NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS D. HOLMES,

Petitioner

vs.

RANDY GIBBS, WARDEN, IOWA STATE PENITENTIARY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Bruce H. Stoltze
300 Walnut St, Suite 260
Des Moines, Iowa 50309
Telephone: (515) 244-1473
Email: Bruce.Stoltze@stoltzelaw.com
ATTORNEY FOR PETITIONER
THOMAS D. HOLMES

QUESTION PRESENTED FOR REVIEW

Whether a Certificate of Appealability should have issued on the question of whether a Defendant can be imprisoned pursuant to an orally pronounced verdict asserting a violation of a criminal statute that does not exist, judgment is affirmed on appeal, the state fails to take timely corrective action, and does so outside the personal presence of the Defendant.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

LIST OF PROCEEDINGS

Thomas Holmes v. State of Iowa, Iowa District Court in and for Black Hawk County, PCCV130925 (judgment entered July 25, 2018)

Thomas Holmes v. State of Iowa, Iowa Court of Appeals, 18-1467 (judgment entered April 29, 2020)

Thomas Holmes v. Randy Gibbs, United States District Court for the Northern District of Iowa, #4:20-cv-2070 (judgment entered January 13, 2021)

Thomas Holmes v. Randy Gibbs, United States Court of Appeals for the Eighth Circuit, No. 21-1345 (judgment entered May 4, 2021)

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OPINION BELOW

The Petitioner, Thomas D. Holmes, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in Case No: 21-1345 entered on May 4, 2021 denying an application for certificate of appealability. The judgement of the Court of Appeals appears at Appendix Pages (A-1) and it was not reported.

JURISDICTION

The date on which the United States Court of Appeals decided the case was May 4, 2021. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U. S. C, § 1254(1). and is timely under Rule of Supreme Court 13(3).

PROVISIONS INVOLVED

This case involves a state criminal defendant's constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

The Fifth Amendment provides in relevant part:

No person shall be held to answer for a capital, or otherwise infamous crime … nor be deprived of life, liberty, or property, without due process of law.

The Sixth Amendment provides in relevant part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.

The Eighth Amendment provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides in relevant part:

… nor shall any State … deny to any person within its jurisdiction the equal protection of the laws.

This case also involves the application of 28 U.S.C. § 2253(c), which states:

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from -

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court;

…

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

On April 24, 2000, Holmes was found guilty, after a trial to the court, of "Kidnapping in the First Degree in violation of Iowa Code Sections ***710.2(3) & (4)***" via an *oral pronouncement* of verdict. (A-43) Emphasis Added. On May 22, 2000, the Court again orally pronounced Holmes guilty of by stating, "[y]ou are adjudged guilty of the offenses of kidnapping in the first degree and robbery in the first degree in violation of Sections ***710.2(3) and (4)***…" (A-41). The written judgement entry, also filed on May 22, 2000, confirming the oral pronouncement, once again finding Applicant guilty, "contrary to Section ***710.2(3) and (4)*** … of the Iowa Criminal Code. (A-

38) Emphasis added. Holmes conviction was affirmed on December 12, 2001, in 00-950 by the Iowa Court of Appeals in an unpublished opinion. (A-22) The Iowa Court of Appeals specifically references Iowa Code Sections ***710.2(3)(4)*** in its opinion. (A-24) Emphasis Added.

Holmes filed a state post-conviction relief application on October 24, 2016. Said application was dismissed on July 25, 2018. (A-17). Holmes appealed the denial, and the Iowa Court of Appeals affirmed the denial on April 29, 2020. (A-14).

On September 2, 2020, Holmes filed a petition for writ of habeas corpus pursuant to 28 U.S.C. 2254 in the United States District Court for the Southern District of Iowa. The case was transferred to the United States District Court for the Northern District of Iowa on September 3, 2020. On January 13, 2021, the United States District Court for the Northern District of Iowa, Eastern Division, dismissed the petition and denied issuing a certificate of appealability. (A-2) On February 10, 2021, Holmes filed a Motion to Reconsider the Court's Order Denying Hearing and Denying Appealability. On February 12, 2021 Holmes filed a notice of appeal. On February 26, 2021 the District Court denied the motion to reconsider as lacking merit. Holmes filed an amended notice of appeal.

