IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. JOSEPH SCOTT WAIGAND, Defendant-Appellant.	)))))))))	S.CT. NO. 19-0089

APPEAL FROM THE IOWA DISTRICT COURT
FOR UNION COUNTY
HONORABLE JOHN D. LLOYD, JUDGE

APPELLANT'S BRIEF AND ARGUMENT
AND
REQUEST FOR ORAL ARGUMENT

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FINAL

CERTIFICATE OF SERVICE

On the 24th day of January, 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 Joseph Waigand, 2921 US Hwy 34, Thayer, IA 50254.

APPELLATE DEFENDER'S OFFICE

/s/ Theresa R. Wilson

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Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065 (1984)

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28 Am. Jur.2d Estoppel and Waiver § 138 (Aug. 2019)

Poyner v. Iowa Dist. Ct for Montgomery Co., No. 02-1349, 2003 WL 21543536 at *1 (Iowa Ct. App. July 2003)

ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because the issues involve presenting substantial questions of enunciating or changing legal principles. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(f) (2019). United States Supreme Court case law has held that the Sixth Amendment requires a jury finding on any fact that increases the statutory maximum sentence, including fines. See Apprendi v. New Jersey, 530 U.S. 466 (2000); Blakely v. Washington, 542 U.S. 296 (2004); Southern Union Company v. United States, 567 U.S. 343 (2012). Based on this progression in the case law, it is now an open question whether a jury finding is necessary in determining the amount of criminal restitution. Even if the Sixth Amendment were not applicable to criminal restitution because of its quasi-civil nature, the question then becomes whether Article I Section 9 of the Iowa Constitution, as mirrored by the Seventh Amendment, would apply to require a

jury finding. Both the public and the bar would benefit from a resolution of these questions.

STATEMENT OF THE CASE

Nature of the Case: This is an appeal by Defendant-Appellant Joseph Waigand from the December 4, 2018, restitution order filed in Union County District Court following Waigand's guilty plea to Ongoing Criminal Conduct. The Honorable John D. Lloyd presided over all relevant proceedings.

Course of Proceedings: On December 8, 2017, the state filed a trial information in Union County District Court charging Defendant-Appellant Joseph Waigand with six counts of Theft in the First Degree, class C felonies in violation of Iowa Code sections 714.1(5) and 714.2(1) (2013-2015) (Count III-VIII), four counts of Theft in the Second Degree, class D felonies in violation of Iowa Code sections 714.1(5) and 714.2(1) (2015) (Counts I-II, IX-X), and one count of Ongoing Criminal Conduct, a class B felony in violation of Iowa Code

sections 706A.1, 706A.2(1), and 706A.4 (2013-2015) (Count XI). (Information)(App. pp. 4-9). Waigand pleaded not guilty and waived his right to a speedy trial. (Written Arraignment)(App. pp. 10-12).

On June 15, 2018, Waigand appeared in open court and submitted a guilty plea to Ongoing Criminal Conduct as charged in Count XI pursuant to an agreement with the State. (Plea & Sent. Tr. p. 2 L.1-25). Under the terms of the agreement, the State would dismiss the remaining charges and Waigand would pay restitution in or near the amount of $270,000 pending final calculations. (Plea & Sent. Tr. p. 2 L.10-p. 3 L.21). The District Court accepted Waigand's plea. (Plea & Sent. Tr. p. 16 L.20-25).

The District Court held a sentencing hearing on August 29, 2018. (Plea & Sent. Tr. 19 L.15-22). A witness from the bank Waigand had his loans through testified that Waigand's deficiency to them was approximately one million dollars. (Plea & Sent. Tr. p. 48 L.7-10). The District Court sentenced

Waigand to 25 years in prison, but suspended the sentence, placed him on probation for five years, and ordered him to complete 150 hours of unpaid community service. (Plea & Sent. Tr. p. 69 L.5-24; Judgment Entry pp. 1-2)(App. pp. 15-16). The court declined to enter a million-dollar restitution order and instead asked the State to provide additional information supporting the request. (Plea & Sent. Tr. p. 72 L.10-20).

Waigand did not file a notice of appeal from his judgment and sentence.

On September 19, 2018, the State filed an application for supplemental restitution order asking for pecuniary damages in the amount of $998,636.25. (Application for Supp. Rest. Order)(Conf. App. pp. 111-112). On October 18, 2018, after the District Court entered a restitution order in the amount cited by the State, Waigand filed an objection to the restitution amount and a request for hearing. (9/19/18 Order for Restitution; Objection to Restitution)(App. pp. 20-21).

Waigand filed a supplement to his objection on November 21, 2018. (Supplement to Objection)(App. pp. 22-23).

The District Court held a restitution hearing on November 21, 2018. (Rest. Tr. p. 1 L.1-25). A witness for the bank testified the bank had foreclosed against Waigand and received a civil judgment of which $988,636.25 remained unpaid. (Rest. Tr. p. 6 L.3-15, p. 8 L.19-p. 9 L.15). Waigand expressed concerns for the potential double-recovery from both the civil proceedings and criminal restitution. (Rest. Tr. p. 16 L.7-p. 17 L.12).

The District Court issued its restitution order on December 24, 2018. (12/24/18 Order on Restitution)(App. pp. 24-29). The court ordered Waigand to pay $988,636.25 in restitution. (12/24/18 Order on Restitution p. 5)(App. p. 28).

Waigand filed a timely notice of appeal on January 16, 2019. (Notice)(App. p. 30).

Facts: At the plea proceeding, Waigand admitted that from August 2014 through October 2016 he was engaged in

farming and had a line of credit with Iowa State Savings Bank in Creston. (Plea & Sent. Tr. p. 9 L.9-p. 10 L.2). He acknowledged that during that time period the bank had as collateral a mortgage and security agreements that secured real estate and crops produced by his farming operation. (Plea & Sent. Tr. p. 10 L.3-7).

Waigand admitted that he engaged in activities that allowed him to sell the secured crops without applying the proceeds to his loan with Iowa State Savings Bank. (Plea & Sent. Tr. p. 10 L.8-13). Waigand specifically admitted to the 40 transactions listed in Exhibit 1, all but six of which exceeded $1,000 and would be indicatable offenses. (Plea & Sent. Tr. p. 10 L.14-p. 11 L.19; Ex. 1)(App. pp. 13-14). Waigand admitted he conducted the transactions between August 2014 and October 2016 to defraud the bank with respect to its ability to collect amounts under the security agreements and mortgages and for his own and his farming

operation's financial gain. (Plea & Sent. Tr. p. 11 L.11-p. 12 L.1).

Waigand told the District Court that to the extent the minutes of testimony referred to transactions that were not listed in Exhibit 1, he did not disagree with the information contained in the minutes of testimony. (Plea & Sent. Tr. p. 12 L.7-18).

According to the minutes of testimony, Waigand obtained a farm loan from Iowa State Savings Bank in 2009, secured by a UCC financing statement filed with the Iowa Secretary of State. (Minutes p. 6)(Conf. App. p. 108). The filing provided a security interest for the bank, in the form of collateral owned by Waigand including but not limited to "…all crops, annual or perennial, and all products of crops…." (Minutes p. 6)(Conf. App. p. 108). The UCC filing was renewed or continued in April 2014. (Minutes p. 6)(Conf. App. p. 108).

In March 2015 Waigand entered into an agreement with Iowa State Savings Bank for a commercial line of credit in the

amount of $1,250,000. (Minutes p. 1)(Conf. App. p. 103). The line was granted in recognition of the following security instruments: a $100,000 mortgage dated June 2010; a $1,228,360 mortgage dated May 2015; a $1,000,000 mortgage dated March 2015; and a security agreement dated May 2009. (Minutes p. 1)(Conf. App. p. 103).

In April 2015, Waigand's last loan was renewed based upon a March 2015 financial statement. (Minutes p. 1)(Conf. App. p. 103). It was later discovered that most of the crops associated with the security on the loan had been liquidated between December 2015 and May 2016. (Minutes p. 1)(Conf. App. p. 103). An agent from the Division of Criminal Investigations found 48 or more transactions completed by Waigand that resulted in liquidation of corn and beans that did not result in a corresponding payment to the bank. (Minutes pp. 3-6)(Conf. App. pp. 105-108). The total amount of funds diverted was $268,788.91. (Minutes p. 6)(Conf. App. p. 108).

