IN THE SUPREME COURT OF IOWA
Supreme Court No. 18-0437

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KENNETH EDWARD PETTY,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POTTAWATTAMIE COUNTY
THE HONORABLE JAMES S. HECKERMAN, JUDGE

APPELLEE'S BRIEF

THOMAS J. MILLER
Attorney General of Iowa

KATIE KRICKBAUM
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
(515) 281-4902 (fax)
Katie.Krickbaum@ag.iowa.gov

MATTHEW D. WILBER
Pottawattamie County Attorney

PATRICK J. EPPLER
Assistant County Attorney

ATTORNEYS FOR PLAINTIFF-APPELLEE

FINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Federal Statute

State Statutes

State Rules

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Has Petty failed to preserve a direct challenge to his guilty plea where he did not argue or develop the specific grounds for reversal that he urges on appeal? If so, should this Court reject Petty's ineffective-assistance-of-counsel claim where, even if Petty's trial counsel breached an essential duty, Petty cannot show that he was prejudiced by the breach?

Arizona v. Fulminante, 499 U.S. 279 (1991)
Bell v. Cone, 535 U.S. 685 (2002)
United States v. Cronic, 466 U.S. 648 (1984)
Boschert v. State, No. 13-009, 2013 WL 6405468 (Iowa Ct. App. Dec. 5, 2013)
Castro v. State, 795 N.W.2d 789 (Iowa 2011)
Kolzow v. State, 813 N.W.2d 731 (Iowa 2012)
Lado v. State, 804 N.W.2d 248 (Iowa 2011)
Leftwich v. State, No. 13-1846, 2015 WL 359239 (Iowa Ct. App. Jan. 28, 2015)
Meier v. Senecaut, 641 N.W.2d 532 (Iowa 2002)
Skipper v. State, No. 14-1401, 2015 WL 7019027 (Iowa Ct. App. Nov. 12, 2015)
Smith v. State, No. 09-1518, 2010 WL 4867384 (Iowa Ct. App. Nov. 24, 2010)
State v. Bearse, 748 N.W.2d 211 (Iowa 2008)
State v. Blum, 560 N.W.2d 7 (Iowa 1997)
State v. Carroll, 767 N.W.2d 638 (Iowa 2009)
State v. Dight, No. 17-1267, 2018 WL 1442723 (Iowa Ct. App. March 21, 2018)
State v. Fisher, 877 N.W.2d 676 (Iowa 2016)
State v. Hallock, 765 N.W.2d 598 (Iowa Ct. App. 2009)
State v. Johnson, No. 17-0172, 2017 WL 6033882 (Iowa Ct. App. Dec. 6, 2017)
State v. Meron, 675 N.W.2d 537 (Iowa 2004)
State v. Myers, 653 N.W.2d 574 (Iowa 2002)
State v. Null, 836 N.W.2d 41 (Iowa 2013)
State v. Ondayog, 722 N.W.2d 778 (Iowa 2006)
State v. Smith, 753 N.W.2d 562 (Iowa 2008)

State v. Straw, 709 N.W.2d 128 (Iowa 2006)
State v. Thorndike, 860 N.W.2d 316 (Iowa 2015)
State v. Tolson, No. 14-2141, 2015 WL 7574229 (Iowa Ct. App. Nov. 25, 2015)
State v. Weitzel, 905 N.W.2d 397 (Iowa 2017)
Iowa Code § 903B.1
Iowa Code § 814.7(2)
Iowa Code § 814.7(3)
Iowa Code § 901.8
Iowa Code §§ 709.3, 902.9 & 902.12(1)(c)
Iowa Code §§ 709.1, 709.4, 728.12(1) & 902.9(d)-(e)
Iowa R. Civ. P. 1.944
Iowa R. Crim. P. 2.24(3)(a)
Iowa R. Crim. P. 2.8(2)
Iowa R. Crim. P. 2.8(2)(b)
Iowa R. Crim. P. 2.8(2)(b)(2)

II. Did the district court adequately address Petty's counsel's motion to withdraw and was its implicit denial of counsel's motion well-within its discretion?

Morris v. Slappy, 461 U.S. 1 (1983)
United State v. Lott, 310 F.3d 1231 (10th Cir. 2002)
State v. Lopez, 633 N.W.2d 774 (Iowa 2001)
State v. Boggs, 741 N.W.2d 492 (Iowa 2007)
State v. Brooks, 540 N.W.2d 270 (Iowa 1995)
State v. Hicks, No. 17-0130, 2018 WL 1433788 (Iowa Ct. App. March 21, 2018)
State v. Lohr, 13-1251, 2014 WL 3511856 (Iowa Ct. App. July 16, 2014)
State v. Lowe, No. 15-0402, 2016 WL 902888 (Iowa Ct. App. March 9, 2016)
State v. Pion, No. 17-2030, 2018 WL 3060271 (Iowa Ct. App. June 20, 2018)
State v. Polson, No. 15-2104, 2017 WL 1401472 (Iowa Ct. App. April 19, 2017)
State v. Tejeda, 677 N.W.2d 744 (Iowa 2004)
State v. Wells, 738 N.W.2d 214 (Iowa 2007)

III. Did the district court clerk properly impose the sexual abuse surcharge for Petty's lascivious acts conviction where, by pleading guilty and accepting the minutes of testimony, Petty implicitly admitted that the sex act may have occurred after the effective date of the new penalty statute?

State v. Bruegger, 773 N.W.2d 862 (Iowa 2009)
State v. Hoeck, 843 N.W.2d 67 (Iowa 2014)
State v. Kingery, No. 17-1529, 2018 WL 3650352 (Iowa Ct. App. Aug. 1, 2018)
State v. Lathrop, 781 N.W.2d 288 (Iowa 2010)
State v. Lopez, 907 N.W.2d 112 (Iowa 2018)
State v. Seering, 701 N.W.2d 655 (Iowa 2005)
U.S. Const. art. I, § 10
Iowa Code § 911.2B
Iowa Const. art. I, § 21
Iowa Acts ch. 96, §§ 15, 17

IV. Must this Court dismiss Petty's reasonable-ability-to-pay claim where the district court did not yet have the obligation to make such a finding and where Petty has not exhausted his administrative remedies?

Bader v. State, 559 N.W.2d 1 (Iowa 1997)
Goodrich v. State, 608 N.W.2d 774 (Iowa 2000)
Iowa Coal Min. Co., Inc. v. Monroe County, 555 N.W.2d 418 (Iowa 1996)
State v. Alexander, No. 16-0669, 2017 WL 510950 (Iowa Ct. App. Feb. 8, 2017)
State v. Bonstetter, 637 N.W.2d 161 (Iowa 2001)
State v. Boutchee, No. 17-1217, 2018 WL 3302010 (Iowa Ct. App. July 5, 2018)
State v. Brown, No. 16-1118, 2017 WL 2181568 (Iowa Ct. App. May 17, 2017)
State v. Bullock, No. 15-0982, 2017 WL 4049276 (Iowa Ct. App. Sept. 13, 2017)
State v. Campbell, No. 15-1181, 2016 WL 4543763 (Iowa Ct. App. Aug. 31, 2016)
State v. Harrison, 351 N.W.2d 526 (Iowa 1984)

State v. Ihde, 532 N.W.2d 827 (Iowa Ct. App. 1995)
State v. Jackson, 601 N.W.2d 354 (Iowa 1999)
State v. Janz, 358 N.W.2d 547 (Iowa 1984)
State v. Jose, 636 N.W.2d 38 (Iowa 2001)
State v. Kaelin, 362 N.W.2d 526 (Iowa 1985)
State v. Kemmerling, No. 16-0221, 2016 WL 5933408 (Iowa Ct. App. Oct. 12, 2016)
State v. Kurtz, 878 N.W.2d 469 (Iowa Ct. App. 2016)
State v. Love, 589 N.W.2d 49 (Iowa 1998)
State v. Martin, No. 11-0914, 2013 WL 4506163 (Iowa Ct. App. Aug. 21, 2013)
State v. McMurry, No. 16-1722, 2017 WL 4317302 (Iowa Ct. App. Sept. 27, 2017)
State v. Richardson, 890 N.W.2d 609 (Iowa 2017)
State v. Steenhoek, No. 17-1772, 2018 WL 4635696 (Iowa Ct. App. Sept. 26, 2018)
State v. Storrs, 351 N.W.2d 520 (Iowa 1984)
State v. Swartz, 601 N.W.2d 348 (Iowa 1999)
State v. Van Hoff, 415 N.W.2d 647 (Iowa 1987)
Iowa Code § 910.3
Iowa Code §§ 910.1(3) & (4)
Iowa Code § 910.7
Iowa Code §§ 910.4 and 910.5
Iowa Code § 910.2(1)
Iowa Code § 910.5(1)(d)
Iowa Code § 910.7(1)
Iowa Code § 910.7(2)
Iowa Code §§ 911.1-911.4
Iowa Code § 910.2(2)
Iowa Code § 910.2

