

IN THE SUPREME COURT OF IOWA

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STATE OF IOWA, )  
 )  
 Plaintiff-Appellee, )  
 )  
 v. ) SUPREME COURT 17-1909  
 )  
 LORI DEE MATHES, )  
 )  
 Defendant-Appellant. )

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APPEAL FROM THE IOWA DISTRICT COURT  
FOR MONONA COUNTY  
HONORABLE DUANE E. HOFFMEYER, JUDGE

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BRIEF OF THE STATE APPELLATE DEFENDER OFFICE  
AS AMICUS CURIAE

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**CERTIFICATE OF SERVICE**

On the 8th day of January, 2020, the undersigned certifies that the foregoing brief was electronically filed with the Clerk of the Supreme Court of Iowa using the Iowa Electronic Document Management System which will serve the parties.

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MJL/lr/1/20

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## **IDENTITY AND INTEREST OF AMICUS CURIAE**

The State Appellate Defender Office is a division of the Office of the State Public Defender. The Appellate Defender Office is statutorily tasked with the representation of indigent individuals on appeal in criminal and postconviction relief cases when appointed to do so by the district court. Iowa Code § 13B.11 (2019).

The Supreme Court invited the State Appellate Defender Office to file an amicus brief to address the specified questions.<sup>1</sup> The Appellate Defender Office is concerned our indigent clients are burdened with significant debt from their involvement in the criminal justice system. See e.g. State v. Dudley, 766 N.W.2d 606 (Iowa 2009)(acquitted defendant order to pay court-appointed attorney fees); State v. Jenkins, 788 N.W.2d 640 (Iowa 2010)(restitution for Crime Victim Compensation Program); State v. Albright, 925 N.W.2d 144

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<sup>1</sup> This brief was authored by undersigned counsel. The State Appellate Defender Office paid the entire cost of the amicus brief. Iowa R. App. P. 6.906(4)(d).



(Iowa 2019)(clarification of reasonable ability to pay criminal restitution); State v. Gross, 935 N.W.2d 695 (Iowa 2019) (challenging correctional fees). See also State v. McMurry, 925 N.W.2d 592, 600-601 n.2 (Iowa 2019)(“[T]hose with lower socioeconomic status and in predominately minority communities are more likely to bear the burden of these direct and collateral costs. This creates a contradictory effect that disproportionately penalizes citizens for their poverty or the community they live in, adding to their cumulative disadvantage, perpetuating a cycle of criminal justice involvement.”); Brennan Center for Justice, The Steep Costs of Criminal Justice Fees and Fines (November 2019) (“Fees and fines are an inefficient source of government [r]evenue.” “[I]ncrease in fees and fines has exacted a steep human cost.”).<sup>2</sup> The seventeen local Public Defender Offices and the Appellate Defender Office represent indigent individuals who

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<sup>2</sup> Available at [https://www.brennancenter.org/sites/default/files/2019-11/2019\\_10\\_Fees%26Fines\\_Final5.pdf](https://www.brennancenter.org/sites/default/files/2019-11/2019_10_Fees%26Fines_Final5.pdf).

have incurred or may in the future incur similar judgments.<sup>3</sup> Therefore, the State Appellate Defender Office has an interest in providing this Court with information to resolve the questions presented in this appeal.

### **INTRODUCTION**

On February 3, 2016, Lori Mathes was charged with possession of a controlled substance (marijuana) – third offense in violation of Iowa Code section 124.401(5) (2015). (App. pp. 10-11). On October 20, 2017, the State moved to dismiss the charge. The prosecutor stated the reason for dismissal was “agreement of the parties.” The motion to dismiss did not outline the terms of the “agreement.” (App. p. 65). The district court dismissed the case and taxed the costs to Mathes. The order stated:

By agreement of the parties, administrative fees of the county sheriff, court-appointed attorney fees, and restitution are taxed to the Defendant. Based on information in the case file and other information proved by the parties, the Court finds that the Defendant has

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<sup>3</sup> See e.g. State v. Palmer, Supreme Court # 19-0864 6/27/19 Order (petition for a writ of certiorari denied); 7/30/19 Adams County SRCR005096 Order (cost judgment rescinded).

the reasonable ability to pay. The Defendant shall pay, fees, costs, and other expenses of court-appointed counsel in the amount approved by the State Public Defender.