Iowa State Savings Bank attempted to collect on Waigand's outstanding obligations, but there remained an outstanding balance of approximately one million dollars. (Minutes p. 6)(Conf. App. p. 108).

Additional facts will be discussed below as necessary.

ARGUMENT

I. THE DISTRICT COURT ERRED IN CALCULATING THE AMOUNT OF RESTITUTION OWED BY WAIGAND. IN HIS GUILTY PLEA PROCEEDINGS, WAIGAND ADMITTED NUMEROUS ACTS OF THEFT OR CONVERSION OF CROPS. WHILE HE MAY BE HELD RESPONSIBLE FOR THE $288,000 LOSS RELATED TO THOSE ACTS, THE STATE FAILED TO ESTABLISH THE CAUSAL CONNECTION TO THE BANK'S FORECLOSURE ON HIS FARM SO AS TO WARRANT THE $988,636.25 IN RESTITUTION.

Preservation of Error: Error was preserved by the District Court's order setting the amount of restitution. (12/24/18 Order of Restitution)(App. pp. 24-29).

Furthermore, the general rule of error preservation is not applicable to void, illegal, unconstitutional, or procedurally defective sentences. State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994); State v. Pearson, 836 N.W.2d 88, 94

(Iowa 2013). Criminal restitution ordered by the court is part of the sentencing order. State v. Jose, 636 N.W.2d 38, 45 (Iowa 2001). The court may correct an illegal sentence at any time. Iowa R. Crim. P. 2.24(5)(a) (2019).

Scope of Review: This Court reviews restitution orders for correction of errors at law. 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). A reviewing court will look to whether the lower court's findings have substantial evidentiary support and whether the court properly applied the law. State v. Bonstetter, 637 N.W.2d 161, 165 (Iowa 2001).

Merits: Waigand contends the District Court erred in determining the amount of criminal restitution owed as it related to the charge for which he pleaded guilty. The court ordered the full $988,636.25 remaining on the civil judgment ordered in Waigand's foreclosure case even though there is

inadequate evidence to indicate the bank's decision to foreclose was caused by the approximately $288,000 loss caused by Waigand's admitted acts. The District Court's restitution order should be vacated and remanded to that court for correction.

Restitution is a mandatory part of criminal sentencing under Iowa law. Iowa Code § 910.2 (2019); State v. Jenkins, 788 N.W.2d 640, 644 (Iowa 2010). It is a criminal sanction that is part of the sentence. Iowa Code § 910.2(1) (2019); State v. Alspach, 554 N.W.2d 882, 883 (Iowa 1996); State v. Mayberry, 415 N.W.2d 644, 646 (Iowa 1987). The legislature has inserted restitution, which otherwise would normally be civil, into the criminal proceeding. State v. Dudley, 766 N.W.2d 606, 620 (Iowa 2009). The court is authorized to order criminal restitution pursuant to the restitution statutes. State v. Bonstetter, 637 N.W.2d 161, 166 (Iowa 2001).

Restitution includes the "payment of pecuniary damages to a victim in an amount and in the manner provided by the

offender's plan of restitution." Iowa Code § 910.1(4) (2019). "'Pecuniary damages" means all damages to the extent not paid by an insurer, which a victim could recover against the offender in a civil action arising out of the same facts or event, except punitive damages and damages for pain, suffering, mental anguish, and loss of consortium." Id. § 910.1(3). A "victim" is "a person[1] who has suffered pecuniary damages as a result of the offender's criminal activities." Id. § 910.1(5).

The Iowa Supreme Court has interpreted these provisions as requiring a restitution order to rest on "a causal connection between the established criminal act and the injuries to the victim." State v. Holmberg, 449 N.W.2d 376, 377 (Iowa 1989). If there is such a connection, the State may recover all damages it can establish by a preponderance of the evidence. Id. A restitution order "is not excessive 'if it bears a real

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1. The Iowa Code defines a "person" as an "individual, corporation, limited liability company, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, or any other legal entity." Iowa Code § 4.1(20) (2019).

reasonable relationship to the damage caused.'" State v. Wagner, 484 N.W.2d 212, 216 (Iowa Ct. App. 1992) (quoting State v. Mayberry, 415 N.W.2d 644, 647 (Iowa 1987)).

The State has the burden to prove the amount of damages caused by a defendant's criminal conduct. State v. Tutor, 538 N.W.2d 894, 897 (Iowa Ct. App. 1995). The trial court has discretion to determine the amount of restitution, and a defendant who seeks to modify a restitution order must establish that the court either failed to exercise or otherwise abused its discretion. Id. at 896. A court abuses its discretion when it orders restitution for losses not causally related to the offense committed. Id. at 896-97.

Restitution is not limited to the parameters of the offense to which a defendant enters a guilty plea. State v. Watts, 587 N.W.2d 750, 751 (Iowa 1998); Earnest v. State, 508 N.W.2d 630, 633 (Iowa 1993). Rather, "the order can be extended to any amount which would be appropriate for tort recovery." State v. Holmberg, 449 N.W.2d 376, 377 (Iowa 1989). Even

so, there must still be evidence tying the defendant's admitted conduct to the amount of restitution ordered. Id. at 377-78.

When Waigand was originally charged, his charges included six counts of Theft in the First Degree, four counts of Theft in the Second Degree, and one count of Ongoing Criminal Conduct. (Information)(App. pp. 4-9). All of the offenses were alleged to have occurred between August 2014 and October 2016. (Information)(App. pp. 4-9).

As part of the plea agreement, Waigand pleaded to the Ongoing Criminal Conduct charge and the State agreed to dismiss the remaining counts. (Plea & Sent. Tr. p. 2 L.1-p. 3 L.21). The agreement also called for Waigand to pay restitution in the amount of approximately $270,000. (Plea & Sent. Tr. p. 3 L.1-11). The State indicated it intended to request that amount or close to it based on the final calculations. (Plea & Sent. Tr. p. 3 L.1-11).

Waigand admitted that from August 2014 to October 2016 he received proceeds from unlawful activity by selling

crops that were collateral for a line of credit with Iowa State Savings bank. (Plea & Sent. Tr. p. 9 L.9-p. 10 L.13). He specifically admitted to the 40 grain transactions listed in Exhibit 1, all of which occurred between August 2014 and October 2016. (Plea & Sent. Tr. p. 10 L.14-p. 11 L.19; Ex. 1)(App. pp. 13-14). Waigand said he did not disagree with any other information regarding *transactions* listed in the minutes of testimony. (Plea & Sent. Tr. p. 12 L.7-18).

According to the minutes of testimony, Waigand obtained a farm loan from Iowa State Savings Bank in 2009, secured by a UCC financing statement filed with the Iowa Secretary of State. (Minutes p. 6)(Conf. App. p. 108). The filing provided a security interest for the bank, in the form of collateral owned by Waigand including but not limited to "…all crops, annual or perennial, and all products of crops…." (Minutes p. 6)(Conf. App. p. 108). The UCC filing was renewed or continued in April 2014. (Minutes p. 6)(Conf. App. p. 108).

In March 2015, Waigand entered into an agreement with Iowa State Savings Bank for a commercial line of credit in the amount of $1,250,000. (Minutes p. 1)(Conf. App. p. 103). The line was granted in recognition of the following security instruments: a $100,000 mortgage dated June 2010; a $1,228,360 mortgage dated May 2015; a $1,000,000 mortgage dated March 2015; and a security agreement dated May 2009. (Minutes p. 1)(Conf. App. p. 103).

In April 2015, Waigand's last loan was renewed based upon a March 2015 financial statement. (Minutes p. 1)(Conf. App. p. 103). It was later discovered that most of the crops associated with the security on the loan had been liquidated between December 2015 and May 2016. (Minutes p. 1)(Conf. App. p. 103). An agent from the Division of Criminal Investigations found 48 or more transactions completed by Waigand that resulted in liquidation of corn and beans that did not result in a corresponding payment to the bank. (Minutes pp. 3-6)(Conf. App. pp. 105-108). The total amount

of funds diverted was $268,788.91. (Minutes p. 6) (Conf. App. p. 108).

Iowa State Savings Bank attempted to collect on Waigand's outstanding obligations, but there remained an outstanding balance of approximately one million dollars. (Minutes p. 6)(Conf. App. p. 108).