ROUTING STATEMENT

Transfer to the Court of Appeals is appropriate because the issues raised involve the application of existing legal principles. Iowa R. App. P. 6.1101(3)(a). Despite Defendant Kenneth Edward Petty's statement to the contrary, retention is not necessary to resolve this case. To start, this Court need not reach what Petty flags as a conflict in how courts review a district court's denial of a motion in arrest of judgment in cases like this one because he has not preserved the issue for appeal. Because the Court may only assess Petty's challenge to his pleas under the ineffective-assistance-of-counsel framework, any analysis of the appropriate standard of review for a direct challenge would be inapposite.

Similarly, this case is not the proper vehicle for this Court to clarify for district courts the proper scope and procedure for determining a defendant's reasonable ability to pay certain restitution amounts like court costs and attorney's fees. Petty's challenge to the district court's restitution order is not yet ripe, nor has he exhausted his administrative remedies. Moreover, as discussed further below, the challenges that Petty identifies in this area are not the result of an

ambiguous statute or conflicting case law. Transfer to the court of appeals is appropriate here.

STATEMENT OF THE CASE

Nature of the Case

Petty pleaded guilty in case number FECR152038 to one count of lascivious acts with a child, in violation of Iowa Code sections 709.8(1) and 709.8(2), a class C felony. In a separate case number—FECR152039—involving a second girl, Petty pleaded guilty to sexual exploitation of a minor, in violation of Iowa Code sections 728.1(1) and 903B.1, also a class C felony. Petty makes several challenges to his guilty pleas, sentence, and order of restitution. The Honorable James S. Heckerman accepted Petty's guilty pleas and imposed sentence.

Facts and Course of Proceedings

M.S., the minor daughter of Petty's neighbor, alleged that she had been having sex with Petty for approximately two years and that, on at least one occasion, Petty had videotaped the incident. Minutes of Testimony (FECR152039), Dec. 29, 2016; Confidential App. 130-

269.[1] Officers discovered a video depicting Petty and M.S. engaging in a sex act when M.S. was under eighteen years of age and Petty was in his mid-forties. Minutes of Testimony (FECR152039), Dec. 29, 2016; Conf. App. 130-269; *see also* Plea Hr'g Tr. 40:3-22.

On December 29, 2016, Petty was charged by trial information in case number FECR152039 with crimes relating to his acts with M.S. Trial Information (FECR152039); App. 8-9. Specifically, the State brought four counts of sexual abuse in the third degree, in violation of Iowa Code sections 709.1, 709.4, and 903B.1 (Counts I-IV); and three counts of sexual exploitation of a minor, in violation of Iowa Code sections 728.12, 903B.1, and 903B.2 (Counts V-VII). Trial Information (FECR152039); App. 8-9.

Separately, Z.C., the daughter of a woman with whom Petty was engaged in a romantic relationship, alleged that Petty fondled her breasts and put his finger in her vagina. Minutes of Testimony (FECR152038); Conf. App. 4-129. Z.C. was under the age of twelve at the time. Minutes of Testimony (FECR152038); Conf. App. 4-129; *see also* Plea Hr'g Tr. 33:2-34:20. For this act, the State charged Petty by

[1] Petty agreed that the district court could take the Minutes of Testimony into account to determine a factual basis. *See* Plea Hearing Transcript, Jan. 17, 2018 ("Plea Hr'g Tr.") 41:1-9.

trial information in case number FECR152038 with one count of sexual abuse in the second degree, in violation of Iowa Code sections 709.1(3), 709.3(1)(b), 709.3(2), and 903B.1, a class B felony. Trial Information (FECR152038); App. 5.

After several continuances, the district court set trial for the case involving M.S. for January 17, 2018; trial for the case involving Z.C. was to begin the following week. See Order Setting Trial, Jan. 8, 2018 (FECR152039); App. 26. Shortly before trial was to begin in M.S.'s case, the court granted the State's motion to amend the trial information. Order, Jan. 4, 2018 (FECR152039); App. 24. The amended trial information charged Petty with two counts of sexual abuse in the third degree, in violation of Iowa Code sections 709.1, 709.4, and 903B.1 (Counts I and II), and three counts of sexual exploitation of a minor, in violation of Iowa Code sections 728.12, 903B.1, and 903B.2 (Counts III-V). Amended Trial Information (FECR152039); App. 21-22.

On January 17, 2018, following a hearing on the parties' motions in limine and with the jury venire present and ready in the courtroom, the parties reported that they had reached a plea agreement that would resolve both cases. Plea Hr'g Tr. 24:21-25:24.

Petty waived his right to have his guilty plea taken in open court, and the colloquy proceeded in chambers. Plea Hr'g Tr. 25:25-26:13.[2]

The district court began by setting forth the terms of Petty's Alford plea. See Plea Hr'g Tr. 26:14-28:20. Speaking first to the case involving M.S., the court stated that Petty intended to plead guilty to sexual exploitation of a minor, in violation of Iowa Code section 728.12(1) and 903B.1 (Count III of the amended trial information), "a Class C Felony carrying up to ten years in prison." Plea Hr'g Tr. 27:13-18. As for the case related to Z.C., the district court stated that Petty intended to plead guilty to an amended charge of lascivious acts, in violation of Iowa Code section 709.8(1)(a) and 709.8(2)(a), which was, "likewise, . . . a Class C Felony." Plea Hr'g Tr. 27:19-28:3.

The court continued that, according to the terms of the agreement, Petty would receive ten-year indeterminate terms on each of these charges, to be served concurrently for a total of ten years in prison. Plea Hr'g Tr. 28:3-9; 29:14-16. The court also stated that Petty would be "subject to the provisions relating to the sex abuse registry and lifetime parole issues." Plea Hr'g Tr. 28:9-11. The court noted

[2] The district court allowed Petty to waive this right despite the fact that Iowa Rule of Criminal Procedure 2.8(2)(b) requires that pleas to felony charges be taken "in open court[.]"

"that by taking advantage of the plea agreement[,]" Petty would be avoiding a twenty-five year sentence with a mandatory minimum of seventeen-and-a-half years in prison in the case involving Z.C. Plea Hr'g Tr. 31:10-32:14; 36:14-37:5; 40:23-41:9; 41:18-42:2; 44:13-20.

When asked how he pled to the amended charge of lascivious acts in Z.C.'s case, Petty stated that he was pleading guilty. Plea Hr'g Tr. 32:15-19. The court then said, "[a]nd you understand that's a Class C felony carrying up to ten years in prison -- . . . and/or a $10,000 fine? You understand that's the maximum penalty?" Plea Hr'g Tr. 32:20-25. Petty said that he understood. Plea Hr'g Tr. 33:1. Then, after a discussion confirming that Petty truly did want to take an Alford plea to the case involving Z.C., Petty also stated that he pled guilty to sexual exploitation of a minor in M.S.'s case. Plea Hr'g Tr. 33:5-40:2. The district court accepted Petty's guilty pleas. Plea Hr'g Tr. 44:13-20.

The next day, Petty's trial counsel moved to withdraw in both cases, stating that he could "no longer effectively communicate with the defendant and no longer agree on how his case should be handled." Motion to Withdraw (both cases); App. 32-33. Petty's counsel informed the court that the day after Petty had pleaded guilty,

Petty texted his trial counsel, "express[ing] his displeasure over the plea bargain" and "falsely accus[ing]" counsel "of having a conflict of interest." Motion to Withdraw; App. 32-33.

