

IN THE SUPREME COURT OF IOWA

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STATE OF IOWA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	S.CT. NO. 18-1215
	)	
TAVISH COLEON SHACKFORD,	)	
	)	
Defendant-Appellant.	)	

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APPEAL FROM THE IOWA DISTRICT COURT  
IN AND FOR POLK COUNTY  
HONORABLE SCOTT D. ROSENBERG, JUDGE  
(RESENTENCING)

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APPELLANT'S REPLY BRIEF AND ARGUMENT

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## **CERTIFICATE OF SERVICE**

On May 16, 2019, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Tavish C. Shackford, 4000 Oxford St., Des Moines, IA 50313.

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VKR/sm/05/19

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## **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

### **DIVISION I. Correctional Fees:**

**1). Defendant should not have been responsible for any post-verdict correctional fees (totaling \$4,935), all incurred because the Count 2 jury verdict for a forcible felony rendered Defendant no longer eligible for release on bond.**

***a). The correctional fee obligation were not imposed as civil judgments.***

### **Authorities**

Iowa Code § 910.1(4)

State v. Alspach, 554 N.W.2d 882, 883 (Iowa 1996)

State v. Dudley, 766 N.W.2d 606, 618 (Iowa 2009)

Jefferson v. Iowa Dist. Ct. for Scott Co., \_\_\_ N.W.2d \_\_\_, No. 16-1544, 2019 WL 1574664, \*4 (Iowa 2019)

State v. Lathrop, 781 N.W.2d 288, 292-93 (Iowa 2010)

State v. Klawonn, 688 N.W.2d 271, 275 (Iowa 2004)

State v. Bonstetter, 637 N.W.2d 161, 165 (Iowa 2001)

Iowa Code § 910.8

Iowa Code § 915.100(2)(i)

Iowa R. Civ. P. 1.302

Iowa R. Civ. P. 1.602



Iowa R. Civ. P. Division IX

State v. Abrahamson, 696 N.W.2d 589, 591 (Iowa 2005)

Iowa Code Chapter 626

State v. Iowa District Court for Polk County, No. 17-0616,  
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Iowa Code § 910.3

Iowa Code § 626.1

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Iowa Court Form 3.25

Iowa Code § 910.5(1)(a)

State v. Albright, 925 N.W.2d 144, 160 (Iowa 2019)

State v. Harrison, 351 N.W.2d 526, 528 (Iowa 1984)

Iowa Code § 356.7(2)

State v. Blakely, 534 N.W.2d 645, 648 (Iowa 1995)

In Re. Sopoci, 467 N.W.2d 799, 800 (Iowa 1991)

Iowa Code § 356.7(3)

State v. Gross, No. 18-0690, 2019 WL 1752670, at \*4 (Iowa Ct.  
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Iowa Code section 910.7A(1)-(2)

Iowa Code § 915.100(f)

Iowa Code § 815.9(7)

State v. Miller, Nos. 12-1448, 12-1449, 2014 WL 1714970, at \*1 (Iowa Ct. App. April 30, 2014)

United States v. Florence, 741 F.2d 1066, 1068 (8th Cir. 1984)

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Iowa Code Chapter 627

Bennett v. Arkansas, 485 U.S. 395, 108 S. Ct. 1204, 99 L. Ed. 2d 455 (1988)

State v. Letscher, 888 N.W.2d 880, 887 (Iowa 2016)

Walters v. Grossheim, 525 N.W.2d 830, 832 (Iowa 1994)

State v. Ross, No. 10-2017, 2011 WL 2694839, at \*3 (Iowa Ct. App. July 13, 2011)

State v. Bradley, No. 15-1774, 2017 WL 936080, \*1 (Iowa Ct. App. March 8, 2017)

Iowa Code § 356.7(2)(c)

Iowa Code § 356.7(4)

State v. Petrie, 478 N.W.2d 620 (Iowa 1991)

State v. McMurry, 925 N.W.2d 592 (Iowa 2019)

***b). Even if the June 2017 Reimbursement Orders are deemed civil judgments, the post-verdict correctional fee obligations must nevertheless be vacated.***

**Authorities**

Iowa Code Chapter 356.7(1)

State v. Petrie, 478 N.W.2d 620, at 621-22 (Iowa 1991)

State v. McMurry, 925 N.W.2d 592 (Iowa 2019)

Iowa Code § 910.1(4)

State v. Letscher, 888 N.W.2d 880, 883 (Iowa 2016)

**2). As to court costs other than the post-verdict correctional fees, Defendant acknowledges that apportionment of these costs is no longer appropriate after McMurry.**

**Authorities**

State v. McMurry, 925 N.W.2d 592, 600-601 (Iowa 2019)

State v. Petrie, 478 N.W.2d 620, 622 (Iowa 1991)

