IN THE SUPREME COURT OF IOWA
Supreme Court No. 17-1822

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STATE OF IOWA,
Plaintiff-Appellee,

vs.

JUSTIN COLE MOORE,
Defendant-Appellant.

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APPEAL FROM THE IOWA DISTRICT COURT
FOR FAYETTE COUNTY
THE HONORABLE JOHN BAUERCAMPER, JUDGE

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# APPELLEE'S BRIEF

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## ROUTING STATEMENT

The State does not agree the Supreme Court should retain this case.

The issue in Division I, which the defendant contends involves a substantial issue of first impression or changing legal principles, has actually been rejected at least eleven times by the Iowa Court of Appeals. *See, e.g.*, *State v. Garcia*, No. 17-0111, 2018 WL 3913668, at *4 (Iowa Ct. App. Aug. 15, 2018); *State v. Lopez-Aguilar,* No. 17-0914, 2018 WL 3913672, at *8 (Iowa Ct. App. Aug. 15, 2018); *State v. Yenger*, No. 17-0592, 2018 WL 3060251, at *4–5 (Iowa Ct. App. June 20, 2018); *State v. Vandekieft*, No. 17-0876, 2018 WL 2727720, at *8 (Iowa Ct. App. June 6, 2018); *State v. Hayes*, No. 17-0563, 2018 WL 2722782, at *5 (Iowa Ct. App. June 6, 2018); *State v. Payne*, No. 16-

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The issue in Division II, whether counsel was ineffective for not requesting an instruction defining "reasonable degree of medical certainty," is novel, but not supported by any case law from this jurisdiction or any other. *See* Division II. An ineffective-assistance claim that lacks even tenuous support in the law is not an appropriate vehicle for resolving this arguable issue of first impression.

Division III is a routine sentencing and restitution challenge. *See* Division III.

This case should be transferred to the Court of Appeals. Iowa R. App. P. 6.1101(3).

## STATEMENT OF THE CASE

### Nature of the Case

The defendant, Justin Cole Moore, appeals his conviction for child endangerment resulting in serious injury, a Class C felony in violation of Iowa Code sections 726.6(1) and 726.6(5) (2015).

### Course of Proceedings

The State accepts the defendant's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

### Facts

On August 30, 2016, the defendant was caring for his girlfriend Brianna's son, E.B., while Brianna worked. Brianna called the defendant twice while she was on her way home. *See* trial tr. vol. II, p. 83, line 22 — p. 88, line 3. At 9:07 p.m., the defendant told Brianna that he was playing video games and that E.B. was asleep, and he asked Brianna to bring him brownies. Trial tr. vol. II, p. 64, line 20 — p. 65, line 4; p. 83, line 22 — p. 84, line 12. He did not mention anything about E.B. being injured or needing medical attention. Trial tr. vol. II, p. 64, line 20 — p. 65, line 4; p. 85, line 20 — p. 86, line 20. The second time Brianna called, at 9:11 p.m., the defendant said that E.B. had fallen but "was okay now" and that the

defendant had "cleaned it up." Trial tr. vol. II, p. 86, line 21 — p. 88, line 3.

When Brianna got home, she saw that video games were still on the screen in the living room, but the defendant was in their bedroom "cradling" E.B. Trial tr. vol. II, p. 89, line 17 — p 90, line 3. E.B. was "fighting" to breathe and gasping for air. Trial tr. vol. II, p. 90, lines 11–16. His neck was limp and his mouth was bloody and "banged up." Trial tr. vol. II, p. 90, line 25 — p. 91, line 10. His eyes were rolled back into his head and his legs and arms were "stiff like a board." Trial tr. vol. II, p. 91, lines 13–22. Brianna knew she needed to take E.B. to the hospital immediately. Trial tr. vol. I, p. 143, lines 17–22, vol. II, p. 92, lines 10–11.

**The Oelwein Hospital**

Brianna carried E.B. into the emergency room at 9:30 p.m. Trial tr. vol. I, p. 143, lines 17–22. When the triage nurse saw that E.B. was "lethargic, nonresponsive, ashen, [and] gray," she yelled for help. Trial tr. vol. I, p. 144, lines 13–23; p. 145, lines 15–16; p. 147, lines 6–10. E.B. did not respond to any stimuli—voice, touch, or even the drilling of an intraossous line into his bone. Trial tr. vol. I, p. 147,

lines 3–10; p. 148, lines 1–9. He did not move or flinch. Trial tr. vol. I, p. 149, lines 15–22.

E.B.'s stomach was "rigid" where it was supposed to soft, there was bruising, and the triage nurse could not hear any bowel sounds. Trial tr. vol. I, p. 150, lines 4–7. A CAT scan revealed "free air" in the abdomen, which is indicative of trauma. Trial tr. vol. I, p. 152, lines 22–25. In 11 years of emergency-room work, the nurse had never before seen a child with "free air" in the abdomen. Trial tr. vol. I, p. 152, lines 19–21.