REASONS FOR GRANTING THE WRIT

FAILING TO GRANT THE WRIT RESULTS IN THE IGNORING OF OVER 100 YEARS OF PRECEDENT AND THE CONTINUED LIFE IMPRISONMENT OF HOLMES UNDER AN INVALID MITTIMUS IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

This matter, while directly affecting one individual serving a life sentence, is of substantial and significant national importance as it ignores and eviscerates the constitutional right to due process, precedent that oral pronouncements of verdict in open court in the presence of a defendant are constitutionally required. The right to an open and public proceeding is the bedrock foundation

to a fair trial. Allowing modifications of an oral pronouncement of verdict, outside the presence of a defendant, denies him his right to an open, public and fair trial.

A Certificate of Appealability should issue if "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner must show that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Certificate of Appealability should issue because Holmes is in custody pursuant to a judgment of a State Court in violation of the Constitution and in direct conflict with clearly established Federal law as determined by the Supreme Court of the United States.

Pursuant to 28 U.S.C. § 2254, a district court "shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Federal courts may not grant habeas relief on a claim that has been decided on the merits in state court unless that adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
> 28 U.S.C. § 2254(d)(1)-(2).

A state court's decision is contrary to . . . clearly established law if it applies a rule that contradicts the governing law set forth in [Supreme Court] cases or if it confronts a set of facts that are materially indistinguishable from a [Supreme Court] decision . . . and nevertheless arrives at a [different] result.'" *Cagle v. Norris*, 474 F.3d 1090, 1095 (8th Cir. 2007) (alteration in original)

(quoting *Mitchell v. Esparza*, 540 U.S. 12, 15-16 (2003)). This case is contrary to clearly established law.

A state court "unreasonably applies" federal law when it "identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case," or "unreasonably extends a legal principle from [the Supreme Court's] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams v. Taylor*, 529 U.S. 362, 407 (2000).

As with every State court addressing Holmes claims the district court here made the same error, focusing on the sentencing, and not the oral pronouncement of verdict. Holmes raised three grounds in his petition:

1. Petitioner is unlawfully held pursuant to a verdict for violating nonexistent Iowa Code Sections in violation of his rights under the United States Constitution.
2. Petitioner is being unlawfully held beyond the expiration of his sentence in violation of his rights under the United States Constitution.
3. The Department of Corrections illegally altered the certified and affirmed judgement and commitment order to reflect Iowa Code Sections in which the Petitioner was not convicted.

As the district court addressed all three issues simultaneously, Holmes will do the same as they can and may interrelate.

1. Petitioner is unlawfully held pursuant to a verdict for violating nonexistent Iowa Code Sections in violation of his rights under the United States Constitution.

Kidnapping in Iowa is defined in Iowa Code Section 710.1:

> A person commits kidnapping when the person either confines a person or removes a person from one place to another, knowing that the person who confines or removes the other person has neither the authority nor the consent of the other to do so; provided, that to constitute kidnapping the act must be accompanied by one or more of the following:
> 1. The intent to hold such person for ransom.
> 2. The intent to use such person as a shield or hostage.

3. The intent to inflict serious injury upon such person, or to subject the person to a sexual abuse.
4. The intent to secretly confine such person.
5. The intent to interfere with the performance of any government function.
Iowa Code § 710.1 (1999)

Kidnapping in the first degree in Iowa is:
710.2 Kidnapping in the first degree.
Kidnapping is kidnapping in the first degree when the person kidnapped, as a consequence of the kidnapping, suffers serious injury, or is intentionally subjected to torture or sexual abuse.
Kidnapping in the first degree is a class "A" felony.
Iowa Code § 710.2 (1999)