At the sentencing hearing, Kevin Stewart, the president of the bank, testified that Waigand had a larger farming operation with a net worth projected at $1.8 million and that the usual loss of $500,000 in a bad year would not have been a major concern. (Plea & Sent. Tr. p. 40 L.6-p. 44 L.1). By 2016, however, the bank learned through bankruptcy proceedings that crops and other items were disappearing and that the net value of the $1.8 million loan was reduced to $600,000. (Plea & Sent. Tr. p. 45 L.7-p. 46 L.20). The bank ultimately foreclosed on the loan, leaving Waigand with a deficiency of $1 million after assets were liquidated. (Sent. Tr. p. 48 L.4-10).

The State acknowledged its documents indicated $286,000 did not go to the bank even though the bank was entitled to receive it. (Plea & Sent. Tr. p. 62 L.2-9). The State acknowledged that amount would be in line with a "normal loss" but that in fact the bank lost one million dollars. (Plea & Sent. Tr. p. 62 L.2-9).

Because the District Court was not comfortable in ordering restitution in the amount of $1 million based on the information it had, it ordered a separate restitution hearing. (Plea & Sent. Tr. p. 72 L.10-20).

On September 19, 2018, the State filed an application for supplemental restitution order in the amount of $988,636.25. (Application for Supp. Rest. Order)(Conf. App. pp. 111-112). Waigand filed an objection stating the bank had already received a civil judgment for the amounts listed in the attachment to the State's application, and that he should not have to face double recovery. (Objection to Restitution)(App. pp. 20-21). Waigand also faulted the application for failing to

specify how the amount related to his plea to $276,518.66 in improper transactions. (Objection to Restitution)(App. pp. 20-21). In a supplement to his objection, Waigand claimed the restitution amount of $276,518.66 should be reduced by $104,069 in legitimate expenses for his farming operation. (Supp. To Obj. to Restitution)(App. pp. 22-23).

Both the State and Waigand asked the District Court to take judicial notice of Union County No. EQCV018051, the civil foreclosure case against Waigand and his wife.[2] (Objection to Restitution; Rest. Tr. p. 9 L.7-15)(App. pp. 20-21). The exhibits attached to the petition for foreclosure provide an additional timeline of the mortgages, promissory notes, and security agreements between Waigand and Iowa State Savings Bank. (EQCV018051 Petition for Foreclosure)(Conf. App. pp. 4-84).

The restitution hearing was held on November 21, 2018. (Rest. Tr. p. 1 L.1-25). Adam Snodgrass, the CEO and CFO

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2. The District Court cited to the file in its restitution order. (12/24/18 Order on Restitution p. 2 n.1)(App. p. 25).

for Iowa State Savings Bank, testified that Waigand engaged in loans with his bank in 2014 and 2015. (Rest. Tr. p. 4 L.21-p. p. 5 L.14). Waigand's last balance sheet was signed in March 2015 and showed $4,287,000 in assets, $2,499,000 in liabilities with a net worth of $1,787,000. (Rest Tr. p. 5 L.15-22). At the time Waigand had $1,045,000 in debt with the bank. (Rest. Tr. p. 5 L.22-24). Based on the balance sheet, the bank made an additional loan of $286,000 for cattle and $1,250,000 for operating expenses. (Rest. Tr. p. 5 L.24-p. 6 L.2).

Snodgrass testified that the bank had foreclosed on the loans and all assets were liquidated, but a civil judgment of $988,000 remained unpaid. (Rest. Tr. p. 6 L.3-15).

The District Court questioned whether the criminal restitution was the amount pledged to the bank, sold, and proceeds not paid to the bank, which may or may not be the same number as the bank's total loss on the loan. (Rest. Tr. p. 9 L.20-25). The State acknowledged that the bank suffered

a direct loss of $288,000 when Waigand liquidated the assets and did not give them to the bank, but argued that "all of the assets were liquidated and not given to the bank." (Rest. Tr. p. 10 L.1-p. 11 L.7). The court questioned whether that included loss of market value, for which Waigand would not be liable. (Rest. Tr. p. 11 L.8-23).

Snodgrass testified that land and other property were liquidated as part of the bankruptcy and foreclosure. (Rest. Tr. p. 12 L.4-15). He explained they would have applied the actual proceeds against the actual outstanding debt, and that the actual proceeds may have differed from the valuation of the property on the balance sheet. (Rest. Tr. p. 12 L.16-23). He said the difference between the pledged assets as represented by Waigand and the recovered assets remains, and that he would not have expected a million-dollar loss given the balance sheet at the time the loans were made. (Rest. Tr. p. 15 L.10-17).

Waigand rested on his objections to the restitution and his request for an adjustment. (Rest. Tr. p. 16 L.7-p. 17 L.12). He acknowledged the facts he admitted to in the guilty plea proceeding were acts of conversion, albeit one course of ongoing conversion. (Rest. Tr. p. 17 L.13-22). As a result, Waigand argued, the civil action contemplated by the restitution statute was for conversion and not foreclosure. (Rest. Tr. p. 17 L.23-p. 18 L.3).

The District Court ultimately ordered Waigand to repay $988,636.25 in restitution to Iowa State Savings Bank. (12/24/18 Order on Restitution p. 5)(App. p. 28). The court noted Waigand's guilty plea admitted no less than $275,000 was diverted, and that his dishonesty resulted in the collapse of his farming operation and the bank obtaining judgments against him for $988,636.25. (12/24/18 Order on Restitution p. 3)(App. p. 26).

While the court could not find a civil tort that was equivalent to Ongoing Criminal Conduct, the court held the

statute allowed the restitution plan to include pecuniary damages the victim could recover against a defendant "under any civil-based theory of recovery 'arising out of the same facts or events.'" (12/24/18 Order on Restitution p. 4)(App. p. 27). The District Court stated "the victim has already recovered a civil judgment and the amount of recovery is fixed." (12/24/18 Order on Restitution p. 4)(App. p. 27).

As to whether the full amount of damages was factually caused by Waigand's conduct and within the scope of liability he should have anticipated when he converted the bank's collateral, the court determined:

> This is a case where the defendant, knowing already that he was in trouble, nevertheless engaged on a course of action that could have no other effect than to cause more trouble. Here, that trouble was the collapse of the defendant's farming operation, forcing the bank to liquidate its collateral. The result factually was losses to the bank. The foreseeability of losses when a troubled farming operation is liquidated is too certain to be gainsaid. Thus, both factually and foreseeably, the victim of the defendant's criminal activity suffered the losses as measured in the civil action that the bank brought against the defendant. The court concludes that the proper amount of restitution in this case is

$988,636.25.

(12/24/18 Order on Restitution p. 5)(App. p. 28).

The District Court erred and abused its discretion.

"As a general rule, restitution depends on the existence of a crime for which the offender was convicted." State v. Bonstetter, 637 N.W.2d 161, 165 (Iowa 2001). In calculating restitution, the court must find "a causal connection between the established criminal act and the injuries to the victim." Id. at 168. "The damage must have been caused by the offender's criminal act to justify the restitution order." Id.

Waigand pleaded guilty to Ongoing Criminal Conduct. As charged, the accusation was that between August 2014 and October 2016, Waigand, "did: knowingly receive any proceeds of a specified unlawful activity to use or invest, directly or indirectly, any part of such proceeds, in the acquisition of any interest in any enterprise or any real property, or in the establishment or operation of any enterprise." (Information Ct. XI)(App. p. 8). This offense did not specifically require a

finding of fraud. The remaining counts, which were later dismissed pursuant to the plea agreement, alleged that Waigand committed theft by taking, destroying, concealing, or disposing of secured property. (Information Cts I-X)(App. pp. 4-7).

At the plea proceeding, Waigand admitted that from August 2014 to October 2016 he received proceeds from unlawful activity by selling crops that were collateral for a line of credit with Iowa State Savings bank. (Plea & Sent. Tr. p. 9 L.9-p. 10 L.13). He specifically admitted to the 40 grain transactions listed in Exhibit 1, all of which occurred between August 2014 and October 2016. (Plea & Sent. Tr. p. 10 L.14-p. 11 L.19; Ex. 1)(App. pp. 13-14). Waigand said he did not disagree with any other information regarding *transactions* listed in the minutes of testimony. (Plea & Sent. Tr. p. 12 L.7-18).