**DIVISION II. Reasonable Ability to Pay:**

**Authorities**

Iowa Code § 910.1(4)

State v. Albright, 925 N.W.2d 144, 161 (Iowa 2019)

State v. McMurry, 925 N.W.2d 592, 596 (Iowa 2019)

State v. Headley, No. 18-0594, \_\_\_ N.W.2d \_\_\_, 2019 WL 1574685, \*5-6 (Iowa April 12, 2019)

State v. Petty, 925 N.W.2d 190, 197 (Iowa 2019)

## **ROUTING STATEMENT**

Retention is appropriate to address the State's claims concerning whether (and if so when) correctional fees approved pursuant to section 356.7 and imposed in the criminal case file may be deemed "collateral civil judgments" rather than part of the defendant's criminal sentence. (State's Br. p.12).

The State posits that the correctional fee obligations imposed herein (though ordered within the criminal case file, included in the DOC's "Restitution Plan", and listed on the financial docket prepared by the clerk for this criminal appeal) created only "collateral civil judgments" which: (a) cannot be reached under error preservation rules allowing correction of illegal sentences at any time; and (b) are not subject to substantive limitations applicable to restitution and court cost sentences (including apportionment between convicted and dismissed counts, and ability to pay determinations). (State's Br. p.12-21).

The question of whether or when such obligations create only 'collateral civil judgments' distinct from the defendant's

sentence was not addressed by the Iowa Supreme Court's recent decisions in State v. Albright, 925 N.W.2d 144 (Iowa 2019) and State McMurry, 925 N.W.2d 592 (Iowa 2019).<sup>1</sup>

The Court of Appeals appears to have addressed aspects of this question in conflicting unpublished decisions.

Compare State v. Iowa District Court for Polk County, No. 17-0616, 2018 WL 739323, \*4 (Iowa Ct. App. Feb. 7, 2018) (concluding Polk County Sheriff did not “actually cho[o]se to execute its room-and-board judgment using chapter 626” where, although “Polk County did not request that its reimbursement claim be included in Gochett’s restitution order”, the “assistant Polk County Attorney presented an exhibit showing the room-and-board fees stood as a financial obligation owed by Gochett *in his criminal case, not as a separate civil judgment.*”) (emphasis added); with State v. Gross, No. 18-0690, 2019 WL 1752670, at \*4 (Iowa Ct. App Apr. 17, 2019) (concluding that, because “[n]either the claim

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<sup>1</sup> A further review application addressing aspects of this question is pending in State v. Larry Gross, S.Ct. No. 18-0690.

by the sheriff nor the ruling by the district court mentions restitution”, the room and board reimbursement ordered in the criminal case was “a civil judgment under chapter 626, not a restitution order under chapter 910”).

The Court of Appeals in Gross erroneously conceived of Chapter 626 as *creating* a civil judgement when, in actuality, Chapter 626 is merely a mechanism for *enforcing or collecting* on a judgment (whether criminal or civil) already received. Indeed, all restitution orders are subject to collection using Chapter 626. See Iowa Code § 910.7A. Ultimately, when a reimbursement obligation is imposed within the criminal case, it creates a criminal restitution judgment, regardless of how the State intends to subsequently enforce or collect on that judgment.

The Supreme Court’s guidance is necessary to clarify these matters, and retention is appropriate.

## STATEMENT OF THE CASE

COMES NOW the defendant-appellant, pursuant to Iowa R. App. P. 6.903(4), and submits the following argument in reply to the State's brief filed on or about April 26, 2019.

## ARGUMENT

### I. Correctional Fees:

**1). Defendant should not have been responsible for any post-verdict correctional fees (totaling \$4,935), all incurred because the Count 2 jury verdict for a forcible felony rendered Defendant no longer eligible for release on bond.**

***a). The correctional fee obligations were not imposed as civil judgments.***

Correctional fees are a type of court costs, and court costs are an aspect of restitution. See Iowa Code § 910.1(4) (“Restitution’... includes... court costs including correctional fees approved pursuant to section 356.7....”). At least when imposed within the criminal case file rather than in a separately instituted civil action, such obligations are part of the criminal sentence. State v. Alspach, 554 N.W.2d 882, 883 (Iowa 1996) (imposition of “restitution is a phase of



sentencing”) (citation omitted); State v. Dudley, 766 N.W.2d 606, 618 (Iowa 2009) (proceeding was part of the criminal case rather than an independent civil proceeding, given that “the process for obtaining reimbursement for the costs of legal assistance” took place “entirely in the context of the criminal case” rather than by the State’s “initiat[ion] [of] a separate suit... to recover these costs.”); Jefferson v. Iowa Dist. Ct. for Scott Co., \_\_\_ N.W.2d \_\_\_, No. 16-1544, 2019 WL 1574664, \*4 (Iowa 2019) (a motion to correct illegal sentence, which “is not filed as a separate action but within the original criminal case”, is “a stage of the original criminal case”). Void, illegal, or procedurally defective sentences may be corrected on appeal even absent an objection before the trial court. State v. Lathrop, 781 N.W.2d 288, 292-93 (Iowa 2010).