Holmes was not found guilty of any of the above. Holmes was found guilty, after a trial to the court, of "Kidnapping in the First Degree in violation of Section ***710.2(3) & (4)*** of the Code of Iowa" via an ***oral pronouncement of verdict***. (A-43) At sentencing the trial court, doubled down, orally pronounced Holmes "guilty of the offenses of Kidnapping in the first degree and robbery in the first degree in violation of Sections ***710.2(3) and (4)***, 711.1(1)(2) and (3)." (A-41) The trial court tripled down confirming the oral pronouncement, once again finding Applicant guilty, "contrary to Section ***710.2(3) and (4)*** … of the Iowa Criminal Code" in the written judgement/sentencing order. (A-38) Emphasis added.

As if the above was not enough, the Iowa Court of Appeals affirmed the convictions, specifically referencing Iowa Code Sections ***710.2(3)(4)*** in its opinion. (A-24) Emphasis Added.

Certificate of Appealability should issue in this case not because reasonable jurists could differ, but because all reasonable jurists should concur that over one hundred years of Supreme Court precedent, followed by numerous Circuit Court decisions, not to mention numerous Iowa Supreme Court cases have established the oral pronouncements by a court control and are binding. *Hill v. United States ex rel. Wampler*, 298 U.S. 460, 464-65, 56 S.Ct. 760, 80 L.Ed. 1283 (1936); *United States v. Morais*, 670 F.3d 889, 895 (8th Cir.2012); *United States v. Brave*, 642 F.3d 625,

627 (8th Cir.2011); *United States v. Durham*, 618 F.3d 921, 945 (8th Cir.2010). The sentencing court cannot alter the terms of a sentence once the defendant has begun to serve it, *Johnson v. Mabry*, 602 F.2d 167, 170 (8th Cir. 1979), and an after-the-fact written judgment cannot cure an illegal sentence imposed in court. *United States v. Foster*, 514 F.3d 821, 825 (8th Cir.2008).

Not only have the Iowa courts ignored the United States Supreme Court precedent and Eighth Circuit precedent cited above, they have ignored their own precedent in this case. In *State v. Hess*, 533 N.W.2d 525 (Iowa, 1995), the court stated the following:

> When a court imposes a sentence which statutory law does not permit, the sentence is illegal, and such a sentence is void and we will vacate it. *Suchanek*, 326 N.W.2d at 265. However, when a **judgment entry *incorrectly differs* from the oral rendition of the judgment** merely as a result of clerical error, the trial court holds the inherent power to correct the judgment entry **so that it will reflect *the actual pronouncement* of the court.** Id. at 265-66; *Harbour*, 240 Iowa at 710-12, 37 N.W.2d at 293-94. The district court may correct a clerical error in a judgment entry through issuance of a nunc pro tunc order. Iowa R.Crim.P. 22(3)(g); *Suchanek*, 326 N.W.2d at 265-66; *Harbour*, 240 Iowa at 711, 37 N.W.2d at 293. (Emphasis added).

As stated above, a judgment entry can be corrected so that it will reflect the actual pronouncement of the court, not the other way around. Here, the Circuit Court in denying the Request for Certificate of Appealability, follows along with the District Court claim that "Here, petitioner attempts to raise a scrivener's error to the level of a constitutional violation. His effort falls woefully short." (A-9). Holmes is attempting no such maneuver. The District Court, as previous courts thread the needle of multiple issues to deny Holmes his constitutionally guaranteed relief. The needle being threaded is that some sort of clerical error related to sentencing has occurred. That is not the issue at hand in this case. The issue at hand is having a hearing to determine whether Holmes is being unlawfully detained under Iowa Code Sections 710.2(3) & (4), code sections that do not exist and therefore cannot constitute a criminal violation, as orally

pronounced by the trial court twice, confirmed in the written sentencing order, and affirmed by the Iowa appellate courts. To be blunt, respectfully, this case is about the constitutional guarantee of enforcement of an **ORALLY PRONOUNCED VERDICT** and the detention therefrom, nothing more. The District Court stated the following : ***enforcing detention not verdict … detention is what is being challenged.