(App. pp 66-67). Mathes disputed she had agreed to pay the costs, or at least that in excess of \$500, associated with the dismissed case. Mathes requested an attorney to appeal the conditions in the dismissal order. (App. pp. 68-69). Notice of appeal was filed on November 1, 2017. (App. pp. 75-76).<sup>4</sup>

The Court of Appeals determined that Mathes did not have a right of appeal because the dismissal order is not a final judgment or sentence. State v. Mathes, No. 17-1909, 2019 WL 1294098, at \*1 (Iowa Ct. App. March 20, 2019). Further, the Court of Appeals found that the arguments advanced did not assert the district court acted illegally or outside of its jurisdiction. Id. at \*2. The Court of Appeals dismissed the appeal. Id.

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<sup>4</sup> The Appellate Defender returned the case to the district court because of the caseload at the time prevented the office from accepting the appointment. Counsel was appointed for the appeal. 11/29/17 Motion to Withdraw; 11/29/17 order (appointing counsel).

The Supreme Court granted Mathes pro se application for further review. 7/12/19 Order (granting further review). After submission, this Court requested supplemental briefing from the parties and invited amicus briefs addressing two questions:

Whether the court has subject matter jurisdiction to assess court costs in a criminal case when the court dismisses all charges?

If the court does have subject matter jurisdiction, does the court have the authority to assess costs or, in the alternative, is the assessment of costs an illegal sentence under these circumstances?

12/11/19 Order (requesting supplemental briefs).

This amicus brief is submitted in response to the December 11, 2019 order of the Iowa Supreme Court.<sup>5</sup>

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<sup>5</sup> The Appellate Defender Office limits the discussion of costs assessed to court-appointed attorney fees and court costs because Iowa Courts online show that Mathes has only been assessed court costs (filing fee and court reporter fee) and indigent defense fees.

## ARGUMENT

### **I. The district court has subject matter jurisdiction.**

““Subject matter jurisdiction” refers to the power of a court to deal with a class of cases to which a particular case belongs.” In re Estate of Falck, 672 N.W.2d 785, 789 (Iowa 2003) (other citation omitted). Subject matter jurisdiction denotes the “the authority of a court to hear and determine cases of the general class to which the proceedings in question belong, not merely the particular case then occupying the court’s attention.” Christie v. Rolscreen Co., 448 N.W.2d 447, 450 (Iowa 1989)(quoting Wederath v. Bryant, 287 N.W.2d 591, 594 (Iowa 1980)). “A constitution or a legislative enactment confers subject matter jurisdiction on the courts.” In re Estate of Falck, 672 N.W.2d at 789. If the district court lacks subject matter jurisdiction, the judgment is void. Id. A void judgment is subject to collateral attack. Id.

The Iowa Constitution grants the district courts “jurisdiction in civil and criminal matters arising in their

respective districts, in such manner as shall be prescribed by law.” Iowa Const. art. V, § 6. The district courts have exclusive, general, and original jurisdiction in criminal cases. Iowa Code § 602.6101 (2019).

The legislature enacted a statute which directs the clerk of the district court to collect filing fees in criminal cases. Iowa Code § 602.8106 (2019). Reporter fees are taxed as court costs. Iowa Code § 625.8(2) (2019). A person granted court-appointed counsel is required to reimburse the state for the total cost of her legal assistance. Iowa Code § 815.9(3) (2019). When a criminal defendant is convicted, the district court is to order restitution, to the extent the defendant has the reasonable ability to pay, to the clerk of court for court cost and court-appointed attorney fees. 2019 Acts, ch. 59, § 232 (to be codified as Iowa Code § 910.2(2)(a)(3), (4) (Supp. 2019)). The district court has subject matter jurisdiction to hear and determine the general class of the proceedings in which court costs and court-appointed attorney fees are assessed. Cf. State v. Wiederien, 709 N.W.2d 538, 540 (Iowa 2006)(“The

Iowa Code gives the district court subject matter jurisdiction to enter a no-contact order against a defendant who is prosecuted for harassment.”).

