IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. ALAN JAMES KUUTTILA, Defendant-Appellant.	)))))))))	S.CT. NO. 19-0283

APPEAL FROM THE IOWA DISTRICT COURT
FOR STORY COUNTY
HONORABLE STEVEN P. VAN MAREL, JUDGE
(MOTION TO SUPPRESS & BENCH TRIAL)
HONORABLE JAMES B. MALLOY, JUDGE (SENTENCING)

APPELLANT'S APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS FILED AUGUST 19, 2020

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CERTIFICATE OF SERVICE

On September 4, 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 Alan Kuuttila, 2279 E 190th St. #22, Ames, IA 50010.

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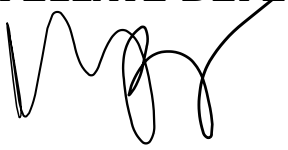

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QUESTIONS PRESENTED FOR REVIEW

I. Are "trash rips" constitutional under the Iowa and United States Constitutions?

II. Do the recent amendments to Chapter 910 apply to a case already on appeal at the time they were enacted? If so, are the changes constitutional?

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STATEMENT IN SUPPORT OF FURTHER REVIEW

This case presents two important issues of law that should be resolved by the Iowa Supreme Court. Iowa R. App. P. 6.1103(1)(b)(2) (2019).

First, this case raises the issue of whether "trash rips" conducted by the police without warrants violate the United States and Iowa Constitutions. State v. Wright (19-0180), a case currently pending in this Court with oral argument scheduled for September 17, 2020, raises virtually the same issue, and accordingly, it would be beneficial to have both cases resolved at the same time. Further, the briefing in this case complements the briefing in Wright. While both Wright and this case argue U.S. Supreme Court's decision in California v. Greenwood, 486 U.S. 35 (1988), is undermined by recent decisions the U.S. Supreme Court, Wright's argument is rooted in the reasoning found in U.S. v. Jones, 565 U.S. 400 (2012), that the search was an unconstitutional physical trespass on his personal effects. Kuuttila's argument focuses on the Supreme Court's waning support of the third-party doctrine, as

seen in both Jones and Carpenter v. U.S., 138 S.Ct. 2206 (2018).

As well, the briefing in this case contains a full-throated argument under the Iowa Constitution. Accordingly, this case provides a suitable vehicle for a decision on the merits of both constitutional arguments.

Further, this Court should grant further review to decide whether recent amendments to Chapter 910 apply to cases on appeal at the time the new law became effective. The Court has already retained and asked for briefing on this issue in State v. Hawk (19-1814).

In this case the court of appeals concluded the district court erred under Albright when it ordered Kuuttila to pay court costs and attorney fees without knowing the amounts and without considering his reasonable ability to pay such restitution. However, the court of appeals remanded for the district court to reconsider its restitution order in light of Albright and the new law. This court should accept further review to clarify that these amendments do not apply to cases

pending on appeal. In the alternative, this court should accept further review to consider whether the amendments are constitutional.

WHEREFORE, Kuuttila respectfully requests that this Court grant further review of the court of appeals' August 19, 2020, decision.

STATEMENT OF THE CASE

Nature of the Case: The defendant-appellant, Alan Kuuttila, seeks further review of the court of appeals' decision affirming his convictions and sentence and remanding his case to the district court to consider the application of recent amendments to the Iowa Code chapter 910 (2020).

Course of Proceedings: The State charged Alan Kuuttila with possession of various controlled substances in violation of Iowa Code section 124.401(5) (2017). (App. pp. 4-6).

Kuuttila filed a motion to suppress, arguing the search of his garbage and the use of evidence obtained from the search violated his rights under both the Iowa and federal constitutions. (Supp. Hrg., p. 16 L. 13 – p. 18 L. 21) (App. pp. 7-8). The motion was denied, and Kuuttila was found guilty after a bench trial on the minutes. (App. pp. 17; 19; 21). At sentencing, the court ordered Kuuttila to pay court costs and attorney fees on each count. (App. pp. 23-26).

Kuuttila appealed, and the court of appeals affirmed his convictions and remanded for the district court to reconsider its

restitution order in light of Albright and recent amendments to Iowa Code chapter 910 (2020). (Opinion).

