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 APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS FILED AUGUST 5, 2020

MARTHA J. LUCEY
State Appellate Defender

THERESA R. WILSON
Assistant Appellate Defender
twilson@spd.state.ia.us
appellatedefender@spd.state.ia.us

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

ATTORNEY'S FOR DEFENDANT-APPELLANT

CERTIFICATE OF SERVICE

On August 21, 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

THERESA R. WILSON
Assistant Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
twilson@spd.state.ia.us
appellatedefender@spd.state.ia.us

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TRW/sm/1/20
TRW/lr/8/20

QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals err in finding a causal connection between the $288,000 loss to which Waigand admitted and the $988,636.25 in foreclosure losses sought by the State?

II. Is Waigand entitled to have an offset for payments made under his civil judgment reflected in his restitution order?

III. Given recent developments in federal precedent, should Waigand have been afforded the right to a jury trial under either the Sixth Amendment to the United States Constitution or Article I section 9 of the Iowa Constitution?

IV. Did counsel provide ineffective assistance by failing to argue for equitable estoppel?

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STATEMENT IN SUPPORT OF FURTHER REVIEW

COMES NOW Defendant-Appellant and pursuant to Iowa R. App. P. 6.1103 requests further review of the August 5, 2020, decision in State of Iowa v. Joseph Scott Waigand, Supreme Court No. 19-0089.

1. The Court of Appeals erred in affirming the District Court's restitution order for $988,636.25 when Waigand pleaded to acts resulting in a loss of no more than $288,000.

2. The State failed to establish a causal connection between Waigand's admitted acts of conversion and the loss to the bank caused by foreclosure. State v. Bonstetter, 637 N.W.2d 161, 165-68 (Iowa 2001).

3. Contrary to the Court of Appeals' holding, there is nothing prohibiting a district court from including in the criminal restitution order an offset for any payments made on a civil judgment. State v. Klawonn, 688 N.W.2d 271, 276 (Iowa 2004).

4. Recent federal case law suggests the Sixth Amendment right to a jury trial may apply to the

determination of criminal restitution, despite Iowa case law to the contrary. State v. Mayberry, 415 N.W.2d 644, 647 (Iowa 1987); Southern Union Co. v. United States, 567 U.S. 343, 346 (2012). And if restitution is not considered "criminal" for the purposes of the Sixth Amendment, it must be considered "civil" for the jury trial requirement under Article I Section 9 of the Iowa Constitution. Iowa Const. Art. I § 9; Iowa Nat. Mut. Ins. Co. v. Mitchell, 305 N.W.2d 724, 726 (Iowa 1981). Because the Court of Appeals cannot overrule Iowa Supreme Court precedent, this Court should address the issue.

5. The Court of Appeals erred in holding trial counsel did not provide ineffective assistance by failing to argue for equitable estoppel.

WHEREFORE, Waigand respectfully requests this Court grant further review of the Court of Appeals' decision in his case.

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.

Course of Proceedings and Facts: Waigand accepts the Court of Appeals' recitation of the course of proceeding and facts as essentially correct. Additional facts will be discussed below as necessary.

ARGUMENT

I. The Court of Appeals erred in finding a causal connection between the $288,000 loss to which Waigand admitted and the $988,636.25 in foreclosure losses sought by the State.

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

Scope of Review: This Court reviews restitution orders for correction of errors at law. State v. Bonstetter, 637 N.W.2d 161, 165 (Iowa 2001).

Merits: "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.

Waigand pleaded guilty to Ongoing Criminal Conduct. The accusation was that between August 2014 and October 2016, he "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 require a finding of fraud. The remaining counts, which were dismissed, 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. (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." (PSI p.11) (Conf. App. p.110).

Waigand's 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.

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 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). 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.

Waigand respectfully requests this Court vacate the

restitution order and remand the case to the District Court to enter a corrected restitution order.

II. Waigand is entitled to have an offset for payments made under his civil judgment reflected in his restitution order.

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

Scope of Review: This Court reviews restitution orders for correction of errors at law. State v. Bonstetter, 637 N.W.2d 161, 165 (Iowa 2001).

Merits: On appeal, the State agreed Waigand was entitled to have payments .toward his civil judgment reduce the amount of his criminal restitution. State's Brief p 32. The Court of Appeals, however, held there was no authority to include an offset provision in a restitution order. Opinion p. 4.

The civil judgment against Waigand was issued before the criminal restitution order. (Rest. Tr. p.6 L.3-15).

Waigand could not have sought a setoff in the civil proceedings before his criminal restitution was determined and ordered.

Nothing in the Iowa Code prohibits a District Court rom including a setoff clause in a restitution order. 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. Iowa Code § 910.8 (2017).

In State v. Klawonn, the Iowa Supreme 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.

State v. Klawonn, 688 N.W.2d 271, 276 (2004).

Waigand respectfully requests that the Order on Restitution be remanded with directions to specifically include an offset of any amounts paid toward the civil judgment.

III. Given recent developments in federal precedent, Waigand should have been afforded the right to a jury trial under either the Sixth Amendment to the United States Constitution or 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). Criminal restitution 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:

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); Cortney E. Lollar, What is Criminal Restitution?, 100 Iowa L. Rev. 93, 150 (Nov. 2014) [hereinafter Lollar, Criminal Restitution]. Recent United States Supreme Court decisions require this Court to reexamine precedent.