## **II. The court does not have the authority to assess costs in a dismissed criminal case.**

### *Authority to order costs*

Although a court may have subject matter jurisdiction, it may lack the authority to hear a particular case. In re Estate of Falck, 672 N.W.2d at 789-790. “In contrast to subject matter jurisdiction, “a court’s lack of authority is not conclusively fatal to the validity of an order.”” Klinge v. Bentien, 725 N.W.2d 13, 16 (Iowa 2006)(citing In re Marriage of Seyler, 559 N.W.2d 7, 10 n.3 (Iowa 1997)). Therefore, “an order entered without authority is voidable rather than void.” In re Estate of Falck, 672 N.W.2d at 790. The district court’s authority to assess court costs and court-appointed attorney reimbursement is limited by statute. City of Cedar Rapids v. Linn County, 267 N.W.2d 673, 673 (Iowa 1978)(“The general rule now is that [costs] are taxable only to the extent provided

by statute.”). See also Woodbury Cty. v. Anderson, 164 N.W.2d 129, 133 (Iowa 1969)(No statutory authorization for recovery of court-appointed attorney costs.).

Filing fees and court reporter fees are taxable as court costs. Iowa Code § 602.8106(1)(a) (2019); Iowa Code § 625.8 (2019). “[I]t is elementary that a winning party does not pay court costs.” State v. Dudley, 766 N.W.2d 606, 624 (Iowa 2009). See also Iowa Code § 625.1 (2019) (costs recoverable by successful party); Iowa Code § 625.3 (2019) (if party is successful only in part, court may make an equitable apportionment of costs); State v. McMurray, 925 N.W.2d 592, 600 (Iowa 2019) (“We continue to recognize the limited role of equitable apportionment of restitution in criminal cases involving multicount prosecutions.”). When a criminal case is dismissed, the criminal defendant is not liable for court costs. The district court lacks authority to order a criminal defendant to pay court costs in a dismissed case.

A person granted court-appointed counsel is required to reimburse the state for the total cost of her legal assistance.



Iowa Code § 815.9(3) (2019). However, the legislature did not provide for reimbursement of legal assistance costs when the case is dismissed. See Iowa Code § 815.9(5) (2019) (“person receiving legal assistance is *convicted* in a criminal case,” the court shall order the amounts as restitution to the extent the person is reasonably able to pay)(emphasis added); Iowa Code § 815.9(6) (2019) (“person receiving legal assistance is *acquitted* in a criminal case or is a party in *a case other than a criminal case*, the court shall order the payment of all or a portion of the total costs and fees incurred for legal assistance, to the extent the person is reasonably able to pay, after an inquiry which includes notice and reasonable opportunity to be heard.”)(emphasis added). Compare Iowa Code § 815.9(4) (2005) (“in a criminal case, all costs and fees incurred for legal assistance shall become due and payable to the clerk of the district court by the person receiving the legal assistance not later than the date of sentencing, or if the person is acquitted or the charges are dismissed, within thirty days of the acquittal or dismissal.”). In 2012, the legislature amended

Iowa Code section 815.9 to eliminate recoupment of legal assistance costs when the case is dismissed. See 2012 Iowa Acts, ch. 1063, § 9. The district court lacks authority to order a criminal defendant to pay the cost of her legal assistance when the case is dismissed.

*The assessment of costs for a dismissed case is the equivalent of an illegal sentence.*

If the district court has subject matter jurisdiction, the court's lack of authority "can be obviated by consent, waiver or estoppel." State v. Mandicino, 509 N.W.2d 481, 483 (Iowa 1993). This Court interpreted the decision in Mandicino to mean that "a court's lack of authority is not conclusively fatal to the validity of an order." In re Marriage of Seyler, 559 N.W.2d at 10 n.3.