E.B.'s lips were chapped and appeared to have a corrosive burn. Trial tr. vol. I, p. 154, line 24 — p. 155, line 7. There was dried blood on his left ear. Trial tr. vol. I, p. 154, line 24 — p. 155, line 7. There were petechiae in his eye. Trial tr. vol. I, p. 154, line 24 — p. 155, line 7. His forehead was bruised. Trial tr. vol. I, p. 155, lines 8–12. There was bruising or a red mark on E.B.'s neck. Trial tr. vol. I, p. 156, lines 4–7. His spine and buttocks were bruised. Trial tr. vol. I, p. 156, lines 8–11; p. 156, lines 12–15. Vomit was visible. Trial tr. vol. I, p. 156, lines 8–11.

There was also bruising on and near E.B.'s genitals. Trial tr. vol. I, p. 156, line 18 — p. 157, line 1. Again, in 11 years of working in

the emergency room, the triage nurse had never seen this kind of genital bruising on a child. Trial tr. vol. I, p. 156, line 24 — p. 157, line 1.

While they were at the hospital, Brianna observed "spotty bruises" start to develop on E.G.—"[k]ind of like fingertips almost, like all over[.]" Trial tr. vol. II, p. 97, lines 6–12.

Brianna's mother, Kris Bengston,[1] observed that E.B. looked very different than he had earlier that same day: "His lips were all fat. His stomach was bruised. His back was bruised. He had different pajamas on. He was throwing up, crying." Trial tr. vol. I, p. 199, line 24 — p. 200, line 2.

E.B. was taken by air to Iowa City for emergency trauma treatment. Trial tr. vol. I, p. 153, lines 1–3.

**Iowa City physicians diagnose and treat E.B., conclude he suffered serious blunt force trauma to the abdomen.**

Dr. Risimye Oral, the director of the Child Protection Program at the University of Iowa Children's Hospital, oversaw E.B's treatment. Trial tr. vol. II, p. 119, lines 6–13. He was diagnosed with

[1] Kris Bengston is referred to as "Grandma Kris" in portions of the trial transcript and the State uses the same for subsequent references in this brief. *See, e.g.*, trial tr. vol. II, p. 30, line 18 — p. 31, line 1.

and treated for two groupings of injuries—head trauma and abdominal trauma—both of which were serious injuries that could have been fatal.

***Head trauma and organ damage.***

Medical tests showed damage to E.B.'s internal organs, including the liver, pancreas, and kidneys, likely due to a lack of oxygen. Trial tr. vol. II, p. 133, line 24 — p. 135, line 16. Scans showed a brain bleed—a subdural hematoma—as a result of a contusion to the brain. Trial tr. vol. II, p. 135, line 23 — p. 136, line 23; p. 138, line 15 — p. 139, line 11. There were retinal hemorrhages to the eyes around the optic nerve. Trial tr. vol. II, p. 137, lines 1–13. E.B. was "overall not very responsive" and unable to make good eye contact. Trial tr. vol. II, p. 182, lines 19–24.

From this information, Dr. Oral concluded to a reasonable degree of medical certainty that E.B. had been subject to an abusive head trauma. Trial tr. vol. II, p. 141, line 16 — p. 142, line 2. "Abusive head trauma is a constellation of injuries to the head" caused by "somebody else doing something to the child." Trial tr. vol. II, p. 142, lines 3–6. This particular head trauma was "due to rotational acceleration/deceleration forces of moderate degree as we [medical

professionals] see … in some shaking cases with or without an impact from a soft surface." Trial tr. vol. II, p. 142, lines 11–18. Dr. Oral found that the brain bleed was entirely consistent with the shearing forces of shaking, while the contusion to the brain was likely indicative of E.B. being "slammed against a surface." Trial tr. vol. II, p. 144, lines 6–23.

Dr. Oral concluded that the injuries occurred within the 72 hours immediately preceding E.B.'s admission to the hospital. Trial tr. vol. II, p. 145, lines 12–18. Most likely the injuries occurred even closer to the time of admission, because a child suffering the kind of injuries E.B. had would have exhibited "major" symptoms: seizures, loss of consciousness, problems with balance, etc. Trial tr. vol. II, p. 145, line 25 — p. 146, line 10.

***Abdominal trauma and the torn intestine.***

Additional medical tests found tears in E.B.'s intestine, leading to free air in the abdominal cavity. Trial tr. vol. II, p. 137, lines 14–21. The tear in the abdominal cavity was particularly dangerous because it causes "the gas and the fluid in the intestines and feces and also the bacteria [to] all spill into the abdominal cavity." Trial tr. vol. II, p.

137, line 22 — p. 138, line 2. "Free air" can be dangerous and even fatal. Trial tr. vol. II, p. 184, lines 20–25.