When the district court set counsel's motion to withdraw for hearing on the date of Petty's sentencing, Petty's counsel filed a motion in arrest of judgment on Petty's behalf. Order, Jan. 18, 2018 (both cases); App. 34-36; Motion in Arrest of Judgment (both cases); App. 38-39. In his motion, Petty's trial counsel argued that Petty's guilty pleas were "inadequate" because Petty "was not adequately advised of his Constitutional rights"; "did not fully understand" those rights; "did not adequately understand the penal consequences of his plea"; and there was no factual basis for the pleas. Motion in Arrest of Judgment; App. 38-39.

Counsel also referred to and attached an affidavit from Petty, which stated, among other things, that Petty "had insufficient time to consider" the State's plea offer, that the plea's requirement that Petty not ask for probation was unfair, that he was "innocent of all charges[,]" and that he did not "want to be labeled as a child molester." Kenneth Petty Affidavit (both cases); App. 40-41. The

district court set this motion for hearing at the time of sentencing as well. Order, Jan. 30, 2018 (both cases); App. 42-44.

At the sentencing hearing on March 12, 2018, Petty's counsel referenced his motion to withdraw and the fact that the court had nonetheless ordered him to appear at the sentencing hearing. Sentencing Hearing Transcript, March 12, 2018 ("Sent. Hr'g Tr.") 3:12-19. Petty's counsel then called Petty to testify as to his reasons for seeking a motion in arrest of judgment. Sent. Hr'g Tr. 3:20-17:24. Much of Petty's testimony related to his contention that he was innocent of the charges to which he had pleaded guilty and the fact that he believed his trial counsel had "quit" on him. *See* Sent. Hr'g Tr. 3:20-17:24. After listening to Petty's testimony and engaging in a lengthy colloquy with Petty itself, the district court denied Petty's motions in arrest of judgment. Sent. Hr'g Tr. 18:20-27:19; Order of Disposition (both cases) at 1; App. 47. In doing so, and in having Petty's trial counsel continue to represent Petty throughout the proceeding and at sentencing, the court also implicitly denied counsel's motion to withdraw. *See* Sent. Hr'g Tr. 3:14-19; 6:9-13.

The court then sentenced Petty in accordance with the plea agreement to two concurrent ten-year terms of imprisonment. Sent.

Hr'g Tr. 29:14-20; Order of Disposition at 1; App. 47. The court also ordered that Petty be subject to the lifetime parole provision in 903B.1 and be on the sex offender registry for life. Sent. Hr'g Tr. 29:23-30:3; Order of Disposition at 1-2; App. 47-48. In each case number, the court imposed the $250 civil penalty mandated by Iowa Code section 692A.110, Order of Disposition at 2; App. 48, and the clerk added to the lascivious acts conviction the $100 sexual abuse surcharge set forth in Iowa Code section 911.2B, Combined General Docket Report (FECR152038), Financial Summary; App. 51. Finally, the court stated that "[a]ll court costs, including court-appointed attorney fees, are taxed to the Defendant[,]" and ordered Petty to pay them "immediately." Order of Disposition at 2; App. 48. The district court referred to the financial page of Iowa Courts Online and stated that "[a]ccruing costs may be added at a later date." Order of Disposition at 2; App. 48.

Petty now appeals, challenging the voluntariness of his guilty plea, the district court's response to his trial counsel's motion to withdraw, the legality of the sexual abuse surcharge as applied to his lascivious acts conviction, and the restitution order. For the reasons set forth below, none of Petty's claims has merit.

ARGUMENT

I. Petty has not preserved his challenge to the voluntariness of his guilty pleas. Nor can Petty succeed on his voluntariness claim by way of an ineffective-assistance-of-counsel argument because he is unable to prove that, barring any alleged breach of essential duty, he would have chosen to go to trial.

Preservation of Error

Petty first argues that the district court erred in denying his motion in arrest of judgment. Petty contends that judgment should not have been entered here because the district court failed to apprise him of the maximum and minimum penalties he faced by pleading guilty, rendering his guilty pleas involuntary. Specifically, Petty asserts that the district court did not ensure that he knew about and understood (1) the minimum fine applicable to his lascivious acts with a minor charge; (2) the minimum and maximum fines applicable to his sexual exploitation of a minor charge; (3) the surcharge applicable to each fine imposed; and (4) the lifetime special sentence mandatory for both charges. *See* Appellant's Brief at 34-40.[3]

---

[3] Despite the fact that the fines were mandatory, Petty did not actually receive a fine in either case. *See* Order of Disposition; App. 47-48; Combined General Docket Report (FECR152038), Financial Summary; App. 51; Combined General Docket Report (FECR152039), Financial Summary; App. 52. And although it appears that the district court clerk imposed a surcharge in case number FECR152038, none was ordered by the district court in its oral or written sentencing

As Petty telegraphs by making the same argument under an ineffective-assistance-of-counsel heading, Petty has not preserved the specific arguments he makes here. Petty's trial counsel filed a motion in arrest of judgment, in which he generally argued that his guilty pleas were "inadequate" because he "did not adequately understand the penal consequences of his plea[.]" Motion in Arrest of Judgment; App. 38-39. In his affidavit, however, and in his testimony in support of his motion during the sentencing hearing, Petty argued instead that he did not have sufficient time to consider the offer and that he was in fact "innocent of all charges" against him. Affidavit of Kenneth Petty; App. 40-41; *see generally*, Sent. Hr'g Tr. 5:1-17:24. Because Petty did not make the arguments he now raises below or receive a ruling on them from the district court, his arguments are not preserved. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002); *State v. Tolson*, No. 14-2141, 2015 WL 7574229, at *1 (Iowa Ct. App. Nov. 25, 2015) (concluding that the defendant had failed to preserve error where, despite filing a motion in arrest of judgment, "the rule 2.8(2)(b)(2) argument he urge[d] on appeal was not presented to the

---

order. Combined General Docket Report (FECR152038), Financial Summary; App. 51.

district court"); *see also* Iowa R. Crim. P. 2.24(3)(a) ("A defendant's failure to challenge the adequacy of a guilty plea proceeding by a motion in arrest of judgment shall preclude the defendant's right to assert such challenge on appeal.").

Petty's ineffective-assistance-of-counsel claim is not bound by traditional error-preservation rules. *State v. Ondayog*, 722 N.W.2d 778, 784 (Iowa 2006).

Standard and Scope of Review

This Court reviews ineffective-assistance-of-counsel claims de novo. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006).[4] A defendant may raise a claim of ineffective assistance of counsel on direct appeal if he believes the record is adequate to address the claim at that stage. *Id.* (citing Iowa Code § 814.7(2)). The Court may decide that the record is sufficient to rule on the merits, or it may choose to preserve the claim for post-conviction proceedings. *Id.* (citing Iowa Code §

[4] Should this Court conclude that Petty's voluntariness claims were preserved, the State urges the Court to abide by its precedent and review the district court's denial of his motion in arrest of judgment for an abuse of discretion. *See State v. Smith*, 753 N.W.2d 562, 564 (Iowa 2008) (citing *State v. Myers*, 653 N.W.2d 574, 581 (Iowa 2002) and *State v. Blum*, 560 N.W.2d 7, 9 (Iowa 1997)).

814.7(3)). This Court can reject Petty's claim on direct appeal without further development of the record.

Merits

Generally, a defendant's decision to plead guilty waives "all defenses and objections to the criminal proceedings . . . including claims of ineffective assistance of counsel." *Castro v. State*, 795 N.W.2d 789, 792 (Iowa 2011). There is an exception, however, for "irregularities that bear on the knowing and voluntary nature of the plea." *Id.* A defendant may "challenge the validity of his guilty plea by proving the advice he received from counsel in connection with the plea was not within the range of competence demanded of attorneys in criminal cases." *State v. Carroll*, 767 N.W.2d 638, 642 (Iowa 2009).

Here, Petty claims that his plea was unknowing and involuntary because the district court failed to substantially comply with Rule 2.8(2)(b)(2). *See* Appellant's Brief at 31-40. And he argues that his trial counsel was ineffective for failing to bring this specific defect in the plea proceeding to the district court's attention. *See* Appellant's Brief at 43-47. To succeed on his claim of ineffective assistance of counsel, Petty must show that (1) his counsel failed to perform an

essential duty, and (2) counsel's failure resulted in prejudice. *See State v. Null*, 836 N.W.2d 41, 48 (Iowa 2013). If this Court determines that "a claimant has failed to establish either" breach of essential duty or prejudice, it "need not address the remaining element." *State v. Thorndike*, 860 N.W.2d 316, 320 (Iowa 2015).