The State argues that the orders here entered in the criminal case directing Shackford to pay reimbursement of correctional fees should be deemed “collateral civil judgments” rather than criminal restitution. (State’s Br. p.12).

Specifically, the State argues that because the Sheriff did not

explicitly state on its reimbursement claim that the obligation was being sought as restitution, it should be treated as a civil judgment rather than as restitution. (State's Br. pp.15-21).

But the very fact that the sheriff's application was filed *in the criminal case* establishes that it was sought and imposed as criminal restitution.

The availability of restitution in the criminal case obviates the need to separately "file a civil action against an offender" and obtain "a civil judgment." State v. Klawonn, 688 N.W.2d 271, 275 (Iowa 2004). See also State v. Bonstetter, 637 N.W.2d 161, 165 (Iowa 2001) ("restitution is a penal sanction separate from civil remedies" and "makes it possible to avoid the necessity of a separate civil action"); Klawonn, 688 N.W.2d at 275 (discussing criminal restitution order, and subsequent "civil judgment" obtained by way of a "civil action" based on "petition" raising tort claims); Iowa Code §§ 910.8 and 915.100(2)(i) (both discussing right of a victim to independently "sue and recover damages from the offender in a civil action.")).

If the sheriff desired to obtain a “civil judgment” (distinct from the criminal sentence), it was required to file a petition in civil court, beginning a new civil action, and complying with the rules of civil procedure governing original actions. See Iowa R. Civ. P. 1.302 (Original notice; form, issuance and service); Iowa R. Civ. P. 1.602 (Pretrial conferences; scheduling; management); Iowa R. Civ. P. Division IX (Trial and Judgment). In that civil suit, the sheriff would have the burden to prove both (a) that it is legally entitled to reimbursement for correctional fees, and (b) the amount of reimbursement that is proper. See State v. Abrahamson, 696 N.W.2d 589, 591 (Iowa 2005) (court compared charges with other counties and considered sheriff’s testimony concerning various costs incurred and how charges were calculated). If the sheriff complied with the required civil process, Shackford would have been provided the opportunity to be heard on the claim. Only after a proper commencement of the civil suit and compliance with the procedural due process embodied in the rules of civil procedure, could the district court then enter a

“civil judgment” against Shackford for the correctional fees. And only after obtaining such a “civil judgment” in the civil proceeding, could the county then seek enforcement of that “civil judgment” through execution. See Iowa Code Chapter 626 (Execution).

Given that the sheriff here filed the claim in the criminal case rather than by way of a separate civil lawsuit, the claim was clearly being pursued as part of restitution in that case. Therefore, it cannot be considered a “civil judgment”, and the amount for room and board is restitution.

In State v. Iowa District Court for Polk County, the Iowa Court of Appeals rejected the State’s argument that the reimbursement obligation had been sought as a civil judgment to be enforced under Chapter 626 and not as restitution, reasoning:

...[O]n a practical basis, it does not appear the Polk County sheriff actually chose to execute its room-and-board judgment using chapter 626. [...] Instead, the assistant Polk County Attorney presented an exhibit showing the room-and-board fees stood as a financial obligation owed by [the

defendant] *in his criminal case, not as a separate civil judgment.*

State v. Iowa District Court for Polk County, No. 17-0616, 2018 WL 739323, \*4 (Iowa Ct. App. Feb. 7, 2018) (emphasis added).

The State notes that “[t]he district court did not reference the [correctional fee] amount as restitution within the new sentencing order.” (State’s Br. p.20). But the new sentencing order did state “RESTITUTION PREVIOUSLY DETERMINED REMAINS THE SAME.” (6/29/18 Order after Resentencing, p.2) (App.91).<sup>2</sup> The new sentencing order also directed that “Court costs are taxed to Defendant”. (6/29/18 Order after Resentencing, p.2) (App.91). The phrases “Restitution” and “court costs” include correctional fees. See Iowa Code § 910.1(4). The correctional fee obligations approved by way of the district court’s earlier June 7-8, 2017 orders were then included as part of defendant’s financial obligations in the

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<sup>2</sup> This was different than the language contained in the original sentencing order. See (4/4/17 Sentencing Order, p.2) (App.36) (“RESTITUTION.”).

clerk of court's financial docket prepared for the appeal herein. (6/7/17-6/8/17 Orders; 7/16/18 Combined General Docket, p.21: Financial Summary) (App.99). The fact that the correctional fee obligation was listed on the clerk of court's financial docket is yet another indication that it was treated as a restitution obligation and not as an independent or collateral civil judgment. See also Iowa Code § 910.3 (Determination of amount of restitution: "The clerk of court shall prepare a statement of... court costs including correctional fees claimed by a sheriff or municipality pursuant to section 356.7, which shall be... submitted to the court at the time of sentencing." Then, "[a]t the time of sentencing or at a later date... the court shall set out the amount of restitution....").