On E.B.'s abdomen, pelvis, and genital area, Dr. Oral found scattered bruising that "raise[d] concern for punching, either by the hand or by the use of a metal knuckle or something similar to that." Trial tr. vol. II, p. 148, line 20 — p. 149, line 9. In. Dr. Oral's other cases, she has seen this type of genital bruising on young male children who have been physically abused (i.e. by pinching, punching, or kicking) or sexually abused. Trial tr. vol. II, p. 149, lines 13–24. Dr. Julia Shelton, a pediatric surgeon, also observed bruises on both sides of E.B.'s lower abdomen, his scrotum, and his penis. Trial tr. vol. II, p. 187, line 20 — p. 188, line 2.

Dr. Oral concluded that E.B. suffered abusive abdominal trauma. Trial tr. vol. II, p. 146, line 22 — p. 147, line 7. The mechanism of trauma was "blunt force," which means "basically hitting a person by punching, kicking, by the use of an object, or in accidental context, the person experiencing a direct impact from an object." Trial tr. vol. II, p. 147, lines 13–23. Dr. Oral found the injuries, in particular the injuries to the spine, to be inconsistent with an explanation of a history of falls or clumsiness. Trial tr. vol. II, p.

147, line 24 — p. 148, line 19. If left untreated, these abdominal injuries created a substantial risk of death. Trial tr. vol. II, p. 152, line 20 — p. 153, line 3.

The intestinal tear "went almost all the way around"—"there was maybe 10 degrees' [out of 360] worth of tissue that was attaching one side to the other." Trial tr. vol. II, p. 195, line 18 — p. 196, line 2. Treatment involved surgically removing 10 to 15 centimeters of E.B.'s intestine. Trial tr. vol. II, p. 197, lines 5–6; p. 198, lines 8–9. After the surgery, E.B. was placed in intensive care and wasn't able to eat for weeks. Trial tr. vol. II, p. 98, lines 18–25. He was fed through a tube in his lower abdomen. Trial tr. vol. II, p. 99, lines 1–6.

**During his time with caretakers other than the defendant, E.B. was normal, happy, and healthy on August 30, 2016.**

Brianna's mother, Grandma Kris, had also cared for E.B. part of August 30, 2016. Trial tr. vol. I, p. 191, lines 1–9. That day, E.B. ran some errands with Grandma Kris, including mid-day trips to Burger King and Maid Rite, where E.B.'s appetite was normal and healthy. Trial tr. vol. I, p. 178, lines 16–19; p. 178, line 20 — p. 179, line 11; p. 181, lines 1–4. One of the errands was to deliver a Jimmy Johns sandwich to E.B.'s mother (Brianna) while she worked. Trial tr. vol. I,

p. 182, lines 21–24. When he saw his mom, E.B. was very excited, "running around, screaming and hollering"—"[t]ypical two-year-old running around, just happy." Trial tr. vol. I, p. 184, lines 9–17.

After picking up E.B's brother from school, the boys and Grandma Kris went to the park and looked for caterpillars. Trial tr. vol. I, p. 187, lines 14–22. There were no indications of trauma or injury. *See* Trial tr. vol. I, p. 188,lines 4–9. They had a snack after looking for caterpillars and eventually went to Grandma Kris' house around 6:00 p.m. Trial tr. vol. I, p. 190, lines 1–16.

At dinner, E.B. ate most of a peanut butter and jelly sandwich, some chips, and chocolate milk. Trial tr. vol. I, p. 191, line 10 — p. 192, line 9. His appetite and eating were normal. Trial tr. vol. I, p. 192, lines 10–20. E.B. and his brother played some after dinner. Trial tr. vol. I, p. 192, lines 21–22. There were no signs of injury or abnormal health. Trial tr. vol. I, p. 215, line 13 — p. 216, line 5.

Before taking E.B. home, Grandma Kris helped E.B change into his pajamas. Trial tr. vol. I, p. 193, line 12 — p. 194, line 3. Grandma Kris saw E.B.'s entire body and there were no injuries. Trial tr. vol. I, p. 194, lines 4–10.

She took E.B. home to the defendant at around 7:45 p.m. Trial tr. vol. I, p. 194, lines 21–25. When Grandma Kris arrived, the defendant was watching TV or playing video games. Trial tr. vol. I, p. 195, lines 4–9. The defendant was the only adult home and Grandma Kris left E.B. in the defendant's care after tucking E.B. in between 8:30 and 8:45 p.m. Trial tr. vol. I, p. 195, lines 10–13; p. 196, line 15 — p. 198, line 5; p. 198, lines 10–13.

**The defendant's version of events.**

When first questioned by DCI agents, the defendant said "he was in the living room, playing video games" when he heard a noise, went into the bathroom, and found E.B. on the floor with a "bashed" lip. Trial tr. vol. II, p. 8, lines 9–14. The defendant blamed E.B.'s injuries on a fall from a seven-inch stool, asserting that E.B. was "clumsy." Trial tr. vol. II, p. 35, lines 1–5. He said he had only been alone with E.B. for about 20 minutes. Trial tr. vol. II, p. 30, line 18 — p. 31, line 1.

