's statutory construction claim fights the plain language of section 664A.8, and cannot overcome it. Section 664A.8 states that, if the facts surrounding an application for an extended no-contact order show no relevant change in circumstances and do not demonstrate "that the defendant *no longer* poses a threat," an extended no-contact order should be issued. *See* Iowa Code § 664A.8 (emphasis added); *Petro*, 2017 WL 1735894, at *4 ("Section 664A.8 does not require a victim to allege or prove a new incident of domestic abuse or a violation of the existing order to satisfy the continuing-threat element."). As such, this Court should reject Vance's claim, if it reaches the merits at all.

VII. The State's Evidence Was Sufficient to Enable the Magistrate Court to Reject Vance's Contentions That He No Longer Posed a Threat to the Victim Family.

Preservation of Error

Vance raised this argument below, and it was rejected by both the magistrate court and the district associate court . *See* HearingTr. (2/15/17) p.13,ln.15–p.16,ln.17; HearingTr. p.32,ln.12–p.33,ln.12; Order (2/15/17); App. 11; Def's Appeal Brief (3/2/17) at 5–7; App. 19–21; Order (3/16/17) at 1—2; App. 28–29. Thus, error was preserved.

Standard of Review

"We review the [lower] court's extension of the no-contact order under Iowa Code section 664A.8 for correction of errors at law." *See*

Petro, 2017 WL 1735894, at *2 (citing Iowa R. App. P. 6.907). The magistrate court's determination that Vance did not establish that he "no longer poses a threat" should be affirmed if it was supported by substantial evidence, which "reasonable minds could accept it as adequate to reach the same findings." *Bacon ex rel Bacon v. Bacon*, 567 N.W.2d 414, 417 (Iowa 1997); Iowa Code § 664A.8; *see also* Modification/Extension No-Contact Order (2/15/17) at 2; App. 8.

Merits

Vance argues that "[t]he bare assertions of a protected person, standing alone, should not suffice to extend a one-year no contact order for an additional five years as a matter of fundamental fairness." *See* Def's Br. at 39. But those assertions may be credited or rejected by the court hearing the motion for extension of the no-contact order; in such matters, "we defer to the trial court—it had the chance to hear the tone and observe the demeanor" of each witness testifying about the relationship between the parties. *Petro*, 2017 WL 1735894, at *3. This Court should decline to impose a burden of proof upon the State that does not appear in the statute, which clearly aims to prioritize protection of victims by requiring *the defendant* to prove that he/she no longer presents a threat. *See State v. Haviland*, No. 11–0729, 2012

WL 1453981, at *2 (Iowa Ct. App. Apr. 25, 2012) (rejecting a proposed interpretation of timeliness requirements under section 664A.8 that "would frustrate the protective purpose of the statute").

At the hearing on the motion for an extended no-contact order, Amy Dawn Staudt testified about the nature of Vance's harassment and her fear that, if the no-contact order were to expire, Vance would resume a pattern of behavior aimed at harassing her sons:

> I have some security issues with my younger children. I feel — after patterns of behavior from Mr. Vance. When we had a civil no contact order put in place, that was disregarded. I — once the criminal no contact order was in place my life became a little more safe, a little more normal again. We weren't contacted through texts or calls or social media, Snapchats, anything along that lines. We had issues with my — a couple of my boys, and he's no longer trying to contact them. I'm just asking for the safety of myself as well as my entire family to please keep it going so we can just get back to our normal routine.
>
> [. . .]
>
> Due to safety issues we did put in a home security system. We started my youngest son in counseling. When the civil no contact order was put in place, we were — continued to have to answer questions or statements on false reporting; and since the no contact order has been in place I feel Mr. Vance has respected the criminal no contact order and, like I said, we haven't had any issues. My son hasn't — he's feeling safer, the other kids are doing fine, and I — I just want to keep it in this direction, please.

HearingTr. p.4,ln.22–p.7,ln.15. This illustrates why the burden is on *Vance* to prove that he no longer poses a threat to the victim family:

the no-contact order, with all of its deterrent value and binding force, represents the status quo—and Vance must do more than show that he *has not violated* the no-contact order to satisfy section 664A.8. Rather, he must establish that the Staudts would continue to be safe if that order were allowed to expire and if they could no longer depend on it to protect them from Vance.