#### *Waiver*

In re Estate of Falck addressed a late motion to set aside the judgment entered against a Trust for a debt owed to Kirkeby for services provided the decedent. In re Estate of Falck, 672 N.W.2d at 787. The court had subject matter

jurisdiction to enter the judgment, therefore, the judgment was not void but voidable. Id. at 791. Any errors committed by the district court were subject to a direct appeal challenge by the Trust. Id. at 792. While the Trust filed an appeal, it did not challenge any issue related to Kirkeby's claim. Id. at 789. This Court held that "if a party *waives* the court's authority to hear a particular case, the judgment becomes final and is not subject to collateral attack." In re Estate of Falck, 672 N.W.2d at 790 (emphasis added).

In contrast, in a criminal case, an illegal sentence cannot be waived by failing to challenge the sentence on direct appeal. Iowa R. Crim. P. 2.24(5) ("The court may correct an illegal sentence at any time."). See also State v. Tindell, 629 N.W.2d 357, 359 (Iowa 2001) ("The exclusion of illegal sentences from the principles of error preservation is limited to those cases in which a trial court has stepped outside the codified bounds of allowable sentencing. In other words, the sentence is illegal because it is beyond the power of the court to impose."); Veal v. State, 779 N.W.2d 63, 65 (Iowa 2010) ("we conclude that the

time restrictions that apply in ordinary postconviction relief actions do not apply in illegal sentence challenges. A claim that a sentence is illegal goes to the underlying power of the court to impose a sentence, not simply to its legal validity.”). The Court has held that illegal sentences are void. State v. Tindell, 629 N.W.2d at 359-360 (“The Iowa rule (as did federal rule 35 before 1966) provides that the correction may be made “at any time,” strongly suggesting it is directed to excision of sentences insofar as they were beyond the jurisdiction of the court and therefore void.”). Additionally, “[n]either party may rely on a plea agreement to uphold an illegal sentence.” State v. Woody, 613 N.W.2d 215, 218 (Iowa 2008). See also Noble v. Iowa District Court for Muscatine Cty., 919 N.W.2d 625, 633 (Iowa Ct. App. 2018)(“the convictions and sentences here constitute an illegal sentence beyond the district court’s authority to impose even when bargained for.”).

When a criminal charge is dismissed in its entirety, there is no sentence. Iowa R. Crim. P. 2.23. Likewise, there can be no restitution ordered upon a dismissal. Iowa Code § 910.2

(2019). Nor can the State recover the costs in an independent civil lawsuit. Cf. Woodbury Cty. v. Anderson, 164 N.W.2d 129, 135 (Iowa 1969) (“We hold that in the absence of statutory authorization taxing expenditures made under this section as part of the costs, no right of recovery can be had by the county through independent suit.”). However, there is an entry of a judgment in favor of the State against Mathes. What kind of judgment is this when there is no authority for it under civil or criminal law?

This Court has analogized one type of legal action or proceeding to another to assist it in resolving the ultimate question presented on appeal. See e.g. State v. Iowa District Court for Warren Cty., 828 N.W.2d 607, 616-617 (Iowa 2013)(consent decree is analogous to the suspended judgment); Id. at 626-627 (Appel, J. dissenting)(consent decree is analogous to a deferred judgment). The judgment for costs is most akin to a criminal sentence.

When a defendant is convicted, the sentencing court must order restitution. Iowa Code § 910.2 (2019). Restitution

includes court costs and court-appointed attorney cost. Iowa Code § 910.1(4) (2019). Criminal restitution is a criminal sanction that is part of the sentence. Iowa Code § 910.2(1) (2015); State v. Alspach, 554 N.W.2d 882, 883 (Iowa 1996); State v. Mayberry, 415 N.W.2d 644, 646 (Iowa 1987). The court is authorized to order criminal restitution pursuant to the restitution statutes. State v. Bonstetter, 637 N.W.2d 161, 166 (Iowa 2001). The cost judgment is the essentially same as a criminal restitution order. Both require the payment of court costs and court-appointed attorney fees. Both are entered within the criminal case in a final judgment in favor of the state.