The room and board obligations had also been included in the "Restitution Plan" issued by the Department of Corrections herein. (5/31/18 Restitution Plan) (App.78). The State argues this was without consequence, suggesting the DOC was simply mistaken in including (and collecting on) the room and board obligations as restitution under Chapter 910.

But, despite being served with a “Restitution Plan” that included the correctional fee obligations as part of restitution, the county attorney’s office (which pursued the claim on behalf of the sheriff) never filed a correction or clarification to state that the correctional fees had been sought or imposed only as a civil judgment and not as restitution. Nor, did the sheriff or County Attorney engage in independent collection efforts under Chapter 626 (by filing a Request for Execution or Praecipe herein), so as to suggest they were treating the obligation as only a civil judgment rather than accepting collection as restitution. See e.g., Iowa Code § 626.1 (enforcement of money judgment is commenced by judgment’ creditor’s filing of a Request for Execution, also known as a Praecipe); Iowa Code § 626.12 (Form of Execution); Iowa Court Form 3.25 (small claim form for Request for General Execution or Praecipe under section 626.12). Note also that it is “the sentencing court” itself that would have “forward[ed] to the director [of the department of corrections] a copy of the offender’s restitution plan, present restitution payment plan if

any, and other pertinent information concerning or affecting restitution by the offender”, from which the DOC would have assembled its Restitution Plan. Iowa Code § 910.5(1)(a). See also State v. Albright, 925 N.W.2d 144, 160 (Iowa 2019) (discussing process for restitution); State v. Harrison, 351 N.W.2d 526, 528 (Iowa 1984) (“the department is charged with developing a plan of payment based on the plan of restitution” established by the sentencing court). Accordingly, the restitution obligations included in the DOC’s “Restitution Plan” (including the correctional fees) would have been the very same obligations also being treated as restitution by the sentencing court and clerk.

Thus, contrary to the State’s argument, the correctional fee obligations were treated as restitution not only by the DOC, but also by the Court, the Clerk, and the Sheriff/County Attorney.

Such treatment makes sense, given that section 910.1(4) defines “Restitution” to include all “court costs including *correctional fees approved pursuant to section 356.7*”. Included



in this definition of restitution and court costs are any and all “correctional fees approved pursuant to section 356.7” – not merely those which the sheriff explicitly requested be included in the restitution plan of payment, and not merely those in which the district court’s order approving the fees explicitly stated they would be treated as restitution.

The sheriff’s claims herein were filed in the criminal case and sought reimbursement “*pursuant to Iowa Code section 356.7....*” (6/7/17-6/8/18 Claims and Applications) (App.51-52, 55-56) (emphasis added). The district court’s orders for reimbursement were also entered in the criminal case, and approved the claims “*pursuant to Iowa Code 356.7....*” (6/7/17-6/8/17 Orders) (App.53, 57) (emphasis added). Thus, the June 7-8 orders entered by the criminal court were for “correctional fees approved pursuant to section 356.7” and were, *by definition*, “Restitution” and “court costs” under Iowa Code section 910.1(4).

Defendant disagrees with the significance placed by the State on State v. Abrahamson, 696 N.W.2d 589 (Iowa 2005).

The State argues that “[i]n Abrahamson, the Iowa Supreme Court made it clear that an affirmative request from the claimant was *required* before the court *could* treat the claimed reimbursement as part of a restitution plan subject to sections 910.2 and 910.3.” (State’s Br. p.17-18) (emphasis added).

The State thus treats the information called for under section 356.7(1)(i) as mandatory and jurisdictional to approval as restitution – but Abrahamson did not so state. In reciting that “Under section 356.7(2)(g) [now 356.7(2)(i)], a sheriff, if he decides to collect the claim under the restitution plan, must so state in the original claim”, the Abrahamson Court was merely referring to and repeating the general subsection (2) requirement in the statute that a reimbursement claim filed with the court “shall include all of the [listed] information, if known”. Iowa Code § 356.7(2). In Abrahamson, the sheriff had explicitly included in the reimbursement claim a request that the obligation be collected as restitution. Abrahamson, 696 N.W.2d at 591. But the Abrahamson Court did not address the question of whether, if the sheriff had *not* specified

that the obligation was being sought as restitution, it would necessarily be deemed non-restitution and/or a collateral civil judgment.

