

IN THE SUPREME COURT OF IOWA

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STATE OF IOWA,

Plaintiff-Appellee,

v.

TIFFANY MCCALLEY,

Defendant-Appellant.

SUPREME COURT 20-1686

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

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APPELLANT'S REPLY BRIEF AND ARGUMENT

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## **CERTIFICATE OF SERVICE**

On the 11<sup>th</sup> day of October, 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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## **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

**I. Did the district court abuse its discretion and violate McCalley's rights to due process and equal protection by imposing a jail sentence because McCalley lacked the financial means to pay a fine?**

### **Authorities**

No authorities

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

### **Authorities**

Iowa Code § 910.2B(1) (2021)

2021 Iowa Acts ch. 80 § 381 (H.F. 739)

2021 Iowa Acts ch. 80 § 382 (H.F. 739)

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State v. Iowa Dist. Court for Henry Cty., 759 N.W.2d 793, 797 (Iowa 2009)

Weaver v. Graham, 450 U.S. 24, 29, 101 S.Ct. 960, 964 (1981)

Collins v. Youngblood, 497 U.S. 37, 46, 110 S.Ct. 2715, 2721 (1990)

State v. Izzolena, 609 N.W.2d 541, 549 (Iowa 2000)

State v. Chrisman, 514 N.W.2d 57, 62 (Iowa 1994)

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

**Authorities**

2020 Iowa Acts, ch. 1070 § 74 (codified at Code § 910.3(8) (2021))

Iowa Code § 910.7(4)(2021)

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State v. Albright, 925 N.W.2d 144, 161 (Iowa 2019)

State v. Davis, 944 N.W.2d 641, 646 (Iowa 2020)

Iowa Code § 910.7A (2021)

## **STATEMENT OF THE CASE**

COMES NOW the defendant-appellant, pursuant to Iowa R. App. P. 6.903(4), and hereby submits the following argument in reply to the plaintiff-appellee's brief.

### **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.**

The State asserts that McCalley "refused" to pay her outstanding debts and that McCalley "willfully failed to do so..." St. Final Brief p. 28. There is no dispute that McCalley had not paid the outstanding court debt or child support. But the record does not demonstrate she refused or willfully failed to pay her obligations. The prosecutor stated that McCalley had "habitually fail[ed] to pay [the fines] and fail[ed] to pay child support. (Tr. p. 5L19-24). He did not contend that McCalley had the ability to pay these debts and refused to do so. Instead, the prosecutor acknowledged McCalley "can't afford to pay it." (Tr. p. 6L4-8).

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

At the time the proof brief was filed on June 9, 2021, appellate counsel was unaware of recent legislation which amended Iowa Code section 910.2B. Initially, the legislature only provided that a restitution order entered prior to June 25, 2020, shall be converted to permanent restitution order. Iowa Code § 910.2B(1) (2021). McCalley was sentenced on December 8, 2020. (Judgment & Sentence)(App. pp. 12-13). However, the legislature again amended Iowa Code section 910.2B(1) during the 2021 legislative session. The legislation provided for all orders entered prior to the enactment of the amendment shall be converted to permanent restitution orders. 2021 Iowa Acts ch. 80 § 381 (H.F. 739). The amendment became effective upon enactment. 2021 Iowa Acts ch. 80 § 382 (H.F. 739). The legislature provided that the 2021 amendment to Iowa Code section 910.2B contained in House File 739 retroactively applied to June 25, 2020. 2021

Iowa Acts ch. 80 § 385 (H.F. 739). The governor signed the legislation, House File 739, on April 30, 2021.

[https://www.legis.iowa.gov/legislation/BillBook?ga=89&ba=hf739.](https://www.legis.iowa.gov/legislation/BillBook?ga=89&ba=hf739)

McCalley maintains the restitution statute in effect at the time of her driving while barred offense is the applicable law. While the legislature provided the conversion of restitution to final orders was retroactive, such legislation violates the prohibition against ex post facto law as guaranteed by the Iowa and the United States constitutions. U.S. Const. art, I, § 10; Iowa Const. art. I, § 21.