> Clerical and scrivener errors in references to code and statutory sections are not constitutional errors. They do not affect a prisoner's substantive constitutional rights. See, e.g., *Dyab v. United States*, 855 F.3d 919, 923 (8th Cir. 2017) ("Fixing typographical errors and the like does not substantively alter a prisoner's sentence . . .."); *Snyder v. Swarthout*, No. 2:11–cv–3064 JAM KJN P, 2012 WL 439644, at *9 (E.D. Cal. Feb. 9, 2012) (finding a judge's immaterial misstatement of a code section—citing Penal Code 3041(b)(3), which did not exist instead of Penal Code Section 3041.5(b)(3)—"does not state a colorable claim for a constitutional violation").
> (A-)

The above analysis by the district court misses the mark as the oral pronouncement of a verdict controls, not the written judgement. The oral pronouncement absolutely affects a "prisoner's substantive constitutional rights." Further, these cases are clearly distinguishable. In *Dyab*, the issue was a typographical error related to an order modifying restitution. In other words, nothing in which an oral pronouncement of any kind occurred. Further, the analysis was related to whether the fixing of the typographical error constituted a new judgement for the purpose of filing a successive 2255 petition. In *Snyder*, the issue was related to a parole revocation proceeding, not an oral pronouncement of a verdict. The specific portion of Snyder, dealing with the "immaterial misstatement" reads in its entirety as follows:

> D. Claim Four
> Petitioner argues that the BPH ordered his next suitability hearing in three years based on California Penal Code § 3041(b)(3). Petitioner argues that this Penal Code section does not exist.
> In finding petitioner entitled to another suitability hearing in three years, Commissioner Prizmich stated,

> So, based upon Penal Code Section 3041(b)(3) and after giving consideration to the victim's safety as well as the public safety and giving consideration to Title 15, a three year denial is what you'll get.
>
> (Dkt. 1-1 at 21-22.)
>
> California Penal Code § 3041.5(b)(3) sets forth the factors the BPH should consider when determining when a prisoner's next parole suitability hearing should be held. At petitioner's 2010 suitability hearing, Commissioner Prizmich obviously meant to refer to § 3041.5(b)(3) when he mentioned § 3041(b)(3). This immaterial misstatement does not state a colorable claim for a constitutional violation. For the reasons discussed above, claim four is without merit and should be dismissed.

Snyder v. Swarthout, No. 2: 11-cv-3064 JAM KJN P, 14-15 (E.D. Cal. Feb. 7, 2012).

The comparison of a "immaterial misstatement" related to when a new parole hearing will be scheduled versus the constitutional guarantee of the enforcement of an oral pronouncement of a verdict is, quite simply, akin to comparing apples and oranges. Additionally, to classify an oral pronouncement of a verdict utilizing non-existent code sections with a resulting life sentence without the possibility of parole as "immaterial" dismisses and trivializes over one hundred years of precedent related to the oral pronouncement of verdicts.

The District Court, in its analysis refers to the issue raised by Holmes as a scrivener's error, a typographical error, and a clerical error. None of which is true.

A scrivener's error is one in which the court says one thing, and another is what is written down. A typographical error is simply when the wrong item is typed. A clerical error is an immaterial error. None of the above examples apply here as all written entries conformed with and accurately reflected the oral pronouncement of the court. Certainly, reasonable jurists could disagree and debate the definitions of a scrivener's error, a typographical error, and a clerical error as it applies to Holmes's situation. Holmes submits it should be obvious none of the "errors" referenced by the district court apply to him, and it should be more obvious based upon the oral pronouncement of verdict that at a bare minimum reasonable jurists could debate and disagree. It

does not even take a close reading of this record to see what happened, the trial court orally pronounced a verdict to a non-existent code section, not once, but twice, and confirmed it in writing. Simply put no "error" as described by the district court occurred and no court can assume one did.