Noncompliance with a statutory obligation (here, to list certain information) does not necessarily or automatically transform a claim into one for a collateral civil judgment rather than restitution. See State v. Blakely, 534 N.W.2d 645, 648 (Iowa 1995) (section 910.1 requirement that county attorney must provide restitution claims for pecuniary damages within 30 days is directory rather than mandatory or jurisdictional; the 30-day “language [is] the legislature’s way of ensuring that restitution is determined promptly.”); In Re. Sopoci, 467 N.W.2d 799, 800 (Iowa 1991) (where statutory duty “is designed to assure order and promptness in the proceeding” as distinct from being “essential to accomplishing the principal purpose of the statute”, it is ordinarily directory rather than mandatory and jurisdictional) (citation omitted). Indeed, in contrast with “pecuniary damages to a victim” which qualify as restitution only “in an amount and in the

manner provided by the offender's plan of restitution", all "correctional fees approved pursuant to section 356.7" appear to fall within the definition of "Restitution" *without regard to whether they are ultimately included in and collected by way of a restitution plan of payment. See* Iowa Code § 910.1(4) ("‘Restitution’ means payment of pecuniary damages to a victim in an amount and in the manner provided by the offender's plan of restitution. ‘Restitution’ also includes... court costs including correctional fees approved pursuant to section 356.7....").

Further, to the extent the sheriff's noncompliance with the requirements of section 356.7(2) *are* meaningful in limiting the nature or validity of the claim for reimbursement, Defendant notes the sheriff did not fully comply with the other listed requirements for a correctional fee claim either. Specifically, the sheriff did not comply with the section 356.7(2)(b) obligation to list "[t]he present address of the residence... of the person named in the claim". Rather, the reimbursement claims listed only a *former* residence address

of the defendant, even though the sheriff's department was the one to transfer Defendant to prison and therefore would be aware that his present residence address was the DOC facility. Compare, (6/7/17-6/8/18 Claims and Applications) (App.51-52, 55-56) (listing former West Des Moines residence address); with (4/12/17 Return of Mittimus) (App.41) (sheriff transported Defendant to Department of Corrections on or about April 6, 2017). If compliance with section 356.7(2) is indeed mandatory and jurisdictional, the sheriff's noncompliance with section 356.7(2)(b) would wholly deprive the district court of jurisdiction and statutory authority to order Shackford's reimbursement of the requested correctional fees. The significance of section 356.7(2) being jurisdictional and mandatory would be invalidation of the claim as a *whole*, not transformation of the claim from criminal restitution to a collateral civil judgment.

Crucially, nowhere in section 356.7 does it say an order approving a correctional fee claim 'is a civil judgment.' It says only that the court's approval order has "the force and effect of

a judgment for purposes of enforcement by the sheriff” and that “[t]he sheriff... may choose to enforce the claim *in the manner* provided in chapter 626.” Iowa Code § 356.7(3).

Similarly, nowhere in Abrahamson did our Supreme Court state that a claim sought to be enforced under Chapter 626 constitutes “a civil judgment”. Rather, the court noted only that “Under section 356.7(3), a court-approved claim for room and board may be *enforced* in two ways: as a judgment in the traditional sense, under Iowa Code chapter 626, or as part of a restitution plan under chapter 910.” Abrahamson, 696 N.W.2d at 591 (emphasis added).

The Court of Appeals in State v. Gross, No. 18-0690, 2019 WL 1752670, at \*4 (Iowa Ct. App Apr. 17, 2019) held that, where the reimbursement claim filed in the criminal case did not reference restitution, the “sheriff was seeking to enforce its claim for reimbursement under chapter 626” and the “case involve[d] a civil judgment under chapter 626, not a restitution order under chapter 910.” But chapter 626 does not *define or control* the nature of the judgment as either civil

or criminal. Rather, chapter 626 is merely a mechanism for *enforcing or collecting on* a money judgment (whether criminal or civil) which has already been received. The fact that an approved correctional fee claim is enforceable under Chapter 626 neither renders it a ‘civil judgment’ nor makes it non-restitution.

This is perhaps made most clear by the fact that the *restitution statute itself* explicitly provides that “[a]n order requiring an offender to pay restitution constitutes a judgment and lien”, and “[a] judgment of restitution may be enforced... *in the same manner as a civil judgment.*” Iowa Code section 910.7A(1)-(2) (emphasis added).<sup>3</sup> The fact that a restitution order is a “judgment” enforceable “in the same manner as a

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<sup>3</sup> Similar language is also contained in other provisions concerning restitution. See Iowa Code § 915.100(f) (“A judgment of restitution may be enforced by a victim entitled under the order to receive restitution, or by a deceased victim’s estate, in the same manner as a civil judgment.”); Iowa Code § 815.9(7) (“[I]f any [legal assistance] costs and fees are not paid at the time specified in the order of the court, a judgment shall be entered against the person for any unpaid amount. Such judgment may be enforced by the state in the same manner as a civil judgment.”).