It is settled, by decisions of this court so well known that their citation may be dispensed with, any statute which punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed is prohibited as ex post facto. The constitutional prohibition and the judicial interpretation of it rest upon the notion that laws, whatever their form, which purport to make innocent acts criminal after the event, or to aggravate an offense, are harsh and oppressive, and that the criminal quality attributable to an act, either by the legal definition of the offense or by the nature or amount of the punishment imposed for its

commission, should not be altered by legislative enactment, after the fact, to the disadvantage of the accused....

Beazell v. Ohio, 269 U.S. 167, 169-170, 46 S.Ct. 68, 68-69 (1925). “This prohibition also “restricts governmental power by restraining arbitrary and potentially vindictive legislation.” “State v. Iowa Dist. Court for Henry Cty., 759 N.W.2d 793, 797 (Iowa 2009)(quoting Weaver v. Graham, 450 U.S. 24, 29, 101 S.Ct. 960, 964 (1981)).

At issue in this case, is the law “which makes more burdensome the punishment for a crime, after its commission.” A change in the law which enacts a procedural change may be an ex post facto law. “[B]y simply labeling a law “procedural,” a legislature does not thereby immunize it from scrutiny under the Ex Post Facto Clause.” Collins v. Youngblood, 497 U.S. 37, 46, 110 S.Ct. 2715, 2721 (1990). “Subtle ex post facto violations are no more permissible than overt ones.” Id.

In State v. Iowa Dist. Court for Henry Cty., the Supreme Court examined whether the amended statute which provided

that in order to earn a reduction in a sentence, the offender was required to follow institutional rules *and* satisfactorily participate in a specified program. State v. Iowa Dist. Court for Henry Cty., 759 N.W.2d at 800. The Court looked at “whether the amended statute increases the penalty by which [the offender’s] crime is punishable or, stated differently, whether it makes the punishment for his crime more onerous.” Id. The Court found the amended statute was a substantive change in the formula use to calculate the reduction in a sentence because it “retroactively decreas[ed] the amount of [earned]-time awarded for an inmate’s good behavior.” Id. at 801 (other citation omitted). Therefore, application of the amended statute to the offender violated the Ex Post Facto Clause.

The imposition of Category B restitution is punitive. See State v. Izzolena, 609 N.W.2d 541, 549 (Iowa 2000)(stating “restitution and fines share a common history as sanctions in a criminal case.”). The change in the procedure resulted in the

increase of the total amount McCalley was ordered to pay the government as part of her criminal sentence. Iowa Code section 4.13(1)(c)(2019) and the Ex Post Facto Clause should apply whether the increase in punishment is accomplished directly or indirectly. Cf. State v. Chrisman, 514 N.W.2d 57, 62 (Iowa 1994) (discussing the legislative purpose of the ameliorative amendment clause).

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

If the provisions of Iowa Chapter 910 (2021), with the 2020 amendments, apply to the present appeal McCalley has a right of appeal. At the time McCalley was sentenced and appealed, the permanent restitution order was “part of the final judgment of sentence as defined in section 814.6 and shall be considered in a properly perfected appeal.” 2020 Iowa Acts, ch. 1070 § 74 (codified at Code § 910.3(8) (2021)). Iowa Code section 910.7(4) prohibits the appellate court from reviewing or modifying an offender’s restitution “under this

subsection” unless the offender exhausts remedies. Iowa Code § 910.7(4)(2021). A section 910.7 petition and hearing are not necessary for a permanent restitution which part of judgment of sentence.

The day before McCalley filed the proof brief, the governor signed S.F. 367 which amended Iowa Code section 910.3.

<https://www.legis.iowa.gov/legislation/BillBook?ga=89&ba=S>

[F367](#). The amendment was effective July 1, 2021. Iowa Const. art. III § 26 (newly-enacted statutes take effect on July 1 unless the legislature has provided for an earlier effective date.). Iowa Code section 910.3(8) now provides:

The court shall enter a permanent restitution order setting out the amount of restitution including the amount of public service to be performed as restitution and the persons to whom restitution must be paid. A permanent restitution order entered at the time of sentencing is part of the final judgment of sentence as defined in section 814.6 and shall be considered in a properly perfected appeal. *An appellate court shall not review or modify any issue related to a defendant's ability to pay unless the defendant has exhausted the defendant's remedies under section 910.7 and obtained a ruling from the district court prior to the issue being raised in the appellate court.*

2021 Iowa Acts ch. 145, § 8 (S.F. 367)(amendment in italics).  
See also 2021 Iowa Acts ch. 80 § 377 (H.F. 739)(replacing  
“public” with “community”). This amendment is not applicable  
to McCalley’s appeal. State v. Macke, 933 N.W.2d 226, 235-36  
(Iowa 2019)(concluding the absence of retroactivity language  
means the statute applies prospectively and does not apply to  
cases pending on July 1<sup>st</sup>).