The district court references this matter has been addressed via the Iowa court in a nunc pro tunc order. However, as a hearing was not allowed as a result of dismissing the petition upon initial review, Holmes was precluded from arguing the United States Supreme Court precedent, the Eighth Circuit precedent, and the Iowa case law precedent seemingly ignored by the Iowa courts. This was a judicial error, not something simply incorrectly recorded. For example, the Iowa Supreme Court has stated, "The function of a nunc pro tunc order is not to modify or correct a judgment but to make the record show truthfully what judgment was actually rendered—"not to make an order now for then, but to enter now for then an order previously made." *State v. Pearson*, 876 N.W.2d 200, 205-206 (2016) citing *Gen. Mills, Inc. v. Prall*, 244 Iowa 218, 225, 56 N.W.2d 596, 600 (1953) (quoting *Chariton & Lucas Cty. Nat'l Bank v. Taylor*, 213 Iowa 1206, 1208, 240 N.W. 740, 741 (1932)).

In *State v. Naujoks*, a case in which is most analogous to Holmes, and precedent once again ignored by the Iowa courts, the trial court found Naujoks guilty of two counts of burglary in the third degree instead of the charged violations of burglary in the second degree. The trial court attempted to correct the issue via a nunc pro tunc. The Iowa Supreme Court stated, "[t]he court was not correcting a clerical error. Rather, in its order nunc pro tunc, the court stated it 'incorrectly recited that the defendant is guilty of burglary in the third degree in each count. This was an error by the court.' *State v. Naujoks*, 637 NW 2d 101, 113, (2001). Additionally the court stated:

> One purpose of a nunc pro tunc order is to ***correct clerical errors***. Emphasis added. Iowa R.Crim. P. 22(3)(g); *State v. Suchanek*, 326 N.W.2d 263, 265-66 (Iowa 1982). A clerical error is one that is not the result of judicial reasoning and determination. *Smith v. State*, 801 S.W.2d 629, 632 (Tex. Ct.App.1991). An order nunc pro tunc cannot be used to remedy an error in judicial thinking, a judicial conclusion, or a mistake of law. *Headley v. Headley*, 172 N.W.2d 104, 108 (Iowa 1969).

Id.

The judgment "actually rendered" at least twice orally, and once in writing was for a violation of a non-existent code section, and therefore, for a non-existent crime. This is an "error in judicial thinking, a judicial conclusion, or a mistake of law." *Id*.

It has been well settled law since the United States Supreme Court in 1936 ruled both that the oral pronouncement of verdict and/or sentencing controls the case. See generally, *Hill v. United States ex rel. Wampler*, 298 US 460 (1936). In *Wampler*, the Court stated "[i]f the judgment and sentence do not authorize his detention, no "mittimus" will avail to make detention lawful." *Id*. Not only has it been Supreme Court precedent since 1936, the doctrine of oral pronouncements has been cited and followed since 1902 by the United States Circuit Courts:

> The reported cases teem with instances where parties have undertaken to supply omissions of courts of limited jurisdiction- to show affirmatively the jurisdictional fact of record before process issued, or some right thereunder is asserted, by way of amendment at a subsequent term. 1 Black, Judgm. § 158, lays down the fundamental proposition that "the allowance of an amendment should never be used by the court as a means- of reviewing its judgments on the merits, or correcting its own judicial mistakes, or substituting a judgment which it neither in fact rendered or intended to render. When the defect consists in the failure of the court to render the proper judgment, or arises from want of judicial action, the record cannot be corrected after the term has closed, the cause being no longer sub judice. * * * **The power to amend nunc pro tunc is not revisory in its nature, and is not intended to correct judicial errors. Such amendments ought never to be the means of modifying or enlarging the judgment, or the judgment record, so that it shall express something *which the court did not pronounce.* However erroneous-, the express judgment of the court cannot be corrected at a subsequent term.**

Edwards v. Bates County, 117 F. 526 (1902)(Emphasis added)

Once again irony strikes this case. The original mittimus in this case was entered in conformity with the oral pronouncement, oral sentencing, and the written judgement entry, that of course being a violation of Iowa Code Sections 710.2(3)&(4). This fact is ignored by the District Court in its analysis and obviously overlooked by the Eighth Circuit in denying the request of certificate of appealability. The modification of the written judgment in this matter cannot cure, change, or correct any oral pronouncement in this case.

