IN THE SUPREME COURT OF IOWA
Supreme Court No. 18-1215

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TAVISH COLEON SHACKFORD,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE SCOTT D. ROSENBERG, JUDGE

APPELLEE'S BRIEF

THOMAS J. MILLER
Attorney General of Iowa

TIMOTHY M. HAU
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
(515) 281-4902 (fax)
tim.hau@ag.iowa.gov

JOHN SARCONE
Polk County Attorney

OLU SALAMI
Assistant County Attorney

ATTORNEYS FOR PLAINTIFF-APPELLEE

FINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

State Statutes

State Rules

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the district court erred in when it did not apportion Shackford's correctional and other fees.

Authorities

State v. Abrahamson, 696 N.W.2d 589 (Iowa 2005)
Meier v. Senecaut, 641 N.W.2d 532 (Iowa 2002)
State v. Gross, No. 18-0690, 2019 WL 1752670 (Iowa Ct. App Apr. 17, 2019)
State v. Hagen, 840 N.W.2d 140 (Iowa 2013)
State v. Iowa Dist. Ct. for Polk Cnty., No. 17-0616, 2018 WL 739323 (Iowa Ct. App. Feb. 7, 2018)
State v. Lathrop, 781 N.W.2d 288 (Iowa 2010)
State v. McMurry, No. 16-1722, 2019 WL 1412428 (Iowa Ct. App. Mar. 29, 2019)
State v. Petrie, 478 N.W.2d 620 (Iowa 1991)
State v. Poyner, No. 06–1100, 2007 WL 4322193 (Iowa Ct. App. Dec. 12, 2007)
State v. Quijas, No. 17-1043, 2018 WL 3654845 (Iowa Ct. App. Aug. 1, 2018)
Tindell v. State, 629 N.W.2d 357 (Iowa 2001)
Iowa Code § 356.7
Iowa Code § 356.7(2)
Iowa Code § 910.2
Iowa Code § 356.7(2)(i)
Iowa Code § 356.7(2)(g)
Iowa Code § 356.7(3)
Iowa R. Civ. P. 1.1007
Iowa R. Crim. P. 2.24(5)

II. Whether the district court considered Shackford's reasonable ability to pay when it required him to pay restitution.

Authorities

State v. Blank, 570 N.W.2d 924 (Iowa 1997)
State v. Haines, 360 N.W.2d 791 (Iowa 1985)

State v. Jackson, 601 N.W.2d 354 (Iowa 1999)
State v. Jenkins, 788 N.W.2d 640 (Iowa 2010)
State v. Johnson, 887 N.W.2d 178 (Iowa Ct. App. 2016)
State v. Kaelin, 362 N.W.2d 526 (Iowa 1985)
State v. Petrie, 478 N.W.2d 620 (Iowa 1991)
State v. Albright, No. 17-1286, 2019 WL 1302384 (Iowa Mar. 22, 2019)
State v. Poyner, No. 06–1100, 2007 WL 4322193 (Iowa Ct. App. Dec. 12, 2007)
Iowa Code § 910.7
Iowa Code § 910.3
Iowa Code § 910.7(1)
Iowa Code § 910.7(2)

ROUTING STATEMENT

Retention is inappropriate. The Iowa Supreme Court has recently issued opinions resolving the majority of Shackford's claims. *See State v. Albright*, No. 17-1286, 2019 WL 1302384 (Iowa Mar. 22, 2019) (addressing procedure for district court's considering defendant's "reasonable ability to pay" prior to ordering restitution); *State v. McMurry*, No. 16-1722, 2019 WL 1412428 (Iowa Mar. 29, 2019) (addressing apportionment of court costs and modifying holding of *State v. Petrie*, 478 N.W.2d 620, 622 (Iowa 1991)). Transfer to the Court of Appeals is appropriate. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

Following resentencing, Tavish Shackford appeals. He challenges the imposition of his pre- and post-verdict correctional costs, the imposition other associated costs of his prosecution, and the district court's failure to consider his reasonable ability to pay the same. The Honorable Scott D. Rosenberg presided at resentencing.