Haines addressed both substantive due process and  
procedure due process. State v. Haines, 360 N.W.2d 791,  
795-96 (Iowa 1985)(stating defendant claims the statute  
violates due process “because it is fundamentally unfair. More  
particularly, defendant objects because indigent criminal  
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.”).  
The Supreme Court addressed both substantive and  
procedure due process together. Id. at 796.

“Procedural due process requires notice and an opportunity to be heard “at a meaningful time in a meaningful manner” prior to depriving an individual of life, liberty, or property.” State v. Dudley, 766 N.W.2d 606, 624 (Iowa 2009)(quoting State v. Hernandez-Lopez, 639 N.W.2d 226, 241 (Iowa 2002)). McCalley was not provided notice of the Category B restitution and its amounts. The Combined General Docket shows that there were filing and docketing fees and indigent defense fees assessed prior to sentencing. (Financial Summary)(App. p. 18). The EDMS docket does not show that McCalley was provided with notice prior to the sentencing hearing. At sentencing, McCalley was not provided notice of these amounts. Requiring McCalley to request a hearing to prove she does not have the ability to pay an unknown amount is not an opportunity to be heard in a meaningful way.

“Substantive due process principles preclude the government “from engaging in conduct that ‘shocks the

conscience,’ or interferes with rights ‘implicit in the concept of ordered liberty.’ ”” Atwood v. Vilsack, 725 N.W.2d 641, 647 (Iowa 2006) (quoting United States v. Salerno, 481 U.S. 739, 746, 107 S.Ct. 2095, 2101 (1987)). The United States Supreme Court has held that the Due Process Clauses “require that deprivations of life, liberty, or property be substantively reasonable, i.e., that they be supported by some legitimate justification.” Russell W. Galloway, Jr., Basic Substantive Due Process Analysis, 26 U.S.F. L. Rev. 625, 625–26 (1992).

The court in Alexander v. Johnson, accurately noted that a detailed discussion of the due process factors “is not necessary in the case we consider, for the Supreme Court has articulated the specific criteria a state’s recoupment or restitution program must meet to survive a facial constitutional challenge on either due process or equal protection grounds.” Alexander v. Johnson, 742 F.2d 117, 123 n.8 (4<sup>th</sup> Cir. 1984) (citing Fuller v. Oregon, 417 U.S. 40, 94

S.Ct. 2116 (1974); James v. Strange, 407 U.S. 128, 92 S.Ct. 2027 (1972). The “focus, then, is to determine whether the program is narrowly drawn to minimize the burdens on the defendant’s rights.” Alexander v. Johnson, 742 F.2d at 123 n.8.

The Iowa Supreme Court had substantially adopted the factors outlined in Alexander v. Johnson. Most notably, the Court had held that a determination of a defendant’s reasonable ability to pay was a prerequisite before a judgment can be enforced. State v. Albright, 925 N.W.2d 144, 161 (Iowa 2019); State v. Davis, 944 N.W.2d 641, 646 (Iowa 2020). In Albright, the Court stated that “[t]he inclusion of the reasonable-ability-to-pay requirement makes these restitution provisions constitutional.” State v. Albright, 925 N.W.2d at 161 (citing State v. Haines, 360 N.W.2d at 793–94). Restitution orders, which are deemed “permanent”, entered pursuant to Iowa Code sections 910.2(1)(a)(2) (2021) and

910.2A (2021) are immediately enforceable. Iowa Code §  
910.7A (2021).

### **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.

### **ATTORNEY'S COST CERTIFICATE**

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was \$0.00, and that amount has been paid in full by the Office of the Appellate Defender.

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME  
LIMITATIONS, TYPEFACE REQUIREMENTS AND TYPE-  
STYLE REQUIREMENTS**

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

[X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 1,928 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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