IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. TIFFANY MCCALLEY, Defendant-Appellant.	SUPREME COURT 20-1686

APPEAL FROM THE IOWA DISTRICT COURT
FOR BOONE COUNTY
HONORABLE STEPHEN A. OWEN, JUDGE

APPELLANT'S BRIEF AND ARGUMENT AND REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF SERVICE

On the 3rd day of September, 2021, 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 Tiffany McCalley, 1715 Tama St., Boone, IA 50036.

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ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court. Iowa Rs. App. P. 6.903(2)(d), 6.1101(2)(a)(issue presenting substantial constitutional questions as to the validity of a statute), 6.1101(2)(c)(issue presenting a substantial issue of first impression in Iowa), and 6.1101(2)(d) (issue presenting fundamental and urgent issues of broad public importance requiring prompt or ultimate determination by the Supreme Court.). Specifically, the present case challenges that Iowa Code section 910.2A (2021)(Reasonable ability to pay — category "B" restitution payments) violates the United States and Iowa Constitutions because it violates the right to counsel, due process and the excessive fines clause.

STATEMENT OF THE CASE

Nature of the Case: Appellant Tiffany McCalley appeals following her guilty plea, judgment and sentence, to the charge of driving while barred in violation of Iowa Code sections 321.555 and 321.561 (2019).

Course of Proceeding and Disposition Below: On February 10, 2020, the State charged McCalley with driving while barred for acts occurring on January 13, 2020. (TI)(App. pp. 5-6). On October 29, 2020, McCalley plead guilty. (WGP)(App. pp. 7-9). The parties did not have an agreement regarding disposition. (WGP ¶18)(App. p. 8). McCalley's guilty plea was accepted by the court. (Order Accepting Plea)(App. pp. 10-11).

On December 8, 2020, McCalley and her attorney appeared by ICN teleconference for sentencing. (Tr. p. 2L1-7). McCalley requested the court suspend the sentence with probation or community service instead of a jail time which defense counsel anticipated the State would recommend. (Tr. p. 3L9-12). The State recommended the court sentence McCalley to six days in jail. The prosecutor reasoned that since McCalley cannot afford to pay a fine, "[i]t seems in the interest of justice or her own rehabilitation might be served by letting her sit in jail and think about the fact that she

shouldn't be driving when she does not have a license." (Tr. p. 5L19-p. 6L19). McCalley was sentenced to serve six days in the county jail. The court explained:

> The Court finds that probation would not materially or substantially offer or assist Ms. McCalley in rehabilitative efforts. The question here is her nonpayment of fines, child support that led to her suspension. Probation would incur additional economic impact to her, and I think on this sort of offense offer her very little in terms of rehabilitative efforts or protection of the community. The Court therefore imposes a six-day jail sentence. * * *

(Tr. p. 7L9-p. 8L16).

The court inquired if McCalley wished to address her reasonable ability to pay category B restitution. Defense counsel stated the issue could be reserved for a later date. Therefore, the court determined that McCalley had the reasonable ability to pay category B restitution because she held two part-time jobs. McCalley could later file a financial affidavit and written application for determination of her ability to pay. (Tr. p. 8L16-p. 9L2).

Notice of Appeal was filed on December 23, 2020. (NOA) (App. pp. 16-17).

Facts: McCalley admitted on "January 13, 2020, in Boone County, Iowa, [she] operated a motor vehicle while [her] license was barred for being a habitual offender under sections 321.555 and 321.556 of the Iowa Code." (WGP ¶19)(App. p. 8). See also Minutes (Conf. App. pp. 5-18).

JURISDICTIONAL STATEMENT

There currently is not an established procedure for the determination whether the defendant has "good cause" to appeal from a conviction where the defendant plead guilty. See Iowa Code § 814.6(1)(a)(3) (Supp. 2020) (exception to right of appeal from final judgment); Iowa R. Crim. P. 2.29 (Appointment of appellate counsel in criminal cases); Iowa R. Crim. P. 2.30 (Duty of continuing representation; withdrawal); Iowa R. App. P. 6.102 (Initiation of appeal from a final judgment); Iowa R. App. P. 6.103 (Review of final orders and judgments); Iowa R. App. P. 6.106 and Iowa Code § 814.6(2) (Discretionary review); Iowa R. Crim. P. 6.107 (Original

certiorari proceedings); Iowa R. Crim. P. 6.108 (Form of Review).

The Iowa Supreme Court addressed "good cause" to appeal in the context of an alleged sentencing error. State v. Damme, 944 N.W.2d 98 (Iowa 2020). The Court stated the Damme case was its first opportunity to adjudicate the "good cause" requirement under Iowa Code section 814.6. Id. at 100. The Court acknowledged the statute does not define "good cause." Id. The Court did not dismiss Damme's appeal based upon the failure to seek leave to appeal. Instead, the Court determined "good cause" from the party's briefs. Id. at 101 (Damme appealed. The State argued Damme had not established good cause and the Court should dismiss the appeal.). This is the same practice employed in challenges to appeals pending prior to the effective date of 2019 Iowa Acts chapter 140 (Senate File 589). See e.g. State v. Macke, 933 N.W.2d 226, 230 (Iowa 2019) (Court ordered supplemental briefing whether new legislation governed appeal.); State v.

Syperda, No. 18-1471, 2019 WL 6893791, at *12 (Iowa Ct. App. Dec. 18, 2019) (same). This is also the same practice used in other appeals from guilty pleas post-July 1, 2019. See e.g. State v. Henderson, No. 19-1425, 2020 WL 2781463, at *1 (Iowa May 29, 2019) (per curiam); State v. Bolden, 954 N.W.2d 62, 67-68 (Iowa 2021).

In Damme, the Supreme Court addressed the definition of the "good cause" requirement under Iowa Code section 814.6(1)(a)(3) (Supp. 2020) to appeal from a conviction based on the defendant's guilty plea. The Supreme Court concluded that "good cause" means a "legally sufficient reason." The Supreme Court further held "that the good-cause requirement is satisfied in this context when the defendant appeals a sentence that was neither mandatory nor agreed to in the plea bargain." State v. Damme, 944 N.W.2d at 100. The Supreme Court stated "[a] sentencing error invariably arises after the court has accepted the guilty plea. This timing provides a

legally sufficient reason to appeal notwithstanding the guilty plea." Id. at 105.

McCalley's sentence was discretionary, not mandatory nor agreed to as part of the plea agreement. Under the Iowa Supreme Court's holding in Damme, McCalley has demonstrated "good cause" to appeal her sentence. The appellate court has jurisdiction to hear McCalley's appeal.

ARGUMENT

I. The district court abused its discretion and violated McCalley's rights to due process and equal protection by imposing a jail sentence because McCalley lacked the financial means to pay a fine.

Preservation of Error.

Procedurally defective, illegal, or void sentences may be corrected at any time, State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994), and are not subject to the usual concept of waiver or requirement of error preservation. State v. Woody, 613 N.W.2d 215, 217 (Iowa 2000).

Additionally, when the claim is that the sentence violates the constitution, the claim may also be raised at any time. State v. Lathrop, 781 N.W.2d 288, 293 (Iowa 2010).

Standard of Review.

Review of a sentence imposed in a criminal case is for correction of errors at law. Iowa R. App. P. 6.907; State v. Formaro, 638 N.W.2d 720, 724 (Iowa 2002). "A sentence will not be upset on appellate review unless the defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure such as the trial court's consideration of impermissible factors." State v. Witham, 583 N.W.2d 677, 678 (Iowa 1998); State v. Sailer, 587 N.W.2d 756, 762 (Iowa 1998). An abuse of discretion will be found only when a court acts on grounds clearly untenable or to an extent clearly unreasonable. State v. Oliver, 588 N.W.2d 412, 414 (Iowa 1998).

This Court reviews constitutional questions de novo. State v. Bruegger, 773 N.W.2d 862, 869 (Iowa 2009).

Discussion.