Course of Proceedings

Following his conviction for willful injury resulting in bodily injury and intimidation with a dangerous weapon, the district court ordered Shackford to pay restitution, and noted that the amount of that restitution was "$TBD." 4/4/2017 Sentencing Order p.2; App. 36. Shackford appealed.

Following the notice of appeal, Shackford filed a motion for a bond review so that the district court could set "a dollar amount for the bond to be set so that I can bail out on appeal bond." 4/12/2017 Bond Request; App. 42. The district court summarily denied the request—at the time, Shackford had been convicted of a forcible felony and was not bond eligible. Iowa Code § 811.1(1).

As the appeal was pending, the Polk County Sheriff filed two requests for reimbursement for "room and board" correctional fees

pursuant to Iowa Code section 356.7. 6/7/2017 Reimbursement Claim; 6/8/2017 Reimbursement Claim; App. 52; 56. These requests were the result of Shackford's two-day incarceration following his arrest and his eighty four-day incarceration post-verdict while awaiting transfer to the Iowa Department of Corrections. The district court approved both requests for reimbursement. 6/7/2017 Order; 6/8/2017 Order; App. 53–54; 57–58.

The Department of Corrections subsequently compiled all amounts it believed Shackford owed and filed a restitution plan indicating that the obligations would be satisfied by withholding 20 percent of each credit to Shackford's institutional account. 5/31/2018 Restitution Plan; App. 78.

In resolving his first appeal, the Iowa Court of Appeals found that there was insufficient evidence to support Shackford's conviction for intimidation and remanded the case with instructions to dismiss the charge. *See State v. Shackford*, No. 17-0634, 2018 WL 1863297, at *4–*5 (Iowa Ct. App. Apr. 18, 2018). Upon remand the district court held another sentencing hearing and imposed an indeterminate five-year sentence. No party raised the issue of restitution at the resentencing hearing. The district court's resentencing order

indicated that "RESTITUTION PREVIOUSLY DETERMINED REMAINS THE SAME. Defendant is ordered to make restitution in the amount of $TBD." 6/29/2018 Resentencing Order; App. 91. Shackford again appealed. 7/12/2018 Notice of Appeal; App. 97.

After his notice of appeal was filed, Shackford filed a request to withdraw his notice of appeal and a motion to reconsider sentence. 6/30/2018 Motion for Reconsideration; 7/18/2018 Motion to Withdraw Notice; App. 93–96; 100. The motion to withdraw his notice of appeal was never ruled on.

Facts

The Iowa Court of Appeals accurately set out the facts of Shackford's crime in his first appeal:

> In the early morning hours of April 17, 2016, Shackford was at a bar in Des Moines with his girlfriend and her friend. Tyler Armel and a group of his friends waited outside until Shackford's group exited the bar. Armel and his friends followed Shackford's group into the parking garage and attempted to start a fight. The fight was broken up by police officers, and Shackford left the garage as a passenger in his girlfriend's vehicle—a silver Honda Civic—at 2:12 a.m. A security video showed the altercation stopped by officers and the exact time Shackford exited the parking garage.
>
> At the trial held January 11 and 12, 2017, Armel admitted he had followed Shackford

into the parking garage for the sole purpose of fighting him. Armel stated after the police ordered him and his friends to leave, he spent about fifteen minutes looking for his brother and then drove home (a five to ten minute drive).

Armel stated he arrived home in his vehicle and three of his friends arrived in at least one separate vehicle. One of the friends was James Wright, who was not present to testify at trial. Armel explained:

> Q. What happened when you got home? A. As soon as I got out of my car—I left my car on because I was about to go to like an after party or something with my friends. And I walked to my front door, and I was about to walk in, and as soon as I put my key in the door, [my friend] said, "Hold on, Bro."
>
> . . . .
>
> A. He said, "Hold on, Bro." I said, "What's going on?" James was about to pull off and he stopped and he got out of his car, and he said, "Tyler, Coleon is pulling up."

