

IN THE SUPREME COURT OF IOWA

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STATE OF IOWA, )  
 )  
 Plaintiff-Appellee, )  
 )  
 v. ) S.CT. NO. 18-1892  
 )  
 TRAVIS BOYER, )  
 )  
 Defendant-Appellant. )

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

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APPELLANT'S BRIEF AND ARGUMENT

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MARIA RUHTENBERG  
Assistant Appellate Defender  
[MRuhtenberg@spd.state.ia.us](mailto:MRuhtenberg@spd.state.ia.us)  
[appellatedefender@spd.state.ia.us](mailto:appellatedefender@spd.state.ia.us)

STATE APPELLATE DEFENDER'S OFFICE  
Fourth Floor Lucas Building  
Des Moines, Iowa 50319  
(515) 281-8841 / (515) 281-7281 FAX

ATTORNEY FOR DEFENDANT-APPELLANT

FINAL

## **CERTIFICATE OF SERVICE**

On the 5th day of June, 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 Travis C. Boyer, No. 6211508, Clarinda Correctional Facility, 2000 North 16<sup>th</sup> Street, Clarinda, IA 51632.

APPELLATE DEFENDER'S OFFICE



---

**MARIA RUHTENBERG**

Assistant Appellate Defender

Appellate Defender Office

Lucas Bldg., 4<sup>th</sup> Floor

321 E. 12<sup>th</sup> Street

Des Moines, IA 50319

(515) 281-8841

[MRuhtenberg@spd.state.ia.us](mailto:MRuhtenberg@spd.state.ia.us)

[appellatedefender@spd.state.ia.us](mailto:appellatedefender@spd.state.ia.us)

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MR/lr/6/19

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

**I. WHETHER THE ORDER FOR REIMBURSEMENT OF JAIL FEES IS A RESTITUTION ORDER IN A CRIMINAL CASE AND THE TRIAL COURT ERRED BY ORDERING THE DEFENDANT TO PAY ROOM AND BOARD FOR TIME SPENT IN JAIL WITHOUT FINDING THAT HE HAD THE REASONABLE ABILITY TO PAY.**

### **Authorities**

State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994)

State v. Mai, 572 N.W.2d 168, 170-171 (Iowa Ct. App. 1997)

State v. Lathrop, 781 N.W.2d 288, 293 (Iowa 2010)

State v. Maxwell, 743 N.W.2d 185, 195 (Iowa 2008)

State v. Paxton, 674 N.W.2d 106, 108 (Iowa 2004)

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Iowa Code section 356.7(1) (2017)

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

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Rompilla v. Beard, 545 U.S. 374, 380 (2005)

State v. Clay, 824 N.W.2d 488, 496 (Iowa 2012)

**II. IF THE STATUTE ALLOWS THE SHERIFF TO IMPOSE A JUDGMENT AS A CIVIL MATTER IN A CRIMINAL CASE WITHOUT THE OPPORTUNITY TO BE HEARD, THE STATUTE VIOLATES DUE PROCESS AND IS UNCONSTITUTIONAL.**

State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994)

State v. Mai, 572 N.W.2d 168, 170-171 (Iowa Ct. App. 1997)

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Iowa Code section 356.7(3) (2017)

State v. Dudley, 766 N.W.2d 606, 624 (Iowa 2009)

State v. Hernandez-Lopez, 639 N.W.2d 226, 241 (Iowa 2002)

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

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Iowa Code § 252C.5(2) (1995)

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State v. Clay, 824 N.W.2d 488, 496 (Iowa 2012)

State v. Maxwell, 743 N.W.2d 185, 196 (Iowa 2008)



## **ROUTING STATEMENT**

This case should be retained by the Iowa Supreme Court because the issues raised involve substantial issues of first impression in Iowa. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(c).