McCalley was convicted of driving while barred, an aggravated misdemeanor. Iowa Code §§ 321.555, 321.561 (2019). At the time of McCalley's aggravated misdemeanor offense, the maximum penalty was imprisonment not to exceed two years. Additionally, there shall be a fine of at least six hundred twenty-five dollars but not to exceed six thousand two hundred fifty dollars. Iowa Code § 903.1(2)(2019). Thus, the district court was not required to impose a term of imprisonment.

The United States Supreme Court has recognized four legitimate penological justifications: retribution, deterrence, incapacitation, and rehabilitation. Graham v. Florida, 560 U.S. 48, 71, 130 S.Ct. 2011, 2028 (2010). "However, "[c]riminal punishment can have different goals, and choosing among them is within a legislature's discretion."" State v. Oliver, 812 N.W.2d 636, 646 (Iowa 2012)(quoting Graham v. Florida, 560 U.S. at 71, 130 S.Ct. at 2028). The Iowa

legislature enacted sentencing statutes which dictate a sentencing judge's authority. Specifically, the legislature has provided guidance on the proper focus of criminal sentences. The sentencing "court shall determine which [sentencing option] is authorized by law for the offense, and of the authorized sentences, which of them or which combination of them, in the discretion of the court, *will provide maximum opportunity for the rehabilitation of the defendant, and for the protection of the community from further offenses by the defendant and others*." Iowa Code § 901.5 (2019)(emphasis added). Similarly, "[b]efore deferring judgment, deferring sentence, or suspending sentence, the court first shall determine which option, if available, *will provide maximum opportunity for the rehabilitation of the defendant and protection of the community from further offenses by the defendant and others*. Iowa Code § 907.5 (2019)(emphasis added).

In exercising its discretion, the district court is to weigh all pertinent matters in determining a proper sentence including the nature of the offense, the attending circumstances, the defendant's age, character, and propensities or chances of reform. State v. Loyd, 530 N.W.2d 708, 713 (Iowa 1995)(quoting State v. Johnson, 513 N.W.2d 717, 719 (Iowa 1994)). The court owes a duty to both the defendant and the public. As such, the court must exercise the sentencing option that would best accomplish justice for both society and the individual defendant, after considering all pertinent sentencing factors. State v. Fink, 320 N.W.2d 632, 634 (Iowa Ct. App. 1982). "In applying the abuse of discretion standard to sentencing decisions, it is important to consider the societal goals of sentencing criminal offenders, which focus on rehabilitation of the offender and the protection of the community from further offenses." State v. Formaro, 638 N.W.2d 720, 724 (Iowa 2002)(citing Iowa Code § 901.5).

The judge's exercise of discretion and reasons for the sentence selected must be viewed within the context of the entire sentencing hearing. McCalley asked for probation or community service or anything appropriate instead of jail time. Defense counsel outlined McCalley's financial struggles: her license was suspended because of nonpayment of fines; she was in the middle of a divorce; she lost her home in a fire; and she had two part-time jobs in industries severely affected by the Covid-19 pandemic. Defense counsel also asserted that incarceration should not be imposed for a nonviolent offense during a significant surge in Covid cases and unnecessarily bring more people to the jail who could be dealt within the community. (Tr. p. 2L24-p. 5L2). The State argued:

Although the state is not unsympathetic to some of the concerns raised by [defense counsel], I am also a little skeptical of the Court imposing probation or additional fines for a person who habitually fails to pay them and fails to pay child support. It is just adding to the mountain of debt she is not yet paying. In a case like this jail time does have some deterrent effect. I point out again to the defendant's driving history. She currently has five suspensions, indefinite suspensions for nonpayment of fines. I don't know what rehabilitative efforts are going to be served by a probationary

period, and I also don't know what effect a fine is going to add to a person who can't afford to pay it. It seems in the interest of justice or her own rehabilitation might be served by letting her sit in jail and think about the fact that she shouldn't be driving when she doesn't have a license.

Your Honor, it is for those reasons the State would recommend a six-day jail sentence. * * *

(Tr. p. 5L19-p. 6L19).

The district court ordered McCalley serve six days in the county jail. The court stated:

Ms. McCalley, on review of the file and her written arraignment and other matters, is 48 years of age. She has a high school education. Record today establishes that she has two part-time jobs. Clearly some effect on her economic status due to the COVID pandemic here in Iowa. She is going through a divorce. Recently suffered a fire. Ms. McCalley's driving history is poor. I think is a charitable description of it. Ms. McCalley recommends suspension of a sentence and probation. State recommends six days in jail with credit time served and an opportunity to get that served. The Court considers the purposes of disposition to rehabilitate defendant and prevent offenses from her. The Court finds that probation would not materially or substantially offer or assist Ms. McCalley in rehabilitative efforts. The question here is her nonpayment of fines, child support that led to her suspension. Probation would incur additional economic impact to her, and I think on this sort of offense offer her very little in terms of rehabilitative efforts or protection of the community. The Court therefore imposes a six-day jail sentence. * * * Given the statements and evidence before this Court, the Court does suspend the minimum fine of $625 and 15 percent surcharge.

(Tr. p. 7L9-p. 8L16). The court improperly considered McCalley's poverty as a factor supporting incarceration. The court abused its discretion and violated her right to equal protection and due process in imposing a jail sentence because McCalley did not have the financial means to pay a fine.

"Providing equal justice for poor and rich, weak and powerful alike is an age-old problem." Griffin v. Illinois, 351 U.S. 12, 16, 76 S.Ct. 585, 589 (1956)) "There can be no equal justice where the kind of [punishment] a man gets depends on the amount of money he has." United States v. Flowers, 946 F.Supp.2d 1295, 1300 (M.D. Ala. 2013)(modifying the famous Supreme Court quote from Griffin v. Illinois, 351 U.S. at 19, 76 S.Ct. at 591). A sentencing court cannot sentence a defendant to jail because she lacks the resources to pay a fine.

"[T]he principle that wealth and poverty have no place in sentencing decisions is nothing new." United States v. Flowers, 946 F.Supp.2d at 1300. The United State Supreme

Court has addressed the constitutionality of imprisoning a defendant when his indigency has prohibited him from paying a fine. See e.g. Williams v. Illinois, 399 U.S. 235, 243, 90 S.Ct. 2018, 2023 (1970)(holding "that a State may not constitutionally imprison beyond the maximum duration fixed by statute a defendant who is financially unable to pay a fine); Morris v. Schoonfield, 399 U.S. 508, 509, 90 S.Ct. 2232, 2232-33 (1970)(White, J., concurring)(stating "the Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full."); Tate v. Short, 401 U.S. 395, 399, 91 S.Ct. 668, 671 (1971)(holding consistent with the Equal Protection Clause the State cannot convert a fine-only sentence into a prison sentence based on inability to pay); Bearden v. Georgia, 461 U.S. 660, 672-73, 103 S.Ct. 2064, 2073 (1983)(holding revoking a term of probation for failure to pay a fine or restitution, absent evidence that the probationer's failure to

pay was willful violated Due Process). The Iowa Supreme Court has likewise determined that imprisoning of an indigent defendant solely because he cannot make immediate payment of a fine violates the equal protection clause of the Fourteenth Amendment. State v. Snyder, 203 N.W.2d 280, 290 (Iowa 1972)(stating a reading of United States Supreme Court decisions and decisions from other jurisdictions compel the result). Appellant did not find Iowa case law directly on-point with the present issue. Maybe this is not surprising given the guidance provided by the United States Supreme Court from almost five decades ago.

The decision in United States v. Flowers, 946 F.Supp.2d 1295 (M.D. Ala. 2013) is instructive. Flowers pled guilty to passing a forged United States Treasury check pursuant to a plea agreement to which the government would recommend a sentence of monitored home confinement rather than imprisonment. However, at sentencing, the United States Probation Department informed the court that due to the

sequestration of federal funds, the department would require Flowers to pay the cost of the monitoring of her home confinement. Flowers could not do so because she was poor. Because home confinement was not possible since Flowers could not pay for it, the government urged the court to send Flowers to prison. "Finding this result disconsonant with both the U.S. Constitution and simple fairness, the court instead imposed a below-guidelines sentence of probation without monitored home confinement." United States v. Flowers, 946 F.Supp.2d at 1296. "In issuing the below-guidelines sentence, the court considered the fact that, but for Flowers's poverty, she would have received home confinement." Id. at 1299.