Armel stated a black Mercedes stopped in the street in front of Armel's home. Armel said he recognized it to be a vehicle Shackford had driven before. Armel walked down the front sidewalk leading from his home to the street towards the vehicle. Armel stated the passenger window of the Mercedes was rolled down and he saw only one person in the car whom he identified as Shackford. Armel stated he saw Shackford point a gun at him

and asked Shackford, “Are you going to shoot me?” Armel stated Shackford fired the gun, and Armel attempted to run around the side of his house. Armel estimated Shackford fired six more shots. Armel was shot in the thigh.

Wright rushed Armel to the hospital where his wound was treated. At 3:16 a.m., Officer Brian Kelley was dispatched to the hospital where he spoke with Armel. Armel identified Shackford as the shooter. Officer Kelley enlisted the help of West Des Moines police officers to go to Shackford’s home in West Des Moines. No West Des Moines police officers were called to testify at trial. Officer Kelley stated the West Des Moines police officers did not locate the Mercedes at Shackford’s residence and did not speak to anyone, although they observed a man inside the home close the blinds.

Shackford resided with his mother, Angela Phelps. Phelps stated when she arrived home on April 17 between 3:30 and 4:30 a.m., the Mercedes was parked in the driveway. Phelps explained she keeps the keys to the Mercedes either on her person or stored in her locked bedroom, and Shackford cannot drive the Mercedes without her permission. Upon arriving home on April 17, Phelps saw West Des Moines police officers coming over the fence out of her backyard and asked them why they were there. The officers told Phelps there had been a shooting and they were looking for Shackford. Phelps refused to let the police officers into her home without a warrant. When she went inside, Phelps saw that Shackford was there as well as his girlfriend and his younger brother.

At trial, Shackford explained that on April 17, after the police directed the individuals in the

> parking garage to go their separate ways, his group left in his girlfriend's car at about 2:17 a.m. Shackford stated they drove around the area for approximately twenty minutes looking for his younger brother. After they found his brother, they dropped another passenger off by his car and drove to Shackford's home in West Des Moines. Shackford estimated they arrived home at about 3 a.m. Shackford stated he did not leave the home for the remainder of the night. Shackford's girlfriend and younger brother also stated at trial that Shackford did not leave the house again that night.

State v. Shackford, No. 17-0634, 2018 WL 1863297, at *1–*2 (Iowa Ct. App. Apr. 18, 2018).

ARGUMENT

I. The District Court could not have Ordered Apportionment of Shackford's Financial Obligations. His Remaining Obligations are Attributable to the Count he was Convicted.

Preservation of Error

All of Shackford's claims address costs, restitution, and the district court's compliance with the procedures to impose those amounts. Appellant's Br. 29–37; 40–46; 51–55. But, as discussed below, Shackford's "room and board" correctional fees could not have been imposed as restitution. The orders approving the correctional fee expense claim created collateral civil judgments, distinct from his sentence. *See State v. Quijas*, No. 17-1043, 2018 WL 3654845, at *2

(Iowa Ct. App. Aug. 1, 2018); *see also State v. Gross*, No. 18-0690, 2019 WL 1752670, at *4 (Iowa Ct. App Apr. 17, 2019). Thus, the illegal sentence exception to the rules of error preservation does not apply to the district court's orders. As the order themselves suggested, Shackford was obligated to seek reconsideration pursuant to Iowa Rule of Civil Procedure 1.1007. 6/7/2017 Order; 6/8/2017 Order; App. 53; 57. He failed to do so, even after the matter was returned for a second sentencing hearing. His failure to provide the district court an opportunity to rule on the claim prevents this Court's review. *See Meier v. Senecaut*, 641 N.W.2d 532, 537, 539 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal."; a rule 1.904(2) motion is necessary to preserve error when district court fails to resolve an issue).

As for the remaining challenges, a district court's failure to consider a defendant's reasonable ability to pay is an attack on the manner a sentence is imposed—a procedural challenge—and not a challenge to the sentence itself. Such challenges cannot be raised under Iowa Rule of Criminal Procedure 2.24(5). *See, e.g., Tindell v. State*, 629 N.W.2d 357, 359 (Iowa 2001) ("Iowa Rule of Criminal

Procedure [2.24(5)] and our cases, allow challenges to illegal sentences at any time, but they do not allow challenges to sentences that, because of procedural errors, are illegally *imposed*. . . . If we were to expand that concept to encompass redress for underlying procedural defects, as well, it would open up a virtual Pandora's box of complaints with no statutorily prescribed procedures for their disposition nor any time limits for their implementation. We do not believe the legislature intended such a result."). Although they could not be raised as a claim of an illegal sentence, because it was a portion of the sentencing order, the State cannot contest error preservation. *See, e.g., State v. Lathrop*, 781 N.W.2d 288, 292–93 (Iowa 2010).