In the presentence investigation report, Waigand acknowledged that "On occasion, I cashed checks that were

supposed to go to ISSB. The money was used to pay for labor, insurance, and farm supplies as well as cash rent. I did so to try to keep farming and pay off debts." (Presentence Investigation Report p. 11)(Conf. App. p. 110).

As acknowledged by Waigand, his admitted conduct amounts to civil conversion. (Rest. Tr. p. 17 L.13-p. 18 L.17). "Conversion is the intentional exercise of control over property 'which so seriously interferes with the right of another to control it that the actor may justly be required to pay … the full value of the chattel.'" State v. Hollinrake, 608 N.W.2d 806, 808 (Iowa Ct. App. 2000).

The charge to which Waigand pleaded guilty did not require a finding of fraud, nor did he ever admit making false statements for the purpose of obtaining loans from Iowa State Savings Bank. See, e.g., Attorney Disciplinary Board v. Wheeler, 824 N.W.2d 505, 509 (Iowa 2012)(attorney pleaded guilty to federal charge of making false statements to a financial institute to obtain a mortgage); State v. Fielder, No.

18-0096, 2019 WL 1303965 at *5-7 (Iowa Ct. App. 2019) (defendant guilty of theft by deception for making false statements to obtain money from another).

Restitution is the "payment of pecuniary damages to a victim in an amount and in the manner provided by the offender's plan of restitution." Iowa Code § 910.1(4) (2019). A victim is "a person who has suffered pecuniary damages as a result of the offender's criminal activities." Id. § 910.1(5). Criminal activities are defined as "any crime for which there is a plea of guilty, verdict of guilty, or special verdict upon which a judgment of conviction is rendered and any other crime committed after July 1, 1982, which is admitted or not contested by the offender, whether or not prosecuted." Id. § 910.1(1).

Because Waigand only pleaded guilty to and admitted engaging in ongoing conduct of conversion and did not plead guilty to or make any admissions regarding obtaining loans by making false statements, he cannot be ordered to pay

restitution on the full amount of loss claimed by Iowa State Savings Bank.

The State acknowledged that the direct loss caused by Waigand's conversion of secured property amounted to approximately $288,000. (Rest. Tr. p. 10 L.17-p. 11 L.3). In order to justify holding Waigand responsible for the full unpaid balance of $988,636.25 from the bank's foreclosure action, the State and bank employees referred to pledged assets that were not "what they were represented to be" or "as represented by" Waigand at the time the bank provided additional financing. (Plea & Sent. Tr. p. 46 L.18-23; Rest. Tr. p. 5 L.3-p. 6 L.2, p. 10 L.1-16, p. 14 L.7-17). But Waigand never pleaded to or admitted any alleged deception in obtaining the financing, and therefore these allegations cannot be used to justify restitution in the amount sought by the State and the bank.

When addressing causation for criminal restitution, the Iowa Supreme Court applies the factual cause and scope of liability prongs of the Restatement (Third) of Torts. State v.

Shears, 920 N.W.2d 527, 541 (Iowa 2018). The courts look to "the risks that made the actors' conduct tortious and a determination of whether the harm at issue is a result of any of these risks." Id.

The District Court found that Waigand's "dishonesty resulted in the collapse of his farming operation and the bank obtained judgments against the defendant and his wife for $988,636.25." (12/24/18 Order on Restitution p. 3)(App. p. 26). This holding assumes Waigand presented false information to obtain the loans from the bank – something to which Waigand did not enter either a plea or an admission.

The harm directly caused by Waigand's properly-considered conversion was no more than $288,000. (Minutes p. 6; Plea & Sent. Tr. p. 56 L.12-17, p. 62 L.2-9; Rest. Tr. p. 10 L.17-p. 11 L.7)(Conf. App. p. 108). Bank officials acknowledged that a loss in that amount, while potentially a concern, would not have caused the bank to initiate foreclosure proceedings. (Plea & Sent. Tr. p. 41 L.21-p. 44

L.1).

There is a lack of an established causal connection between Waigand's admitted criminal conduct and the $988,636.25 ordered in restitution. Waigand respectfully requests this Court vacate the restitution order and remand the case to the District Court to enter a restitution order correctly reflecting the losses caused by Waigand's ongoing acts of conversion.

II. THE DISTRICT COURT ERRED IN FAILING TO ORDER AN OFFSET FOR ANY AMOUNTS PAID ON THE CORRESPONDING CIVIL JUDGMENT.

Preservation of Error: Error was preserved by the District Court's order setting the amount of restitution. (12/24/18 Order of Restitution)(App. pp. 24-29).

Furthermore, the general rule of error preservation is not applicable to void, illegal, unconstitutional, or procedurally defective sentences. State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994); State v. Pearson, 836 N.W.2d 88, 94 (Iowa 2013). Criminal restitution ordered by the court is part

of the sentencing order. State v. Jose, 636 N.W.2d 38, 45 (Iowa 2001). The court may correct an illegal sentence at any time. Iowa R. Crim. P. 2.24(5)(a) (2019).

Scope of Review: This Court reviews restitution orders for correction of errors at law. 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). A reviewing court will look to whether the lower court's findings have substantial evidentiary support and whether the court properly applied the law. State v. Bonstetter, 637 N.W.2d 161, 165 (Iowa 2001).

Merits: As part of his objection to the State's supplemental request for restitution, Waigand asked the District Court to alleviate any concerns over the bank's double recovery under both the civil judgment and the criminal restitution order. (Objection to Restitution; Rest. Tr. p. 16 L.7-p. 17 L.12)(App. pp. 20-21). At the restitution hearing, a

representative of Iowa State Savings Bank acknowledged that the bank could only collect on the amount owed, and said it would apply any payments made to both the civil and criminal cases. (Rest. Tr. p. 6 L.16-p. 7 L.11). The District Court failed to include any setoff provision in its restitution order. The court erred.

Under Iowa Code section 910.8, any criminal restitution payment received by a victim must be set off against any corresponding civil judgment the victim may later receive against the defendant:

> This chapter and proceedings under this chapter do not limit or impair the rights of victims to sue and recover damages from the offender in a civil action. The institution of a restitution plan shall toll the applicable statute of limitations for a civil action arising out of the same facts or event for the period of time that the restitution plan is effective. However, any restitution payment by the offender to a victim shall be set off against any judgment in favor of the victim in a civil action arising out of the same facts or event.

Iowa Code § 910.8 (2017). The statute does not specifically address what should happen if the victim first obtains a civil

judgment against the defendant who is later ordered to pay criminal restitution in the matter.

In State v. Klawonn, the Iowa Supreme Court considered the effect of a final settlement and release in a civil proceeding on the amount of restitution owed by the defendant in the corresponding criminal case. State v. Klawonn, 688 N.W.2d 271 (2004). The Court held:

> [I]t would be an absurd result to allow an offender who has paid his or her court-ordered restitution to offset the restitution against a subsequent civil judgment, while prohibiting a person from setting off the final settlement of a civil action arising out of the same facts or events as the prior criminal proceeding against amounts ordered to restitution.

Id. at 276. Accordingly, the Court approved the District Court's order setting off the civil settlement made by Klawonn's attorney against the $150,000 order of restitution. Id.

> Klawonn makes clear the purpose of the statute is to coordinate civil recoveries with criminal restitution to avoid double recovery. … The statutory purpose of coordinating civil damages with criminal-restitution payments as declared in

> Klawonn does not turn on the timing of the civil-settlement and criminal-restitution orders.

State v. Driscoll, 839 N.W.2d 188, 191 (Iowa 2013).

Waigand respectfully requests that the Order on Restitution be remanded with directions to specifically include a provision requiring the offset of any amounts paid on the civil judgment toward the amount of criminal restitution.

III. THE DISTRICT COURT ENTERED AN ILLEGAL SENTENCE WHEN IT ORDERED CRIMINAL RESTITUTION IN THE AMOUNT OF $988,636.25 WITHOUT AFFORDING WAIGAND HIS RIGHT TO A JURY TRIAL UNDER THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I SECTION 9 OF THE IOWA CONSTITUTION.

Preservation of Error: The general rule of error preservation is not applicable to void, illegal, unconstitutional, or procedurally defective sentences. State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994); State v. Pearson, 836 N.W.2d 88, 94 (Iowa 2013). Criminal restitution ordered by the court is part of the sentencing order. State v. Jose, 636 N.W.2d 38, 45 (Iowa 2001). The court may correct an illegal sentence at any time. Iowa R. Crim. P. 2.24(5)(a) (2019).