According to the defendant, he took E.B. to get cleaned up after the alleged fall and then Brianna called, telling him that she was on her way home. Trial tr. vol. II, p. 32, lines 1–24. Then, he claimed, E.B. was seizing on the ground when he got off the phone. Trial tr.

vol. II, p. 33, lines 2–7. In the defendant's words, E.B. was "lifeless." Trial tr. vol. II, p. 33, lines 16–17.

The defendant decided not to call 911, and instead blew air on E.B.'s face and waited for Brianna to get home. Trial tr. vol. II, p. 33, line 24 — p. 34, line 3. The defendant estimated he waited around 10 minutes for Brianna to get home and never called 911 during that time. Trial tr. vol. II, p. 34, lines 4–9.

Agents searched the defendant's home and photographed the bathroom where the defendant claimed E.B. had fallen. *See* trial tr. vol. II, p. 8, lines 17–21. The bathroom floor was "heavily padded" and carpeted. Trial tr. vol. II, p. 13, lines 2–12. The stools from which the defendant claimed E.B. had fallen were 7 and 7 and 1/2 inches tall. Trial tr. vol. II, p. 16, lines 9–19.

**The medical evidence cannot be reconciled with the defendant's version of events.**

Dr. Oral, the program director, opined that that it was "not plausible" that a fall from the bathroom stool would explain E.B.'s injuries. Trial tr. vol. II, p. 150, lines 9–18. Dr. Oral arrived at that opinion because some of the injuries required different mechanisms of trauma, i.e. shaking and/or slamming in addition to blunt force trauma. Trial tr. vol. II, p. 150, line 19 — p. 151, line 9. In her words:

"All of these [injuries] could not have occurred with that one single trivial fall, period." Trial tr. vol. II, p. 150, line 19 — p. 151, line 9.

Dr. Oral also believed it unlikely that this particular constellation of injuries could have resulted from an accident: "[S]cience shows us that the chest, the abdomen, the genitalia, the back, rarely get injured in accidental context." Trial tr. vol. II, p. 165, line 12 — p. 166, line 5. Instead, it was much more likely that the use of force was significant and would have been recognized by the person inflicting the injury:

> Simply put, it is a violent force. It's not just a bump on the wall. It's not just a minor movement of the head. Because we don't have the amount of force, because we can't study these things, what is usually articulated is that whoever observes the shaking episode, they say, "Oh, my gosh. The child is going to get injured," or confessions by perpetrators state that, "I knew I went too far, and I hurt my baby." So that's all I can tell you.

Trial tr. vol. II, p. 172, lines 6–17. The level of injury E.B. experienced was comparable to a child in a car accident being thrown from the vehicle or a child falling to the ground from a multi-story building. Trial tr. vol. II, p. 172, line 18 — p. 173, line 4.

Dr. Shelton, the surgeon, also opined that this type of abdominal injury tends to occur when a "significant force [is] applied

to the abdomen," such as a "high speed car accident" without a shoulder belt. Trial tr. vol. II, p. 198, line 16 — p. 199, line 7. She agreed with Dr. Oral's opinion that blunt force trauma was the source of the injuries, and further opined that there was no alternative medical explanation available for these injuries. Trial tr. vol. II, p. 200, lines 7–18.

Both physicians opined that the injuries E.B. suffered would have caused him to deteriorate very quickly, meaning he would not have been able to eat and play normally after suffering the injuries. Trial tr. vol. II, p. 151, line 10 — p. 152, line 9; p. 200, line 24 — p. 201, line 8.

## ARGUMENT

### I. Counsel Had No Duty to Object to the Jury Instruction Regarding the Defendant's Statements. The Court of Appeals Has Consistently and Repeatedly Rejected this Argument.

#### Preservation of Error

The defendant asserts counsel was ineffective, which is an exception to the rules of error preservation. *See State v. Wills*, 696 N.W.2d 20, 22 (Iowa 2005).

**Standard of Review**

Allegations of ineffective assistance are reviewed de novo. *Wills*, 696 N.W.2d at 22.

**Merits**

The defendant's first argument relies entirely on unpublished dissents from the Court of Appeals to claim counsel was ineffective for not objecting to model instruction 200.44, which addresses a criminal defendant's out-of-court statements. Defendant's Proof Br. at 40–53. This claim is without merit. As discussed below, this claim has been consistently and repeatedly by the Court of Appeals. *See, e.g.*, *State v. Garcia*, No. 17-0111, 2018 WL 3913668, at *4 (Iowa Ct. App. Aug. 15, 2018) (collecting cases). Counsel is not ineffective when he does not object to a legally accurate instruction that has been issued in hundreds of jury trials.