Standard of Review

Statutory interpretation and restitution orders are ordinarily reviewed for correction of errors at law. *See State v. Hagen*, 840 N.W.2d 140, 144 (Iowa 2013) ("Questions of statutory interpretation . . . are reviewed for correction of errors at law."); *State v. Poyner*, No. 06–1100, 2007 WL 4322193, at *1 (Iowa Ct. App. Dec. 12, 2007) (citing *State v. Petrie*, 478 N.W.2d 620, 622 (Iowa 1991)).

Merits

Shackford first attacks the district court's imposition of court costs and correctional fees. Pointing to the fact that after his initial appeal one of the convictions against him was vacated and dismissed, he believes the district court erred in failing to apportion the remaining costs. This Court should disregard both challenges. First, the district court could not have imposed Shackford's pre- or post-verdict correction fees as restitution, and accordingly apportionment of either was unnecessary. Second, because he was convicted of a single count in a multi-count prosecution, the remaining fees he challenges were not subject to apportionment. The State address each matter in turn.

A. Shackford's pre- and post-verdict correctional fees were not imposed as court costs or restitution. Shackford miscasts his present challenge.

Shackford urges that because the court of appeals reversed his conviction for intimidation with a dangerous weapon, he cannot be required to pay any court costs associated with this dismissed count. Appellant's Br. 30–33 (citing *Petrie*, 478 N.W.2d at 622). One such cost he attributes to the dismissed conviction is his post-verdict incarceration. Appellant's Br. 31–32. He also alleges that his pre-

verdict jail stay should have been equitably apportioned consistent with the dismissal of count II. Appellant's Br. 34. This Court should reject each challenge. The primary authority Shackford relies upon for each sub-claim is *Petrie*. Appellant's Br. 30–34. But *Petrie* is inapplicable and does not support the remedy Shackford seeks.

Petrie addressed apportionment in the context of a restitution obligation. 478 N.W.2d at 620–21. In the case, the defendant had been charged in a three-count prosecution for possession of a controlled substance with intent to deliver, being a habitual offender, and driving while barred. *Id.* at 621. Through counsel, he had successfully moved for suppression of evidence key to the possession count. He subsequently entered a guilty plea to the driving while barred count, and the remaining counts were dismissed. *Id.* After sentencing, the defendant filed a motion for hearing to challenge the restitution order and argued that he should not be required to pay his entire attorney fee and court cost obligation. The district court rejected his challenge that his obligation should be apportioned on a case-by-case basis, but reduced the amount of attorney fees Petrie owed. *Id.* On appeal, the Iowa Supreme Court found that the *restitution* statute—Iowa Code section 910.2—"clearly require[s] . . .

that only such fees and costs attributable to the charge on which a criminal defendant is convicted should be recoverable under a restitution plan." *Id.* at 622. It found the district court should have equitably limited the defendant's restitution obligation to the conviction. *Id.* Absent some agreement between the parties, he could not be required to pay attorney fees connected with the successful suppression issue. *Id.*

But *Petrie*'s apportionment rule does not apply here because Shackford's obligation to pay his correctional fees could not be and was not imposed as restitution pursuant to Iowa Code section 910.2. In order for correctional costs to be imposed under chapter 910, the sheriff, municipality, or the county attorney must comply with the requirements of Iowa Code section 356.7(2) and indicate in its reimbursement claim that it "wishes to have the amount of the claim for charges owed included within the amount of restitution determined to be owed by the person, a request that the amount owed be included within the order for payment of restitution by the person." Iowa Code § 356.7(2)(i). In *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:

> 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. Under section 356.7(2)(g), a sheriff, if he decides to collect the claim under the restitution plan, must so state in the original claim.
>
> In this case, the sheriff chose the latter, specifically stating in his claims that he elected to collect the amounts under the restitution alternative. The district court complied with that request and assessed the claims under Iowa Code sections 910.2 and 910.3, which impose limitations on the power of the State to require restitution.