## **STATEMENT OF THE CASE**

**Nature of the Case:** This is an appeal of an order of restitution in Mills County case number FECR048497.<sup>1</sup>

**Course of Proceedings:** On July 23, 2018, the State charged the defendant, Travis Boyer, with sexual abuse in the third degree in violation of Iowa Code sections 709.1 and 709.4(1)(a) (2017), a class C felony. (Trial Information) (App. pp. 4-5). On September 24, 2018, Boyer entered a guilty plea to sexual abuse in the third degree pursuant to a plea bargain. (Plea and

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<sup>1</sup> The defendant was also charged and convicted of Sexual Abuse in the third degree in Pottawattamie case number FECR157438. That charge was consolidated with the Mills County charge for purposes of the plea and sentencing proceedings. Boyer filed notices of appeal in both matters. The issue on appeal challenges the order for the defendant to reimburse the Mills County Sheriff. Therefore, the brief will not recite the facts and proceedings in the Pottawattamie case.

Sentencing Hrg. tr. p. 1, L. 1-25). The court sentenced the defendant to 10 years in prison. On October 5, 2018, the Mills County Sheriff filed a “Room & Board Reimbursement Claim – 910; 356.7” for \$4680.00. (Room & Board Reimbursement Claim – 910; 356.7) (App. p. 9). On the same day, the district court issued an order approving the amount. (Order of Court, 10/5/2018) (App. pp. 10-11). On November 2, 2018, Boyer filed a notice of appeal. (Notice of Appeal) (App. p. 12). This Court granted a delayed appeal on December 7, 2018. (S. Ct. Order, 12/7/2018) (App. p. 13).

**Facts:** The defendant, Travis Boyer, was charged with sexual abuse in the third degree for allegedly assaulting A.F. on July 4, 2014. (Minutes of Testimony) (Conf. App. pp. 4-8). Boyer pled guilty to that charge and was sentenced to prison as a result. (Sentencing Order) (App. p. 6). This appeal only concerns the court’s order approving reimbursement for jail fees and no further discussion of the underlying facts are relevant to this appeal.

## ARGUMENT

### **I. THE ORDER FOR REIMBURSEMENT OF JAIL FEES IS A RESTITUTION ORDER IN A CRIMINAL CASE AND THE TRIAL COURT ERRED BY ORDERING THE DEFENDANT TO PAY ROOM AND BOARD FOR TIME SPENT IN JAIL WITHOUT FINDING THAT HE HAD THE REASONABLE ABILITY TO PAY.**

**Preservation of Error and Standard of Review:** The defendant did not object to the order at issue. The order was issued without a hearing. The general rule of error preservation is not applicable to void, illegal or procedurally defective sentences. State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994). The sentence in the instant matter is illegal by virtue of the fact that Boyer was ordered to pay room and board without any showing that he had the reasonable ability to repay those obligations. (Order of Court, 10/5/2018) (App. pp. 10-11).

No objection is necessary to preserve an issue of irregularity in sentencing for appeal. State v. Mai, 572 N.W.2d 168, 170-171 (Iowa Ct. App. 1997) (finding defendant's failure to object to restitution during sentencing hearing where

restitution was ordered because there was no need to object to sentencing irregularity); State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994) (finding defendant need not object to sentencing irregularity to preserve issue for appeal).

Preservation of error requirements are relaxed in cases involving sentencing issues. State v. Lathrop, 781 N.W.2d 288, 293 (Iowa 2010). If the court finds that error was not preserved, the issue should be reviewed under the ineffective assistance of counsel framework. State v. Maxwell, 743 N.W.2d 185, 195 (Iowa 2008).

The Court reviews a district court's restitution order for errors of law. State v. Paxton, 674 N.W.2d 106, 108 (Iowa 2004). When reviewing a restitution order, the appellate court determines whether the district court has properly applied the law. State v. Jenkins, 788 N.W.2d 640, 642 (Iowa 2010); State v. Klawonn, 688 N.W.2d 271, 274 (Iowa 2004). The Court's review of constitutional claims is de novo. State v. Dudley, 766 N.W.2d 606, 612 (Iowa 2009).