As a threshold matter, counsel did not breach an essential duty because the instruction did not misstate the law. Out-of-court admissions made by a party opponent, such as a defendant in a criminal case, are substantive evidence that may be considered for any purpose. *See* Laurie Kratky Doré, 7 *Iowa Practice Series: Evidence* § 5.801:9 (Westlaw 2018). The complained-about

instruction merely states this principle in a manner amenable to laypersons: a normal person does not know what "substantive evidence" means, but can understand that it is generally similar to other evidence heard at trial. The defendant urges this Court to undertake a willful misreading of the instruction, essentially arguing that instead of saying the jurors could consider the evidence "as if made at this trial," they could consider the evidence as if made under oath and pursuant to the pains and penalty for perjury. Defendant's Proof Br. at 49. The instruction does not say that. Rather, the instruction adequately states the law, as reinforced by the consistent, frequent, and repeated rejection of this claim by the Court of Appeals majority. *See, e.g., Garcia*, 2018 WL 3913668, at *4 ("We are persuaded by the reasoning of *Yenger* and the remaining cited opinions. We conclude counsel did not breach an essential duty in failing to object to the instruction."); *State v. Lopez-Aguilar,* No. 17-0914, 2018 WL 3913672, at *8 (Iowa Ct. App. Aug. 15, 2018) ("This court has repeatedly found the challenged instruction to be a correct statement of the law and repeatedly rejected the same argument."); *State v. Yenger*, No. 17-0592, 2018 WL 3060251, at *5 (Iowa Ct. App. June 20, 2018) ("Although the challenged instructional language does

not appear in rule 5.801(d)(2), we believe it is a correct statement of the law."); *State v. Vandekieft*, No. 17-0876, 2018 WL 2727720, at *8 (Iowa Ct. App. June 6, 2018) ("We find instruction number eight correctly states the law."); *State v. Hayes*, No. 17-0563, 2018 WL 2722782, at *5 (Iowa Ct. App. June 6, 2018) ("This court recently held this instruction correctly states the law and giving the instruction was not in error. … Hayes cannot establish his counsel was ineffective for failing to object to instruction no. 14"); *State v. Payne*, No. 16-1672, 2018 WL 1182624, at *9 (Iowa Ct. App. Mar. 7, 2018) ("Clearly, the instruction was not an incorrect statement of the law, and the judge's ruling was not in error."); *State v. Wynn*, No. 16-2150, 2018 WL 769272, at *4 (Iowa Ct. App. Feb. 7, 2018) ("We find Jury Instruction 17 and Jury Instruction 21 were not improper and defense counsel had no obligation to object."); *State v. Wineinger*, No. 16-1471, 2017 WL 6027727, at *3 (Iowa Ct. App. Nov. 22, 2017) ("Instruction No. 15 is a correct statement of law."); *State v. Tucker*, No. 13-1790, 2015 WL 405970, at *3 (Iowa Ct. App. Jan. 28, 2015) (disagreeing with assertion that instruction was misleading).

But even if one could quibble about whether this statement was indeed accurate, counsel did not breach any essential duty for the

additional reason that breach of duty must be an objective comparative measurement, seeking to grade counsel's performance relative to prevailing professional norms. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Model instruction 200.44 has been given in hundreds of trials by scores of defense attorneys since the Bar Association adopted it in September of 2003. *See* ISBA Model Criminal Jury Instructions, Model Instruction 200.44 (revision date: 9/03). Contrary to the defendant's argument on appeal, counsel does not have a duty to advance every novel and likely frivolous argument. *See State v. Walker*, No. 11-1768, 2012 WL 5356103, at *2 (Iowa Ct. App. Oct. 31, 2012) ("Where there has been no previous occasion to rule on the issue and the objection is novel, we will not find counsel ineffective." (citing *State v. McKetterick*, 480 N.W.2d 52, 59 (Iowa 1992)).

Also, even if the defendant could prove that counsel breached an essential duty, he cannot prove prejudice. A minor revision in the language of this instruction would not have changed the course of the trial, particularly given that the defendant does not challenge the admissibility of his statements to the police. *See State v. Kissel*, No. 16- 0887, 2017 WL 6032585, at *5 (Iowa Ct. App. Nov. 22, 2017)

(finding no prejudice from the same challenged jury instruction); *State v. Chinberg*, No. 16-1600, 2017 WL 6026718, at *2 (Iowa Ct. App. Nov. 22, 2017) (same). Moreover, the defendant's statements were largely cumulative and not a lynchpin of trial: the strongest evidence was the medical testimony in conjunction with the undisputed fact that the defendant had sole custody of E.B. in the approximately 30 minutes between Grandma Kris leaving and Brianna arriving home. No one argued that the defendant's statements to police were equivalent to sworn statements under oath, nor would they have: seasoned prosecutors (and jurors that deploy their common sense) know that a criminal defendant's statements are often most reliable when they are *not* in court trying to convince a jury of their innocence.