The State agrees that the district court did not substantially comply with Rule 2.8(2)(b)(2). Nevertheless, reversal is not required here because, even assuming that trial counsel breached an essential duty by failing to "present any argument or evidence to substantiate the defect[,]" Petty cannot show that he suffered prejudice as a result. *See* Appellant's Brief at 44. Nor does this case fall within the exceedingly narrow category of cases in which the defendant was actually or constructively denied counsel during a critical stage.

A. The district court did not substantially comply with Rule 2.8(2)(b)(2). Nevertheless, assuming that Petty's trial counsel's failure to make this argument below was a breach of an essential duty, Petty cannot show that he was prejudiced as a result of the breach.

Iowa Rule of Criminal Procedure 2.8(2) governs pleas before Iowa courts. A district court "shall not accept a plea of guilty without first determining that the plea is made voluntarily and intelligently and has a factual basis." Iowa R. Crim. P. 2.8(2)(b); *see also Straw*,

709 N.W.2d at 133 (stating that "[d]ue process requires the defendant enter his guilty plea voluntarily and intelligently"). Before accepting a guilty plea, a "court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands," among other things, "[t]he mandatory minimum punishment, if any, and the maximum possible punishment provided by the statute defining the offense to which the plea is offered." Iowa R. Crim. P. 2.8(2)(b)(2). Substantial, not strict, compliance with the rule is required. *See State v. Meron*, 675 N.W.2d 537, 542 (Iowa 2004).

The district court here did substantially comply with its duty to inform Petty of the mandatory lifetime special sentence associated with both charges to which Petty pleaded guilty. *See State v. Myers*, 653 N.W.2d 574, 578 (Iowa 2002) (stating that under the substantial compliance standard, "it is sufficient that the defendant be informed of his rights in such a way that he is made aware of them"). When outlining the amended charges to which Petty agreed to plead guilty, the district court identified Iowa Code section 903B.1 for each. *See* Plea Hr'g Tr. 27:13-28:11; 39:21-25. Then, discussing both charges, the court made clear that if Petty pleaded guilty, he would be "subject

to provisions relating to the sex abuse registry and lifetime parole issues." Plea Hr'g Tr. 28:2-13. The court informed Petty of the special sentence and its duration. That is enough to substantially comply with Rule 2.8(2). *See*, *e.g.*, *State v. Johnson*, No. 17-0172, 2017 WL 6033882, at *1-2 (Iowa Ct. App. Dec. 6, 2017) (concluding that the district court substantially complied with Rule 2.8(2) where the written plea proved that the defendant "was aware of the special parole and the duration").

Despite Petty's contention, there is no requirement that the district court inform a defendant of the parole board's role in determining how the defendant serves his term or of the potential consequences of revocation. The court is only required to inform the defendant of the direct consequences of his plea. *See State v. Fisher*, 877 N.W.2d 676, 684-85 (Iowa 2016) (defining direct consequences as those that are "mandatory, immediate, and part of the punishment for that offense"); *see also Kolzow v. State*, 813 N.W.2d 731, 737 (Iowa 2012) ("Section 903B.2 plainly defines 'special sentence' to mean the ten-year IDOC custody period, not the revocation of release . . . periods."). Petty cites no authority to the contrary.

The State concedes, however, that the district court failed to substantially comply with Rule 2.8(2)(b)(2) on other grounds because it did not inform Petty before he pleaded guilty of the minimum fine associated with the lascivious acts with a minor charge, the minimum and maximum fines associated with the sexual exploitation of a minor charge, and the thirty-five percent surcharges. *See State v. Weitzel*, 905 N.W.2d 397, 405-08 (Iowa 2017). But even assuming that Petty's trial counsel's failure to properly argue his motion in arrest of judgment was a breach of an essential duty, Petty cannot succeed on his ineffective-assistance-of-counsel claim because he is unable to demonstrate that he was prejudiced as a result.

To satisfy the prejudice prong in this context, Petty "must show that there is a reasonable probability that, but for counsel's errors, he . . . would not have pleaded guilty and would have insisted on going to trial." *Straw*, 709 N.W.2d at 138. Petty does not even try to meet this burden, and for good reason. In choosing to plead guilty, Petty received a significant benefit. Indeed, this was a "benefit of the bargain plea[.]" Plea Hr'g Tr. 29:23-30:5; 36:14-37:5; 44:13-20. In the case involving Z.C., Petty was facing a charge of sexual abuse in the second degree, which is a class B felony punishable by a mandatory

minimum term of seventeen-and-a-half years in prison, up to a maximum term of twenty-five years.' Trial Information (FECR152038); App. 5; Plea Hr'g Tr. 30:6-32:14; Iowa Code §§ 709.3, 902.9 & 902.12(1)(c). By pleading guilty to an amended charge of lascivious acts, a class C felony that does not carry a mandatory minimum term, Petty significantly reduced the amount of time he would spend in prison just on that one case. *See* Plea Hr'g Tr. 30:6-32:14.

Petty's plea also disposed of the charges he faced in the case involving M.S. In that case, Petty faced five charges, three of which were class C felonies punishable by a term of up to ten years in prison, and one of which was a class D felony punishable by a term of up to five years in prison.[5] *See* Amended Trial Information (FECR152039); App. 21-22; Iowa Code §§ 709.1, 709.4, 728.12(1) & 902.9(d)-(e). Petty's plea agreement allowed him to plead guilty to just one count of sexual exploitation of a minor, which exposed him to an indeterminant ten-year term. Importantly, the agreement also called for Petty to serve that term concurrent to the ten-year term imposed

[5] The final charge was an aggravated misdemeanor. Amended Trial Information (FECR152039); App. 21-22.

in the case involving Z.C., a significant benefit considering the fact that the two cases involved the abuse of separate girls on separate occasions. *See* Plea Hr'g Tr. 27:13-28:9; 29:12-16; Iowa Code § 901.8.

Further, the State's case against Petty was strong. In the case involving M.S., Petty admitted that there was a video depicting him and M.S. engaged in a prohibited sexual act. *See* Plea Hr'g Tr. 28:21-29:3; 35:18-36:11. And although Petty continued to deny Z.C.'s allegations throughout the plea hearing, *see* Plea Hr'g Tr. 33:14-24; 37:6-8; 38:7-11, Z.C.'s mother had already been convicted of child endangerment for exposing her daughter to Petty's abuse. Plea Hr'g Tr. 33:25-34:20. Trials on these charges with these facts would not have gone well for Petty. *See Skipper v. State*, No. 14-1401, 2015 WL 7019027, at *3-4 (Iowa Ct. App. Nov. 12, 2015) (finding no prejudice where the defendant received an "obvious benefit" from his guilty plea and where he faced "a high probability of being found guilty of a forcible felony" had he gone to trial).

Petty cannot prove that, but for his counsel's alleged errors, Petty would have chosen to go to trial rather than pleading guilty. *See*, *e.g.*, *State v. Hallock*, 765 N.W.2d 598, 606 (Iowa Ct. App. 2009) (concluding that, under all the circumstances, there was "no

reasonable probability that [the defendant] would have rejected the plea agreement and insisted on going to trial had he been informed at his plea hearing of the special sentence provision of section 903B.2"); *Leftwich v. State*, No. 13-1846, 2015 WL 359239, at *3-4 (Iowa Ct. App. Jan. 28, 2015) (same); *Boschert v. State*, No. 13-009, 2013 WL 6405468, at *4 (Iowa Ct. App. Dec. 5, 2013) (same); *Smith v. State*, No. 09-1518, 2010 WL 4867384, at *6 (Iowa Ct. App. Nov. 24, 2010) (same). Because he has not met his burden of demonstrating that he was prejudiced as a result of his trial counsel's alleged errors, he cannot succeed on his ineffective-assistance claim. This Court should reject Petty's challenges to his guilty pleas and affirm his convictions.