**Discussion:** The Mills County Sheriff filed a claim for

reimbursement for room and board on October 5, 2018. The sheriff sought reimbursement for the days the defendant spent in jail, which were July 12, 2018 to September 28, 2018. The claim stated: “Pursuant to Iowa Code, Section 910 and/or 356.7, you are hereby given notice that you are being billed for 78 days sentenced and served in the Mills County Detention Center at the rate of \$60.00 per day equaling \$4,680.00.” (Room & Board Reimbursement Claim – 910; 356.7) (App. p. 9). This claim was served on the defendant on September 28, 2018, the last day of his confinement in the Mills County Detention Center. (Room & Board Reimbursement Claim – 910; 356.7) (App. p. 9). The claim stated that the total amount was due immediately upon release and, if not paid in full at that time it would be filed with the Mills County Clerk of Court. (Room & Board Reimbursement Claim – 910; 356.7) (App. p. 9). The amount, therefore, was due and payable at the moment he was released from the facility. The claim was filed with the clerk one week later. Two hours after the claim was filed, the district court issued an order approving the claim. (Order of Court,

10/5/2018) (App. pp. 10-11). The order ignored Iowa's restitution statute, Iowa Code chapter 910, that is referenced in the claim, but granted the claim pursuant to Iowa Code section 356.7 as a civil judgment. The order stated that if the defendant "disputes any part of the Reimbursement Claim he/she must request a hearing within twenty (20) days from the date this order was filed with the Clerk of Court by filing a written request for said hearing through the Clerk of Court at the Mills County Courthouse." Further, the court stated that if the defendant did not request such a hearing, "the Claim will be enforceable with the force and effect of a civil judgment . . . ." (Order of Court 10/5/2018) (App. pp. 10-11). It is not clear from the order if it was sent to the defendant or if he received the order.

The reimbursement order in this case is restitution under Iowa Code chapter 910 despite the fact that the Mills County Court seemed to treat it as a civil judgment. Iowa Code section 356.7(1) (2017) allows the county sheriff to charge a prisoner for room and board during his or her stay at the county jail. The

statute lists the required information that the sheriff must include in the claim for reimbursement, including whether the sheriff wishes to have the amount included within the amount of restitution. Iowa Code § 356.7(2)(i) (2017). The court “shall approve” the amount of the restitution upon receipt of the claim for reimbursement. Id. § 356.7(3). A claim for reimbursement under section 356.7 may be enforced under Iowa Code chapter 626 or as part of restitution under chapter 910. If the sheriff wishes to have the claim collected as part of the restitution plan, he must so state in the original claim. State v. Abrahamson, 696 N.W.2d 589, 591 (Iowa 2005).

In this case, the sheriff’s claim was filed pursuant to chapter 910 and 356.7 and was filed in the criminal case. In State v. Iowa District Court for Polk County, No. 17-0616, 2018 WL 739323 (Iowa Ct. App. Feb. 7, 2018), the court stated:

On a theoretical basis, the State presents a persuasive argument that when a sheriff opts to enforce its room-and-board judgment under chapter 626, the restitution provisions in chapter 910 do not apply. But on a practical basis, it does not appear the Polk County sheriff actually chose to execute its room-and-board judgment using chapter 626. *Cf.* State v. Letscher, 888

N.W.2d 880, 887 (Iowa 2016) (noting in bail forfeiture case that sentencing court “followed none of the ordinary procedures for attachment and execution”). 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.

Id. at \*4. In this case, the Mills County Sheriff did not file a separate civil action and chose to request reimbursement through the criminal case. Had the sheriff wished to collect fees as a civil judgment, the sheriff should have filed a petition in civil court and pursued it in the traditional sense. Since the sheriff filed the claim in the criminal case, the claim was clearly being pursued as part of the restitution in that case. Therefore, it cannot be considered a civil judgment and the amount for room and board is restitution.