Alternatively, appellate review is not precluded if failure to preserve error results from a denial of effective assistance of counsel. State v. Clark, 351 N.W.2d 532, 535 (Iowa 1985).

Scope of Review: Illegal sentences are review for correction of errors at law. State v. Davis, 544 N.W.2d 453, 455 (Iowa 1996). Constitutional questions are reviewed de novo. State v. Bruegger, 773 N.W.2d 862, 869 (Iowa 2009).

Merits: The District Court erred in setting the amount of criminal restitution absent jury findings to support the amount. While prior case law has held the jury trial right contained in the United States Constitution to be inapplicable to criminal restitution, a recent progression of case law from the United States Supreme Court suggests criminal restitution amounts must be supported by jury findings. And if criminal restitution were held to be somehow civil, then the civil jury provisions of Article I Section 9 of the Iowa Constitution – which incorporates the same protections as the Seventh Amendment to the United States Constitution – would apply.

Either way, Waigand was deprived of his right to have a jury determine any amount of restitution outside of that justified by his admissions.

A. The jury trial rights of the Sixth and Fourteenth Amendments to the United States Constitution and Article I Section 9 of the Iowa Constitution apply to criminal restitution hearings.

Until recently, it was generally well-established that the constitutional right to a jury trial did not apply to a hearing on criminal restitution. See, e.g., State v. Mayberry, 415 N.W.2d 644, 647 (Iowa 1987)(no right to jury trial for restitution under either Sixth Amendment or Article I Section 9 of the Iowa Constitution); Cortney E. Lollar, What is Criminal Restitution?, 100 Iowa L. Rev. 93, 150 (Nov. 2014) ("[E]very circuit court to consider whether the Sixth Amendment applies to criminal restitution has declined to grant this constitutional protection."). Recent United States Supreme Court decisions require this Court to reexamine precedent.

In Apprendi v. New Jersey, a criminal court applied an enhanced sentence to Apprendi after finding, without a jury,

that the crimes to which he pleaded guilty were motivated by racial bias. Apprendi v. New Jersey, 530 U.S. 466, 470-71 (2000). This finding increased the maximum penalty for the applicable offenses from 10 years to 12 years. Id. Apprendi appealed, arguing that due process required a jury to find beyond a reasonable doubt that he was motivated by bias. Id. at 471.

The United States Supreme Court referred to its prior precedent with respect to a federal prosecution:

> under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.

Id. at 476 (quoting Jones v. United States, 526 U.S. 227, 243 (1999). The Court determined the Fourteenth Amendment required the same restrictions be placed upon the states. Id.

The Court reasoned that any distinction between an "element" of an offense and a "sentencing factor" would have

been unknown in common law. Id. at 478-79. All the relevant facts would have been noticed to the defendant in the indictment so that the defendant could predict with certainty the judgment and therefore punishment that could be imposed. Id. at 478-80. While recognizing a court has discretion to consider various factors in imposing a sentence within the range prescribed by statute, the Court held it erodes the protections offered defendants to allow a judge to impose a sentence in excess of the maximum permitted by the jury's verdict. Id. at 481-83.

In Blakely v. Washington, the United States Supreme Court addressed the definition of "statutory maximum sentence" for the purposes of Apprendi. Blakely v. Washington, 542 U.S. 296, 303-04 (2004). The Court clarified that the phrase meant "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Id. at 303.

> In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose

> after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment,"… and the judge exceeds his proper authority.

Id. at 303-04. Because Blakely was sentenced to prison for an extra three years beyond the maximum for the crime to which he confessed without any additional findings by a jury, the Court reversed his sentence. Id. at 313-14.

In Southern Union Company v. United States, the U.S. Supreme Court extended Apprendi and Blakely to a court's imposition of a fine. Southern Union Co. v. United States, 567 U.S. 343, 346 (2012). Southern Union was convicted by a jury of violating the Resource Conservation and Recovery Act of 1976, which was punishable by a fine of not more than $50,000 for each day of violation. Id. at 346-47. It argued that because the jury was not asked to determine the duration of the violation, the court could impose only a maximum fine of $50,000. Id. at 347. The court disagreed – finding the

"content and context of the verdict all together" found a 762-day violation – and set a potential maximum fine of $38.1 million with an actual fine of $6 million and a community service obligation of $12 million. Id.

The U.S. Supreme Court found "no principled basis" for treating criminal fines differently than sentences of incarceration or death for purposes of Apprendi. Id. at 349. The "core concern" of Apprendi was to save for the jury the determination of facts that will justify the statutory punishment for an offense and that concern applied regardless of whether the punishment was incarceration of a fine. Id. The Court recognized that fines are penalties inflicted by the government for the commission of an offense, and that they were the most common form of noncapital punishment at the Founding. Id. Furthermore, the amount of the fine is often calculated by reference to the facts of the offense. Id.

The Court recognized that a fine could be so insubstantial as to be considered "petty" and not warranting

Sixth Amendment protection. Id. at 350. The same held true for brief periods of imprisonment. Id. at 351. "But not all fines are insubstantial, and not all offenses punishable by fines are petty." Id. If the amount of the fine is sufficient enough to trigger the Sixth Amendment right to a jury trial, Apprendi would be applied in full. Id. at 352. The government did not contend the extent of the punishment did not require a jury trial. Id.

The Court acknowledged that at the Founding judges "'possessed a great deal of discretion' in determining whether to impose a fine and in what amount." Id. at 353. Some fines were apparently without limit while other fines were capped at by statute. Id. But where the amount of the fine was pegged to the determination of specified facts – such as the value of property taken – the predominant practice was for the facts to be alleged in the indictment and proved to the jury. Id. at 354. The Court concluded Apprendi applied to criminal fines. Id. at 360.

As recognized by the Iowa Supreme Court, this progression of case law has left the legal community wondering if constitutional issues are "lurking" behind restitution statutes. See State v. Jenkins, 788 N.W.2d 640, 643 (Iowa 2010)(referring to academic commentary on whether imposing restitution without a jury violates the Sixth or Seventh Amendments); State v. Shears, 920 N.W.2d 527, 531 n.2 (Iowa 2018)(same). See also Cortney E. Lollar, What is Criminal Restitution?, 100 Iowa L. Rev. 93, 149-54 (Nov. 2014) (discussing potential application of Sixth, Seventh and Eighth Amendments); James Barta, Guarding the Rights of the Accused and Accuser: The Jury's Role in Awarding Criminal Restitution Under the Sixth Amendment, 51 Am. Crim. L. Rev. 463, 477-81 (Spring 2014)(discussing application of the Sixth Amendment); Judge William M. Acker, Jr., The Mandatory Victims Restitution Act is Unconstitutional. Will the Courts Say So After Southern Union v. United States?, 64 Ala. L. Rev. 803, 821-29 (2013)(same); Melanie D. Wilson, In Booker's

Shadow: Restitution Forces a Second Debate on Honesty in Sentencing, 39 Ind. L. Rev. 379, 394-409 (2006)(same).

The possible application of the Sixth Amendment to criminal restitution has attracted the attention of some members of the U.S. Supreme Court. In Hester v. United States, petitioners asked whether the ruling of Apprendi and Southern Union should be applied to criminal restitution under the federal Mandatory Victims Restitution Act [MVRA]. Petition for Writ of Certiorari, Hester v. United States, No. 17-9082 (May 21, 2018). The petition was ultimately denied by the Court, but Justices Gorsuch and Sotomayor dissented in the denial. Hester v. United States, 139 S.Ct. 509 (Mem.) (2019).

In his dissent, Justice Gorsuch indicated the case was worthy of review given the increasing prevalence of criminal restitution orders and their effects on the offender's right to vote, court supervision and reincarceration. Id. at 510. He referred to various circuit court rulings, including the one

below, that acknowledged that allowing judges rather than juries to decide the facts necessary for restitution orders was not "well-harmonized" with the Court's Sixth Amendment precedent. Id.

Justice Gorsuch was unconvinced by the government's argument that the Sixth Amendment did not apply in the restitution context because the amount of restitution was dictated by the amount of the victim's loss and did not involve a "statutory maximum":

> But the government's argument misunderstands the teaching of our cases. We've used the term "statutory maximum" to refer to the harshest sentence the law allows a court to impose based on facts a jury has found or the defendant has admitted. *Blakely v. Washington*, 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). In that sense, the statutory maximum for restitution is usually *zero*, because a court can't award any restitution without finding additional facts about the victim's loss. And just as a jury must find any facts necessary to authorize a steeper prison sentence or fine, it would seem to follow that a jury must find any facts necessary to support a (nonzero) restitution order.