civil judgment” certainly does not transform restitution from a criminal sentence into a collateral civil judgment. See e.g., State v. Miller, Nos. 12–1448, 12–1449, 2014 WL 1714970, at \*1 (Iowa Ct. App. April 30, 2014) (citing United States v. Florence, 741 F.2d 1066, 1068 (8th Cir. 1984) as “concluding that a parallel federal statutory provision providing that a restitution order shall be enforceable to the same extent as a civil judgment does not change the nature of the restitution hearing from criminal sentencing proceeding to civil proceeding.”). Rather, it simply means that restitution order may be *collected and enforced* (a) under a restitution plan of payment, or (b) by way of the same debt collection procedures applicable to money judgments (Execution under Chapter 626)<sup>4</sup>. See e.g., Walters v. Grossheim, 525 N.W.2d 830, 832

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<sup>4</sup> If enforcing the obligation in the manner of a money judgment under Chapter 626, the government is subject to the same limitations which apply to other judgment creditors, including debtors’ exemptions, prohibitions against improper or unfair collection practices, and obligations to follow statutorily prescribed collection procedures. See Iowa Code Chapter 630 (Execution); Iowa Code Chapter 627 (Debtors’ Exemptions); Iowa Code Chapter 630 (Proceedings Auxiliary to



(Iowa 1994) (pursuant to section 910.7A pronouncement that restitution is enforceable in the same manner as a civil judgment, “whether incarcerated or not, a defendant liable for restitution is generally subject to the same collection methods available to other creditors”); State v. Ross, No. 10–2017, 2011 WL 2694839, at \*3 (Iowa Ct. App. July 13, 2011) (“Under [section 910.7A], the restitution order became a judgment which the State may enforce after a defendant's sentence is discharged ‘in the same manner as a civil judgment.’”); State v. Bradley, No. 15-1774, 2017 WL 936080, \*1 (Iowa Ct. App. March 8, 2017) (delinquent restitution obligations are assigned to collections, and “there is no provision that restricts the IDOC from continuing to collect the restitution plan of payment from an inmate’s account once the judicial branch

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Execution); Bennett v. Arkansas, 485 U.S. 395, 108 S. Ct. 1204, 99 L. Ed. 2d 455 (1988) (federal debtor exemptions); State v. Letscher, 888 N.W.2d 880, 887 (Iowa 2016) (in forfeiting cash bond to satisfy court debt, sentencing “court followed none of the ordinary procedures for attachment and execution” set forth in the Iowa Code).

assigns the collection of the delinquent debt” to a collection entity).

Similarly, section 356.7 contemplates that a room and board obligation approved by the court may, like any other restitution obligation, be collected and enforced (a) under a restitution plan of payment or (b) in the same manner as a money judgment (under Chapter 626). See Iowa Code § 356.7(2)(c) (stating sheriff may request the amount “be included within the order for payment of restitution by the person.”); Iowa Code § 356.7(3) (“The sheriff or municipality may choose to enforce the claim in the manner approved by chapter 626. Once approved by the court, the claim for the amount owed by the person shall have the force and effect of a judgment for purposes of enforcement by the sheriff or municipality.”); Iowa Code § 356.7(4) (“This section does not limit the right of the sheriff or municipality to obtain any other remedy authorized by law.”); Abrahamson, 696 N.W.2d at 591 (“Under section 356.7(3), a court-approved claim for room and board may be enforced in two ways: as a judgment in the

traditional sense, under Iowa Code chapter 626, or as part of a restitution plan under chapter 910.”). The distinction between Chapter 910 and Chapter 626 relates not to the nature of the underlying order for reimbursement (civil judgment or criminal restitution sentence) but, rather, the manner or method of *enforcement* of the judgment already received.

The fact that correctional fee obligations (like all restitution orders) can be collected under a restitution plan of payment or in the manner of a money judgment does not change the fundamental reality that “correctional fees approved pursuant to section 356.7” are, by definition, “Restitution” and “court costs”. Iowa Code section 910.1(4). They are thus subject to the substantive limitations applicable to restitution and court costs – including ability to pay determinations, and apportionment between convicted and dismissed counts pursuant to State v. Petrie, 478 N.W.2d 620 (Iowa 1991) and State v. McMurry, 925 N.W.2d 592 (Iowa 2019).

Further, at least if imposed in the criminal case number rather than by way of a separate civil action, such obligations are imposed as part of the defendant's criminal sentence. See Alspach, 554 N.W.2d at 883; Dudley, 766 N.W.2d at 618; Jefferson, 2019 WL 1574664, at \*4. The judicial imposition of a correctional fee obligation in the criminal case is thus part of the convicted defendant's restitution sentence and, therefore, is subject to the rules governing illegal sentences.