State v. Abrahamson, 696 N.W.2d 589, 591 (Iowa 2005). Absent a request from the sheriff to include its reimbursement claim in the restitution plan, a district court cannot treat the amount as restitution and impose it within the criminal judgment pursuant to Iowa Code sections 910.2 and 910.3. *Id.* Instead, an approved claim creates a civil judgment. *See* Iowa Code § 356.7(3) ("Upon receipt of a claim for reimbursement, the court shall approve the claim in favor of the sheriff or the county, or the municipality, for the amount owed by the prisoner as identified in the claim and any fees or charges associated

with the filing or processing of the claim with the court. The sheriff or municipality may choose to enforce the claim in the manner provided in 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."); *see State v. Gross*, No. 18-0690, 2019 WL 1752670, at *3–4 (Iowa Ct. App. Apr. 17, 2019). *But see State v. Iowa Dist. Ct. for Polk Cnty.*, No. 17-0616, 2018 WL 739323, at *3–5 (Iowa Ct. App. Feb. 7, 2018) (rejecting State's appeal that district court unlawfully converted claim pursuant to Iowa Code section 356.7 into community service, State had argued before district court that this obligation was "court debt").

Applying the law to the present facts proves the point. On June 8, 2017, the Polk County sheriff filed an "application for reimbursement" through the Polk County Attorney. 6/8/2017 Reimbursement Claim; 6/8/2017 Application for Room and Board Fees; 6/8/2017 Order; App. 55–58. In the application, the State indicated that it sought reimbursement pursuant to Iowa Code section 356.7. 6/8/2017 Reimbursement Claim ("This Claim is made pursuant to Iowa Code Section 356.7 for the reimbursement of Administrative Costs, Room and Board, and Medical Aid Costs.");

6/8/2017 Application for Room and Board Fees ("Comes now the Polk County Sheriff, pursuant to Iowa Code 356.7 . . ."); App. 55–56. The reimbursement requests did not state that the State sought them to be included within the restitution order.[1] *Id.* Thus the amounts were a civil judgment against Shackford and could not have been imposed as restitution. The district court's approval of the request did not indicate that the amounts were being imposed as restitution and the district court did not make a determination of Shackford's reasonable ability to pay the amount. 6/8/2017 Order; App. 57. The district court did not reference the amount as restitution within the new sentencing order. 6/29/2018 Resentencing Order p.2; App. 91.

The Department of Correction's May 31, 2018 filing titled "restitution plan" does not assist Shackford's claim. 5/31/2018 Restitution Plan; App. 78. That filing indicates that the department of corrections had compiled amounts it believed to be restitution and

[1] A reimbursement claim under section 356.7 could be filed as a separate civil action, even where the sheriff elects to enforce the claim as restitution. In the State's experience, these claims are commonly filed in the criminal case, as it was here. The State believes that the best practice—and one that would lead to significantly less confusion about the district court's duty—would be to file reimbursement claims as separate civil actions regardless whether the sheriff elects to enforce the judgment under chapter 626 or as restitution under chapter 910.

began withdrawing twenty percent of all credits to Shackford's institutional account to satisfy these obligations. *Id.* But if the sheriff never indicated that it wished the amounts to be treated as restitution debt and the district court never ordered the amounts to be included within Shackford's restitution obligation, it then necessarily follows that the department of corrections could not have included these amounts in his restitution obligation nor enforced the amounts through chapter 910. Identical logic applies to his pre-verdict correctional expenses.

In sum, the Polk County Sheriff failed to indicate that it was seeking repayment through Iowa's restitution provisions. Shackford's obligation to repay either amount exists as civil judgments—not restitution. *See Gross*, No. 18-0690, 2019 WL 1752670, at *3–*4 (Iowa Ct. App. Apr. 17, 2019). Because Shackford's pre- and post-verdict jail stays were not imposed through chapter 910, *Petrie*'s apportionment principles are inapplicable and Shackford is liable for these amounts without apportionment or consideration of his reasonable ability to pay.