Id.

Gorsuch was also unimpressed with the government's argument that the Sixth Amendment did not apply to restitution orders because they were only a civil penalty meant to compensate victims for their losses. Id. at 510-11. Gorsuch responded that the Sixth Amendment's jury trial right applied to all criminal prosecutions, and that restitution is a penalty imposed as part of the offender's criminal sentence. Id. Even if criminal restitution fell outside of the Sixth Amendment, the Court would then have to consider the civil jury trial right imposed by the Seventh Amendment. Id. at 511. And historically, when both Amendments were adopted, restitution for stolen goods was only permitted to the extent they were mentioned in the indictment and their value found by a jury. Id.

The Sixth Amendment right to a jury trial applied to the determination of criminal restitution in Waigand's case. As discussed in Justice Gorsuch's dissent in the Hester denial of certiorari and in the Southern Union case, historically, before

a judge could impose restitution for the value of goods stolen, an offender was entitled to notice of the value in the indictment and a jury determination of the value of the goods. Id. In the American colonies, an individual convicted of larceny would be required to repay what was stolen plus an additional amount as punishment. James Barta, Guarding the Rights of the Accused and Accuser: The Jury's Role in Awarding Criminal Restitution Under the Sixth Amendment, 51 Am. Crim. L. Rev. 463, 474 (Spring 2014). Unlike a civil action for punitive damages, prosecution for these restitution amounts was brought in the name of the State. Id. "English and American courts almost uniformly imposed restitution only after a conviction and only based on the facts alleged in the indictment. A victim could not obtain restitution for stolen goods omitted from the indictment, unless the jury returned a special verdict." Id. at 477. These common law practices define the contours of the right to a jury trial under the Sixth Amendment. Southern Union Co. v. United States,

567 U.S. 343, 353 (2012)(the scope of the right to a jury trial is informed by the "historical role of the jury at common law).

The characterization of restitution as criminal rather than civil has gained increasing popularity. Most circuit courts have held that restitution is a criminal remedy that serves a punitive and deterrent purpose. See e.g., Cortney E. Lollar, What is Criminal Restitution?, 100 Iowa L. Rev. 93, 121 (Nov. 2014) (citing the 7th and 10th Circuits as the only circuit courts to hold criminal restitution is not punitive); United States v. Serawop, 505 F.3d 1112, 1122-23 & n.4 (10th Cir. 2007)(discussing the circuit split at the time). The justifications for classifying restitution as criminal may differ somewhat, but in general the categorization is based on Supreme Court precedent describing restitution as criminal punishment and the history and purpose of restitution in general. James M. Bertucci, Note, Apprendi-land Opens its Borders: Will the Supreme Court's Decision in Southern

Union Co. v. United States Extend Apprendi's Reach to Restitution?, 58 St. Louis U. L.J. 565, 584 (Winter 2014).

Even when recognizing restitution as a criminal penalty, however, the circuit courts have uniformly rejected applying Apprendi to criminal restitution under the MVRA. Id. at 585. They generally do so because the MVRA requires restitution for "the full extent of the victim's harm" and therefore there is no "statutory maximum" to be applied. Id. at 585-86. This approach is inconsistent with Blakely, which tied the "statutory maximum" to that which is authorized by the facts found by a jury or admitted by a defendant. Blakely v. Washington, 542 U.S. 296, 303 (2004).

The Iowa Supreme Court has recently discussed the complex nature of restitution. The Court stated it "arises in the context of a criminal proceeding designed to punish the offender" and that as a result criminal restitution is nondischargeable in bankruptcy. State v. Shears, 920 N.W.2d 527, 531 (Iowa 2018). It is also subject to the

Excessive Fines Clause. Id. At the same time, the Court held, criminal restitution seeks to provide compensation to the victim for losses caused by the defendant's conduct, which is a civil goal. Id.

Realistically, however, criminal restitution cannot be separated from the criminal sentence imposed upon a defendant. The Iowa Code orders a criminal court to order restitution at sentencing when a defendant pleads or is found guilty. Iowa Code § 910.2(1) (2019). Ordering restitution at sentencing is a matter of law, while the court has discretion to determine the amount of restitution. State v. Shears, 920 N.W.2d at 532. The State files a statement of pecuniary damages and the burden is on the State to show entitlement to criminal restitution. Id.; Iowa Code § 910.3 (2019). The victim has no role in the restitution hearing. The amount of restitution ordered is limited by the defendant's reasonable ability to pay so as not to offense the Excessive Fines Clause. State v. Shears, 920 N.W.2d at 532. The Court has

previously described criminal restitution as penal in nature. State v. Bonstetter, 637 N.W.2d 161, 166 (Iowa 2001).

Because criminal restitution is punishment, the Sixth Amendment applies. See Duncan v. Louisiana, 391 U.S. 145, 149 (1968)(Sixth Amendment applies to states through the due process clause of the Fourteenth Amendment); State v. Biddle, 652 N.W.2d 191, 200-01 (Iowa 2002)(same). So does Article I Section 9 of the Iowa Constitution:

> The right of trial by jury shall remain inviolate; but the General Assembly may authorize trial by a jury of a less number than twelve men in inferior courts" and "[i]n all criminal prosecutions, and in cases involving the life, or liberty of an individual the accused shall have a right to a speedy and public trial by an impartial jury....

Iowa Const. Art. I § 9.

The Iowa Supreme Court has generally interpreted the jury trial right of Article I Section 9 in a similar manner to the Sixth Amendment, and likewise recognizes that the contours of the state provision are interpreted in relation to jury trial rights at common law, though with some flexibility. See State

v. Biddle, 652 N.W.2d 191, 201 (Iowa 2002)(similar interpretation); State v. Morgan, 559 N.W.2d 603, 609 (Iowa 1997)(common law considerations); Pitcher v. Lakes Amusement Co., 236 N.W.2d 333, 338 (Iowa 1975).

In this matter, Waigand admitted the conversion of crops listed in Exhibit 1 and did not disagree with other transactions listed in the minutes of testimony. Waigand was never provided notice in conjunction with the trial information and minutes that the State would seek the full remaining $988,636.25 unpaid balance from the foreclosure, no jury ever made such a finding, and Waigand never admitted causing that extent of loss. Waigand was not afforded his right to a jury trial on his restitution obligation. The District Court's December 24, 2018 Order of Restitution should be vacated and the case remanded for restitution limited to the conversions admitted to by Waigand.

B. If the right to a jury trial in criminal proceedings does not apply to criminal restitution, then the right to a civil jury trial under Article I Section 9 of the Iowa Constitution applies.

While most federal circuit courts have determined criminal restitution to be penal in nature, a few have determined that it is civil in nature and therefore Apprendi and Southern Union do not apply. See e.g., United States v. Wolfe, 701 F.3d 1206, 1216-17 (7th Cir. 2012). If criminal restitution is indeed civil in nature, then it is the Seventh Amendment, not the Sixth, and Article I Section 9 of the Iowa Constitution that have relevance to this case.

The Seventh Amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Const. amend VII.

The Seventh Amendment is not applicable to the states. O'Hara v. State, 642 N.W.2d 303, 314 (Iowa 2002).

Nonetheless, the Iowa Constitution contains a provision similar to the Seventh Amendment:

> The right of trial by jury shall remain inviolate; but the General Assembly may authorize trial by jury of a less number than twelve men in inferior courts; but no person shall be deprived of life, liberty, or property, without due process of law.

Iowa Const. Art. I § 9. The Iowa Supreme Court has held that the intent of the two amendments are the same. Schloemer v. Uhlenhopp, 237 Iowa 279, 282, 21 N.W.2d 457, 458 (1946). Therefore, this Court may find arguments relating to jury trials under the Seventh Amendment persuasive as to the meaning of Article I Section 9. Iowa Nat. Mut. Ins. Co. v. Mitchell, 305 N.W.2d 724, 726 (Iowa 1981).