Facts: After receiving tips that Kuuttila was dealing methamphetamine and marijuana out of an apartment in a quadplex in Nevada, Iowa, police conducted two separate "trash rips" by removing garbage bags from the four garbage cans on the property. The officer pulled the bags out of the garbage cans and took them back to his office to search. (Supp. Tr. p. 6 L. 4 – p. 7 L. 23; p. 14 L. 16-22).

The garbage cans were placed in a row, on the grass near the edge of the yard along an alley. The cans were not marked to indicate if they were assigned to a particular apartment. They were placed about 4-5 feet from the alley. The four cans were surrounded by a small fence to keep them from falling over or blowing away. (Supp. Tr. p. 8 L. 5 – p. 10 L. 23; p. 11 L. 11 – 21; p. 15 L. 10 – 24) (App. pp. 13-16).

Inside one bag police located mail addressed to Kuuttila and baggies containing a crystal substance and a green leafy substance. (Supp. Tr. 10 L. 18 – p. 11 L. 10). This

information was used to obtain a search warrant for Kuuttila's apartment. (Supp. Tr. p. 11 L. 24-25).

ARGUMENT

I. "Trash rips" violate federal and state constitutional rights against unreasonable searches and seizures.

Federal Constitution. The United States Supreme Court's holding in California v. Greenwood, 486 U.S. 35, 40–41 (1988), that household garbage, set out curbside for pickup and disposal, is not protected from warrantless searches by the Fourth Amendment, relied heavily on the third-party doctrine: "'a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.'" Greenwood, 486 U.S. at 41 (quoting Smith v. Maryland, 442 U.S. 735, 743-44 (1979)).

The dissent sharply criticized the majority's reliance on the third-party doctrine.

> In the first place, Greenwood can hardly be faulted for leaving trash on his curb when a county ordinance commanded him to do so, and prohibited him from disposing of it in any other way. Unlike in other circumstances where privacy is compromised, Greenwood could not "avoid exposing personal belongings ... by simply leaving them at home." More

> importantly, even the voluntary relinquishment of possession or control over an effect does not necessarily amount to a relinquishment of a privacy expectation in it. Were it otherwise, a letter or package would lose all Fourth Amendment protection when placed in a mailbox or other depository with the "express purpose" of entrusting it to the postal officer or a private carrier; those bailees are just as likely as trash collectors (and certainly have greater incentive) to "sor[t] through" the personal effects entrusted to them, "or permi[t] others, such as police to do so." Yet, it has been clear for at least 110 years that the possibility of such an intrusion does not justify a warrantless search by police in the first instance.

Greenwood, 486 U.S. 35, 54–55 (Brennan, J., dissenting) (internal citations omitted).

However, recent opinions of the U.S. Supreme Court indicate that support for the doctrine is waning. For example, the Court concluded the third-party doctrine did not overcome a defendant's disclosure of his location information to a third-party—his cell phone company—did not waive his Fourth Amendment rights. Carpenter v. U.S., 138 S.Ct. 2206, 2216–17 (2018). See also U.S. v. Jones, 565 U.S. 400, 417–18 (2012) (avoiding the application of the Katz "reasonable expectation of privacy" test or consideration of the third-party doctrine by concluding installation of GPS tracking device on an automobile

was a search under the Fourth Amendment because it was a physical intrusion onto personal property, notwithstanding the fact that the information revealed by the tracking device was information revealed to others by traveling on public roads). See also Jones, 565 U.S. at 417–18 (Sotomayor, J, concurring) ("More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties.").

The Court reasoned in Carpenter, in part, that the sheer breadth of information revealed by cell-site records and the necessity of carrying a cell phone in our modern culture overrode the application of the third-party doctrine. "In light of the deeply revealing nature of CSLI, its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection, the fact that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection." Carpenter, 138 S.Ct. at 2223.