The Flowers court noted that "[w]hile relative wealth and poverty will inevitably have some effect on the administration of justice, any sentence that subjects a criminal defendant "to imprisonment solely because of ... indigency" is constitutionally infirm and cannot stand." Id. at 1300. "Sending Flowers to prison because she is poor and cannot

pay the cost of monitored home confinement thus raises serious constitutional concerns." Id. at 1301. The court concluded that "the weight of the inequality resulting from the lack of funding must rest with the government, not the defendant." Id. at 1302.

The record shows that McCalley experienced financial difficulties. Her driver's license was initially suspended for non-payment of child support. McCalley's driver's license has been suspended four times for non-payment of child support. Her license has been suspended five times for non-payment of a fine. (Minutes p. 13)(Conf. App. p. 16). McCalley' s failure to pay child support and fines is not a result of willful defiance of these requirements but due to her lack of means to do so. McCalley was working two part-time jobs while helping care for her boyfriend's father. (Tr. p. 3L17-p. 4L12). Poverty is a very difficult situation to change. This does not make her less worthy of consideration for probation.

The district court did not wish to add to McCalley's debt. (Tr. p. 8L3-6). But the judge failed to consider that the sentence was, in fact, adding significant debt with a new judgment for correctional fees. See Iowa Code § 356.7 (2021) (charges for actual administrative costs relating to the arrest and booking of that prisoner, for room and board provided to the prisoner while in the custody of the county sheriff.). The court also failed to recognize that probation enrollment fee may be waived when the department of correctional services determines the probationer is unable to pay the fee. Iowa Code § 905.14(3) (2021); Iowa Admin. Code r. 201-42.1(14) (2021).

Imposing a jail sentence because of McCalley's poverty is an improper consideration. State v. Dunn, No. 12–0417, 2012 WL 6193868, at *3 (Iowa Ct. App. Dec. 12, 2012) (stating "[b]ecause the Fourteenth Amendment protects against discrimination due to economic status, a defendant's receipt of public assistance is an impermissible reason to deny a

deferred judgment. Acceptance of government assistance does not speak to matters pertinent in sentencing, such as a defendant's character, propensities, or chance of reform or rehabilitation, and does not affect a court's duty to protect the community from further offenses by the defendant or others."). See also cf. State v. Snyder, 203 N.W.2d at 287 (Distinctions in the administration of criminal justice between rich and poor are generally not likely to bear up under Constitutional scrutiny.).

When a court in determining a sentence uses any improper consideration, re-sentencing of the defendant is required. State v. Gonzales, 582 N.W.2d 515, 517 (Iowa 1998); State v. Black, 324 N.W.2d 313, 315 (Iowa 1982); State v. Sinclair, 582 N.W.2d 762, 765 (Iowa 1998). This is true even if it is was merely a secondary consideration. See State v. Messer, 306 N.W.2d 731, 733 (Iowa 1981) (The appellate court cannot speculate about the weight trial court mentally

assigned an improper factor). McCalley should be granted a new sentencing hearing.

II. McCalley's restitution obligation for court costs and attorney fees are governed by Iowa Code Chapter 910 (2019).

Preservation of Error.

Criminal restitution is a criminal sanction that is part of the sentence. State v. Alspach, 554 N.W.2d 882, 883 (Iowa 1996); State v. Mayberry, 415 N.W.2d 644, 646 (Iowa 1987). Procedurally defective, illegal, or void sentences are not subject to the usual concept of waiver or requirement of error preservation. State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994); State v. Woody, 613 N.W.2d 215, 217 (Iowa 2000).

Standard of Review.

The Court reviews restitution orders for correction of errors at law. State v. Klawonn, 688 N.W.2d 271, 274 (Iowa 2004). When reviewing a restitution order, the appellate court determines whether the district court has properly applied the law. State v. Jenkins, 788 N.W.2d 640, 642 (Iowa 2010).

Discussion.

McCalley committed the criminal offense of driving while barred on January 13, 2020. (TI)(App. pp. 5-6). At the time of her offense, Iowa Code section 910.2(1) stated in relevant part:

> In all criminal cases in which there is a plea of guilty, … the sentencing court shall order that restitution be made by each offender to the victims of the offender's criminal activities, to the clerk of court for fines, penalties, surcharges, and, *to the extent that the offender is reasonably able to pay*, … court costs including correctional fees approved pursuant to section 356.7, court-appointed attorney fees ordered pursuant to section 815.9, including the expense of a public defender …"

Iowa Code § 910.2(1) (2019) (emphasis added).

Prior to the sentencing hearing, the Iowa legislature amended Iowa Code Chapter 910. The legislature amended Iowa Code section 910.2 to provide "Category "B" restitution shall be ordered subject to an offender's reasonable ability to make payments pursuant to section 910.2A." 2020 Iowa Acts, ch. 1074, §71 (codified in Iowa Code § 910.2(1)(a)(2) (2021)). The legislature added a new section to Chapter 910 which states "[a]n offender is presumed to have the reasonable ability to make restitution payments for the full amount of category

"B" restitution." 2020 Iowa Acts, ch. 1074, §72 (codified in Iowa Code § 910.2A(1) (2021)). The burden is placed on the offender to request the court determine the amount of category B restitution payments she is reasonably able to make toward paying the full amount of such restitution. 2020 Iowa Acts, ch. 1074, §72 (codified in Iowa Code § 910.2A(2) (2021)). The offender also has the burden to prove she is unable to reasonably make payments toward the full amount of category "B" restitution. 2020 Iowa Acts, ch. 1074, §72 (codified in Iowa Code § 910.2A(2)(a) (2021)).

At sentencing, the district court ordered restitution for court costs and attorney fees pursuant to new Code section 910.2A. (Tr. p. 8L16-p. 9L2; Judgment & Sentence)(App. pp. 12-15). The district court lacked authority to order restitution pursuant to a statute which was not in effect at the time of McCalley's offense. Iowa Code § 4.13(1)(c) (2019) (The amendment of a statute does not affect any punishment incurred in respect to the statute prior to the amendment.).

Additionally, both the United States Constitution and the Iowa Constitution protect defendants from ex post facto legislation. U.S. Const. art. I, §10; Iowa Const. art. I, § 21. See also State v. Corwin, 616 N.W.2d 600, 601 (Iowa 2000)(stating "[t]hese constitutional provisions forbid the application of a new punitive measure to conduct already committed.").

Appellant acknowledges the Supreme Court's July 7, 2020 Supervisory Order which stated "[a] defendant sentenced on or after June 25, 2020, shall be subject to the requirements of S.F. 457." Iowa Supreme Ct. Supervisory Order, *In the Matter of Interim Procedures Governing Ability to Pay Determinations and Conversion of Restitution Orders* ¶ (C) (July 7, 2020). The Court's order is inconsistent with the Iowa Code and contrary to the constitutions.

The court is only authorized to order criminal restitution pursuant to Chapter 910. Absent such statute, the court has no power to issue a criminal restitution order. State v. Bonstetter, 637 N.W.2d 161, 166 (Iowa 2001). Criminal

restitution is a part of sentencing. State v. Alspach, 554 N.W.2d at 883. A sentence is the judgment imposing the punishment to be inflicted. State v. Richardson, 890 N.W.2d 609, 617 (Iowa 2017); State v. Lathrop, 781 N.W.2d 288, 295 (Iowa 2010). Restitution for court costs and attorney fees is punitive. The Iowa Supreme Court has stated that the purpose of the sanction "goes beyond revenue recovery; it is designed to instill responsibility in criminal offenders." State v. Haines, 360 N.W.2d 791, 795 (Iowa 1985).