Finally, while the Court could preserve this claim for postconviction relief, it should instead reject this claim on the direct-appeal record. *See* Iowa Code § 814.7 (2015). In light of the consistent Court of Appeals decisions rejecting this claim, preserving it serves only to clog postconviction courts with meritless litigation.

## II. Counsel Had No Duty to Request an Instruction Defining "Reasonable Degree of Medical Certainty" and No Such Instruction Would Have Been Given If Requested.

### Preservation of Error

The defendant asserts counsel was ineffective, which is an exception to the rules of error preservation. *See State v. Wills*, 696 N.W.2d 20, 22 (Iowa 2005).

### Standard of Review

Allegations of ineffective assistance are reviewed de novo. *Wills*, 696 N.W.2d at 22.

### Merits

The defendant next makes the novel assertion that trial counsel had a heretofore-unknown duty to request a jury instruction defining "reasonable degree of medical certainty." Defendant's Proof Br. at 53–60. No legal authority supports the defendant's contention and it should be summarily rejected.

So far as the State can tell, no court anywhere in the United States has required courts to instruct juries on the definition of "reasonable degree of medical certainty" in a criminal case. The defendant cites no such case. Defendant's Proof Br. at 53–60. And it makes sense that courts would not want to impose a legal stricture on

top of this medical term: two different medical doctors testified in this trial and it would undoubtedly be error for a court to give an instruction that defines that term differently than the medical professionals would have. Indeed, the very law review article that the defendant stretches to support his argument confesses that there is no uniform identical definition for this term—"among judges, attorneys, or academic commentators." Jeff L. Lewin, *The Genesis and Evolution of Legal Uncertainty About "Reasonable Medical Certainty,"* 57 Md. L. Rev. 380 (1998).

Given the total lack of authority supporting the defendant's claim, his ineffective-assistance argument is self-defeating: counsel cannot be ineffective for declining to advance an argument that has never been recognized by any court, in any jurisdiction, in the history of the United States. And even if this Court were inclined to consider the merits of such an argument, counsel had no duty to press it. *Snethen v. State*, 308 N.W.2d 11, 16 (Iowa 1981) ("[I]t is not necessary to know what the law will become in the future to provide effective assistance of counsel.").

The meager authorities marshaled by the defendant are of no help in the context of this case. He cites the Restatement of Torts and

Black's Law Dictionary, both of which involve definitions specifically tailored to proving causation by a preponderance of the evidence for torts. Defendant's Proof Br. at 56–57. This is a criminal case and the jury was instructed accordingly. *See generally* Jury Instrs.

Additionally, there is no reasonable probability of a different outcome because there is no reason to think that the district court judge would have given an instruction defining "reasonable degree of medical certainty." Iowa has no model criminal jury instruction defining the concept. Nor does it appear any Iowa appellate court has ever considered whether such an instruction is required. Against this backdrop, it is almost inconceivable that a district court would have been willing to entertain crafting a definitional instruction from whole cloth and without appellate guidance. Thus, even if counsel had requested an instruction, it is not likely the request would have been granted.

Also, even if counsel had a duty to press this argument below *and* had convinced the court to issue a definition, there is no reason to believe that defining "reasonable degree of medical certainty" would have changed the course of trial. When compiling jury instructions, "[g]enerally understood words of ordinary usage need

not be defined." *State v. Kellogg*, 542 N.W.2d 514, 516 (Iowa 1996). Contrary to the defendant's assertions, in this trial, "reasonable degree of medical certainty" involved the definition supplied by an ordinary dictionary:

1. **Reasonable** means "agreeable to reason or sound judgment," "not exceeding the limit prescribed by reason," and "moderate."[2]

2. **Degree** means "a stage in a scale of intensity or amount."[3]

3. **Medical** means "of or relating to the science or practice of medicine."[4]

4. **Certainty** means "the state of being certain" or "something certain; an assured fact," synonymous with "confidence" or "certitude."[5]

So, taken in the aggregate, "reasonable degree of medical certainty" means a moderate amount of confidence in an opinion related to medicine. Ordinary jurors are capable of understanding this testimony and the jury did so here. *Cf. State v. Thompson*, 570

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[2] *Reasonable*, dictionary.com, https://www.dictionary.com/browse/reasonable?s=t (last accessed Aug. 19, 2018).

[3] *Degree*, DICTIONARY.COM, https://www.dictionary.com/browse/degree?s=t (last accessed Aug. 19, 2018).

[4] *Medical*, DICTIONARY.COM, https://www.dictionary.com/browse/medical?s=t (last accessed Aug. 19, 2018).

[5] *Certainty*, DICTIONARY.COM, https://www.dictionary.com/browse/certainty?s=t (last accessed Aug. 19, 2018).

N.W.2d 765, 768 (Iowa 1997) (holding that district court was not required to define "manifesting an extreme indifference to human life" was in jury instructions, jurors were capable of understanding the term). There is no reasonable probability of a different outcome if the definition of "reasonable degree of medical certainty" had been written into the instructions.