***b). Even if the June 2017 Reimbursement Orders are deemed civil judgments, the post-verdict correctional fee obligations must nevertheless be vacated.***

Even if the June 2017 Reimbursement Orders are deemed civil judgments, Shackford's post-verdict correctional fee obligations must nevertheless be vacated. The district court had no authority to approve the request for correctional fees as a civil judgment given the failure to follow the process required to commence and prosecute an original civil action to obtain a civil judgment.

Defendant also disagrees with the State's position that apportionment between convicted and dismissed counts would

not apply if reimbursement was obtained as a civil judgment rather than as part of a restitution sentence. (State's Br. pp.17, 21). Like the language of the statutes discussed in Petrie, section 356.7 makes it equally clear that room and board may be charged only for those expenses associated with convicted counts. See Iowa Code Chapter 356.7(1) (sheriff "may charge a prisoner... *who has been convicted* of a criminal offense", and "[i]f *a prisoner who has been convicted* of a criminal offense... fails to pay", sheriff may file reimbursement claim with district court) (emphasis added). Compare State v. Petrie, 478 N.W.2d 620, at 621-22 (Iowa 1991) (discussing language of Iowa Code Sections 815.13 and 910.2). Indeed, the apportionment principles established in Petrie appear to have been adapted from civil law principles. See State v. McMurry, 925 N.W.2d 592, 596 (Iowa 2019) ("Historically, the rule in Iowa that permits apportionment of court costs in civil cases has not been applied to criminal cases. [...]

Notwithstanding, twenty-eight years ago in Petrie, we recognized a place for equitable apportionment of costs in

criminal prosecutions involving multicount... trial informations when some counts resulted in a conviction and others were dismissed ...."). They would thus appear to apply equally even to correctional fees sought by way of a separate civil lawsuit.

Note also that, in contrast with "pecuniary damages to a victim" which qualify as restitution only "in an amount and in the manner provided by the offender's plan of restitution", "correctional fees approved pursuant to section 356.7" are defined as "Restitution" *without regard to whether they are included in a restitution plan of payment*. See Iowa Code § 910.1(4) ("Restitution' means payment of pecuniary damages to a victim in an amount and in the manner provided by the offender's plan of restitution. 'Restitution' also includes... court costs including correctional fees approved pursuant to section 356.7...."). It would thus appear that even a civil judgment for correctional fees would fall within the statutory definition of "Restitution", making it subject to the same substantive limitations (apportionment between convicted and

acquitted counts, and ability to pay determinations) that apply to restitution in a criminal case.

The State argues that Shackford was obligated to seek reconsideration from the June 2017 correctional fee orders pursuant to Iowa Rule of Civil Procedure 1.1007. (State's Br. p.13). But it does not appear Shackford was ever even personally served with a copy of those Orders – the Orders indicated the clerk was to serve Shackford with copies, but the service address listed was for Shackford's former residence and not for the DOC facility where he was then incarcerated.<sup>5</sup> Compare, (6/7/17-6/8/17 Orders) (App.53-54, 57-58) (listing West Des Moines residence address); with (4/12/17 Return of Mittimus) (App.41) (sheriff transported Defendant to Department of Corrections on or about April 6, 2017).

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<sup>5</sup> There is also no indication Shackford was served with a copy of the Sheriff's Claims and Applications for reimbursement. These similarly listed Shackford's old residence address, though Shackford had been incarcerated in the jail since the January 13, 2017 jury verdicts, and had then been transported by the sheriff from jail to prison in April 2017. See (Trial Vol.3 p.7 L.10-p.8 L.11); (4/4/17 Sent. Order, p.3; 4/12/17 Return of Mittimus; 6/7/17-6/8/17 Claims and Applications) (App.37, 41, 51-52, 55-56).

Note also that the illegality challenged herein did not exist at the time the June 2017 orders were initially entered but, rather, was created by the fact that the Count 2 Forcible Felony was later reversed by the Court of Appeals' April 2018 decision for insufficient evidence. (4/26/18 Amended CTA Opin.) (App.59-74). The district court accordingly dismissed Count 2 on May 31, 2018. (5/31/18 Order on Remand, p.1) (App.79). Shackford was then resentenced on June 29, 2018, and rather than apportioning out the correctional fees between the convicted and dismissed counts pursuant to Petrie (as now modified by McMurry), the sentencing court simply re-incorporated the June 2017 correctional fee obligations into Shackford's new sentence by stating "RESTITUTION PREVIOUSLY DETERMINED REMAINS THE SAME" and "Court costs are taxed to Defendant". (6/29/18 Order after Resentencing, p.2) (App.91). The earlier June 2017 correctional fee orders were thus incorporated into the June 2018 sentencing order and, accordingly, can be challenged on appeal. See State v. Letscher, 888 N.W.2d 880, 883 (Iowa



2016) (Although bail is “normally a matter we address and review separate from the entry of a judgment and sentence”, here “the district court made forfeiture of the pretrial appearance bond... into a term of the sentencing order” and “Letscher was entitled to challenge it as any other term of sentence.”).