> Cell phone location information is not truly "shared" as one normally understands the term. In the first place, cell phones and the services they provide are "such a pervasive and insistent part of daily life" that

> carrying one is indispensable to participation in modern society." Second, a cell phone logs a cell-site record by dint of its operation, without any affirmative act on the part of the user beyond powering up. Virtually any activity on the phone generates CSLI, including incoming calls, texts, or e-mails and countless other data connections that a phone automatically makes when checking for news, weather, or social media updates. Apart from disconnecting the phone from the network, there is no way to avoid leaving behind a trail of location data. As a result, in no meaningful sense does the user voluntarily "assume[ ] the risk" of turning over a comprehensive dossier of his physical movements.

Carpenter, 138 S. Ct. at 2220 (internal citations omitted).

In these respects, household garbage is like CSLI—the creation of household trash is unavoidable as is the reliance on a third party for disposal of the waste. Because "almost every human activity ultimately manifests itself in waste products." Greenwood, 486 U.S. at 50 (quoting Smith v. State, 510 P.2d 793, 798 (AK 1973)) and because Kuuttila was required by law to dispose of his waste as he did, his household trash was not truly "shared" with third parties. To conclude he has voluntarily relinquished his Fourth Amendment rights under these circumstances is unjust and unreasonable, and the issue is ripe for reconsideration under the federal constitution.

2. *The Iowa Constitution*. The Iowa Supreme Court has not addressed whether Iowans have a reasonable expectation of privacy in their garbage. Nor has the Iowa Supreme Court adopted the "third party doctrine" of United States v. Miller, 425 U.S. 435 (1976) and Smith v. Maryland, 442 U.S. 735 (1979). Instead, the Iowa Supreme Court has indicated in its more recent decisions interpreting article I, section 8 that it will not blindly follow the U.S. Supreme Court's Fourth Amendment analysis. Likewise, significant minority of state courts, both before and after Greenwood, have concluded their constitutions protect their citizens' privacy interest in their trash.

The Iowa Supreme Court has adopted the test articulated in Katz to determine whether there has been a violation of article I, section 8 of the Iowa Constitution. State v. Brooks, 888 N.W.2d 406, 410–11 (Iowa 2016). "'The determination of whether a person has a legitimate expectation of privacy with respect to a certain area is made on a case-by-case basis, considering the unique facts of each particular situation.'" Id. (quoting State v. Tyler, 867 N.W.2d 136, 168 (Iowa 2015)).

Such an assessment begins with the "the premise that '[e]xpectations of privacy are established by general social norms.'" State v. Hempele, 576 A.2d 793, 803 (N.J. 1990) (quoting Robbins v. California, 453 U.S. 420, 428 (1981)). It is reasonable that a person would want to keep the contents of his or her garbage private. "Clues to people's most private traits and affairs can be found in their garbage." Hempele, 576 A.2d at 802. "Business records, bills, correspondence, magazines, tax records, and other telltale refuse can reveal much about a person's activities, associations, and beliefs. If we were to hold otherwise, police could search everyone's trash bags on their property without any reason and thereby learn of their activities, associations, and beliefs." State v. Tanaka, 701 P.2d 1274, 1276-77 (Haw. 1985).

The reasonableness of this expectation is demonstrated by local ordinances that prohibit the rummaging of another's trash. Nevada, Iowa, Code of Ordinances § 105.10 (prohibiting scavenging solid waste). See also State v. Crane, 329 P.3d 689, 696 (N.M. 2014) ("[W]e conclude that society would consider the

expectation of privacy to be reasonable, as evidenced by ordinances that prohibit rummaging through another individual's garbage.").

That privacy interest is not lost when people deposit their garbage in closed containers at curbside for collection and disposal. "First, the placement of trash in closed, opaque bags manifests an intent that the contents of the bags not be subjected to examination by the public in general or the police in particular. . . . There is a privacy interest in opaque trash bags just as there is in any other closed container whose contents are not in plain view." State v. Morris, 680 A.2d 90, 95 (Vt. 1996).

Further, "the regulated collection of garbage is necessary for the proper functioning of our complex society." Morris, 680 A.2d at 95. In most communities, it is either "unreasonably burdensome or unlawful to privately burn or bury unwanted refuse," and people must "necessarily rely upon governmental or commercial trash collection systems to achieve anonymous disposal of garbage." Id. "[A]llowing the State to conduct a

warrantless search of refuse set out for collection when an individual is required by law to dispose of his refuse in a specific place, time, and manner is inconsistent with [constitutional] privacy protections." Crane, 329 P.3d at 696.