As with the Sixth Amendment, the Seventh Amendment uses a "historical test" to determine when a jury trial is constitutionally required in a civil case. Id. If a jury would have been impaneled in 1791 practice in England, then a jury is required for Seventh Amendment purposes. Id. at 726-27 (quoting Wolfram, The Constitutional History of the Seventh

Amendment, 57 Minn. L. Rev. 639, 639-40 (1973)). One historical distinction provided for juries in law cases but not in cases of equity or admiralty. Id. at 727.

Another historical distinction involved the amount of the claim; juries were not required unless the amount of the claim exceeded 40 shillings. Id. The amount of the claim may have been increased by statute over time, but the general concept was that small claims were excluded from the jury requirement. Id.

> This small claim nonjury concept was incorporated directly into the seventh amendment to the federal constitution in the "twenty dollar" limitation. We are convinced it also is inherent in article I, section 9, of the Iowa Constitution, even though no monetary limitation is included.

Id.

In Iowa National Mutual Insurance Company v. Mitchell, the Iowa Supreme Court declined to set a constitutional ceiling amount under Article I Section 9, but held that the right to a jury trial did not apply to small claims. Id. at 728-29. As of July 1, 2018, the amount for a small claims proceeding in

Iowa is capped at $6,500. Iowa Code § 631.1(1)(b) (2019). The amount sought by the State on behalf of Iowa State Savings Bank is $988,636.25. (Application for Supp. Rest. Order)(Conf. App. pp. 111-112). Based on the amount of the restitution sought by the State, a jury trial was required under Article I Section 9.

Even when criminal restitution is considered under the cases in law versus equity distinction, there is a basis for finding a jury requirement. In 1791, restitution was available in both law and at equity. Bonnie Arnett Von Roeder, Note, The Right to a Jury Trial to Determine Restitution Under the Victim and Witness Protection Act of 1982, 63 Tex. L. Rev., 671, 685 (Dec. 1984). The United States Supreme Court has held "'restitution is a legal remedy when ordered in a case at law and an equitable remedy ... when ordered in an equity case,' and whether it is legal or equitable depends on 'the basis for [the plaintiff's] claim' and the nature of the underlying remedies sought." Great-West Life & Annuity Ins.

Co. v. Knudson, 534 U.S. 204, 213 (2002)(citing Reich v. Continental Cas. Co., 33 F.3d 754, 756 (7th Cir. 1994)). Generally speaking, compensation for pecuniary damages is considered a legal remedy. Bonnie Arnett Von Roeder, Note, The Right to a Jury Trial to Determine Restitution Under the Victim and Witness Protection Act of 1982, 63 Tex. L. Rev., 671, 685 (Dec. 1984). See, e.g., Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 43-48 (1989)(when a cause of action is solely for money damages, it is an action in law and not in equity).

The Iowa Supreme Court looks to the "essential nature of the cause of action" and not simply the remedy to determine whether a party is entitled to a jury trial under Article I Section 9 of the Iowa Constitution. Weltzin v. Nail, 618 N.W.2d 293, 297 (Iowa 2000)(citing Moser v. Thorp Sales Corp., 312 N.W.2d 881, 895 (Iowa 1981). The restitution sought in this case is part of the criminal proceeding. See State v. Jenkins, 788 N.W.2d 640, 643-44 (Iowa 2010)

(describing statutory framework for criminal restitution). It is accordingly legal in nature and Waigand was entitled to have a jury determination the amount of restitution.

The District Court's determination of the amount of restitution violated Waigand's rights under Article I Section 9 of the Iowa Constitution. The restitution order should be vacated and remanded to the District Court.

C. If error was not preserved for any reason, Waigand alternatively claims restitution counsel ineffective.

Should this Court deem that defense counsel did not preserve error for any reason, Washington alternatively claims trial counsel ineffective. A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction under ·the Sixth Amendment to the United States Constitution has two components:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that

> counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2065 (1984). Defendant has the burden to prove both of these elements by a preponderance of the evidence. Id.

A convicted defendant making a claim of ineffective assistance of counsel must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. Id. at 690, 104 S.Ct. at 2066. The defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694, 104 S.Ct. at 2068.

Certainly, counsel is not expected to be a "'crystal gazer' who can predict future changes in established rules of law in order to provide effective assistance to a criminal defendant." State v. Schoelerman, 315 N.W.2d 67, 72 (Iowa 1982).

Waigand recognizes the established case law in Iowa and the federal circuits had not applied jury trial rights to criminal restitution. See State v. Mayberry, 415 N.W.2d 644, 647 (Iowa 1987)(no right to jury trial for restitution under either Sixth Amendment or Article I Section 9 of the Iowa Constitution); Cortney E. Lollar, What is Criminal Restitution?, 100 Iowa L. Rev. 93, 150 (Nov. 2014) ("[E]very circuit court to consider whether the Sixth Amendment applies to criminal restitution has declined to grant this constitutional protection.").

At the same time, counsel is expected to exercise reasonable diligence in determining whether an issue is "worth raising." State v. Westeen, 591 N.W.2d 203, 210 (Iowa 1999). As of 2014, there was significant academic commentary as to whether the United States Supreme Court's decision in Southern Union would lead the Court to rule that the Sixth Amendment required that the determination of criminal restitution amounts be based on either jury findings or

admissions by the defendant. See, e.g., Cortney E. Lollar, What is Criminal Restitution?, 100 Iowa L. Rev. 93, 149-54 (Nov. 2014)(discussing potential application of Sixth, Seventh and Eighth Amendments); James Barta, Guarding the Rights of the Accused and Accuser: The Jury's Role in Awarding Criminal Restitution Under the Sixth Amendment, 51 Am. Crim. L. Rev. 463, 477-81 (Spring 2014)(discussing application of the Sixth Amendment); Judge William M. Acker, Jr., The Mandatory Victims Restitution Act is Unconstitutional. Will the Courts Say So After Southern Union v. United States?, 64 Ala. L. Rev. 803, 821-29 (2013)(same); Melanie D. Wilson, In Booker's Shadow: Restitution Forces a Second Debate on Honesty in Sentencing, 39 Ind. L. Rev. 379, 394-409 (2006)(same). Iowa case law recognized the penal nature of criminal restitution, and a majority of circuit courts likewise recognized criminal restitution was punishment. See State v. Jenkins, 788 N.W.2d 640, 643-44 (Iowa 2010)(describing statutory

framework for criminal restitution); State v. Bonstetter, 637 N.W.2d 161, 166 (Iowa 2001)(describing restitution as penal in nature); Cortney E. Lollar, What is Criminal Restitution?, 100 Iowa L. Rev. 93, 121 (Nov. 2014)(most circuit courts recognize restitution as a criminal remedy).

In addition, several Iowa cases raised the prospect that if the Sixth Amendment did not apply to criminal restitution because it was somehow "civil," then the Seventh Amendment would apply. See State v. Jenkins, 788 N.W.2d 640, 643 (Iowa 2010)(referring to academic commentary on whether imposing restitution without a jury violates the Sixth or Seventh Amendments); State v. Shears, 920 N.W.2d 527, 531 n.2 (Iowa 2018)(same). See also Cortney E. Lollar, What is Criminal Restitution?, 100 Iowa L. Rev. 93, 149-54 (Nov. 2014) (discussing potential application of Sixth, Seventh and Eighth Amendments). Although the Seventh Amendment would not apply to an Iowa criminal case, counsel should have been aware that the similar provision in Article I Section 9 of the

Iowa Constitution would apply. Schloemer v. Uhlenhopp, 237 Iowa 279, 282, 21 N.W.2d 457, 458 (1946); Iowa Nat. Mut. Ins. Co. v. Mitchell, 305 N.W.2d 724, 726 (Iowa 1981).

Furthermore, the potential application of the Sixth and Seventh Amendments to criminal restitution was addressed by State v. Jenkins in 2010 and in a footnote in State v. Shears nearly a month before the District Court issued its restitution order. State v. Jenkins, 788 N.W.2d 640, 643 (Iowa 2010); State v. Shears, 920 N.W.2d 527, 531 n.2 (Iowa 2018). (12/24/18 Order on Restitution)(App. pp. 24-29). Although these cases obviously did not provide a resolution of the issue, they would have alerted counsel to the potential arguments.

While the violation of the right to a public trial is a structural error, the United States Supreme Court has held that the failure to have a jury trial on a sentencing factor is not structural. Compare Weaver v. Massachusetts, 137 S.Ct. 1899, 1908 (2017)(structural error for lack of jury trial) with Washington v. Recuenco, 548 U.S. 212, 222 (2006).