In Dudley, this Court found that an acquitted criminal defendant had a right to counsel in a post-acquittal hearing challenging an order requiring him to pay court-appointed attorney fees. The Court placed significance in the fact the cost judgment was entered within the criminal case. State v. Dudley, 766 N.W.2d 606, 620 (Iowa 2009) (“Because the criminal case did not end, by definition, until the cost

judgment had been entered against Dudley and in favor of the State, Dudley was entitled to counsel for the postacquittal proceedings.”). Similarly, because a dismissal order which enters judgment for costs is completed during the criminal case, it is best interpreted as an equivalent of a sentence. The label attached to the cost judgment should not be determinative. Cf. Id. (“We think it proper to focus on the legislative intent evidenced by these statutes, rather than on the label attached to the final judgment.”).

The cost judgment in a dismissed case is the equivalent of an illegal sentence. Cf. State v. Brown, 905 N.W.2d 846, 857 (Iowa 2018)(“The State agrees with Brown that an assessment of court costs for the dismissed simple misdemeanor charge would be an illegal sentence.”). A cost judgment in a dismissed case is void and is not subject to waiver, consent or estoppel.

*Consent*

*Dispositional agreement*

If this Court determines that a cost judgment in a dismissed case is not the equivalent of an illegal sentence and therefore void, the reviewing court may have to determine if the particular record sufficiently demonstrates consent. Cf. State v. Macke, 933 N.W.2d 226, 238 (Iowa 2019)(Mansfield, J., dissenting in part)(“I would reverse Macke’s conviction and sentence and remand for the court to conduct a hearing to determine whether there was an agreement to jointly recommend a deferred judgment.”). Ordinarily, in the context of a plea agreement, a defendant signs the agreement or is personally present in open court when the plea agreement is stated on the record. A court should use caution in finding an agreement or consent when the record is not clear. A form order may purport to show an agreement; but an agreement is not necessarily a given in what might have become a common practice – requiring the defendant to pay costs when a case is dismissed. As previously noted, such a practice is unsupported by the Code.



Additionally, if this Court determines that a cost judgment in a dismissed case is not the equivalent of an illegal sentence and therefore void, this Court should determine whether its prior approval of negotiating for payment of costs as stated in McMurry and Petrie is inapplicable when there has been a complete dismissal of the criminal case.

In Petrie, this Court held that “where the plea agreement is silent regarding the payment of fees and costs, that only such fees and costs attributable to the charge on which a criminal defendant is convicted should be recoverable under a restitution plan.” State v. Petrie, 478 N.W.2d 620, 622 (Iowa 1991). Recently, this Court modified the rule in Petrie. In McMurry, the Court disavowed “the language that fees and costs not associated with any one charge should be assessed proportionally between the counts dismissed and the counts of conviction.” State v. McMurry, 925 N.W.2d 592, 601 (Iowa 2019). Instead, if the “costs and fees would have been incurred in the prosecution of a count of conviction even if the dismissed counts had not been prosecuted, equity does not

support apportionment.” Id. at 600. This Court reiterated the observation in Petrie “that the parties are free to agree to the apportionment of fees and costs in a plea agreement.” Id. at 601. See State v. Petrie, 478 N.W.2d at 622 (“We stress that nothing in this opinion prevents the parties to a plea agreement from making a provision covering the payment of costs and fees.”).

Petrie and McMurry both involved a plea agreement which dismissed only one count in a multicount Trial Information. State v. Petrie, 478 N.W.2d at 621; State v. McMurry, 925 N.W.2d at 594. The Court’s approval of payment of costs in a plea agreement in Petrie and McMurry should not translate to a complete dismissal of a criminal case. When a defendant pleads guilty to a count, even if not all that are charged, she is admitting to criminal activity. See Iowa Code § 910.1(1) (2019) (defining “criminal activities” as used in Chapter 910.). The sentencing court shall order that restitution be made by an offender to the victims of the offender’s “criminal activities” and to the clerk of court for

finer, surcharges, fees and costs. Iowa Code § 910.2 (2019).

When a criminal defendant is convicted restitution serves multiple purposes: (1) it compensates the victim; and (2) aids rehabilitation by instilling responsibility in criminal offenders. State v. Bonstetter, 637 N.W.2d 161, 166 (Iowa 2001).

When the entire criminal case is dismissed, what goal does the payment of the associated costs achieve? There is no need for rehabilitation or instilling responsibility in a person who is not legally liable. The Court's approval in McMurry and Petrie of bargaining for payment of costs is misplaced when there is a complete dismissal.