The fact that someone is discarding rather than transporting his effects does not result in a loss of privacy interest in the items. "[T]he question is not whether the person abandoned the garbage itself but rather whether the person relinquished an expectation of privacy in the garbage." Morris, 680 A.2d at 96.

Accordingly, the rationale of the Greenwood decision is unsound and should be rejected by this court when interpreting the Iowa Constitution. This court should conclude that a person who disposes of his household trash in the customary manner, as required by local ordinance, by placing it in garbage bags inside an appropriately located trash receptacle, has not relinquished a reasonable and socially acceptable expectation of privacy in the discarded effects. Accordingly, police may not

search the contents of the such trash containers without probable cause and a search warrant.

Kuuttila's garbage had been bagged and placed in one of four metal lidded garbage cans located on the edge of the lawn of the quad plex where he lived in Nevada, Iowa. The cans were an estimated four to five feet from an alley. The officer seized all the garbage bags from the cans and took them back to the police station to search them. (Supp. Tr. p. 6 L. 20 – p. 11 L. 18; p. 15 L. 10 - 25) (App. pp. 13-16). Kuuttila demonstrated a subjective expectation of privacy by discarding of his trash in a manner that shielded its contents from view by the public. He complied with local laws regarding the disposal of solid waste.

Conclusion. This court should grant Kuuttila's application for further review and hold that the search of his garbage without a warrant was unconstitutional under both the Iowa Constitution and the United States Constitution.

II. Recent amendments to Chapter 910 do not apply to Kuuttila's case, and if they do, they are unconstitutional.

On February 14, 2019, the district court sentenced Kuuttila and assessed court costs and attorney fees against Kuuttila. (App. pp. 23-25). The sentencing order provided that all amounts were due immediately. (App. pp. 23-25). However, the court did not know the total amount of the restitution it ordered Kuuttila to pay, and the court did not make a finding on Kuuttila's reasonable ability to pay, in violation of State v. Albright, 925 N.W.2d 144, 159 (2019). (See Opinion, p. 5). Kuuttila appealed the next day. (App. p. 29).

Briefing on appeal was completed, including the challenge to the restitution, and Kuuttila's case was submitted to the court of appeals on March 20, 2020. Three months later, on June 25, 2020, amendments to Iowa Code chapter 910 (2020) were signed by the Governor and became effective immediately. See 2020 Iowa Acts ch. 1074, § 64. Because Kuuttila's case was already on appeal when the amendments went into effect, they do not apply to his case.

"[I]t is the general rule that, unless the legislature clearly

indicates otherwise, 'statutes controlling appeals are those that were in effect at the time the judgment or order appealed from was rendered.'" James v. State, 479 N.W.2d 287, 290 (Iowa 1991); see also State v. Macke, 933 N.W.2d 226, 228 (Iowa 2019). "The clear indication of intent for retroactive application must be found in the text of the statute; legislative history is no substitute." Macke, 933 N.W.2d at 228. The amendments do not indicate they are retroactive.

Section 73 converted any existing non-permanent restitution orders and purported to limit a defendant's ability to challenge them. See 2020 Iowa Acts ch. 1074, § 73, codified at Iowa Code § 910.2B (2020). This section applies to temporary restitution orders, supplemental restitution orders, and restitution orders that do not contain a determination of the defendant's reasonable ability to pay. Iowa Code § 910.2B(1)(a-c) (2020). Further, the amendments provide that the "provisions of this chapter, including but not limited to the procedures in section 910.2A, *shall apply to a challenge to the conversion of an existing restitution order* in the district court

and on appeal." Iowa Code § 910.2B(3). However, Kuuttila is not challenging the *conversion* of an existing non-permanent restitution order. Because his sentencing order provided that all amounts were due immediately, his restitution order was permanent when he appealed and before the new law went into effect. See Iowa Supreme Ct. Supervisory Order, *In the Matter of Interim Procedures Governing Ability to Pay Determinations and Conversion of Restitution Orders,* at 2-3 (July 7, 2020) (explaining that the conversion section only affects previously non-permanent restitution orders).