Restitution is defined as “payment of pecuniary damages to a victim in an amount and in the manner provided by the offender’s plan of restitution.” Id. § 910.1(4). In general, “restitution ordered to the victim is made without regard to the defendant’s ability to pay.” State v. Wagner, 484 N.W.2d 212, 215-216 (Iowa Ct. App. 1992). “However, restitution is ordered



for crime victim assistance reimbursement, for public agencies, for court costs including correctional fees, for court-appointed attorney fees, for contribution to local anticrime organization, and for the medical assistance program only to the extent the defendant is reasonably able to pay.” State v. Kurtz, 878 N.W.2d 469, 472 (Iowa Ct. App. 2016) (citing Iowa Code § 910.2(1) (2015)). “Constitutionally, a court must determine a criminal defendant’s ability to pay before entering an order requiring such defendant to pay criminal restitution pursuant to Iowa Code section 910.2.” Goodrich v. State, 608 N.W.2d 774, 776 (Iowa 2000). Recently this Court held that once a final restitution order is filed, the court must then determine if the defendant had the reasonable ability to pay restitution for jail fees. State v. Albright, 925 N.W.2d 144, 160-161 (Iowa 2019).

In this case the restitution order entered on October 5, 2018, was a final restitution order. The court determined the amount of the restitution for jail fees and left no indication that the matter would be left open for further claims. The court did

not consider the defendant's ability to pay the room and board as is required by the statute and Albright. The defendant is entitled to a hearing on his reasonable ability to pay the amount of the restitution for jail fees. The restitution matter should be vacated and remanded for a hearing on the defendant's reasonable ability to pay the jail room and board.

If this Court determines that the issue was not preserved for appeal, counsel was ineffective in failing to do so. To prove a claim of ineffective assistance of counsel, the defendant must show (1) trial counsel failed to perform an essential duty, and (2) prejudice resulted. Strickland v. Washington, 466 U.S. 668, 688 (1984). "Ineffective assistance under Strickland is deficient performance by counsel resulting in prejudice, with performance being measured against an 'objective standard of reasonableness,' 'under prevailing professional norms.'" State v. Maxwell, 743 N.W.2d 185, 195 (Iowa 2008) (quoting Rompilla v. Beard, 545 U.S. 374, 380 (2005)).

Prejudice exists when counsel's failure to perform an essential duty undermines confidence in the outcome of the

proceeding. State v. Clay, 824 N.W.2d 488, 496 (Iowa 2012). This “does not mean a defendant must establish that counsel’s deficient conduct more likely than not altered the outcome in the case. A defendant need only show that the probability of a different result is sufficient to undermine confidence in the outcome.” State v. Maxwell, 743 N.W.2d 185, 196 (Iowa 2008). Counsel should have recognized that the order was not in compliance with the law and should have requested a hearing on the restitution. The defendant was prejudiced because he was not given this opportunity to present his financial situation to the court, especially after being sent to prison.

**II. IF THE STATUTE ALLOWS THE SHERIFF TO IMPOSE A JUDGMENT AS A CIVIL MATTER IN A CRIMINAL CASE WITHOUT THE OPPORTUNITY TO BE HEARD, THE STATUTE VIOLATES DUE PROCESS AND IS UNCONSTITUTIONAL.**

**Preservation of Error and Standard of Review:** The defendant did not object to the order at issue. The order was issued without a hearing. The general rule of error preservation is not applicable to void, illegal or procedurally defective sentences. State v. Thomas, 520 N.W.2d 311, 313

(Iowa Ct. App. 1994). The sentence in the instant matter is illegal by virtue of the fact that Boyer was ordered to pay room and board without any showing that he had the reasonable ability to repay those obligations. (Order of Court, 10/5/2018) (App. pp. 10-11).

No objection is necessary to preserve an issue of irregularity in sentencing for appeal. State v. Mai, 572 N.W.2d 168, 170-171 (Iowa Ct. App. 1997) (finding defendant's failure to object to restitution during sentencing hearing where restitution was ordered because there was no need to object to sentencing irregularity); State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994) (finding defendant need not object to sentencing irregularity to preserve issue for appeal).