*Is a cost judgment in a dismissed case unenforceable as it violates public policy?*

Why does a prosecutor seek payment of costs in exchange for a dismissal? Why might a defendant "consent" to such an agreement? The answers to these questions may depend on the reason for the dismissal.

This Court has applied contract principles to plea agreements. State v. Ceretti, 871 N.W.2d 88, 96-97 (Iowa

2015). With a typical plea agreement, contract principles may be followed within the bounds of due process. United States v. Baldacchino, 762 F.2d 170, 179 (1st Cir. 1985)(“[P]lea bargains are subject to contract law principles insofar as their application will [e]nsure the defendant what is reasonably due him.”); Lee v. State, 816 N.E.2d 35, 38 (Ind. 2004)(“Because important due process rights are involved, contract law principles although helpful are not necessarily determinative in cases involving plea agreements.”). A dispositional agreement to pay costs in exchange for a dismissal may be analogous to a plea agreement.

Contracts that violate public policy will not be enforced. Rogers v. Webb, 558 N.W.2d 155, 156-157 (Iowa 1997). See also Restatement (Second) of Contracts § 178 (1981)(“A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.”). ““Public policy can be found “in

our state and federal constitutions, our statutes, and the common law,” among other sources.” People v. Smith, 918 N.W.2d 718, 723 (Mich. 2018).

There is no doubt that prosecutors possess wide discretion to determine which cases to file, what plea agreement to extend to a defendant, or whether to dismiss a charge in the interest of justice. But also, a “prosecutor has the responsibility of a minister of justice and not simply that of an advocate.” Iowa R. of Prof’l Conduct 32:3.8 cmt. 1. A prosecutor shall “refrain from prosecuting a charge that the prosecutor knows or reasonably should know is not supported by probable cause.” Iowa R. of Prof’l Conduct 32:3.8(a). A prosecutor shall “make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense...” Iowa R. of Prof’l Conduct 32:3.8(d). If an agreement to dismiss charges in exchange for payment of costs violates the Code of Professional Conduct, that agreement violates public policy.

There can also be no doubt that the prosecutor has enormous bargaining power where a criminal defendant may have none. Cf. State v. Baldon, 829 N.W.2d 785, 796 (Iowa 2013)(recognizing the absence of bargaining power by a parolee in a parole agreement). In extending the offer to dismiss a charge which carries some consequence to the defendant, i.e. monetary fine, a barrier to employment, housing, or education, loss of driver's license, or incarceration, the State always has superior bargaining power. If an agreement is based on threat of continued prosecution in the absence of probable cause or known violation of the defendant's rights which is contrary to the administration of justice, that agreement violates public policy. Cf. Rogers v. Webb, 558 N.W.2d at 157 (Contingent fee contract in dissolution case was void. "The public policy that precipitated the rule for lawyers applies alike to nonlawyers.").

A prosecutor may in good faith determine the continued prosecution of an individual may not further justice. In those circumstances, the prosecutor should not condition the

dismissal on payment of costs. If the dismissal furthers the prosecutor's duty to do justice, is such an agreement void?

Some prosecutors have an agreement with the state to collect outstanding court debt. Iowa Code § 602.8107(4) (2019). If the prosecutor has an agreement to collect delinquent debt for a percentage (28%), does the prosecutor have a conflict between his duty to do justice and loyalty to the county, his employer? Does this conflict breed "agreements" which foster inequity and questionable validity?

The legislature established the laws related to imposition of fees and costs. The legislature has not authorized the court to order a cost judgment when the case is completely dismissed. The legislature has spoken on the public policy objectives. An agreement outside this authority should not be sanctioned.

### **CONCLUSION**

The district court has subject matter jurisdiction to assess court costs and fees, but it lacks authority to do so when the criminal case is dismissed. A cost judgment entered

in a dismissed criminal case is void as such an order is the equivalent to an illegal sentence. Furthermore, an agreement to pay costs in exchange for a dismissal may be unenforceable as it violates public policy.

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

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) 6.903(1)(g)(1) and 6.906(4) because:

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/s/ Martha J. Lucey\_\_\_\_\_

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