B. Following *State v. McMurry*, No. 16-1722, 2019 WL 1412428 (Iowa Ct. App. Mar. 29, 2019), Shackford's remaining costs need not be apportioned.

Shackford additionally urges that his other fees were not solely attributable to count I and must be equitably apportioned per *Petrie*. Appellant's Br. 34–37. Following Shackford's briefing, but prior to the time of the State's writing, the Iowa Supreme Court released its decision in *State v. McMurry*, No. 16-1722, 2019 WL 1412428 (Iowa Ct. App. Mar. 29, 2019). The opinion dictates the result in this case.

In *McMurry*, the Iowa Supreme Court returned to the question of apportionment arising from a multi-count prosecution. It reviewed the apportionment's history in Iowa and noted that *Petrie* mistakenly ordered "apportionment of fees and costs not attributed to any single count. Apportionment must be based on equitable circumstances, and the portion of the fees attributed to the dismissed count must relate to those circumstances." *Id.* at *3–*6. The *McMurry* court found that equity did not require apportionment where "all [of a defendant's] costs fall within the category of fees that *would have been the same even if the dismissed counts would not have been prosecuted*." *Id.* at *6. The supreme court then modified *Petrie*'s apportionment requirement, holding

> fees 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. We, accordingly, modify our rule in *Petrie* and disavow 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.

McMurry, 2019 WL 1412428, at *6. The court cautioned that the apportionment rule is "not had and fast, nor time-consuming in its application. It rests within the sound discretion of the sentencing court and is applied to achieve justice not precision." *Id.* at *7.

Here, Shackford was convicted of one of the two counts charged. There exists no equitable basis to order that he only pay a portion of fees not directly attributable to that count. *McMurry*, 2019 WL 1412428, at *6. The transportation fee, filing fee, court reporter fees, jury fees, and copy fees need not be proportioned because they too would have been identical had the State never proceeded to trial on count II of the trial information. These financial obligations are not "solely associated with any *single* charge" and Shackford's claim under this sub-heading collapses. Appellant's Br. 35. Because *McMurry* conclusively resolves this claim, this Court should affirm.

II. The District Court's Restitution Order was not Final and is not Reviewable at this Time.

Preservation of Error and Ripeness

The State does not contest error preservation. However, ripeness concerns prevent this Court's review. There are two ways by which a defendant may challenge a restitution order. A criminal defendant may challenge restitution at the time of sentencing and may file a timely appeal in the criminal case of any subsequent final restitution order. *State v. Jenkins*, 788 N.W.2d 640, 644 (Iowa 2010) (citing *State v. Blank,* 570 N.W.2d 924, 925-26 (Iowa 1997)). Additionally, pursuant to Iowa Code section 910.7, "[a]t any time during the period of probation, parole, or incarceration, the offender . . . may petition the court on any matter related to the plan of restitution or restitution plan of payment." Iowa Code § 910.7(1). If the district court determines that a hearing should be held, the court has authority to modify the plan of restitution, the plan of payment, or both. Iowa Code § 910.7(2).

The matter is not ripe and is not appealable until the court issues the final restitution order. *Albright*, 2019 WL 1302384, at *14–*15; *see also State v. Jackson*, 601 N.W.2d 354, 357 (Iowa 1999). Until the court issues a final restitution order—based upon both a

restitution amount and a plan of repayment—the court need not consider the offender's reasonable ability to pay. *Id.*; *see also* Iowa Code § 910.3; *State v. Haines*, 360 N.W.2d 791, 793–94 (Iowa 1985). Temporary or placeholder restitution orders entered prior to this final order are not appealable as final orders and are not enforceable against the offender. *Albright*, 2019 WL 1302384, at *14–15.

At resentencing, the district court did not enter a final restitution order in Shackford's case. The court's order was not a final order, it reiterated the text of the original sentencing order: "RESTITUTION PREVIOUSLY DETERMINED REMAINS THE SAME. Defendant is ordered to make restitution in the amount of $TBD." 6/29/2018 Resentencing Order p.2; App. 91. Because this was not a final order, the restitution amount was not enforceable against Shackford until the district court made a determination of his reasonable ability to pay based upon *known* amounts. *Albright*, 2019 WL 1302384, at *13–*15. The matter is not ripe for review.