B. Nor was Petty constructively denied counsel during the motion in arrest of judgment hearing.

Rather than relying on a demonstration of *Strickland* prejudice, Petty attempts to shoehorn his case into the narrow structural-error exception. *See* Appellant's Brief at 47-51. Structural errors are those that "'affect[] the framework within which the trial proceeds.'" *Lado v. State*, 804 N.W.2d 248, 252 (Iowa 2011) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)). Structural error occurs when:

> (1) counsel is completely denied, actually or constructively, at a crucial stage of the proceeding; (2) where counsel does not place the prosecution's case

> against meaningful adversarial testing; or (3) where surrounding circumstances justify a presumption of ineffectiveness, such as where counsel has an actual conflict of interest in jointly representing multiple defendants.

Lado, 804 N.W.2d at 252. Under these limited circumstances, the defendant is not required to specifically show prejudice because "the criminal adversary process itself is 'presumptively unreliable.'" *Id.* (quoting *United States v. Cronic*, 466 U.S. 648, 658 (1984)).

Petty relies on the first recognized form of structural error, arguing that Petty was constructively denied counsel at the motion in arrest of judgment hearing. *See* Appellant's Brief at 48-51. But unlike the postconviction relief applicant's counsel in *Lado*, who stood mute and did nothing to prevent an imminent dismissal for failure to prosecute the case under Iowa Rule of Civil Procedure 1.944, Petty's counsel did not commit this type of error. *See Lado*, 804 N.W.2d at 253. Once Petty's counsel learned that his representation would last until at least the conclusion of a hearing on his motion to withdraw, he filed a broad motion in arrest of judgment that included the general claim that Petty's plea was entered without knowledge of "the penal consequences" of pleading guilty. Motion in Arrest of Judgment; App. 38-39. Although counsel failed to point to or develop

the specific meritorious issues and ultimately abandoned the claim, Petty's trial counsel did initially provide Petty with an avenue for relief.

Once he learned that he would continue to represent Petty throughout the hearing on the motion in arrest of judgment and at sentencing, Petty's trial counsel participated fully in those proceedings. *See* Sent. Hr'g Tr. 3:12-19. Counsel called and examined Petty as a witness, which gave Petty a chance to voice his concerns. *See* Sent. Hr'g Tr. 3:21-4:3. Under challenging circumstances, Petty's counsel sought to keep Petty's testimony focused on the ways in which Petty believed the plea proceedings were inadequate. *See* Sent. Hr'g Tr. 4:22-14:24. Counsel also attempted to prevent Petty from incriminating himself. Sent. Hr'g Tr. 10:20-11:20. Petty cannot now credibly claim that he was constructively unrepresented at the motion in arrest of judgment hearing.

The State does not dispute that Petty's trial counsel could have done more. But less-than-zealous advocacy, even if it includes a breach of an essential duty, does not itself constitute structural error. The United States Supreme Court said as much in *Bell v. Cone*, 535 U.S. 685, 697 (2002), explaining that any alleged failure to test the

prosecution's case "must be complete" to constitute structural error. The Court held that the defendant's complaint—that counsel failed to adduce mitigating evidence or give a closing argument—alleged failures at "specific points" of the proceedings, rather than a failure "to oppose the prosecution throughout the sentencing proceeding as a whole." *Id.* Those errors fell squarely under *Strickland*; they were "plainly of the same ilk" as any other claim evaluated under "*Strickland*'s performance and prejudice components." *Bell*, 535 U.S. at 697-98. Similarly, although Petty's trial counsel may have breached an essential duty, his actions do not amount to structural error. For all of those reasons, Petty's guilty pleas must stand.

C. Alternatively, the Court should affirm and preserve Petty's argument for postconviction proceedings.

If the Court concludes that the record on direct appeal is not sufficient to resolve Petty's ineffective-assistance claim, it should affirm and preserve the argument for postconviction proceedings. *See State v. Bearse*, 748 N.W.2d 211, 219 (Iowa 2008); *Straw*, 709 N.W.2d at 138; *see also*, *e.g.*, *State v. Dight*, No. 17-1267, 2018 WL 1442723, at *1 (Iowa Ct. App. March 21, 2018) (collecting cases).

II. The district court did not err by not inquiring further into the alleged breakdown in communication between Petty and his trial counsel.

Preservation of Error

Petty next argues that the district court denied him his right to counsel by not adequately inquiring into the alleged breakdown in communication between Petty and his trial counsel. *See* Appellant's Brief at 51-60. Petty's trial counsel's motion to withdraw preserved this issue for appeal. *See State v. Tejeda*, 677 N.W.2d 744, 749 (Iowa 2004).

Standard of Review

This Court reviews de novo a claim that the district court failed to adequately inquire into an alleged breakdown of the attorney-client relationship. *See State v. Wells*, 738 N.W.2d 214, 218 (Iowa 2007) (*citing Tejeda*, 677 N.W.2d at 749).

To the extent the district court did deny trial counsel's motion to withdraw, this Court reviews a challenge to that ruling for an abuse of discretion. *See State v. Brooks*, 540 N.W.2d 270, 272 (Iowa 1995).

Merits

The Sixth Amendment guarantees a defendant the right to counsel, but it does not guarantee "a 'meaningful relationship' between an accused and his counsel." *Morris v. Slappy*, 461 U.S. 1,

13-15 (1983); *see Tejeda*, 677 N.W.2d at 749. Where a defendant who has been appointed counsel requests substitute counsel, he must present sufficient cause to justify replacement. *Tejeda*, 677 N.W.2d at 749-50. "Sufficient cause includes a conflict of interest, irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant." *State v. Lopez*, 633 N.W.2d 774, 779 (Iowa 2001) (quotation and marks omitted).

District courts have a duty to inquire "once a defendant requests substitute counsel on account of an alleged breakdown in communication." *Tejeda*, 677 N.W.2d at 750. But as the Court recognized in *Tejeda*, courts are not required to "conduct a hearing every time a dissatisfied defendant lodges a complaint about his attorney." *Id.* at 751. The duty of inquiry is only triggered where the court receives a "colorable complaint" of "'a complete breakdown in communications between the attorney and the defendant.'" *Id.* at 751-52 (quoting *Lopez*, 633 N.W.2d at 779). To prove a "complete breakdown," a defendant must generally "'put forth evidence of a severe and pervasive conflict with his attorney or evidence that he had such minimal contact with the attorney that meaningful communication was not possible.'" *Tejeda*, 677 N.W.2d at 752

(*quoting United State v. Lott*, 310 F.3d 1231, 1249 (10th Cir. 2002)); *see also*, *e.g.*, *State v. Lowe*, No. 15-0402, 2016 WL 902888, at *4 (Iowa Ct. App. March 9, 2016) (quotation omitted) (stating that before triggering the duty to inquire, the defendant must first present a "colorable complaint" and offer evidence of "a severe and pervasive conflict with his attorney"); *State v. Lohr*, 13-1251, 2014 WL 3511856, at *4 (Iowa Ct. App. July 16, 2014) (concluding that the defendant had not offered a colorable complaint "concerning the deterioration of the attorney-client relationship," and thus the court's duty of inquiry was not triggered).

The district court's inquiry here was sufficient under the circumstances. And the court's implicit denial of Petty's trial counsel's motion to withdraw was not an abuse of discretion. To start, although Petty's trial counsel's motion stated that he could "no longer effectively communicate with the defendant and no longer agree on how his case should be handled[,]" the motion also described any alleged conflict as a false one. Motion to Withdraw; App. 32-33 ("In a second text, defendant falsely accused the undersigned of having a conflict of interest."). The motion also makes clear that any supposed breakdown in communication arose from the fact that Petty was not

pleased with the plea bargain to which he had agreed the previous day. Motion to Withdraw; App. 32-33. Because the issue was brought to the court by Petty's counsel himself after Petty had already entered his guilty pleas and because the motion contained enough information for the district court to conclude that Petty would not be able to show a severe and pervasive conflict, the duty to inquire further was not triggered here. The district court did not run afoul of *Tejeda* under these circumstances.

Even if the motion to withdraw did trigger a duty to inquire further, the district court met its obligation and its implicit denial of Petty's counsel's motion was a proper use of its discretion. *See State v. Polson*, No. 15-2104, 2017 WL 1401472, at *5 (Iowa Ct. App. April 19, 2017) ("*Tej[e]da* does not proscribe what the court's inquiry must look like; it just requires the court to make one once a defendant requests substitute counsel."). At the start of the hearing on the motions in arrest of judgment and to withdraw, Petty's counsel stated: "I filed a motion to withdraw. The Court ordered I appear today. By implication I interpreted that to mean the Court wanted me to file the post-trial motions or motion on behalf of Mr. Petty?" Sent. Hr'g Tr. 3:14-18. The court agreed that was correct. Sent. Hr'g Tr.