The new section enacted by 2020 Iowa Acts, ch. 1074, §72, now codified in Iowa Code section 910.2A (2021), is more onerous than Iowa Code section 910.2(1) (2019). While section 910.2A (2021) does not increase the amount of court costs generated and attorney fees charged, the new statute does change how much of that total amount an offender will be ordered to pay. The new section changes the process of determining an indigent offender's reasonable ability to pay. The changes to Chapter 910 eliminated the district court's

duty to determine an offender's reasonable ability to pay category B restitution (previously referred to as Tier 2 restitution) prior to the imposition of this sanction thereby eliminating the constitutional protections. The addition of Iowa Code section 910.2A shifted the burden to the offender to request a determination. See B. John Burns, 4A Iowa Practice: Criminal Procedure § 21:2 (2021 ed.) (stating previously the "onus was on the sentencing court to find that the defendant had the ability to pay."). Furthermore, section 910.2A arguably may only address installment amounts not the entire amount of restitution. See Iowa Code § 910.2A(2) (2021)(stating "[i]f an offender requests that the court determine the amount of category "B" restitution payments the offender is reasonably able to make toward paying the full amount of such restitution…"); Iowa Code § 910.2A(2)(d)(2021) (stating "the court shall determine the amount of category "B" restitution the offender is reasonably able to make payments toward, and order the offender to make payments toward that

amount."). *Compare* Iowa Code § 910.2(1)(2019) (stating "to the extent that the offender is reasonably able to pay" with no mention of payments or installment amounts). Lastly, section 910.2A(1) codified a presumption that all offenders have the ability to pay the full amount of restitution without regarding to an offender's clear and obvious indigency. Iowa Code § 910.2A(1)(2021). Because the amendments affect McCalley's punishment and are more onerous, McCalley legal assistance fees and court cost determination is controlled by the provisions of Iowa Code Chapter 910 (2019). See Cf. State v. Corwin, 616 N.W.2d at 602 (stating "[b]ecause section 910.3B makes more burdensome the penalty suffered by Corwin for crimes he committed before the statute was enacted, it cannot be applied to him without violating constitutional norms.").

Pursuant to Iowa Code section 910.3 (2019), at the time of sentencing, the court was to set out the amount of restitution. If the full amount of restitution could not be determined at the time of sentencing, the court was to issue a

temporary order determining a reasonable amount for restitution identified up to that time. Once the final amounts were known, the court must issue a permanent, supplemental order, setting the full amount of restitution. Iowa Code § 910.3 (2019). See also State v. Albright, 925 N.W.2d 144, 160 (Iowa 2019). Once the final amounts are known, the district court is required to determine McCalley's reasonable ability to pay court costs and attorney fees. State v. Davis, 944 N.W.2d 641, 646 (Iowa 2020).

The district court failed to follow the proper law. Ordinarily, the vacation of the improperly assessed category B restitution and a remand is required when the district court failed follow the law. State v. Davis, 944 N.W.2d at 646. The enactment of 2020 Iowa Acts, ch. 1074, §73, codified in Iowa Code section 910.3A (2021), does not change the outcome in the present appeal. McCalley was sentenced on December 8, 2020. (Judgment & Sentence)(App. pp. 12-15). The conversion of existing restitution orders to final orders only

applies to orders entered prior to the effective date of the statute – June 25, 2020. Iowa Code § 910.3A(1) (2021). See e.g. State v Holmes, No. 20-0335, 2021 WL 1583176, at *3 (Iowa April 23, 2021)(stating the 2019 restitution order, which lacked an ability-to-pay determination as to certain items, is subject to the conversion statute). This Court must vacate the order and remand for the district court to enter a final order of restitution after the requisite determination of the defendant's reasonable ability to pay consistent with the law in effect at the time of her offense.

III. If Chapter 910 (2021) is applicable to McCalley's restitution obligation, Iowa Code section 910.2A is unconstitutional.

Preservation of Error.

McCalley did not object the imposition of category B restitution in the district court. Nor did she challenge the Iowa Code section 910.2A which declares that an offender is presumed to have the reasonable ability to make payments for the full amount of category B restitution. Nevertheless,

McCalley may now assert on appeal the statute is unconstitutional. State v. Bruegger, 773 N.W.2d 862, 871 (Iowa 2009)(stating "a challenge to an illegal sentence includes claims that the court lacked the power to impose the sentence or that the sentence itself is somehow inherently legally flawed, including claims that the sentence is outside the statutory bounds or that the sentence itself is unconstitutional.").

Criminal restitution is a criminal sanction that is part of the sentence. 2020 Iowa Acts, ch. 1074, §71 (codified in Iowa Code § 910.2(1)(a) (2021)); State v. Alspach, 554 N.W.2d 882, 883 (Iowa 1996); State v. Mayberry, 415 N.W.2d 644, 646 (Iowa 1987). Procedurally defective, illegal, or void sentences may be corrected at any time and are not subject to the usual concept of waiver or requirement of error preservation. State v. Lathrop, 781 N.W.2d 288, 293 (Iowa 2010).

Standard of Review.

Constitutional claims are reviewed de novo. State v Dudley, 766 N.W.2d 606, 612 (Iowa 2009).

Discussion.

Iowa Code section 815.9 provides the authority to recoup the total cost of legal assistance provided to an indigent person. See Iowa Code § 815.9(3)(2021) (stating "the person shall be required to reimburse the state for the total cost of legal assistance provided to the person pursuant to this section."); Iowa Code § 815.9(5)(2021) (stating when the person is convicted of a criminal offense, the total legal assistance cost shall be ordered as restitution "the extent to which the person is reasonably able to pay, or order the performance of community service in lieu of such payments, in accordance with chapter 910."); Iowa Code § 815.9(6) (2021) (stating if the person is acquitted in a criminal case, "the court shall order the payment of all or a portion of the total costs and fees incurred for legal assistance, to the extent the person is

reasonably able to pay, after an inquiry which includes notice and reasonable opportunity to be heard.").[1]

Because McCalley was convicted, the recoupment of her legal assistance cost is governed by Iowa Code Chapter 910. Court costs are recoverable by the successful party against the losing party. Iowa Code § 625.1 (2021). Court costs and legal assistance costs are included in category B restitution. Iowa Code § 910.1(2)(2021). The sentencing court is to order category B restitution to be paid to the clerk of court. Iowa Code §§ 910.2(1)(a)(2) and 910.2A (2021).

In 2020, the Iowa legislature enacted 2020 Iowa Acts chapter 1074 (Senate File 457) which amended portions of Iowa Code Chapter 910. At issue here are the changes made

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1 Iowa Code section 815.9(5)(2021) is not applicable in the present case. However, it appears acquitted individuals' legal assistance recoupment is still subject to only the extent to which she is reasonably able to pay without any presumption of ability to pay or other provisions of Iowa Code Chapter 910 (2021). See e.g. State v. Dudley, 766 N.W.2d at 614-15 (stating previous "chapter 815.9, as applied to acquitted defendants, infringes on their federal and state right to counsel[]" and remanding for remanding for hearing on his reasonable ability to pay the costs of his legal assistance.).

to the law regarding a defendant's reasonable ability to pay category B restitution (court costs and attorney fees). Iowa Code section 910.2(1)(a)(2) provides "Category "B" restitution shall be ordered subject to an offender's reasonable ability to make payments pursuant to section 910.2A." Iowa Code § 910.2(1)(a)(2) (2021). Iowa Code section 910.2A provides:

1. An offender is presumed to have the reasonable ability to make restitution payments for the full amount of category "B" restitution.

2. If an offender requests that the court determine the amount of category "B" restitution payments the offender is reasonably able to make toward paying the full amount of such restitution, the court shall hold a hearing and make such a determination, subject to the following provisions:

a. To obtain relief at such a hearing, the offender must affirmatively prove by a preponderance of the evidence that the offender is unable to reasonably make payments toward the full amount of category "B" restitution.

b. The offender must furnish the prosecuting attorney and sentencing court with a completed financial affidavit. Failure to furnish a completed financial affidavit waives any claim regarding the offender's reasonable ability to pay.

c. The prosecuting attorney, the attorney for the defendant, and the court shall be permitted to question the offender regarding the offender's reasonable ability to pay.

d. Based on the evidence offered at the hearing, including but not limited to the financial affidavit, the court shall determine the amount of category "B" restitution the offender is reasonably able to make payments toward, and order the offender to make payments toward that amount.