Standard of Review

Restitution orders are reviewed for correction of errors at law. *See Poyner*, 2007 WL 4322193, at *1 (citing *Petrie*, 478 N.W.2d at 622).

Merits

On appeal, Shackford challenges his restitution obligation, urging that the district court failed to make a reasonable ability to pay determination. Following his initial appeal, the re-sentencing order stated that "RESTITUTION PREVIOUSLY DETERMINED REMAINS THE SAME. Defendant is ordered to make restitution in the amount of $TBD." 6/29/2018 Resentencing Order p.2; App. 91. His initial sentencing order originally ordered him "to make restitution in the amount of $TBD." 4/4/2017 Sentencing Order p.2; App. 36. Following his 2017 sentencing and prior to the 2018 resentencing, a restitution plan indicating that Shackford was to pay $5,444.78 from his institutional account was filed on May 31, 2018 at a rate of 20 percent of any credit to his institutional account. 5/31/2018 Restitution Plan; App. 78.

On March 22, 2019, the Iowa Supreme Court filed its opinion in *State v. Albright*. *Albright*, 2019 WL 1302384. In the case, the Iowa Supreme Court reviewed the relevant statutes making up Iowa's restitution framework and reaffirmed its precedent requiring that a district court consider the defendant's reasonable ability to pay that amount prior to entering a final order imposing restitution. *Albright*,

2019 WL 1302384, at *11–*13. If a defendant possesses a reasonable ability to pay, the district court may order restitution. But, if the defendant lacks the reasonable ability to pay the district court has three available courses of action:

> First, the court may not order restitution for the item. Second, the court may order restitution in an amount less than the full amount of the item. Third, the court may order the offender to pay none or part of the amount of an item of restitution and perform community service in lieu of that payment under section 910.2. Of course, if in the future the offender obtains the reasonable ability to pay an item of restitution not previously assessed, the court may modify the plan of restitution upon petition. Iowa Code § 910.7.

Id. at *14.

Because it was another temporary order, the district court's resentencing order failed to address what restitution existed and whether Shackford possessed a reasonable ability to pay these amounts. *See* Resentencing Tr. p.10 line 9–11 ("He shall pay restitution, if there is any."); 6/29/2018 Resentencing Order; App. 91. Because no final order has been entered, review remains premature. *See Albright*, 2019 WL 1302384, at *13, *14. If the Court bypasses *Albright*'s holding that non-final orders are not appealable, this matter could be remanded to the district court so that it may consider

his reasonable ability to pay the remaining amounts. *State v. Johnson*, 887 N.W.2d 178, 184 (Iowa Ct. App. 2016) (finding that record was silent as to whether the court considered defendant's ability to pay court costs and remanding for determination of same). If it elects to do so, this Court need not consider the remaining portions of Shackford's brief seeking overrule of Iowa's restitution precedent. On remand, although it may be preferable, the district court need not explicate the *reasons* it believes Shackford does or does not have the ability to pay the costs of this case; it must simply consider the relevant criterion and determine to what extent he is reasonably able to pay. *State v. Kaelin*, 362 N.W.2d 526, 528 (Iowa 1985); *see also Albright*, 2019 WL 1302384, at *11–*15.

CONCLUSION

Shackford remains fully liable for the costs of his pre- and post-verdict incarceration. Because the Polk County Sheriff did not comply with the statutory requirements for treating these amounts of restitution, they could not be imposed pursuant to chapter 910 but instead exist as a civil judgment.

The remaining costs of the prosecution would have been identical even if the State had never charged Shackford with count II;

thus, those costs need not be equitably apportioned between the counts.

As to Shackford's restitution obligations, the district court's restitution order remains unripe for review. The district court's order was not final and there was no need to determine his reasonable ability to pay at that time.

REQUEST FOR NONORAL SUBMISSION

The State does not request oral submission.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

TIMOTHY M. HAU
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
tim.hau@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 **4,828** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: May 28, 2019

TIMOTHY M. HAU
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
tim.hau@ag.iowa.gov