3:14-19. Petty's counsel then put Petty on the stand to describe "his concerns." Sent. Hr'g Tr. 3:20-4:4. And while Petty's testimony was intended to be support for his motion in arrest of judgment, the bulk of it was Petty's description of his displeasure with his counsel's representation. *See*, *e.g.*, Sent. Hr'g Tr. 5:20-6:5; 7:9-8:13; 9:4-10:4; 10:13-19; 11:12-12:18.

After listening to Petty's testimony, the court properly concluded that Petty had not presented sufficient cause to warrant the appointment of new counsel at this point in the proceedings. The court was well-within its discretion in making that determination. *See State v. Boggs*, 741 N.W.2d 492, 506 (Iowa 2007) (stating that "general frustration and dissatisfaction with defense counsel expressed by a defendant does not alone render counsel unable to perform as a zealous and effective advocate"). Although Petty was clearly unhappy with the way the case had turned out, and his trial counsel believed that Petty should have new counsel for that reason, counsel nevertheless continued to represent Petty throughout the motion hearing and spoke on Petty's behalf at sentencing. *Compare Id.* at 506-08 (finding that counsel's refusal to speak on his client's behalf at sentencing did not amount to the complete denial of counsel

and that the defendant did not suffer prejudice as a result). For all of those reasons, the district court did not err in denying Petty's counsel's motion to withdraw. *See State v. Hicks*, No. 17-0130, 2018 WL 1433788, at *9-10 (Iowa Ct. App. March 21, 2018); *Polson*, 2017 WL 1401472, at *5; *State v. Pion*, No. 17-2030, 2018 WL 3060271, *2-4 (Iowa Ct. App. June 20, 2018). At the very least, this Court should affirm and preserve the issue for postconviction relief. *See Tejeda*, 677 N.W.2d at 752-53.

III. The district court clerk improperly imposed the sexual abuse surcharge on Petty's lascivious acts conviction.

Preservation of Error

Petty also argues that the district court clerk's imposition of the sexual abuse surcharge in the case involving Z.C. amounted to an ex post facto punishment. "A defendant may challenge an illegal sentence at any time." *State v. Bruegger*, 773 N.W.2d 862, 869 (Iowa 2009). This includes allegations that a court imposed ex post facto punishment. *See State v. Lathrop*, 781 N.W.2d 288, 293 (Iowa 2010).

Standard of Review

This Court reviews claims of an illegal sentence for correction of errors at law. *See State v. Hoeck*, 843 N.W.2d 67, 70 (Iowa 2014). When the sentence is claimed to be unconstitutional, the court

reviews such constitutional questions de novo. *Bruegger*, 773 N.W.2d at 869.

Merits

The United States and Iowa constitutions prohibit ex post facto punishment. *See State v. Lopez*, 907 N.W.2d 112, 122 (Iowa 2018) (citing U.S. Const. art. I, § 10; Iowa Const. art. I, § 21). The "provisions prohibit legislative acts that apply 'a new punitive measure to conduct already committed' or that make the punishment for a crime more burdensome after its commission." *Id.* (quoting *State v. Seering*, 701 N.W.2d 655, 666 (Iowa 2005)).

A criminal law is an ex post facto law if two elements are met: (1) the law is retrospective, *i.e.*, it applies to events that occurred before it was enacted; and (2) the law either altered the definition of criminal conduct or increased the penalty for the crime. *Id.* at 122-23. This Court has determined that section 911.2B of the Iowa Code, which mandates that "the court or clerk of the district court" assess a $100 surcharge on a defendant convicted of, among other things, sexual abuse, is a form of punishment. *See Lopez*, 907 N.W.2d at 123. Thus, the only question is whether the clerk's assessment of the surcharge here "change[d] the legal consequences of acts completed

before its effective date." *Lopez*, 907 N.W.2d at 123 (quotation and marks omitted).

The State concedes that the sexual abuse surcharge had retrospective effect here. Section 911.2B became effective on July 1, 2015. 2015 Iowa Acts ch. 96, §§ 15, 17. Although the original trial information alleged that the sex act with Z.C. occurred "on or about June 1, 2015"—before the effective date of the surcharge—Petty ultimately pleaded guilty to an orally-amended trial information that did not specify a date. Trial Information (FECR152038); App. 5; Plea Hr'g Tr. 27:19-28:18; 32:15-34:20. Nor did counsel, the prosecutor, or the court refer to a date during the plea hearing other than the fact that Z.C. was under twelve when the abuse occurred. *See* Plea Hr'g Tr. 33:2-24. Petty did, however, stipulate during the hearing that the district court could rely on the minutes of testimony to determine whether there was a factual basis for his guilty pleas. Plea Hr'g Tr. 30:2-5; 40:23-41:17. And the minutes put the abuse in either the summer of 2015—before or after July 1—or the summer of 2016. *See generally*, Minutes of Testimony (FECR152038); Conf. App. 4-129.

Where it is unclear whether a defendant's conduct occurred before or after the change in law, this Court concludes that section

911.2B has been applied retrospectively. *Lopez*, 907 N.W.2d at 123. Accordingly, because the clerk here imposed the 911.2B surcharge for abuse that may have taken place before the law creating the surcharge took effect, this Court should vacate the discrete portion of Petty's sentence that imposed the 911.2B surcharge and remand for entry of a corrected sentence. *See id.* at 123-24; *State v. Kingery*, No. 17-1529, 2018 WL 3650352, at *4-5 (Iowa Ct. App. Aug. 1, 2018) (finding an ex post facto violation where the State conceded that there was "uncertainty as to whether conduct occurred before or after the effective date of a law").

IV. Petty's restitution challenge is premature, not directly appealable, and must be dismissed because there is no plan of restitution in place. Should the Court reach the merits, it should reaffirm its decisions in *Swartz*, *Jackson*, and *Van Hoff*.

Motion to Dismiss/Preservation of Error

Lastly, Petty contends that the district court erred by failing to determine whether he had the reasonable ability to pay court costs and attorney's fees. Petty's ability-to-pay claim is not properly before this Court because it is not yet ripe. Nor has Petty exhausted his remedies below, as required. For those reasons, this Court should dismiss Petty's restitution claim. *See Iowa Coal Min. Co., Inc. v.*

Monroe County, 555 N.W.2d 418, 432 (Iowa 1996) ("If a claim is not ripe for adjudication, a court is without jurisdiction to hear the claim and must dismiss it."); *State v. Jackson*, 601 N.W.2d 354, 357 (Iowa 1999) (declining to grant relief on a defendant's ability-to-pay challenge where the plan of restitution was not yet complete and the defendant had not yet petitioned the district court for modification under Iowa Code section 910.7).

A district court is not required to consider a defendant's reasonable ability to pay until "the plan of restitution contemplated by Iowa Code section 910.3 [i]s complete . . . ." *Jackson*, 601 N.W.2d at 357; *see also State v. Swartz*, 601 N.W.2d 348, 354 (Iowa 1999); *State v. Campbell*, No. 15-1181, 2016 WL 4543763, at *4 (Iowa Ct. App. Aug. 31, 2016) (stating that the sentencing court is not required to consider the defendant's ability to pay until it has issued "the order constituting the plan of restitution"). Until that obligation is triggered, a defendant's challenge on ability-to-pay grounds is premature. *See Jackson*, 601 N.W.2d at 357 (stating that it was precluded from granting the defendant the relief he sought).

