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 APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS FILED JANUARY 9, 2020

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**CERTIFICATE OF SERVICE**

On January 29, 2020, 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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*/s/ Vidhya K. Reddy*

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## QUESTIONS PRESENTED FOR REVIEW

**I. If deemed civil judgments, are the correctional fee orders void where they were obtained without notice, due process, or the appointment of a guardian ad litem to the then-incarcerated Shackford?**

**II. If deemed civil judgments but not void, must the correctional fee obligations nevertheless be apportioned between the convicted and acquitted count pursuant to Petrie (as modified by McMurry), which apportionment principle itself derived from civil law?**

**III. If deemed civil judgments but not void, are the correctional fee obligations nevertheless also subject to the substantive limitation of an ability to pay determination?**

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## STATEMENT IN SUPPORT OF FURTHER REVIEW

Shackford respectfully urges that, even if deemed civil judgments, the June 7 and June 8, 2017 correctional fee orders are void because they were obtained without notice, due process, or the appointment of a guardian ad litem to the then-incarcerated Shackford.

Shackford also urges that, even if the correction fee obligations are deemed civil judgments and not void, apportionment was still required between the convicted and acquitted counts. First, because all "correctional fees approved pursuant to section 356.7" are, *by definition*, "Restitution" and "court costs" under Iowa Code section 910.1(4), all court costs must in turn be apportioned pursuant to State v. Petrie, 478 N.W.2d 620 (Iowa 1991) as modified by State v. McMurry, 925 N.W.2d 592 (Iowa 2019). Second, the apportionment principle stated in Petrie *derives from civil law* and therefore applies even to civil judgments.

The above legal questions were not resolved by the Supreme Court's decision in State v. Gross, 935 N.W.2d 695

(Iowa 2019), which did not address apportionment considerations, nor reach the question of what substantive or procedural limitations apply even where correctional fees are approved under section 356.7 as civil judgments.

Additionally, this case involves the question of what costs are properly subject to apportionment after McMurry. Specifically, Shackford argued that even under McMurry, apportionment is 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 would not have been incurred if the ultimately-dismissed Count 2 forcible felony had not been prosecuted, as Shackford would then have remained bond-eligible even after the verdict, pending sentencing and appeal.

Further review should be granted to address these important questions of first impression or of enunciating or changing legal principles in Iowa. Iowa R. App. P. 6.1103(1)(b)(3)-(4).

## STATEMENT OF THE CASE

This is an appeal by Defendant-Appellant Tavish Coleon Shackford from his resentencing (following a prior appeal) for: Willful Injury Causing Bodily Injury, a Class D Felony in violation of Iowa Code section 708.4(2) (2015) (Count 1).

## ARGUMENT

On appeal, Shackford argued that, pursuant to the reasoning of State v. Petrie, 478 N.W.2d 620 (Iowa 1991) as modified by State v. McMurry, 925 N.W.2d 592 (Iowa 2019), apportionment was required as to the post-verdict correctional fees (totaling $4,935), all of which were 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 (who was out on pretrial release bond) would then have remained bond-eligible even after the verdict, pending

sentencing and appeal, and thus would not have incurred these post-verdict correctional fees.

The Court of Appeals here concluded that, because the sheriff's reimbursement claims did not ask for inclusion of the correctional fees as restitution (as required under Iowa Code section 356.7(2)(i), the district court could impose such correctional fees only as a civil judgment and not as restitution. The Court of Appeals appears to have concluded that the June 7 and 8, 2017 correctional fee reimbursement orders (approving the sheriff's correctional fee claims filed on the same date) were thus entered as civil judgments and not as restitution. (CTA Opin.8). It acknowledged, however, that these appeared to later have been treated as restitution by both the district court and the DOC. The Court of Appeals admonished that "[t]he DOC should not have included these correctional fees in the restitution plan of payment it filed with the court", the "sheriff cannot recover these costs as restitution", and "[o]n remand, the court may not include the correctional fees in the restitution order". (CTA Opin.8-9).

Nevertheless, the Court of Appeals appears to conclude that the June 7 and June 8, 2018 correctional fee reimbursement orders filed by the district court remain standing as civil judgments. (CTA Opin.8). And the Court of Appeals also appears to have concluded that such civil judgments are not subject to apportionment between the convicted and dismissed counts based on the rationale in Petrie (as modified by McMurry) nor the underlying language of section 356.7(1). (CTA Opin.6). These conclusions were erroneous.