Preservation of error requirements are relaxed in cases involving sentencing issues. State v. Lathrop, 781 N.W.2d 288, 293 (Iowa 2010). If the court finds that error was not preserved, the issue should be reviewed under the ineffective assistance of counsel framework. State v. Maxwell, 743 N.W.2d 185, 195 (Iowa 2008).

The Court's review of constitutional claims is de novo.

State v. Dudley, 766 N.W.2d 606, 612 (Iowa 2009).

**Discussion:** Iowa Code section 356.7(3) (2017) states:

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 . . . . The sheriff of 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 the purposes of enforcement by the sheriff or municipality.

The procedure that this section prescribes is that, upon receipt of a claim for reimbursement, the court is required to approve the claim in favor of the sheriff, and, once approved, the claim has the full force and effect of a judgment. This provision has no provision to offer the defendant an opportunity to be heard because the court must approve the amount once received and once approved, it becomes a judgment.

“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)). This provision of the Code does not provide an opportunity to be heard. This section was challenged in State v. Abrahamson, 696 N.W.2d 589 (Iowa 2005). In that case, the defendants challenged the language in the statute that provided the court “shall approve” the claim. This Court found that, because the claim in that case was treated as part of the defendants’ restitution, and the defendants did in fact have a hearing, their due process challenge failed. Id. at 592. However, the court went on to address the situation where “a sheriff requests court approval of a claim as a condition precedent to collection of it under the regular judgment collection provision of chapter 626, rather than through restitution.” Id. Thereafter this Court determined that the language “shall approve” did not require the court to rubber stamp the claim because the court had “inherent discretionary authority to review any order . . . for substantive, as well as procedural, irregularity, and to set the matter for hearing where necessary.” Id. (quoting State ex rel. Allee v. Gocha, 555

N.W.2d 683, 686 (Iowa 1996)).

The Abrahamson Court did not address the central problem with the statute that it does not provide the defendant an opportunity to be heard. The case it relied on, Gocha, to uphold the language was not a due process challenge to the statute at issue in that case. The issue in that case involved a question of separation of powers. Gocha involved Iowa Code section 252C.2 (1995) that authorized the department of human services to prepare orders for child support and present them to the court for summary approval. The court refused to sign the order because it believed the statute usurped the court's inherent discretion. Gocha, 555 N.W.2d at 684. The statute provided the administrator "shall present" the order to the district court for "review and approval." The statute stated the court "shall approve" the order unless it discovered defects on the face of the order and the attachments. Iowa Code § 252C.5(2) (1995).

This Court found that the district court had inherent ability to review the order for substance and procedural defects

and set the matter for hearing, and therefore the language of the statute did not violate the separation of powers doctrine. Due process was not an issue in that case. Indeed, that statute in question provided that, prior to the department presenting an order to the court for approval, the department had to provide notice to the person responsible for the financial obligation by personal service in accordance with the rules of civil procedure. Id. § 252C.3(1). The statute also provided that the department had to provide notice to the person responsible for the financial obligation that he or she could request to participate in the process of determining the amount to be paid and a conference would be set up. The notice also had to advise the person of their right to be heard in court. Id. The statute provided due process to the person obligated to pay the child support well before the order was presented to the court for summary approval. In this case, the statute provides no such process. Furthermore, even though the Abrahamson Court mentions due process in the opinion, it never addressed the issue of the lack of opportunity to be heard. Indeed, in that case, the



defendants were heard in court with regard to restitution issues. The statute violates due process on its face because it does not provide a meaningful opportunity to be heard. To the extent Abrahamson holds otherwise, it should be overturned.

Additionally, the statute is unconstitutional as applied in this case. The court's order gave the defendant 20 days from the date the order was filed to request a hearing on the issue, and, if no hearing is requested, then judgment would be entered against him. (Order of Court, 10/5/2018) (App. pp. 10-11).<sup>2</sup> This is similar to the post-deprivation remedy that was rejected by this Court in Jenkins. The Jenkins Court rejected the notion that the opportunity to request a hearing to challenge restitution that was imposed without prior hearing was inadequate to satisfy the requirements of due process.