Finally, this Court could preserve the claim for development in postconviction litigation. Iowa Code § 814.7 (2015). However, given the lack of legal authority that supports this novel ineffective-assistance claim, the Court should instead deny it on direct appeal.

## III. The Restitution Challenge is Premature and Does Not Warrant Reversal.

### Motion to Dismiss/Failure To Exhaust

Under controlling Supreme Court precedent, the defendant has failed to exhaust his remedies for challenging his reasonable ability to pay, and his complaint cannot be heard:

> ... Iowa Code section 910.7 permits an offender who is dissatisfied with the amount of restitution required by the plan to petition the district court for a modification. **Unless that remedy has been exhausted, we have no basis for reviewing the issue in this court.**

*State v. Jackson*, 601 N.W.2d 354, 357 (Iowa 1999) (internal citation omitted, emphasis added); *accord State v. Swartz*, 601 N.W.2d 348, 354 (Iowa 1999).[6] No 910.7 motion has been litigated in the district court related to this issue, nor had a plan of restitution been filed at the time of sentencing. *See generally* Docket Entries. Therefore, the defendant has not exhausted his remedies and cannot seek review. This portion of the appeal should be dismissed.

**Preservation of Error**

Error was not preserved. A challenge to the reasonable ability to pay is not an illegal-sentence challenge under the circumstances presented in this case. *See State v. Bullock*, No. 15-0982, 2017 WL 4049276, at *2 (Iowa Ct. App. Sept. 13, 2017) (citing *Jose v. State*, 636 N.W.2d 38, 45 (Iowa 2001)).

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[6] There is one published Court of Appeals case at odds with *Jackson* and *Swartz*: *State v. Kurtz*, 878 N.W.2d 469, 472 (Iowa Ct. App. 2016). *Kurtz* is wrongly decided. It concluded the *Jackson*/*Swartz* exhaustion rule did not apply based on citation to a single legal authority: *State v. Janz*, 358 N.W.2d 547, 549 (Iowa 1984). *Jackson* (1999) and *Swartz* (1999) both post-date *Janz* (1984) and are controlling. Also, *Jackson* was recently re-affirmed in *State v. Richardson*, 890 N.W.2d 609, 626 (Iowa 2017) ("We have previously held that ability-to-pay challenges to restitution are premature until the defendant has exhausted the modification remedy afforded by Iowa Code section 910.7.").

**Standard of Review**

Review is for an abuse of discretion. *State v. Van Hoff*, 415 N.W.2d 647, 648 (Iowa 1987).

**Merits**

The defendant raises two restitution challenges, neither of which can be resolved on this record or warrant reversal. A nunc pro tunc order is inappropriate and unnecessary. And the reasonable-ability-to-pay challenge is premature because the plan of restitution is incomplete and no one knows the total amounts payable.

**A. A nunc pro tunc order cannot be used to resolve the jail-fee issue. But a remand is unnecessary under the current state of the record.**

While the defendant is correct that the written judgment imposes a jail fee and the court did not specifically address the jail fee at sentencing, the State does not agree that a nunc pro tunc order is the correct remedy. *See* Defendant's Proof Br. at 61–62. "When judicial intent is unclear, we will remand for an evidentiary hearing for a determination of the proper method of correcting the defective written sentence." *State v. Hess*, 533 N.W.2d 525, 527 (Iowa 1995). However, in this particular case, a remand is unnecessary on the current state of the record for the reasons discussed in Division III.B below: the jail fee was imposed contingent on certification by the

sheriff and the certification is not part of the record, as it was not filed before the notice of appeal. *See* Docket Entries; *Alvarez v. IBP, Inc.*, 696 N.W.2d 1, 3 (Iowa 2005) ("the appellate courts cannot consider materials that were not before the district court when that court entered its judgment"). A 910.7 motion is the better mechanism by which to address this issue.

### B. The district court was not required to determine the defendant's reasonable ability to pay.

This is the latest in a line of many cases where defendants complain that the district court did not conduct a reasonable-ability-to-pay analysis, but a review of the record shows the defendant was never ordered to pay any specific amounts of court costs or other restitution. The defendant's complaints seem to be about "court costs" generally and the section-356.7 fee specifically. Defendant's Proof Br. at 63. There is no specific dollar amount associated with general "court costs" in the sentencing order, and the portion of the order addressing the section-356.7 fee specifically notes it is only payable "in an amount to be certified by the sheriff to the clerk of district court." Order of Disposition, pp. 1–2; App. 23–24. No plan of restitution was filed and no jail fees were certified prior to the filing of

the notice of appeal. *See* Docket Entries. There is thus nothing to appeal.