3. a. If an offender does not make a request as provided in subsection 2 at the time of sentencing or within thirty days after the court issues a permanent restitution order, the court shall order the offender to pay the full amount of category "B" restitution.

b. An offender's failure to request a determination pursuant to this section waives all future claims regarding the offender's reasonable ability to pay, except as provided by section 910.7.

4. If an offender requests that the court make a determination pursuant to subsection 2, the offender's financial affidavit shall be filed of record in all criminal cases for which the offender owes restitution and the affidavit shall be accessible by a prosecuting attorney or attorney for the offender without court order or appearance.

5. A court that makes a determination under this section is presumed to have properly exercised its discretion. A court is not required to state its reasons for making a determination.

Iowa Code § 910.2A (2021). The enactment of 2020 Iowa Acts ch. 1074, § 72 (codified at Iowa Code § 910.2A (2021)) has changed the reasonable-ability-to-pay landscape. See e.g. State v. Smith, No. 18-2248, 2021 WL 1400772, at *4 (Iowa

Ct. App. April 14, 2021)(stating "legislation has changed the *Albright* landscape"); State v. Washington, No. 18-2092, 2021 WL 815865, at *2 (Iowa Ct. App. March 3, 2021)(same); State v. Dessinger, No. 18-2116, 2021 WL 1584079, at *11 (Iowa April 23, 2021)(stating the legislation "changed the criminal restitution framework.").

Recently, the Supreme Court acknowledged criminal defendants face obstacles "when saddled with large amounts of court debt that make it difficult to make a fresh start after serving their term of imprisonment." State v. Hawk, 952 N.W.2d 314, 321 (Iowa 2020). The Iowa legislature apparently failed to recognize those same realities by amending the recoupment statute which will continue to make it harder for criminal defendants to move beyond the criminal justice system without any true impact on the fiscal health of the state. See State v. Rogers, 251 N.W.2d 239, 243 (Iowa

1977)(stating "the chase may not be worth the prize.").[2] However, bad public policy does not make a misguided statute unconstitutional. James v. Strange, 407 U.S. 128, 133, 92 S.Ct. 2027, 2031 (1972) (The Supreme Court noted that its function was not to determine whether the law was wise, desirable or effective. The only task was to determine whether the recoupment statute was constitutional.). Iowa Code section 910.2A is unconstitutional and cannot stand.

History of Recoupment Jurisprudence

Over forty-five years ago, the United States Supreme Court addressed the constitutionality of two recoupment statutes. James v. Strange, 407 U.S. 128, 92 S.Ct. 2027 (1972); Fuller v. Oregon, 417 U.S. 40, 94 S.Ct. 2116 (1974).

In James v. Strange, the United States Supreme Court addressed a constitutional challenge to a Kansas recoupment statute which authorized the state to recover in a subsequent

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[2] See e.g. https://www.legis.iowa.gov/docs/publications/DF/1069863.pdf (Judicial Branch 6/30/19 accounts receivable).

civil proceedings counsel and other legal defense fees expended for the benefit of indigent defendants. The Kansas statute provided that the defendant became obligated to the state for the amount expended in his behalf. The defendant was notified of his debt and given 30 days to repay it. If the sum remained unpaid within 60 days, a judgment was docketed against the defendant for any unpaid amount. The debt became a lien on the real estate of the defendant and could be executed by garnishment or in any other manner provided by the Kansas Code of Civil Procedure. The indigent defendant was not afforded any of the exceptions provided by the code for other judgment debtors except the homestead exception. James v. Strange, 407 U.S. 128, 129-130, 92 S.Ct. 2027, 2029-2030 (1972).

The James Court found that there was no denial of the right to counsel in the strictest sense since counsel had been appointed. James v. Strange, 407 U.S. at 134, 92 S.Ct. at 2031. Whether the statutory obligations for repayment

impermissibly deterred the exercise of the right to counsel was not a question the Court needed to reach, because the statute was constitutionally infirm on other grounds. Id. The United States Supreme Court found the Kansas statute "embodies elements of punitiveness and discrimination which violate the rights of citizens to equal treatment under the law." Id. at 142, 92 S.Ct. at 2035. The statute provided for unequal treatment between indigent defendants and other civil judgment debtors. The recoupment statute stripped from the indigent defendant the array of protective exceptions the state had erected for other civil judgment debtors. Id. 135, 92 S.Ct. at 2031-2032. The Court observed, "For Kansas to deny protections such as these to the once criminally accused is to risk denying him the means needed to keep himself and his family afloat." Id. at 136, 92 S.Ct. at 2032. The Court concluded that to impose these harsh conditions on a class of debtors who were provided counsel as required by the

Constitution is to practice a discrimination which the Equal Protection Clause proscribes. Id. at140-141, 92 S.Ct. at 2034.

In Fuller v. Oregon, the United States Supreme Court was called upon to determine whether Oregon may constitutionally require a person convicted of a criminal offense to repay the state the costs of providing him with effective representation of counsel, when he was indigent at the time of the criminal proceedings but subsequently acquired the means to bear the costs of his legal defense. Fuller v. Oregon, 417 U.S. 40, 41, 94 S.Ct. 2116, 2119, 40 L.Ed.2d 642, 647 (1974). Defendant Fuller was required to pay the costs of his legal representation as a condition of probation. Id. at 42, 94 S.Ct. at 2119. The Oregon statute's requirement of repayment was never mandatory. Several conditions had to be satisfied before a person was required to repay the costs of his legal defense. First, the person had to be convicted. Second, the court could not order a convicted person to pay these expenses unless he was or would be able

to pay them. The sentencing court was required to consider the financial resources of the defendant and the nature of the burden that payment of the costs would impose. No requirement of payment could be imposed if it appeared at the time of sentencing that there is no likelihood that a defendant's indigency would end. Third, a convicted person under an obligation to repay could petition the court for remission of the payment of costs or any unpaid portion. The court was empowered to remit if payment would impose manifest hardship on the defendant or his immediate family. Finally, no convicted person could be held in contempt for failure to repay if he showed that his failure to pay was not attributable to an intentional refusal to obey the court order. Fuller v. Oregon, 417 U.S. at 44-46, 94 S.Ct. at 2120-2121.

Fuller challenged that Oregon's recoupment statute infringed upon his constitutional right to have counsel provided by the state when he was indigent. Id. at 51, 94 S.Ct. at 2123. He asserted that a defendant's knowledge that

he may remain under an obligation to repay the expenses incurred in providing him legal representation might impel him to decline the services of an appointed lawyer and therefore, "chill" his constitutional right to counsel. Id. The Court determined that Oregon's statute did not deprive an indigent defendant of the necessary legal assistance. Id. at 52, 94 S.Ct. at 2124. The Oregon statute was carefully designed to ensure that only those who actually become capable of repaying the state will ever be obligated to do so. Those who remain indigent or for whom repayment would work "manifest hardship" are forever exempt from any obligation to repay. Id. at 53, 94 S.Ct. at 2124. The Court concluded that the Oregon recoupment statute did not place a penalty on the exercise of a constitutional right. The Court ruled:

> Oregon's recoupment statute merely provides that a convicted person who later becomes able to pay for his counsel may be required to do so. Oregon's legislation is tailored to impose an obligation only upon those with a foreseeable ability to meet it, and to enforce that obligation only against those who actually become able to meet it without hardship.

Fuller v. Oregon, 417 U.S. at 54, 94 S.Ct. at 2125.

In Bearden v. Georgia, the United States Supreme Court addressed the question whether the 14th Amendment prohibits a State from revoking an indigent defendant's probation for failure to pay a fine and restitution. Bearden v. Georgia 461 U.S. 660, 661, 103 S. Ct. 2064, 2066-2067 (1983). The Court held:

> that in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority. If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternative measures of punishment other than imprisonment. Only if alternative measures are not adequate to meet the State's interest in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay. To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness by the Fourteenth Amendment.

Bearden v. Georgia, 461 U.S. at 672-673, 103 S.Ct. 2073.