Jenkins, 788 N.W.2d at 646-47. The court found such hearing, which was discretionary and not a matter of right

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<sup>2</sup> This order arguably does not comply with the statute, since the statute requires that the claim, once approved, shall have the full force and effect as a judgment. Therefore, any hearing requested and held would have been after the claim became a judgment by operation of law.

troublesome from a procedural due process standpoint. “A contingent postdeprivation remedy where the offender may be unrepresented does not give this court comfort in the context of procedural due process.” Id. at 647. There is no provision in the statute or in the order that requires the court to grant a hearing if requested. This is not a meaningful opportunity to be heard.

In typical civil proceedings the action is commenced by filing a petition with the court, filing and serving an original notice that contains information about the length of time the respondent has to respond. Furthermore, there must be personal service upon the respondent. Iowa R. Civ. P. 1.301(1), 1.302, 1.305. Although the claim for jail fee reimbursement was personally served on the defendant, there was no notice of an opportunity to respond and to be heard in a legal proceeding. The notice merely states that the amount was due and owing on the day it was served, and, if not paid, then it would be filed with the district court. (Room & Board Reimbursement Claim – 910;356.7) (App. p. 9). The order was indeed filed with the

district court and the amount due was approved immediately. (Order of the Court) (App. pp. 10-11). If the order filed in this case was indeed a civil order, the court denied the defendant due process protections that traditional civil proceedings provide.

In order to avoid constitutional violations, if the sheriff wishes to pursue a civil judgment against a defendant for reimbursement of jail fees, he or she should be required to abide by the rules of civil procedure and give the defendant notice and opportunity to be heard.

If this Court determines that the issue was not preserved for appeal, counsel was ineffective in failing to do so. To prove a claim of ineffective assistance of counsel, the defendant must show (1) trial counsel failed to perform an essential duty, and (2) prejudice resulted. Strickland v. Washington, 466 U.S. 668, 688 (1984). “Ineffective assistance under Strickland is deficient performance by counsel resulting in prejudice, with performance being measured against an ‘objective standard of reasonableness,’ ‘under prevailing professional norms.’” State

v. Maxwell, 743 N.W.2d 185, 195 (Iowa 2008) (quoting Rompilla v. Beard, 545 U.S. 374, 380 (2005)).

Prejudice exists when counsel's failure to perform an essential duty undermines confidence in the outcome of the proceeding. State v. Clay, 824 N.W.2d 488, 496 (Iowa 2012). This "does not mean a defendant must establish that counsel's deficient conduct more likely than not altered the outcome in the case. A defendant need only show that the probability of a different result is sufficient to undermine confidence in the outcome." State v. Maxwell, 743 N.W.2d 185, 196 (Iowa 2008). Counsel should have recognized that the order was not in compliance with the law and should have requested a hearing on the restitution. The defendant was prejudiced because he was not given this opportunity to present his financial situation to the court, especially after being sent to prison.

### **CONCLUSION**

For the foregoing reasons the Appellant requests the Court reverse the restitution order and remand for a hearing on the defendant's reasonable ability to pay the entire amount of the

room and board reimbursement and find that Iowa Code section 356.7 (2017) violates the Due Process clause by allowing the sheriff to impose a civil proceeding into a criminal proceeding and bypassing all due process protections.

**NONORAL SUBMISSION**

Counsel requests not to be heard in oral argument.

**ATTORNEY'S COST CERTIFICATE**

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was \$ 3.06, and that amount has been paid in full by the Office of the Appellate Defender.

**CERTIFICATE OF COMPLIANCE WITH TYPEFACE  
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MARIA RUHTENBERG  
Assistant Appellate Defender  
Appellate Defender Office  
Lucas Bldg., 4<sup>th</sup> Floor  
321 E. 12<sup>th</sup> Street  
Des Moines, IA 50319  
(515) 281-8841  
mruhtenberg@spd.state.ia.us  
appellatedefender@spd.state.ia.us