In a dissent on unrelated issues Justice Sotomayor reinforces the long-standing case law that an oral pronouncement of verdict controls:

> And when that decision was announced in open court, it became entitled to full double jeopardy protection. See, e.g., *Commonwealth v. Roth*, 437 Mass. 777, 796, 776 N.E.2d 437, 450–451 (2002) (declining to give effect to " ' "the verdict received from the lips of the foreman in open court" ' " would "elevate form over substance"); *Stone*, 31 Cal.3d, at 511, 183 Cal.Rptr. 647, 646 P.2d, at 814–815 ("[I]n determining what verdict, if any, a jury intended to return, the oral declaration of the jurors endorsing the result is the true return of the verdict" (internal quotation marks omitted)); see also, e.g., *Dixon v. State*, 29 Ark. 165, 171 (1874) (technical defect in verdict "is of no consequence whatever, for the verdict need not be in writing, but may be announced by the foreman of the jury orally"); *State v. Mills*, 19 Ark. 476 (1858) ("The verdict was of no validity until delivered, by the jury, in Court").

Blueford v. Arkansas, 132 S.Ct. 2044, 566 U.S. 599 (2012) (J.Sotomayor dissenting)

A look at the dates of these cases, made up of over 150 years of precedent, clearly reinforces the proposition of an oral pronouncement of verdict controls.

Additionally, as the District Court dismissed upon initial review, relying on the aforementioned nunc pro tunc order, Holmes was denied his ability to argue the entry of the nunc pro tunc order was a violation of his constitutional right under the Sixth Amendment requiring an open and public trial as this was a substantial change to the verdict, which is required to be conducted in open court. Reasonable jurists could certainly debate whether the entry of the nunc

pro tunc order is a new conviction, judgment, and sentence. If so, Holmes was convicted and sentenced without constitutionally required representation of counsel. To make matters worse, this was done outside his personal presence, essentially in absentia, in clear violation of substantial constitutional rights.

Finally, as a result of the dismissal after initial review and the denial of the request for Certificate of Appealability Holmes was precluded from further developing and asserting the argument the law of his case had been determined can could not be corrected by the entry of a nunc pro tunc order. The Iowa courts have violated Holmes constitutional rights to due process as guaranteed under the Fifth Amendment to the United States Constitution by failing to follow their own established precedent. At a bare minimum reasonable jurists could debate and disagree.

As stated previously Appellant was found guilty, after a trial to the court, of "Kidnapping in the First Degree in violation of Iowa Code Sections 710.2(3) & (4)" via an oral pronouncement of the district court. (A-43). This is undisputed and cannot be refuted. This pronouncement therefore controls as it is "[a] rule of nearly universal application is that 'where there is a discrepancy between the oral pronouncement of sentence and the written judgment and commitment, the oral pronouncement of sentence controls.'" *State v. Hess*, 533 NW 2d 525, 528 (Iowa 1995) citing *United States v. Marquez*, 506 F.2d 620, 622 (2d Cir.1974); *United States v. Munoz-Dela Rosa*, 495 F.2d 253, 256 (9th Cir.1974); *Cuozzo v. United States*, 340 F.2d 303, 304 (5th Cir.1965); *State v. Hanson*, 138 Ariz. 296, 674 P.2d 850, 858-59 (Ct.App.1983); *Donald v. State*, 613 So.2d 935, 936 (Fla.Dist.Ct.App.1993); *Hambrick v. State*, 576 So.2d 397, 398 (Fla.Dist. Ct.App.1991); *Clarke v. State*, 453 So.2d 488, 489 (Fla.Dist.Ct.App.1984); *State v. Bradley*, 414 A.2d 1236, 1241 (Me.1980); *Sampson v. State*, 506 N.W.2d 722, 726-27 (N.D.1993); *State v. Cady*, 422 N.W.2d 828, 830 (S.D. 1988).