The United States Supreme Court identified the basic features separating a constitutionally acceptable recoupment

or restitution program from one that is fatally defective. Fuller v. Oregon, 417 U.S. at 47-54, 94 S.Ct. at 2121-2125; James v. Strange, 407 U.S. at 135-139, 92 S.Ct. at 2031-2034; Bearden v. Georgia, 461 U.S. at 672-673, 103 S.Ct. at 2073. From the pronouncements in James, Fuller and Bearden, five basic features of constitutionally acceptable recoupment programs emerged. The Fourth Circuit Court of Appeals in Alexander v. Johnson, succinctly outlined the features:

> First, the program under all circumstances must guarantee the indigent defendant's fundamental right to counsel without cumbersome procedural obstacles designed to determine whether he is entitled to court-appointed representation. Second, the state's decision to impose the burden of repayment must not be made without providing him notice of the contemplated action and a meaningful opportunity to be heard. Third, the entity deciding whether to require payment must take cognizance of the individual's resources, the other demands on his own and family's finances, and the hardships he or his family will endure if repayment is required. The purpose of this inquiry is to assure repayment is not required as long as he remains indigent. Fourth, the defendant accepting court-appointed counsel cannot be exposed to more severe collection practices than the ordinary civil debtor. Fifth, the indigent defendant ordered to repay his attorney's fees as a condition of work-release, parole, or probation cannot be imprisoned for failing to extinguish his debt as long as his default is attributable to his poverty, not his contumacy.

Alexander v. Johnson, 742 F.2d 117, 124 (4th Cir. 1984). See also Olson v. James, 603 F.2d 150, 153-155 (10th Cir. 1979)(discussing general guides gleaned from the Supreme Court's decisions in James v. Strange and Fuller v. Oregon.); State v. Rogers, 251 N.W.2d 239, 245 (Iowa 1977)(observing "that recoupment of attorney fees as a condition of probation must satisfy constitutional criteria.").

The Iowa Supreme Court addressed similar issues in State v. Haines. Haines was required as a condition of probation to reimburse the county for the costs of court appointed attorney's fees associated with his case by paying cash or performing community service. State v. Haines, 360 N.W.2d 791, 792 (Iowa 1985). Haines challenged the constitutionality of Iowa Code sections 910.1-4 (1983 & Supp. 1983) on several grounds. Id. at 793. Haines challenged that allowing recoupment of court appointed attorney's fees violated the guaranteed right to counsel by discouraging or

punishing the exercise of this right. In rejecting this

contention, this Court stated:

Like the Oregon statute the Iowa statute only authorizes the court to order the offender to make restitution of court costs and court-appointed attorney's fees "to the extent that the offender is reasonably able to do so." § 910.2. The key difference between the Oregon and Iowa statutes is that the Iowa statute states that "[w]hen the offender is not reasonably able to pay all or a part of the court costs, court-appointed attorney's fees or the expense of a public defender, the court may require the offender . . . to perform a needed public services." § 910.2. Thus, the court "may require" an offender to perform a public service, if he is not reasonably able to pay the court costs and court-appointed attorney's fees, only "to the extent his is reasonably able to do so"; this belies defendant's assertion that the statute mandates restitution, either in the form of direct payment or in the form of public service. An offender is given the opportunity to show "impairment which would limit or prohibit the performance of public services." § 910.3. Public service is not mandated when an offender is not reasonably able to perform public service.

The Iowa statute provides further protection. The restitution plan is subject to modification by the court following hearing. § 910.7. Keeping in mind the purpose of the statutes when read in conjunction, we interpret these statutes to provide a defendant required to perform public service work as a term of probation a means to obtain modification of an order specifying public service when circumstances dictate. Thus, if a probationer later becomes unable to meet the plan of restitution, a mechanism has been established to provide relief. Chapter 910 includes sufficient safeguards to overcome a sixth amendment challenge.

State v. Haines, 360 N.W.2d at 794.

Haines also asserted the statute violated the due process provision of the 14th Amendment and Article I, Section 9 of the Iowa Constitution because it is fundamentally unfair. Haines asserted that indigent defendants are given no input into the selection of an attorney or the cost of legal services and because he was never given notice that he might be expected to pay for the attorney he was instructed would be provided for him at public expense. State v. Haines, 360 N.W.2d at 795-796. Counsel was appointed to advise defendant of legal position and his rights. The Court concluded there was no basic unfairness to defendants under this carefully devised plan which provides counsel for the indigent when needed and prescribes protective standards under which reimbursement may be ordered only after a hearing. Id. at 796.

The Iowa Supreme Court has consistently held a defendant's reasonable ability to pay is a constitutional

prerequisite for a criminal restitution order. See e.g. State v. Haines, 360 N.W.2d at 797; State v. Harrison, 351 N.W.2d 526, 529 (Iowa 1984); State v. Albright, 925 N.W.2d 144, 161 (Iowa 2019). "A cost judgment may not be constitutionally imposed on a defendant unless a determination is first made that the defendant is or will be reasonably able to pay the judgment." State v. Dudley, 766 N.W.2d at 615.

Appellant was unable to locate any other jurisdiction that has a statute similar to Iowa Code section 910.2A (2021). The other states' statutes do not contain a presumption of the ability to pay costs. Consistent with Fuller, the statutes provide for the determination of the ability to pay before the court orders an offender to reimburse the government for the costs. See e.g. Ala. Code § 45-41-83.19 (2021); Ariz. Rev. Stat. § 11-584(3)(D) (2021); Cal. Penal Code § 987.81 (2021); Colo. Rev. Stat. § 21-1-103 (2021); Conn. Gen. Stat. § 51-298 (2021); Ind. Code § 35-33-7-6 (2021); Kan. Stat. Ann. § 22-4504 (2021); Ky. Rev. Stat. § 31.211 (2021); La. Rev. Stat.

Ann. § 15:176 (2020); Minn. Stat. Ann. § 611.35 (2021); N.D. Cent. Code Ann. § 29-07-01.1 (2021); N.H. Rev. Stat, Ann. § 604-A:9 (2021); Nev. Rev. Stat. Ann. § 178.3975 (2021); N.J. Stat. Ann. § 2B:24-17 (2021); Or. Rev. Stat. Ann. § 151.487 (2020); Tex. Crim. Pro. Art. 26.05 (2021); Vt. Stat. Ann. tit.13 § 5238 (2021); Wash. Rev. Code Ann. § 10.01.160 (2021); Wyo. Stat. Ann. § 7-6-106 (2021).

Right To Counsel

The accused in a criminal proceeding is guaranteed a right to assistance of counsel. U.S. Const. amend. VI ; Iowa Const. art. I, § 10. Iowa Code section 910.2A (2021) violates the right to assistance of counsel as guaranteed by the 6th Amendment and Iowa Constitution Article 1, Section 10. McCalley does not assert the State of Iowa failed to appoint counsel, nor that her counsel at trial was ineffective. The challenge asserted is that Iowa Code section 910.2A "chills" her constitutional right to counsel. The knowledge that a defendant may remain under an obligation to repay the

expenses incurred in proper representation might impel her to decline the services of an appointed attorney. Fuller v. Oregon, 417 U.S. at 51, 94 S.Ct. at 2123.

Iowa, like every jurisdiction, has an irrevocable constitutional duty to provide court-appointed counsel to an indigent defendant once she requests it. Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792 (1963). The Gideon Court in discussing the need for a lawyer quoted Justice Sutherland in Powell v. Alabama:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Gideon v. Wainwright, 372 U.S. at 344-345, 83 S.Ct. at 797 (1963) (quoting Powell v. Alabama, 287 U.S. 45, 68-69, 53 S.Ct. 55 (1932)).

Due Process

No person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. V; U. S. Const. XIV, § 1; Iowa Const. art. I, § 9. This Court has applied the federal and state due process protections equally in scope, import and purpose. Exira Community Sch. Dist. v. State, 512 N.W.2d 787, 792-93 (Iowa 1994). Appellant does not assert that the federal constitutional right to due process and the state constitutional right to due process should be analyzed differently. Iowa Code section 910.2A (2021) violates the right to Due Process guaranteed by the 5th and 14th Amendment of the United States Constitution and Article I, Section 9 of the Iowa Constitution because it is fundamentally unfair.