In Apprendi v. New Jersey, the United States Supreme Court held that "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" in order to satisfy the Fifth Amendment right to due process and the Sixth Amendment rights to notice and a jury trial. Apprendi v. New Jersey, 530 U.S. 466, 476 (2000). The Fourteenth Amendment required the same restrictions be placed upon the states. Id.

In Blakely v. Washington, the Court clarified that Apprendi's phrase "statutory maximum sentence" 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." Blakely v. Washington, 542 U.S. 296, 303-04 (2004).

In Southern Union Company v. United States, the Court extended Apprendi and Blakely to fines. Southern Union Co. v. United States, 567 U.S. 343, 346 (2012). The Court recognized that fines are penalties inflicted by the government for the commission of an offense, and that the amount of a fine is often calculated by reference to the facts of the offense. Id. at 349. 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. 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.

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); State v. Shears, 920 N.W.2d 527, 531 n.2 (Iowa 2018). See also Lollar, Criminal Restitution at 149-54 (Nov. 2014); 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); 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).

In Hester v. United States, petitioners asked the United States Supreme Court whether 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).

Justice Gorsuch noted 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 acknowledging that having judges rather than juries 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 because the amount of restitution was dictated by the amount of the victim's loss and not a "statutory maximum":

> 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.

Justice Gorsuch explained 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. at 510-11. 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. 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).

Most circuit courts have held that restitution is a criminal remedy. See e.g., Lollar, Criminal Restitution at 121; United States v. Serawop, 505 F.3d 1112, 1122-23 & n.4 (10th

Cir. 2007). 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 so, circuit courts have uniformly rejected applying Apprendi to criminal restitution under the MVRA. Id. at 585. They 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 said restitution "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, 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 directs 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 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); State v. Biddle, 652 N.W.2d 191, 200-01 (Iowa 2002). So does the jury trial right of Article I Section 9 of the Iowa Constitution. Iowa Const. Art. I § 9. 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).

Waigand was never provided notice in conjunction with the trial information and minutes that the State would seek the full $988,636.25 unpaid balance from the foreclosure, no jury ever made such a finding, and Waigand never admitted causing that extent of loss. The District Court's 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.

A few circuit courts have determined that criminal restitution 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 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 Supreme Court has held that the intent of the Seventh Amendment and Article I Section 9 of the Iowa

Constitution is 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).

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. 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, generally, small claims were excluded from the jury requirement. Id.

The Iowa Supreme Court has held that the right to a jury trial under Article I Section 9 does 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). Based on the $988,636.25 sought by the State, a jury trial was required under Article I Section 9. (Application for Supp. Rest. Order)(Conf. App. pp.111-112).

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). 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).

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). 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). It is accordingly legal in nature and Waigand was entitled to have a jury determination the amount of restitution.

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

Counsel is not expected to be a "'crystal gazer' who can predict future changes in established rules of law. State v. Schoelerman, 315 N.W.2d 67, 72 (Iowa 1982). 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 decision in Southern Union would lead the United States Supreme 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., Lollar, Criminal Restitution at 149-54; 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); 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); Melanie D. Wilson, In Booker's Shadow: Restitution Forces a Second Debate on Honesty in Sentencing, 39 Ind. L. Rev. 379, 394-409 (2006). 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); State v. Bonstetter, 637 N.W.2d 161, 166 (Iowa 2001); Lollar, Criminal Restitution at 121.

In addition, several Iowa cases raised the prospect that if the Sixth Amendment did not apply to criminal restitution,

then the Seventh Amendment would apply. See State v. Jenkins, 788 N.W.2d 640, 643 (Iowa 2010); State v. Shears, 920 N.W.2d 527, 531 n.2 (Iowa 2018). See also Lollar, Criminal Restitution at 149-54. 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).

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). These cases would have alerted counsel to the potential arguments.

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. at 223-29 (Justices Stevens and Ginsburg dissenting).

Had restitution counsel raised a timely objection, the amount of restitution should have been limited to Waigand's admitted facts of conversion. The restitution order should be vacated and remanded to the District Court.

IV. Counsel provided ineffective assistance by failing 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: Review is de novo. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984).

Merits: 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.

Strickland v. Washington, 466 U.S. 668, 687 (1984).

Restitution counsel rendered ineffective assistance by failing to assert the doctrine of equitable estoppel to limit Waigand's criminal restitution to the amount initially proffered by the prosecutor that induced his plea.

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

> 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).

At the sentencing hearing, the bank for the first time alleged that it suffered a loss of nearly $1 million 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). Similar statements were made at the restitution hearing. (Rest. Tr. p.6 L.3-15, p.10 L.1-p.11 L.7).

Waigand's attorney should have raised the defense of equitable estoppel to limit his amount of criminal restitution to that which was originally requested by the State. 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. 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.

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. Yet 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.

Waigand's case should be remanded for entry of a new restitution order.

CONCLUSION

Defendant-Appellant Joseph Waigand respectfully requests this Court vacate the decision of the Court of Appeals, vacate the Order of Restitution, and remand his case to the District Court to reduce the amount of restitution owed and to provide for an offset for payments made toward the civil judgment.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Application for Further Review was $3.82, and that amount has been paid in full by the Office of the Appellate Defender.

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

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

[X] this application has been prepared in a proportionally spaced typeface using Bookman Old Style, font 14 point and contains 5,562 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).

/s/ Theresa R. Wilson Dated: *8/22/20*

THERESA R. WILSON
Assistant Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
twilson@spd.state.ia.us
appellatedefender@spd.state.ia.us