Regardless of whether a money judgment for a correctional fee obligation imposed under section 356.7(2) is deemed a civil judgment or criminal restitution, the "shall approve" language contained in that statute is "a grant of authority to the court to resolve the merits of the claim - not a mandate that it simply sign the order as a ministerial function." State v. Gross, 935 N.W.2d 695, 702 (Iowa 2019) (quoting State v. Abrahamson, 696 N.W.2d 589, 593 (Iowa 2005). Thus, when presented with a reimbursement claim, a

district court must consider the substantive and procedural validity of the claim before entering an order approving it. Abrahamson, 696 N.W.1d at 592 (drawing from State ex rel. Allee v. Gocha, 555 N.W.2d 683, 684 (Iowa 1996)).

In the present case, both procedural and substantive defects inhered in the correctional fee claims, which precluded the district court from properly approving them. Thus, even if deemed civil judgments, the district court's June 7 and June 8, 2018 correctional fee orders: (1) must be deemed void; or (2) if not void, should have been subject to apportionment.

**I. If deemed civil judgments, the June 7 and June 8, 2017 correctional fee orders are void because they were obtained without notice, due process, or the appointment of a guardian ad litem to the then-incarcerated Shackford.**

Even if the June 7 and June 8, 2017 correctional fee reimbursement orders are deemed civil judgments, they must nevertheless be vacated owing to the failure to comply with necessary statutory and due process requirements.

The sheriff here 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 sheriff's 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 (controlling under section 356.7(2)(i) the identity of the ultimate correctional fee order as either restitution or a civil judgment), the sheriff's noncompliance with section 356.7(2)(b) wholly deprives the district court of jurisdiction and statutory authority to order Shackford's reimbursement of the requested correctional fees.

Further, "no judgment may be entered in a civil case against an incarcerated person without the appointment of a

guardian ad litem." Garcia v. Wibholm, 461 N.W.2d 166, 170 (Iowa 1990); See also Iowa R. Civ. P. 1.211. Shackford was incarcerated at the time June 2017 correctional fee orders were entered by the district court, but no guardian ad litem was appointed to him. A judgment entered against an incarcerated person without appointment of a guardian ad litem "is void if the incarcerated person received no representation" thereon. Wibholm, 461 N.W.2d at 170.

Further, "[n]ormally a judgment entered against a party without notice is void, as the court has no personal jurisdiction over the defendant." Opat v. Ludeking, 666 N.W.2d 597, 607 (Iowa 2003). As discussed above, Shackford was not served with a copy of the sheriff's correctional fee claims (which were sent to his former address rather than to his place of incarceration). He was similarly not served with a copy the district court's June 2017 correctional fee orders, each of which were filed on the same day as the claims themselves. While those Orders indicated the clerk was to serve Shackford with copies, the service address listed was for

Shackford's former residence and not for the DOC facility where he was then incarcerated. 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). Even if deemed civil judgments, the challenged correctional fee orders were entered against Shackford without notice and, therefore, are "void, as the court had no personal jurisdiction over the defendant." Ludeking, 666 N.W.2d at 607.

Additionally, "Procedural due process requires notice and an opportunity to be heard 'at a meaningful time in a meaningful manner' prior to depriving an individual of life, liberty, or property." State v. Dudley, 766 N.W.2d 606, 624 (Iowa 2009) (quoting State v. Hernandez-Lopez, 639 N.W.2d 226, 241 (Iowa 2002)). In the present case, Shackford was not given any pre-deprivation notice or opportunity to be heard. He was not served with a copy of the sheriff's correctional fee claims, was not appointed a guardian ad litem, and was not

given any opportunity to be heard prior to the district court's entry of orders approving the correctional fee claims (which orders were entered on the very same day the claims were filed by the sheriff).

The district court's June 2017 correctional fee orders did state that an aggrieved Defendant could file a request for the court to reexamine its decision within 15 days. But Due Process requires a pre-deprivation remedy, and such purported post-deprivation remedy does not suffice. See State v. Jenkins, 788 N.W.2d 640, 646-47 (Iowa 2010). Even if a post-deprivation remedy could suffice however, the district court's June 2017 correctional fee orders (like the Sheriff's claims themselves) were not properly served on Shackford, listing as the service address Shackford's former residence rather than his current place of incarceration.

Thus, even if deemed civil judgments, the correctional fee orders are void because they were obtained without compliance with statutory requirements, appointment of a guardian ad litem, notice, or due process. Wibholm, 461

N.W.2d 166, 170-71 (Iowa 1990); Ludeking, 666 N.W.2d 597, 606 (Iowa 2003).

**II. If deemed a civil judgment but not void, the correctional fee obligation must still be apportioned between the convicted and acquitted count pursuant to Petrie (as modified by McMurry), which apportionment principle derived from civil law.**

Shackford urges that, even if the correction fee obligations are deemed civil judgments, apportionment was still required between the convicted and acquitted counts. First, all "correctional fees approved pursuant to section 356.7" are, *by definition*, "Restitution" and "court costs" under Iowa Code section 910.1(4), and all court costs must in turn be apportioned pursuant to Petrie (as modified by McMurry). Second, the apportionment principle stated in Petrie *derives from civil law* and therefore applies even to civil judgments.