The United States Supreme Court has generally analyzed "the fairness of relations between the criminal defendant and the State under the Due Process Clause." Bearden v. Georgia, 461 U.S. at 665, 103 S.Ct. at 2069. "The test of whether due process has been violated is whether the challenged practice or rule 'offends some principle of justice so rooted in the traditions and conscience of our people to be ranked as fundamental.'" State v. Haines, 360 N.W.2d at 796 (other citations omitted). The United States Supreme Court in Bearden observed:

> A due process approach has the advantage in this context of directly confronting the intertwined question of the role that a defendant's financial background can play in determining an appropriate sentence. When the court is initially considering what sentence to impose, a defendant's level of financial resources is a point on a spectrum rather than a classification.
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> * * *
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> The more appropriate question is whether consideration of a defendant's financial background in setting or resetting a sentence is so arbitrary or unfair as to be a denial of due process.

Bearden v. Georgia, 461 U.S. at 666 n.8, 103 S.Ct. at 2069 n.8.

Excessive Fines

The Iowa and United States Constitutions prohibit the government's imposition of excessive fines. Iowa Const. Art. I, § 17 ("Excessive bail shall not be required; excessive fines shall not be imposed, and cruel and unusual punishment shall not be inflicted."); U.S. Const. Amend VIII (Excessive bail shall not be required, nor excessive fines be imposed, nor cruel and unusual punishment inflicted."). See also Timbs v. Indiana, 139 S.Ct. 682, 687 (2019)(The Excessive Fines Clause of the Eighth Amendment is incorporated by the Due Process Clause of the Fourteenth Amendment.). The similarity between the two clauses permits the Iowa Court to look to the interpretations by the United States Supreme Court for guidance in interpreting our own clause. State v. Izzolena, 609 N.W.2d 541, 546 (Iowa 2000).

The Excessive Fines Clause was intended to limit the steps a government may take against an individual in imposing excessive monetary sanctions. Browning–Ferris

Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 275, 109 S.Ct. 2909, 2920 (1989). The United States Supreme Court stated:

> The Excessive Fines Clause limits the government's power to extract payments, whether in cash or in kind, "as punishment for some offense." "The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law." "It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties."

Austin v. United States, 509 U.S. 602, 609–10, 113 S.Ct. 2801, 2805 (1993) (other citations omitted). Therefore, "fine" not only includes the monetary penalties traditionally imposed in a criminal case, but also other sanctions which are punishment. State v. Izzolena, 609 N.W.2d at 547.

"The touchstone of the constitutional inquiry into the Excessive Fines Clause is the principle of proportionality: the amount of the [fine] must bears some relationship to the gravity of the offense that it is designed to punish." United States v. Bajakajian, 524 U.S. 321, 334, 118 S.Ct. 2028, 2036 (1998). The fine is excessive if it is grossly disproportional to

the gravity of the offense committed. Id.

Category B restitution is part of an offender's sentence. See State v. Alspach, 554 N.W.2d at 883 (stating restitution is a criminal sanction that is part of the sentence). "Although most monetary sanctions in criminal cases are payable to the government, the greater concern of the Excessive Fines Clause was not the financial gain of the government, but to prevent the government from abusing its power to punish an offender." State v. Izzolena, 609 N.W.2d at 549. "The idea was to limit government power to punish an individual, not necessarily limit its power to raise revenue. Thus, the focus of the clause is on the impact of the punishment to the individual." Id.

There is no doubt that one purpose of the statute is to raise money. However, this Court has stated that the purpose of the sanction "goes beyond revenue recovery; it is designed to instill responsibility in criminal offenders." State v. Haines, 360 N.W.2d at 795. Therefore, section 910.2A serves in part to punish and is subject to the Excessive Fines Clause.

The "constitutional prohibition against "excessive fines" requires that "[a] fine should have some reference to a person's ability to pay it." Nicholas M. McLean, Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause, 40 Hastings Const. L.Q. 833, 885-886 (2013). This Court in Klawonn acknowledged:

> The financial inability of an offender to pay a fine does relate to the degree of punishment. The amount of a fine can adversely impact an offender with limited financial means more than an offender with greater financial means. Thus, it is properly considered under the proportionality test as it impacts the amount of the fine.

State v. Klawonn, 609 N.W.2d 515, 518 (Iowa 2000). The Klawonn Court recognized that the award which was enforceable as a civil judgment could create broad long-term obstacles. Id. Yet, the Court underestimated the concerns stating "the impact is controlled by statutory restrictions and limitations placed on the enforcement and collection of the fine." Id. at 519. This Court overlooked that the "imposition of monetary sanctions significantly exceeding a defendant's ability to pay … fundamentally impair[s] the prospects for the

defendant's rehabilitation and reintegration as a productive member of society." Nicholas M. McLean, Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause, 40 Hastings Const. L.Q. at 886.

A 2010 study, Criminal Justice Debt: A Barrier to Reentry, powerfully makes this case. In that study, the authors conclude that "[d]espite the fact that most criminal defendants are indigent, none of the fifteen examined states pay adequate attention to whether individuals have the resources to pay criminal justice debt, either when courts determine how much debt to impose or during the debt collection process." Consequently, "[t]he result is a system effectively designed to turn individuals with criminal convictions into permanent debtors." This can seriously impact the capacity of defendants to reintegrate as productive members of society: for defendants, "unpaid criminal justice debt . . . can impact everything from their employment and housing opportunities, to their financial stability, to their right to vote."

Id. (footnotes omitted).

Similarly, the authors of a recent empirical study on the impact of criminal justice debt conclude that "[b]y reducing income; limiting access to housing, credit, transportation, and employment; and increasing the chances of ongoing criminal justice involvement, monetary sanctions significantly expand the duration and intensity of penalties associated with a criminal conviction."

Id. at 888 (footnote omitted). "In short, "a growing body of evidence now suggests that criminal justice debt leads to

serious unintended consequences--consequences that harm the individual, the community, and the criminal justice system itself."" Id. at 889 (footnote omitted).

Analysis

The Iowa Supreme Court recognized that the "reasonably able to pay" requirement in former Iowa Code § 910.2 (2019) enabled it to withstand constitutional attack. State v. Haines, 360 N.W.2d at 794, 796; Goodrich v. State, 608 N.W.2d 774, 776 (Iowa 2000); State v. Jenkins, 788 N.W.2d 640, 646 (Iowa 2010) (denying defendant an opportunity to challenge, before the district court, the amounts of the restitution order implicates his right to due process). In Albright, the Iowa Supreme Court recognized that a final order of restitution "must take into account the offender's reasonable ability to pay." And that until the reasonable ability to pay determination was made, the order was not enforceable. State v. Albright, 925 N.W.2d 160-61. In June 2020, the Court reaffirmed its Albright holding. State v. Davis, 944 N.W.2d

641, 646 (Iowa 2020) (stating "[w]e reiterate that the district court does not have an obligation to conduct the reasonable-ability-to-pay determination until all items of restitution are before it and the final order of restitution is entered."). Within days of Davis, the legislature passed SF 457. State v. Hawk, 952 N.W.2d at 317. See also 2020 Iowa Acts ch. 1074, Div. XIII (now codified in Chapter 910 (2021)).

Senate File 457 (2020) changed the category B restitution framework. The changes in Chapter 910 eliminated the safeguards from former Chapter 910 (2019) which enabled it to withstand constitutional challenges. See e.g. State v. Harrison, 351 N.W.2d at 529 (stating "[p]rocedures thus exist in chapter 910 from the inception of the sentence to assure that the [constitutional] criteria are satisfied."); State v. Haines, 360 N.W.2d at 794 (stating "Chapter 910 includes sufficient safeguards to overcome a sixth amendment challenge.").