The irony of this situation is there is NO discrepancy between the oral pronouncement and the written judgement entry as the district court ***confirmed*** the oral pronouncement with a written judgement entry on May 22, 2000, confirming the oral pronouncement, once again finding Holmes guilty of violations of Iowa Code Sections 710.2(3) & (4). (A-38) (emphasis added). In the case at hand, the oral transcript of the verdict pronouncement, sentencing transcript, and the written judgement entry ALL find Holmes in violations of Iowa Code Sections 710.2(3) & (4). The Iowa Supreme Court previously stated:

> Upon affirmance by us, the judgment of the district court became a finality as of the date of its entry there. We do not enter a new judgment when we affirm; we merely approve the judgment already entered by the trial court. In such cases the effect is to leave the parties as if no appeal has been taken. In the absence of a remand or a procedendo directing further proceedings in the trial court, the jurisdiction of that court terminates, both as to the parties and the subject matter, with the filing of notice of appeal. But see *Weaver v. Herrick*, 258 Iowa 796, 803, 140 N.W.2d 178, 182. Thereafter it can have nothing more to do with the litigation. It has no jurisdiction except to enforce the provisions of that judgment. *Dunton v. McCook*, 120 Iowa 444, 447, 94 N.W. 942, 944; *Hogle v. Smith*, 136 Iowa 32, 36, 113 N.W. 556, 558; *Kern v. Woodbury County*, 234 Iowa 1321, 1323, 14 N.W.2d 687, 688; *Florke v. Florke*, 241 Iowa 867, 869, 43 N.W.2d 670, 671; *Dawson v. Laufersweiler*, 242 Iowa 757, 759, 48 N.W.2d 228.

Jersild v. Sarcone, 163 N.W.2d 78, 79-80 (Iowa 1968).

As such, the original oral pronouncement in this case, which has never been disturbed controls. Furthermore, in light of *Barker v. Iowa Department of Public Safety*, 922 N.W.2d 581 (Iowa 2019) if there is any argument for claim preclusion or res judicata it must be in favor of Holmes. Holmes contends after the ruling in *State v. Holmes*, NO. 00-950, 2001 WL 1577584 (Iowa Ct. App. Dec. 12, 2001) the law of his case has been established.

Holmes's contention, and a reasonably debatable argument on which jurists could disagree is that the law of Holmes case is a conviction under Iowa Code Section 710.2(3)(4), a code section that does not exist. As such, pursuant to and analogous to Iowa Supreme Court precedent, any

further rulings by the Iowa Court of Appeals and/or the District Court are moot and invalid as the code section under which he was convicted has been confirmed.

The Iowa Supreme Court has further stated, “issue preclusion is a type of res judicata that prohibits parties "from relitigating in a subsequent action issues raised and resolved in [a] previous action." *Barker v. Iowa Department of Public Safety, 922 N.W.2d 581 (Iowa 2019)* quoting *Emp'rs Mut. Cas. Co.*, 815 N.W.2d at 22 (alteration in original) (quoting *Soults Farms, Inc. v. Schafer*, 797 N.W.2d 92, 103 (Iowa 2011)). Issue preclusion applies to legal and factual issues. *Grant*, 722 N.W.2d at 174. This doctrine furthers "judicial economy and efficiency by preventing unnecessary litigation" while protecting parties from "relitigating identical issues with identical parties or those persons with a significant connected interest to the prior litigation." *Emp'rs Mut. Cas. Co*., 815 N.W.2d at 22 (quoting *Winnebago Indus., Inc. v. Haverly*, 727 N.W.2d 567, 571-72 (Iowa 2006)). Moreover, it "tends to prevent the anomalous situation, so damaging to public faith in the judicial system, of two authoritative but conflicting answers being given to the very same question." *Id*. (quoting *Grant*, 722 N.W.2d at 178). For a previous determination to have preclusive effect in a subsequent action, the party claiming issue preclusion must establish the following elements:

> (1) the issue in the present case must be identical,
> (2) the issue must have been raised and litigated in the prior action,
> (3) the issue must have been material and relevant to the disposition of the prior
> case, and
> (4) the determination of the issue in the prior action must have been essential to the resulting judgment.