At the time of Petty's appeal, his plan of restitution was not complete. The district court had ordered that Petty pay "[a]ll court

costs, including court-appointed attorney fees," but it did not include even a temporary amount of costs or fees in its sentencing order. Order of Disposition at 2; App. 48. Nor had it entered any supplemental orders setting forth the amounts of those costs and fees. Until the district court has "at a minimum, an estimate of the total amount of restitution," it has no obligation to assess Petty's ability to pay costs and fees. *See Campbell*, 2016 WL 4543763, at *4. And Petty may not challenge the district court's failure to make an ability-to-pay determination until that obligation exists. *See*, *e.g.*, *State v. Steenhoek*, No. 17-1772, 2018 WL 4635696, at *2-3 (Iowa Ct. App. Sept. 26, 2018) (citing *Swartz* and *Jackson* and agreeing that the defendant's ability-to-pay challenge was not ripe because "the district court ha[d] not yet ordered the amount or plan of restitution"); *State v. Boutchee*, No. 17-1217, 2018 WL 3302010, at *5 (Iowa Ct. App. July 5, 2018) (stating that the defendant's restitution argument was "not ready for review" where "the restitution order was incomplete"); *State v. Brown*, No. 16-1118, 2017 WL 2181568, at *4 (Iowa Ct. App. May 17, 2017) (concluding that the defendant's claim was premature because "the trial court had not yet entered a plan of restitution that would trigger the trial court's obligation to determine

[the defendant's] reasonable ability to pay"); *State v. Alexander*, No. 16-0669, 2017 WL 510950, at *3 (Iowa Ct. App. Feb. 8, 2017) (holding that the district court's restitution order was "incomplete and not directly appealable" where the district court had "expressly reserved the amounts to be included in the plan of restitution for a later determination"); *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."); *see also State v. McMurry*, No. 16-1722, 2017 WL 4317302, at *4 (Iowa Ct. App. Sept. 27, 2017) (stating that a preliminary restitution order with no restitution amount would not be properly before the court).

Nor is Petty entitled to directly appeal the district court's reasonable ability to pay finding—or lack thereof—until he moves under Iowa Code section 910.7 for modification of the plan of restitution or plan of payment, or both. *See State v. Richardson*, 890 N.W.2d 609, 626 (Iowa 2017) (reaffirming *Jackson*'s principle "that ability-to-pay challenges to restitution are premature until the

defendant has exhausted the modification remedy afforded by Iowa Code section 910.7").

Petty incorrectly asserts that his restitution claim is a challenge to an illegal sentence that he may bring at any time. *See* Appellant's Brief at 65-66. While that may be true of a defendant's challenge to the *amount* of restitution found in the sentencing order, *see State v. Janz*, 358 N.W.2d 547, 549 (Iowa 1984), it is not the case for a reasonable-ability-to-pay challenge, particularly when the district court made no finding of the defendant's ability to pay in its sentencing order. *See Campbell*, 2016 WL 4543763, at *3; *see also State v. Bullock*, No. 15-0982, 2017 WL 4049276, at *2 (Iowa Ct. App. Sept. 13, 2017) (stating that a reasonable-ability-to-pay challenge "does not automatically bring his claim within the ambit of an illegal sentence"). "The ability to pay is an issue apart from the amount of restitution and is therefore not an 'order incorporated in the sentence' and is therefore not directly appealable as such." *State v. Jose*, 636 N.W.2d 38, 45 (Iowa 2001) (alteration omitted).

Petty cannot yet bring his reasonable-ability-to-pay claim because events below have not yet triggered the district court's obligation to make such a finding. Once the district court enters a

supplemental order completing the plan of restitution, Petty will have the opportunity to challenge the district court's finding (or lack thereof) that he has the reasonable ability to pay those amounts. After exhausting that remedy, Petty may then bring his claim back to this Court. But until the district court completes the plan of restitution and Petty exhausts his remedies under Iowa Code section 910.7, Petty's claim is not ripe or directly appealable. *See Jackson*, 601 N.W.2d at 357. Because Petty's restitution claim is not properly before this Court, it must be dismissed.

Standard of Review

This Court reviews restitution orders for correction of errors at law. *Jose*, 636 N.W.2d at 43. When reviewing a restitution order, the Court "determine[s] whether the court's findings lack substantial evidentiary support, or whether the court has not properly applied the law." *State v. Bonstetter*, 637 N.W.2d 161, 165 (Iowa 2001). To the extent that Petty raises a constitutional claim, the Court's review is de novo. *See State v. Love*, 589 N.W.2d 49, 50 (Iowa 1998).

A defendant seeking "to upset an order for restitution" for court costs and attorney fees "'has the burden to demonstrate a failure of the trial court to exercise discretion or abuse of discretion.'" *State v.*

Kaelin, 362 N.W.2d 526, 528 (Iowa 1985) (quoting *State v. Storrs*, 351 N.W.2d 520, 522 (Iowa 1984)); *State v. Ihde*, 532 N.W.2d 827, 829 (Iowa Ct. App. 1995).

Merits

Petty asserts that the district court erred by entering a general order to pay court costs and attorney's fees—with no amount of costs or fees specified—without first considering whether Petty was reasonably able to pay. *See* Appellant's Brief at 83. To get around the obvious problem that it is impossible to determine whether a defendant has the ability to pay an amount that is yet to be determined, Petty asks this Court to (1) find a non-existent conflict among its cases and then overrule an entire line of long-standing precedent, and (2) conform its caselaw to local practices that likely run afoul of the restitution statute and that ultimately harm both the courts and the defendants.

For the reasons set forth above, this case is not yet ripe for review. Assuming the Court reaches the merits, however, it should conclude that there is no conflict among its reasonable-ability-to-pay cases, and encourage the district courts to abide by the restitution statute by, to the extent the defendant is reasonably able to pay,

imposing specific amounts of court costs and attorney's fees either in the judgment order or in supplemental restitution orders.

A. Restitution Framework

Restitution is mandatory in every criminal case in which the defendant is found or pleads guilty. Iowa Code § 910.2(1). The sentencing court is required to order restitution in the form of pecuniary damages to the defendant's victims and to the clerk for fines, penalties, and surcharges. *Id.*; *Id.* §§ 910.1(3) & (4). To the extent the defendant is reasonably able to pay, the court must also impose other payments such as contributions to a local anticrime organization, reimbursements to the crime victim compensation program, restitution to public agencies, court costs including correctional fees, and court-appointed attorney fees. *Id.* § 910.2(1). If the court finds that the defendant is unable to pay certain costs and fees, it may instead order that the defendant perform community service. *Id.* § 910.2(2).

Everyone involved in the criminal case has a role in compiling the restitution figures. The county attorney is tasked with providing the court with "a statement of pecuniary damages to victims of the defendant . . . ." *Id.* § 910.3. If the amount is not available at the time

of sentencing, the county attorney has thirty days after that date to provide the statement to the court. *Id.* It is the clerk of court's job to provide the court with a statement of court-appointed attorney fees and court costs including correctional fees. *Id.*

At sentencing or "at a later date to be determined by the court," *the sentencing court* is required to "set out the amount of restitution . . . and the persons to whom restitution must be paid." *Id.* (emphasis added). "If the full amount of restitution cannot be determined at the time of sentencing, the court shall issue a temporary order determining a reasonable amount for restitution identified up to that time." *Id.* The court must then "issue a permanent, supplemental order, setting the full amount of restitution[,]" and "further supplemental orders, if necessary." *Id.* Together, these orders are "known as the plan of restitution." *Id.*; *see State v. Harrison*, 351 N.W.2d 526, 528 (Iowa 1984) (stating that a restitution order "must include a plan of restitution setting out the amounts and kind of restitution in accordance with the priorities established in section 910.2").

"After sentencing in which a plan of restitution is ordered, the next step is establishing a plan of payment." *Harrison*, 351 N.W.2d at

528. The plan of payment is a schedule of payments that will allow the defendant to carry out the plan of restitution. *Id*. When a defendant is incarcerated, the director of the Iowa department of corrections is required to "prepare a restitution plan of payment or modify any existing plan of payment." Iowa Code § 910.5(1)(d). Unlike when a defendant is placed on probation, however, an incarcerated defendant's "plan of payment is not initially made subject to court approval or change." *See Harrison*, 351 N.W.2d at 528-29 (comparing Iowa Code sections 910.4 and 910.5).

Nevertheless, at any time during the defendant's probation, parole, or incarceration, the defendant "may petition the court on any matter related to the plan of restitution or restitution plan of payment and the court shall grant a hearing" if one is warranted. Iowa Code § 910.7(1). The court may modify the plan of restitution or plan of payment, or both. *Id*. § 910.7(2).