***a)*** **All "correctional fees approved pursuant to section 356.7" are, *by definition*, "Restitution" and "court costs" under Iowa Code section 910.1(4), and must therefore be apportioned under Petrie (as modified by McMurry).**

Section 910.1(4) defines "Restitution" to include all "court costs including *correctional fees approved pursuant to section*

*356.7*". Iowa Code § 910.1(4). 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 pursuant to section 356.7(2)(i). The sheriff's claims herein 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 also 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 district 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).

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….") (emphasis added).

Because all "correctional fees approved pursuant to section 356.7" are, *by definition*, "Restitution" and "court costs" under Iowa Code section 910.1(4), all such correctional fees must be apportioned under Petrie (as modified by McMurry).

**b). The apportionment principle stated in Petrie (as modified by McMurry) itself derives from civil law and therefore applies even to civil judgments.**

The Court of Appeals appears to have concluded that apportionment between convicted and dismissed counts does not apply if reimbursement is obtained as a civil judgment rather than as restitution. (CTA Opin.6). Defendant respectfully disagrees.

Like the language of the statutes discussed in Petrie (namely, sections 815.3 and 910.2), 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 § 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 with Iowa Code § 815.13 (2015) (stating prosecution "fees and costs are recoverable by the [prosecuting] county... from the defendant *unless the defendant is found not guilty or the action is dismissed*....") (emphasis added); Iowa Code § 910.2 (2015) ("In all criminal cases in *which there is a plea [or] verdict of guilty*..., the sentencing court shall order that restitution be made by each offender... to the clerk of court for... court costs....") (emphasis added); State v. Petrie, 478 N.W.2d 620, 622 (Iowa 1991) ("... Iowa Code section 815.13 and section 910.2 clearly require... that only such... costs attributable to *the charge* on which a

criminal defendant is convicted should be recoverable.…." ) (emphasis added).

State v. Jackson, 601 N.W.2d 354, 356 (Iowa 1999), relied upon by the Court of Appeals to reach a contrary conclusion (CTA Opin.5), is inapposite. Jackson, in no way addressed the question of apportionment of expenses between convicted and acquitted counts (a matter which is instead addressed directly in Petrie and McMurry). Jackson involved only the rejection of a convicted defendant's claim that the language of section 356.7(1) authorized the sheriff to recover only *post-conviction* room and board fees (e.g., for time spent after he was convicted) and not *pre-trial* room and board fees. It was only in this context that the Court in Jackson stated "[T]he language 'who has been convicted of a criminal offense' describes who may be charged rather than the services for which charges may be made." Jackson, 601 N.W.2d at 356. The guidance necessary to resolve the issue presented herein is properly derived from the analysis set forth in Petrie and McMurry, not Jackson.

The Court of Appeals also reasoned that Petrie (and perhaps by extension McMurry) was decided in the context of criminal restitution and would not apply to correctional fee obligations imposed as civil judgments rather than as restitution. But this is error, as 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 ...."). The apportionment principles set forth in Petrie would therefore appear to apply equally even to correctional fees sought and imposed as a civil judgment rather than as part of a restitution obligation.

**III). Even if deemed a civil judgment but not void, the correctional fee obligation is also subject to the substantive limitation of an ability to pay determination.**

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 that apply to restitution in a criminal case – not only apportionment between convicted and acquitted counts (as argued above), but also ability to pay determinations. See Iowa Code § 910.1(4) (defining

"Restitution" to include[]… court costs including correctional fees approved pursuant to section 356.7…."); Iowa Code § 910.2(1) (2015) (restitution for court costs, including correctional fees, is subject to a determination of the defendant's reasonable ability to pay).

Gross addressed only the defendant's argument that "the sheriff's effort to collect jail fees must be subject to the reasonable-ability-to-pay limitation in Iowa Code chapter 910 because the sheriff here did not file a separate civil action." Gross, 935 N.W.2d at 704. Gross thus did not address or resolve the argument presented by Shackford herein, that *even if* imposed as a civil judgment, the substantive ability-to-pay limitation must still apply.

## CONCLUSION

For the reasons stated above, Shackford respectfully requests that this Court grant further review of the Court of Appeals decision herein.

## ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Application for Further Review was $ 0 , and that amount has been paid in full by the Office of the Appellate Defender.

## CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR FURTHER REVIEWS

This application complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because:

[X] this application has been prepared in a proportionally spaced typeface using Bookman Old Style, font 14 point and contains 3,056 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).

*/s/ Vidhya K. Reddy* Dated: *1/29/30*

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