Id. (quoting *Soults Farms, Inc.*, 797 N.W.2d at 104).

These are all issues in which reasonable jurists could debate and disagree in which involve substantial constitutional rights.

2. Petitioner is being unlawfully held beyond the expiration of his sentence in violation of his rights under the United States Constitution.

This Court cannot deny the obvious, Holmes has been unlawfully convicted under a code section that does not exist and said conviction has been affirmed by the Courts. As such, the law of Holmes case is that he is being held under a sentence for violating Iowa Code Section 710.2(3)(4). Since one cannot violate a code section that does not exist Holmes is being unlawfully detained in violation of the Fifth and Eighth Amendments to the United States Constitution.

Clearly being held beyond the expiration of one's sentence involves a substantial constitutional right.

3. The Department of Corrections illegally altered the certified and affirmed judgement and commitment order to reflect Iowa Code Sections in which the Petitioner was not convicted.

"A prisoner is detained not by virtue of the warrant of commitment, but on account of the judgement and sentence." *State v. Orte*, 540 NW 2d 435, 438 (Iowa 1995) quoting *Biddle v. Shirley*, 16 F.2d 566, 567 (8th Cir. 1926). It is clear from the record, as indicated previously, Holmes has been convicted under a code section that does not exist. Thus, his conviction is invalid. As such the district court erred in ruling he was not being unlawfully held or detained. It has been well settled law since the United States Supreme Court in 1936 ruled both that the oral pronouncement of verdict and/or sentencing controls the case. See generally, *Hill v. United States ex rel. Wampler*, 298 US 460 (1936). In *Wampler*, the Court stated "[i]f the judgment and sentence do not authorize his detention, no "mittimus" will avail to make detention lawful." *Id.* Once again irony strikes this case. The original mittimus in this case was entered in conformity with the oral pronouncement, oral sentencing, and the written judgement entry, that of course being a violation

of Iowa Code Sections 710.2(3)&(4). As such, Holmes is of course being unlawfully held and/or detained.

However, as a result of the summary dismissal by the District Court and the denial of the request for certificate of appealability, Holmes has been denied the right to argue, develop, and present evidence the Iowa Department of Corrections unlawfully changed the mittimus to hold Holmes under different Iowa Code Sections. (A-35). It is well settled law, under *Wampler*, mittimus cannot be altered as "[a] warrant of commitment departing in matter of substance from the judgment back of it is void. *Id.* citing *Boyd v. Archer*, 42 F.2d 43 (9th Cir. 1930). Clearly an altered mittimus is "departing in matter of substance from the judgment."

Certificate of Appealability should issue as, no matter how hard courts try to claim this was a scriveners, clerical, or typographical error, it simply is not. At a bare minimum issues presented were adequate to deserve encouragement to proceed further. Application of constitutional principles, those of enforcement of the oral pronouncement of verdict, require a Certificate of Appealability should issue because Holmes is custody pursuant to a judgment of a State Court in violation of the Constitution and in direct conflict with clearly established Federal law as determined by the Supreme Court of the United States. Additionally, the failure to adhere to the long-standing principal of the oral pronouncement controls has led the Holmes being held beyond his sentence in violation of constitutional rights. It has further led to the Iowa Department of Corrections illegally altering Holmes mittimus resulting in additional constitutional violations.

CONCLUSION

For all of the reasons stated, the Petitioner prays that the petition for writ of certiorari be granted and that the decision of the Court below be reversed and remanded with instructions to issue a certificate of appealability.

Respectfully Submitted,
/S/ Bruce H. Stoltze
Bruce H. Stoltze
300 Walnut St, Suite 260
Des Moines, Iowa 50309
Telephone: (515) 244-1473
Email: Bruce.Stoltze@stoltzelaw.com
ATTORNEY FOR PETITIONER
THOMAS D. HOLMES