B. Reasonable ability to pay

At issue here is the sentencing court's finding—or lack thereof—of Petty's reasonable ability to pay court costs and attorney's fees. The parties agree that the sentencing court is constitutionally required to make an ability-to-pay finding. *See Harrison*, 351 N.W.2d at 529

(emphasis and alterations omitted) ("We believe that section 910.2 requires the sentencing court to order restitution in the plan of restitution 'for court costs, court-appointed attorney fees or the expense of a public defender when applicable' only 'to the extent that the offender is reasonably able to make such restitution'"); *see also Goodrich v. State*, 608 N.W.2d 774, 776 (Iowa 2000) (stating that "[t]he 'reasonable able to pay' requirement enables section 910.2 to withstand constitutional attack"); Appellant's Brief at 70. The question is when the court is required to make that determination.

Pointing to what it deems a conflict between "the *Harrison* and *Haines* line of cases" and the "*Swartz* and *Jackson* line of cases[,]" *see* Appellant's Brief at 78, Petty seems to contend that the district court must make the reasonable-ability-to-pay finding at sentencing, regardless of whether the court actually imposes any specific amounts. But that is not what the statute nor *Harrison* and *Haines* require, nor does it make practical sense. As set forth above, although Iowa Code section 910.3 does encourage findings involving court costs and attorney's fees to be made at sentencing, it specifically leaves open the possibility that those amounts will be imposed later in supplemental orders. All that is required of the court at sentencing is

"a temporary order determining a reasonable amount for restitution identified up to that time." Iowa Code § 910.3.

While there is some ambiguity in the statute as to whether a temporary order imposing costs and fees requires a reasonable-ability-to-pay finding, *Swartz* and *Jackson* plainly state that the district court's obligation to make that finding does not arise until the plan of restitution in final. This makes sense. It is impossible for a court to make a reasoned determination of a defendant's reasonable ability to pay $5,000 in court-appointed attorney's fees, for example, if the defendant is later found to owe $15,000 in restitution to the victim. Indeed, a finding without at least "an estimate of the total amount of restitution" is "premature and lack[s] evidentiary support." *See Campbell*, 2016 WL 4543763, at *4.

In cases like *Harrison* and *Haines* where the district court issues its final restitution order during the sentencing hearing, the court's obligation to determine the defendant's reasonable ability to pay certain restitution amounts was triggered and the defendant may immediately appeal. *See State v. Kurtz*, 878 N.W.2d 469, 472 (Iowa Ct. App. 2016). If, however, as in *Swartz* and *Jackson* and many of the court of appeals cases cited in both parties' briefs, the district

court has not issued even a temporary restitution order with any specific amounts of costs or fees, the court need not yet make the ability to pay finding. Until this finding is required, the lack of a finding is not yet ripe for review. And because *Swartz* and *Jackson* anticipate that the final plan of restitution in such cases will likely be issued without an additional hearing and after the defendant's time for direct review is up, those cases also require a defendant in those circumstances to first ask the district court for relief under section 910.7 before filing an appeal. In short, this Court's caselaw is not in conflict.

Petty also complains that the established caselaw does not comport with how district courts and clerks of court actually assess court costs and attorney's fees. *See* Appellant's Brief at 78-80. He asserts that what happened here is typical: In its judgment order, the district court ordered an unspecified amount of court costs and attorney's fees, ordered them due immediately, but made no mention of Petty's reasonable ability to pay. *See* Order of Disposition; App. 47-48. Then, the district court clerk—on its own and without a supplemental restitution order or a reasonable-ability-to-pay finding—recorded specific amounts of costs and fees. *See* Combined

General Docket (FECR152038), Financial Summary; App. 51; Combined General Docket (FECR152039), Financial Summary; App. 52. As discussed above, because the district court has not actually entered an order imposing any specific restitution amounts, let alone the final plan of restitution, it does not yet have the obligation to determine whether the defendant is reasonably able to pay those amounts. And if there is no obligation to make such a finding, the district court cannot have erred by not making one.

The State acknowledges that the procedure used here confuses things and may prejudice both the courts and defendants. Rather than overruling controlling precedent to align with some counties' informal procedure, however, this Court should encourage the district courts to abide by the statute in the first instance. Section 910.3 provides that "[t]he clerk of court shall prepare a statement of court-appointed attorney fees . . . and court costs including correctional fees claimed by a sheriff or municipality . . . , which shall be provided to the presentence investigator or submitted to the court at the time of sentencing." If at sentencing the clerk provides the district court with the specific amount of court costs and at least an estimate of attorney's fees, the court should issue a temporary restitution order

and make a reasonable-ability-to-pay determination at that time. If the plan of restitution is not complete at the time of sentencing, such a determination is not yet required, *see Jackson*, 601 N.W.2d at 357, but having the court make a temporary reasonable-ability-to-pay finding as it enters restitution amounts hews most closely to the statute.

As it stands, however, the specific amounts tallied by the clerk alone, without a court order imposing the amount and without a reasonable-ability-to-pay finding, are not enforceable against the defendant. *See Campbell*, 2016 WL 4543763, at *3 n.4 (citing *Bader v. State*, 559 N.W.2d 1, 3-4 (Iowa 1997)) (questioning "the propriety of sending an account to collections before the court has completed the plan of restitution and determined the total amount due"). Unlike the surcharge statutes, which do give the district court clerks the independent authority to assess certain amounts, *see* Iowa Code §§ 911.1-911.4, there cannot be a complete or even a temporary restitution plan without a court order setting forth the amount and type of restitution ordered, *see* Iowa Code § 910.3 (requiring that "the court shall set out the amount of restitution[,]" either at sentencing or in "a permanent, supplemental order, setting the full amount of

restitution"). Without a supplemental restitution order imposing a specific amount of court costs and attorney's fees, they are not part of the plan of restitution. *See State v. Martin*, No. 11-0914, 2013 WL 4506163, at *2 & n.3 (Iowa Ct. App. Aug. 21, 2013) (stating that where the sentencing order contains no restitution amounts and there are no supplemental orders, "no restitution has been ordered" and "there is nothing for [the defendant] to challenge").

The State urges the Court to abide by *Swartz* and *Jackson*, and conclude that the sentencing court "is not required to give consideration to the defendant's ability to pay" until "the plan of restitution contemplated by Iowa Code section 910.3 [i]s complete . . . ." *Jackson*, 601 N.W.2d at 357; *Swartz*, 601 N.W.2d at 354. In the case of a defendant serving a term of imprisonment, the court's determination of whether the defendant is reasonably able to pay costs and fees "is more appropriately based on [his] ability to pay the current installments than his ability to ultimately pay the total amount due." *State v. Van Hoff*, 415 N.W.2d 647, 649 (Iowa 1987). Despite Petty's contention otherwise, the principles set forth in *Swartz*, *Jackson*, and *Van Hoff* do not conflict with *Harrison*, *Haines*, or the restitution statute itself.

At most, this Court should affirm with instructions for the district court to enter a final plan of restitution setting forth the restitution amounts. *See Campbell*, 2016 WL 4543763, at *4. At that point, the district court should determine whether Petty has the reasonable ability to pay the full amount or whatever installments it imposes. *See id.*; *see also Van Hoff*, 415 N.W.2d at 648. If Petty "believes the forthcoming plan of restitution does not reflect his reasonable ability to pay, he may petition the district court for modification under Iowa Code section 910.7." *See Campbell*, 2016 WL 4543763, at *4.

CONCLUSION

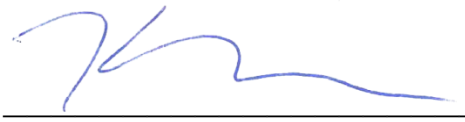
For the reasons set forth above, the State respectfully requests that this Court affirm Petty's conviction and sentence, and dismiss his restitution claim as premature.

REQUEST FOR NONORAL SUBMISSION

The State requests that this case be submitted without oral argument. Should the Court grant oral argument, the State asks to be heard.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa



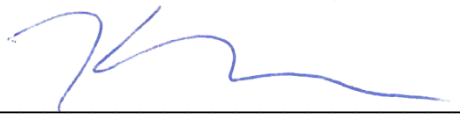
KATIE KRICKBAUM
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
katie.krickbaum@ag.iowa.gov

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 **9,948** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: November 13, 2018



KATIE KRICKBAUM
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
katie.krickbaum@ag.iowa.gov