If the amendments do apply to Kuuttila, significant constitutional issues are implicated. Section 72 provides that a defendant "is presumed to have the reasonable ability" to pay Category B restitution in full. Iowa Code § 910.2B(1) (2020). Category B restitution includes a multitude of costs, including court costs, attorney fees, crime victim assistance reimbursement, and funds to local anticrime organizations. Iowa Code § 910.1(001) (2020). Under the new law, a defendant must request a hearing and prove by a

preponderance of the evidence that he is unable to reasonably make payments toward the full amount of the restitution or the issue is considered waived. Iowa Code § 910.2A(2) (2020). The law creates a presumption that the district court acted properly and explicitly removes any requirement that the court provide reasoning to support its decision. Iowa Code § 910.2A(5) (2020).

The new law's presumption of a defendant's ability to pay is unconstitutional. "A constitutional prerequisite for a restitution order is the court's determination of a defendant's reasonable ability to pay." State v. Van Hoff, 415 N.W.2d 647, 648 (Iowa 1987); see also State v. Dudley, 766 N.W.2d 606, 615 (Iowa 2009) ("A cost judgment may not be constitutionally imposed on a defendant unless a determination is first made that the defendant is or will be reasonably able to pay the judgment."); State v. Jenkins, 788 N.W.2d 640, 646 (Iowa 2010) (denying defendant an opportunity to challenge the amounts of the restitution order before the district court implicates his right to due process).

As well, the requirement that a defendant must affirmatively request a hearing or the issue is waived raises additional constitutional concerns. See State v. Coleman, 907 N.W.2d 124, 149 (Iowa 2018) ("[W]hen the district court assesses any future attorney fees on Coleman's case, it must follow the law and determine the defendant's reasonable ability to pay the attorney fees without requiring him to affirmatively request a hearing on his ability to pay."); Goodrich v. State, 608 N.W.2d 774, 776 (Iowa 2000) ("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.").

The presumption that the court properly exercised its discretion and the explicit removal of any requirement that the court provide reasoning raises separation of powers problems and interferes with the Supreme Court's supervisory authority over the lower courts. The Iowa constitution confers on the Iowa Supreme Court jurisdiction over appeals and over correction of lower court errors. Iowa Const. art V, § 4. It

further gives the Iowa Supreme Court supervisory authority over the lower courts. Iowa Const. art. V, § 4. The existing requirement that district courts provide on the record reasons for a sentence imposed ensures meaningful review by the appellate court. See State v. Thacker, 862 N.W.2d 402, 409 (Iowa 2015); Iowa R. Crim. P. 2.23(3)(d). Thus, the amendments unduly interfere with the Supreme Court's constitutional duty and power to supervise the lower courts and review their decisions on appeal.

The scheme as a whole: 1) requiring the court to presume the defendant has the ability to pay; 2) requiring the defendant to request a hearing within a limited time or have the issue forever waived; 3) requiring the defendant to prove by preponderance of the evidence that he cannot reasonably pay the restitution (the amount of which may not be known in that short timeframe); 4) not requiring a district court to provide rationale for its ability-to-pay determination; and 5) creating a presumption that a court's determination of ability-to-pay is proper, does not comport with due process guarantees under

either the Iowa or the United States Constitution. See Fuller v. Oregon, 417 U.S. 40, 53 (restitution statutes must be "carefully designed to insure that only those who actually become capable of repaying the State will ever be obliged to do so."); Eldridge v. Matthews, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"); State v. Dudley, 766 N.W.2d 606, 624-26 (Iowa 2009) (due process satisfied because defendant given a hearing before imposing attorney fees); State v. Haines, 360 N.W.2d 791, 796 (Iowa 1985) (Due process not violated because "[i]t is not fundamentally unfair to recoup court costs and attorney fees from those indigents who are reasonably able to pay…."). This scheme is not carefully tailored to ensure that only those defendants who are able to pay are required to pay category B restitution, and the scheme purports to eliminate any meaningful review of the district court's decision.

Conclusion. The recent amendments to chapter 910 do not apply to Kuuttila's sentencing order and the court of appeals

erred in remanding for the district court to consider the impact of the new legislation, this court should grant Kuuttila's request for further review.

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 $2.76, 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 3,760 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).

Dated: *9/4/20*

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