Section 910.2(1)(a)(2) provides that category B restitution is "subject to an offender's reasonable ability to make payments pursuant to section 910.2A." Iowa Code § 910.2(1)(a)(2)(2021). "An offender is presumed to have the reasonable ability to make restitution payments for the full amount of category "B" restitution." Iowa Code § 910.2A(1) (2021). The statute's tenor makes it clear that an offender's indigency does not matter. Olson v. James, 603 F.2d at 155. The district court is not required to consider an offender's ability to pay category B restitution. Iowa Code section 910.2A (2021) shifted this burden to the offender to request the court determine the amount of payments the offender is reasonably able to make toward paying the full amount of the restitution. Iowa Code § 910.2A(2) (2021). If the offender does not make a request at the time of sentencing or within 30 days of sentencing, the court must order her to pay the entire amount of category B restitution. Iowa Code § 910.2A(3) (2021). Iowa

Code Chapter 910 (2021) does not satisfy the constitutional criteria.

To satisfy the constitutional criteria as outlined in Fuller v. Oregon, James v. Strange, Olson v. James, Alexander v. Johnson, State v. Haines, and State v. Rogers, the court shall not order an offender to pay category B restitution unless she is able to pay or will be able to pay in the future without undue hardship. State v. Haines, 360 N.W.2d at 794. If the offender is unlikely to able to pay, no requirement is imposed. Olson v. James, 603 F.2d at 155; State v. Harrison, 351 N.W.2d at 529. For the statute to be constitutional, the sentencing court has the duty to inquire and determine an offender's reasonable ability to pay category B restitution. The district court must make this determination prior to entering an order. See State v. Dudley, 766 N.W.2d at 615 (reimbursement obligation "may not be constitutionally imposed on a defendant unless a determination is *first* made that the defendant is or will be reasonably able to pay the

judgment.") (emphasis added); Goodrich v. State, 608 N.W.2d at 776 ("Constitutionally, a court must determine a criminal defendant's ability to pay *before* entering an order requiring such defendant to pay criminal restitution pursuant to Iowa Code section 910.2.") (emphasis added). The order setting out the amount of category B restitution is immediately enforceable. Iowa Code §§ 910.3(8), (9) (2021) (stating the court shall enter a permanent restitution order); Iowa Code § 910.7 (2021) (stating an order requiring an offender to pay restitution constitutes a judgment and lien against all property of a liable defendant.); State v. Albright, 925 N.W.2d at 161 (stating final orders are enforceable).

The presumption that an offender, such as McCalley, has the reasonable ability to pay category B restitution eliminates the court's duty to ensure an offender is able to pay without undue hardship. The absurdity of the presumption of non-indigency is especially apparent in the present case. The sentencing hearing record shows discussion about McCalley's

poverty. (Tr. p. 3L19-p. 4L1, p. 5L19-p. 6L8, p. 7L12-14, p. 8L1-6). In following the statute, the district court was required to find McCalley had the reasonable ability to pay category B restitution. The court notes she had two part-time jobs. (Tr. p. 8L21-p. 9L2). This determination that the two part-time jobs enabled her to pay category B restitution was proceeded by the court's recognition that the Covid pandemic clearly had some effect on McCalley's economic status. And that the court did not want McCalley to incur additional cost by being placed on probation. (Tr. p. 7L12-14, p. 8L1-6). The sentencing court is constitutionally compelled to make an ability to pay determination prior to assessing the amount of restitution. The legislation is contrary to constitutional guarantees.

Iowa Code section 910.2A (2021) cannot survive constitutional scrutiny. Iowa Code section 910.2A (2021) eliminated the district court's duty to determine an offender's reasonable ability to pay category B restitution prior to the

imposition of this sanction thereby eliminating the constitutional protections. The addition of Iowa Code section 910.2A shifted the burden to the offender to request a determination. B. John Burns, 4A Iowa Practice: Criminal Procedure § 21:2 (2021 ed.). Furthermore, section 910.2A arguably may only address installment amounts not the entire amount of restitution. Iowa Code § 910.2A(2) (2021). The elimination of the safeguards to ensure that only those who actually become capable of repaying the state will ever be obligated to do so renders the statute unconstitutional.

The statute's constitutionality is not assisted by any other statutes. Iowa Code section 815.9(5) (2021) provides the reasonable ability to pay determination in accordance with Iowa Code Chapter 910. Iowa Code § 815.9(5) (2021).

Nor does Iowa Code section 910.7 (2021) rescue section 910.2A (2021). An offender may only seek modification of the order for category B restitution "during the period of probation, parole, or incarceration". Iowa Code § 910.7(1)

(2021). If an offender is not on probation, parole or incarcerated, she cannot seek modification of the restitution order. One of the constitutional criteria is that a person who is obligated to repay costs should be able to petition the court *any time* for remission of the payment of cost. Olson v. James, 603 F.2d at 155. Section 910.7 only provides for a limited period to seek remission of the costs. An offender who is not placed on probation, like McCalley, has no means to seek remission or modification. Without this Court's intervention, McCalley will be forever required to pay the entire amount of category B restitution. Section 910.7 (2021) does not provide a safeguard to make Section 910.2A constitutional. See State v. Haines, 360 N.W.2d at 794 (stating Iowa Code section 910.7 provides further protection).[3]

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3 Iowa Code section 910.7 (1985) provided the "court *at any time prior to the expiration* of the offender's sentence, may modify the plan of restitution or the restitution plan of payment, or both, and may extend the period of time for the completion of restitution." (emphasis added).

Additionally, section 910.7(1) does not require the court to hold a hearing on the petition for modification. Iowa Code § 910.7(1) (2021). A petition pursuant to section 910.7 is a post-deprivation remedy where the hearing is discretionary. State v. Jenkins, 788 N.W.2d at 646-47. An offender is not entitled to court-appointed counsel for a section 910.7 hearing. State v. Alspach, 554 N.W.2d at 883. The Jenkins Court concluded: a "contingent postdeprivation remedy where the offender may be unrepresented does not give this court comfort in the context of procedural due process." State v. Jenkins, 788 N.W.2d at 647.

Lastly, appellate review of a ruling under 910.7 is only available by a writ of certiorari. Iowa Code § 910.7(5) (2021). A writ of certiorari is applicable where a party claims a district court judge, exceeded the judge's jurisdiction or otherwise acted illegally. Iowa R. App. 6.107(1). Illegality exists when the court's findings lack substantial evidentiary support, or when the court has not properly applied the law. Sorci v. Iowa

Dist. Court for Polk County, 671 N.W.2d 482, 489 (Iowa 2003). A pro se litigant would have to preserve error on her claim and file a petition for writ of certiorari in the Supreme Court. A post-deprivation discretionary hearing where the defendant is unrepresented without an appeal of right does not provide any safeguard to make Iowa Code section 910.2A (2021) constitutional.

Conclusion

Iowa Code section 910.2A places a penalty on the indigent person's exercise of a constitutional right. The presumption that a defendant has the ability to pay category B restitution and the lack of safeguards to ensure an indigent defendant will not be ordered to pay the costs of legal assistance chills the assertion of the constitutional right to counsel by penalizing those who choose to exercise it. Fuller v. Oregon, 417 U.S. at 54, 94 S.Ct. at 2125. See cf. State v. Dudley, 766 N.W.2d at 614 (stating "[t]he very safeguard that sustained the constitutionality of the recoupment statutes

applied to convicted defendants in *Fuller* and *Haines* is absent here."). The question is not whether the chilling effect is incidental rather than intention; the question is whether that effect is unnecessary and therefore excessive. United States v. Jackson, 390 U.S. 570, 582, 88 S.Ct. 1209, 1216 (1968).

The elimination of the court's responsibility to make ability to pay determination prior to the entry of cost judgment violates due process.

Iowa Code section 910.2A which presumes the ability to pay category B restitution and shifts the burden to the offender to prove she cannot pay violates the Excessive Fines Clauses of the Iowa and the United States Constitutions.

The statute cannot survive constitutional scrutiny and must be invalidated. The portion of the sentencing order imposing category B restitution must be vacated.

CONCLUSION

Tiffany McCalley respectfully requests this Court vacate her sentence, including provision for payment of category B

restitution, and remand for resentencing. Resentencing must include the constitutionally required determination of her reasonable ability to pay category B restitution prior to district court entering such an order.

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 $6.58, 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

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:

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/s/ Martha J. Lucey Dated: 9/3/21

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