**2). As to court costs other than the post-verdict correctional fees, Defendant acknowledges that apportionment of these costs is no longer appropriate after McMurry.**

In State v. McMurry, 925 N.W.2d 592, 600-601 (Iowa 2019), the Iowa Supreme Court modified the holding in State v. Petrie, 478 N.W.2d 620, 622 (Iowa 1991). Defendant acknowledges that, after McMurry, it is no longer appropriate to apportion the remaining court costs (other than the post-verdict correctional fees) as these would have been the same even if the dismissed count had not been prosecuted.

McMurry, 925 N.W.2d 592, 601 (Iowa 2019) (“...[F]ees and costs should not be apportioned in multicount cases that result in both a conviction and a dismissal when the fees and

costs would have been the same without the dismissed counts.”).

However, even under McMurry, apportionment is still required as to the post-verdict correctional fees (totaling \$4,935), all incurred because the Count 2 jury verdict for a forcible felony rendered Defendant no longer eligible for release on bond. These post-verdict correctional fees cannot be assessed against Shackford because they would not have been incurred if the ultimately-dismissed Count 2 forcible felony had not been prosecuted – Shackford would then have remained bond-eligible even after the verdict, pending sentencing and appeal.

## **II. Reasonable Ability to Pay.**

The resentencing court ordered that “RESTITUTION PREVIOUSLY DETERMINED REMAINS THE SAME.” (6/29/18 Order after Resentencing, p.2) (App.91). The resentencing court also ordered that “Court costs are taxed to Defendant.” (6/29/18 Order after Resentencing, p.2) (App.91). The phrases “Restitution” and “court costs” include correctional

fees. See Iowa Code § 910.1(4). Defendant urges that the district court abused its discretion and entered an illegal sentence in ordering Shackford to pay court costs and correctional fees without an ability to pay determination as to those obligations.

The State argues this matter is not ripe. (State's Br. p.24-28). But the correctional fee and court cost obligations had already been subject to enforcement and collection by way of the earlier DOC "Restitution Plan". (5/31/18 Restitution Plan) (App.78) (specifying that pursuant to Chapter 910, Shackford would be required to pay toward his court debt to the clerk of the district court 20% of all credits to his institutional account). Compare State v. Albright, 925 N.W.2d 144, 161 (Iowa 2019) (non-final restitution orders are not "enforceable against the offender."). Given that the obligations were already apparently subject to enforcement and collection under the restitution plan, they are ripe.

Further, the Combined General Docket issued for this appeal following Shackford's resentencing confirms that all

court costs, including all correctional fees, have been assessed and charged to Shackford. (7/16/18 Comb. Gen. Docket p.21) (App.99). As in McMurry, this also renders the claim ripe. See State v. McMurry, 925 N.W.2d 592, 596 (Iowa 2019) (“...[T]he sentencing court in this case never addressed or decided which court costs McMurry was required to pay. Instead, we presume the sentencing order only intended McMurry to pay those court costs authorized by law. Thus, the question in this case is whether the amount subsequently set forth in the docket report and assessed by the clerk of court complied with the law. Thus, we review the sentencing order together with the docket report from the clerk of court to determine if McMurry has been assessed court costs not authorized by law.”). See also State v. Headley, No. 18-0594, --- N.W.2d---, 2019 WL 1574685, \*5-6 (Iowa April 12, 2019) (considering Defendant’s argument that “the district court erred in ordering him to pay restitution in the form of court costs and correctional fees without first determining his reasonable ability to pay those items”; “we must vacate that

part of the sentencing order regarding restitution and remand the case back to the district court to impose restitution consistent with our decision in Albright."); State v. Petty, 925 N.W.2d 190, 197 (Iowa 2019) (similarly holding).

### **CONCLUSION**

Pursuant to the issue raised in Division I, the post-verdict correctional fee obligation (totaling \$4,935) must be vacated. Shackford should not be required to pay any of these post-verdict correctional fees, as they were all incurred because the (ultimately dismissed) Count 2 forcible felony jury verdict rendered him no longer eligible for bond.

Further, pursuant to the issue raised in Division II, all of the court cost and restitution obligations must be vacated and remanded to the district court for compliance with State v. Albright, 925 N.W.2d 144, 159-63 (Iowa 2019), including the requirement that the court make an ability to pay determination before any obligations become enforceable against the defendant.

### ATTORNEY'S COST CERTIFICATE

I, the undersigned, hereby certify that the true cost of producing the necessary copies of the foregoing Reply Brief and Argument was \$ 4.63, and that amount has been paid in full by the State Appellate Defender.

### CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS AND TYPE-STYLE REQUIREMENTS

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