The Court of Appeals opinion in *State v. Hols* is instructive on how to handle a situation such as this, when the defendant challenges an order that does not yet impose an actual dollar amount of restitution subject to a statutory or constitutional limitation:

> The State asserts that Hols's appeal, and the claims of error he makes, are premature and not properly presented for appellate review. It argues there was no order entered requiring him to pay restitution for any amount of court-appointed attorney fees, much less an amount in excess of any fee limitation established pursuant to section 13B.4.
>
> The State requests that we affirm the district court's judgment entry, pointing out that if at any time the court has entered or does enter an illegal order for restitution Hols may utilize section 910.7 (2011) to correct any such error. We agree with the State on these points.

*State v. Hols*, 10-1841, 2013 WL 750307, at *2 (Iowa Ct. App. Feb. 27, 2013).[7] Just like in *Hols*, the judgment here does not specify any amount due and owing as restitution for court costs, nor have any

[7] Other cases come to a similar conclusion. *See, e.g., State v. Boutchee*, No. 17-1217, 2018 WL 3302010, at *4–5 (Iowa Ct. App. July 5, 2018); *State v. Plettenberg*, No. 17-1312, 2018 WL 2084814, at *2 (Iowa Ct. App. May 2, 2018); *State v. Brown*, No. 16-1118, 2017 WL 2181568, at *4 (Iowa Ct. App. May 17, 2017) ("[T]he trial court

such amounts been certified or approved. *See* Order of Disposition, pp. 1–2; App. 23–24. Just like in *Hols*, this Court cannot reach the question presented and should affirm the judgment in its current state. *Hols*, 2013 WL 750307, at *2–3. And just like in *Hols*, the defendant "may of course seek relief pursuant to section 910.7" if the district court later enters an unlawful restitution order. *Id.* at *3. In short, until a plan of restitution is completed, "the court is not required to give consideration to the defendant's ability to pay," no such plan is in place here, and no justiciable issue is presented. *See Jackson*, 601 N.W.2d at 357.

Also, even setting aside the holding of *Hols* and the other cases, logic and practicality also dictate that the defendant's challenge cannot be heard at this time. His complaint is that the district court

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had not yet entered a plan of restitution that would trigger the trial court's obligation to determine Brown's reasonable ability to pay. Brown's appeal from the current order is premature."); *State v. Kemmerling*, No. 16-0221, 2016 WL 5933408, at *1 (Iowa Ct. App. Oct. 12, 2016) ("Because the total amount of restitution had not yet been determined by the time the notice of appeal was filed, any challenge to the restitution order in this case is premature."); *State v. Martin*, No. 11-0914, 2013 WL 4506163, at *2 (Iowa Ct. App. Aug. 21, 2013) ("We find, because no restitution order is yet in place, Martin's challenge is premature."); *State v. Wilson*, No. 00-0609, 2001 WL 427404, at *3 (Iowa Ct. App. Apr. 27, 2001) ("We cannot address this issue at this time because no plan of restitution was completed at the time Wilson filed his notice of appeal….").

did not adequately determine his reasonable ability to pay, yet we have no idea what dollar amounts for court costs will actually be imposed as restitution. It is impossible to evaluate whether the defendant is reasonably able to pay an unknown dollar amount.

However, if this Court disagrees and does find that a restitution amount was imposed for court costs, the defendant still would not be entitled to relief. "A defendant who seeks to upset a restitution order … has the burden to demonstrate either the failure of the court to exercise discretion or an abuse of that discretion." *State v. Van Hoff*, 415 N.W.2d 647, 648 (Iowa 1987). A "silent record" does not indicate an abuse of discretion. *State v. Kaelin*, 362 N.W.2d 526, 528 (Iowa 1985). Further, to the extent the defendant argues or implies that a restitution order must include specific findings about the defendant's reasonable ability to pay, the Supreme Court has already rejected that argument:

> Defendant argues that this court should require sentencing judges to state their reasons on the record for ordering restitution for court costs and attorney fees to assure that their discretion is exercised and provide a better record for review. 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. A defendant has at least two opportunities to

> make an appropriate record on the issue. One is at sentencing. The other is through the provisions in chapter 910 for modification of the order.

*Kaelin*, 362 N.W.2d at 528. These decisions are controlling. And to the extent this case is retained by the Supreme Court, *Jackson*, *Kaelin*, *Swartz*, and *Van Hoff* should not be disturbed: not only does the presumption of *stare decisis* support those decisions, so does logic. It does not make sense to require an explanation of the reasonable ability to pay in cases like this one, when the amount of restitution cannot be fully assessed at sentencing. Why would this Court require a statement of reasons for a determination the district court is unable to make? Until the dollar amounts of restitution are known to the court, it is unnecessary to review any decision on the offender's reasonable ability to pay.

On this record, the defendant has failed to carry his burden to challenge the restitution order and the district court should be affirmed.

## CONCLUSION

This Court should affirm the defendant's conviction and sentence.

## REQUEST FOR NONORAL SUBMISSION

Given the framework in which the arguably novel issues in this appeal are presented (ineffective assistance), oral argument is unnecessary and the 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 **6,933** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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