Nonetheless, the dissents in Recuenco make a strong argument for finding structural error where the defendant admits to one offense (conversion) but is held financially responsible in the criminal case for an act (resulting foreclosure) that was neither admitted by the defendant nor proven to a jury. Washington v. Recuenco, 548 U.S. 212, 223-29 (2006)(Justices Stevens and Ginsburg dissenting).

Regardless, had restitution counsel raised a timely objection, the amount of restitution should have been limited to Waigand's admitted facts of conversion. He was prejudiced by trial counsel's failure, and the restitution order should be vacated and remanded to the District Court.

IV. DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE ONE, SECTION TEN OF THE IOWA CONSTITUTION WHEN RESTITUTION COUNSEL FAILED TO ARGUE FOR EQUITABLE ESTOPPEL.

Preservation of Error: Appellate review is not precluded if failure to preserve error results from a denial of

effective assistance of counsel. State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1983).

Scope of Review: When a defendant asserts a constitutional violation, the reviewing court makes an independent evaluation of the totality of the circumstances, which is the equivalent of a de novo review. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984).

Merits: The purpose of the effective assistance guarantee of the Sixth Amendment is to ensure criminal defendants receive a fair trial. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065 (1984).

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction has two components:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the

> defendant of a fair trial, a trial whose result is reliable.

Id. at 687, 104 S.Ct. at 2065. See also Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984). Defendant has the burden to prove both of these elements by a preponderance of the evidence. Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. at 2065.

A convicted defendant making a claim of ineffective assistance of counsel must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. Id. at 690, 104 S.Ct. at 2066. The defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694, 104 S.Ct. at 2068-69.

Waigand claims trial counsel rendered ineffective assistance by failing to assert the doctrine of equitable

estoppel to limit his criminal restitution to the amount initially proffered by the prosecutor and that induced his plea.

At the plea proceeding, the State recited the terms of the plea agreement and referred to the prospect of restitution:

> There will, of course, need to be a presentence investigation report completed. There will be some potential questions regarding restitution, Your Honor, and I believe the parties at this point -- the State's position is that restitution is already requested in the approximate amount of $270,000. We have had some discussions regarding the auditing and exact calculation of that number. But for purposes of our plea today, I believe the numbering in the minutes was $268,788.91. Certainly, Your Honor, we intend to request that amount or near that based upon the final arithmetic calculations.

(Plea & Sent. Tr. p. 3 L.1-11). Waigand tendered his plea and the District Court accepted it. (Plea & Sent. Tr. p. 16 L.17-25).

Circumstances changed at the sentencing hearing. For the first time, the bank alleged that it suffered a loss of nearly one million dollars following the liquidation of Waigand's assets in foreclosure. (Plea & Sent. Tr. p. 48 L.4-10). The

State acknowledged that the bank lost $286,000 directly from the converted collateral, but argued that the bank in fact lost a total of $1 million. (Plea & Sent. Tr. p. 62 L.2-9). At the restitution hearing, the bank claimed that $988,000 of the civil judgment obtained against Waigand following foreclosure remained unpaid. (Rest. Tr. p. 6 L.3-15). Again, the State acknowledged the bank suffered a direct loss of $288,000 but argued for the full amount of the unpaid debt. (Rest. Tr. p. 10 L.1-p. 11 L.7).

Waigand contends his attorney below should have raised the defense of equitable estoppel to limit his amount of criminal restitution to that which was originally requested by the State. Counsel breached an essential duty and caused prejudice to Waigand.

The Iowa Supreme Court has discussed the contours of the equitable estoppel doctrine:

> Equitable estoppel is a common-law affirmative defense "preventing one party who has made certain representations from taking unfair advantage of another when the party making the representations

> changes its position to the prejudice of the party who relied upon the representations." *ABC Disposal Sys., Inc. v. Dep't of Natural Res.*, 681 N.W.2d 596, 606 (Iowa 2004) (citing *Ahrendsen v. Iowa Dep't of Human Servs.*, 613 N.W.2d 674, 678 (Iowa 2000)). Joseph, as the party asserting the defense, has the burden to prove "by clear and convincing evidence," *id.* (citing *Fencl v. City of Harpers Ferry*, 620 N.W.2d 808, 816 (Iowa 2000)), the following elements:
>
> > "(1) a false representation or concealment of material facts; (2) lack of knowledge of the true facts on the part of the actor; (3) the intention that it be acted upon; and (4) reliance thereon by the party to whom made, to his prejudice and injury."

Markey v. Carney, 705 N.W.2d 13, 21 (Iowa 2005).

"The purpose of equitable doctrines is 'to avoid injustice in particular cases.'" United States v. Williams, 612 F.3d 500, 510 (6th Cir. 2010). Even so, the doctrine of equitable estoppel generally does not apply to the government unless there are exceptional or compelling circumstances resulting in manifest injustice. 28 Am. Jur.2d Estoppel and Waiver § 138 (Aug. 2019); Poyner v. Iowa Dist. Ct for Montgomery Co., No. 02-1349, 2003 WL 21543536 at *1 (Iowa Ct. App. July 2003).

There were compelling reasons to apply the doctrine of equitable estoppel in this case. The State presented a significantly inaccurate statement of the amount of restitution it would seek at the time Waigand entered his plea. The State provided an initial approximate figure of $270,000 and, while acknowledging it was still awaiting final calculations, stated that "we intend to request that amount or near that." (Plea & Sent. Tr. p. 3 L.1-11). This, obviously, was a serious departure from the amount the State later requested.

Waigand detrimentally relied on the initial amount provided by the State when he waived his rights to a jury trial and entered a guilty plea. Perhaps it would have been one thing had the final calculations resulted in an extra $6,000. But the State's final calculation added an extra $600,000 to the restitution amount. (Application for Supp. Rest. Order) (Conf. App. pp. 111-112).

It is not as though the final calculations based on the foreclosure would have been a surprise to the State at the time

Waigand entered his plea on June 15, 2018. The decree of foreclosure was entered on January 20, 2017. (EQCV018051 Decree of Foreclosure)(Conf. App. pp. 85-100). In the decree, the District Court found the unpaid balance on Waigand's notes was $1,752,882.89. (EQCV018051 Decree of Foreclosure Ct. III ¶ 12)(Conf. App. pp. 97-98). The general execution ordered on October 3, 2017 – provided by the State during the restitution hearing – indicated the remaining unpaid amount of $988.636.25. (Rest. Tr. p. 9 L.7-15; EQCV018051 10/3/17 General Execution)(Conf. App. pp. 101-102).

The State knew when it suggested $270,000 in restitution at the plea hearing that the bank actually lost significantly more money in the foreclosure action. Yet the $270,000 figure was consistent with the amounts Waigand admitted converting. (Ex. 1)(App. pp. 13-14). Waigand would have little reason to think that the State would come back to seek an additional $600,000 in criminal restitution,

particularly when the bank had already received a civil judgment against him for the full amount of his loss.

It was manifestly unjust for the State to lure Waigand into a plea agreement with the prospect of $270,000 in restitution only to then seek $988,000 in criminal restitution based upon his plea. While counsel below argued that restitution should be for Waigand's acts of conversion and not the bank's decision to foreclose, counsel did not argue that equitable estoppel prevented the government from changing its theory of recovery between the plea and the restitution hearing. This was a breach of duty.

Waigand was prejudiced by counsel's error. Had counsel invoked the doctrine, the District Court should have limited the restitution amount to the approximately $288,000 loss resulting from Waigand's admitted conversions. Because the bank has already received a civil judgment against Waigand, its interests are still protected even if the amount of criminal restitution was reduced.

The District Court should have been asked to apply the doctrine of equitable estoppel. The failure of counsel below to make such a request prejudiced Waigand and his case should be remanded for entry of a new restitution order.

CONCLUSION

For all of the reasons addressed above, Defendant-Appellant Joseph Waigand respectfully requests this Court vacate the December 24, 2018 Order of Restitution and remand his case to the District Court to reduce the amount of restitution consistent with loss causally related to his admitted acts of conversion, and to specifically provide for an offset of any payments made toward the civil judgment.

REQUEST FOR ORAL ARGUMENT

Counsel requests 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 $5.03, 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 BRIEFS

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because:

[X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 12,091 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Theresa R. Wilson Dated: January 22, 2020

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