Here, Vance totally disregarded a prior *civil* no-contact order, and the criminal no-contact order under section 664A.5 was the only measure that stopped Vance's harassment and alleviated the problem. HearingTr. p.4,ln.22–p.7,ln.15; *cf.* Resistance (5/27/16); App. --- ("The Defendant's factual basis in this case was that he intentionally sent his son to a high school event where the victims' son was participating with the intent to harass them. This took place after being ordered by the Court not to attend."). The magistrate court was empowered to determine whether it found that Vance's testimony was convincing enough to establish that he would not resume his pattern of harassing behavior if the no-contact order were allowed to expire—and its decision not to credit Vance's self-serving assurances should not be second-guessed on appellate review. Nothing in this record establishes the magistrate erred in extending the no-contact order.

VIII. The State's Motion to Extend the No-Contact Order Did Not Breach the Underlying Plea Agreement.

Preservation of Error

Before the magistrate court, Vance argued that the State's motion to extend the no-contact order was excessively "punitive"—but he did not argue this amounted to a breach of the plea agreement which would, in itself, warrant denial of the State's motion to extend. *See* HearingTr. p.13,ln.15–p.16,ln.13; HearingTr. p.32,ln.12–p.33,ln.6; *see also* Def's Br. at 40 (claiming that error was preserved because "[t]his issue was raised by [Vance] in his appeal brief submitted to the district court"). Because this argument for dismissing/denying the State's motion was not made to or ruled upon by the magistrate court, error was not preserved for this claim on appeal. *See, e.g.*, *Wasson*, 2013 WL 6686489, at *2; *cf. Lamasters*, 821 N.W.2d at 864.

Standard of Review

Review of any ruling on whether the prosecutor violated the plea agreement would be for errors at law. *See State v. King*, 576 N.W.2d 369, 370 (Iowa 1998) (citing *State v. Hinners*, 471 N.W.2d 841, 843 (Iowa 1993)).

Merits

Vance asserts "[t]he prosecuting attorney agreed to a one-year no-contact order." *See* Def's Br. at 42. But the guilty plea that Vance signed did not specify any duration—it said: "the state will request a fine of $65, court costs, and a No Contact Order." *See* Plea of Guilty (2/29/16); App. 1. And the one-year duration of the original order does not necessarily reflect or memorialize any deal as to duration—as discussed, this was a rational choice for the magistrate to make if it intended to assess the situation later, to determine whether tensions would subside and make an extended no-contact order unnecessary.

Vance's argument transforms into a claim that he reasonably relied on the sentencing no-contact order's statement that it would "remain in effect until March 4, 2017 unless it is modified, terminated, or extended by further written order of the Court." *See* Def's Br. at 43 (quoting Sentencing No-Contact Order (3/18/16); App. 2). But this does not contain any implicit promise that modification/extension would not happen, even if present circumstances continued. Indeed, that language expressly put Vance on notice that the no-contact order could be *extended*, and it attached no conditions to that possibility.

Moreover, Vance was legally obligated to comply with the sentencing no-contact order, regardless of whether he reasonably believed its expiration date was set in stone. There can be no plausible claim that Vance "acted to his detriment in reliance" on that language, which is a precondition for showing promissory estoppel. *See McKee v. Isle of Capri Casinos, Inc.*, 864 N.W.2d 518, 532 (Iowa 2015) (citing *Schoff v. Combine Ins. Co. of Am.*, 604 N.W.2d 43, 48 (Iowa 1999)). And the sentencing no-contact order would not have been issued until *after* discussing the plea agreement and taking Vance's guilty plea, so there is no basis for any argument that Vance relied on that order's tentative expiration date when making his decision to plead guilty.

Vance cannot demonstrate any breach of the plea agreement, and he cannot establish that he relied on any representation from the State to his detriment under any quasi-estoppel theory. Thus, even if error were preserved, his challenge would fail.

CONCLUSION

The State respectfully requests that this Court reject Vance's arguments, find the magistrate court had jurisdiction to enter the order extending the no-contact order, and affirm that order.

REQUEST FOR NONORAL SUBMISSION

This case should be set for nonoral submission. In the event argument is scheduled, the State asks to be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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