IN THE SUPREME COURT OF IOWA
Supreme Court No. 20-1686

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TIFFANY MCCALLEY,
Defendant-Appellant.

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

APPELLEE'S BRIEF

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ROUTING STATEMENT

This case involves issues substantial issues of first impression regarding the applicability of Iowa Code section 910.2A and whether it is constitutional. This case should be retained by the Iowa Supreme Court. Iowa R. App. P. 6.1101(2)(a) and (c).

STATEMENT OF THE CASE

Nature of the Case

Tiffany McCalley appeals the sentence and restitution order imposed following her plea to driving while barred as a habitual offender. The Honorable Stephen A. Owen presided over the proceedings in Boone County, Iowa. The issues on appeal are whether the court abused its discretion when it sentenced McCalley to six days in jail, whether Iowa Code chapter 910 of the 2019 or 2020 code applies, and if the 2020 code provisions apply, whether section 910.2A is unconstitutional.

Course of Proceedings

On February 10, 2020, the State charged McCalley with operating a motor vehicle while license barred as a habitual offender, a violation of Iowa Code sections 321.555, 321.556, 321.560, and 321.561, and punishable as an aggravated misdemeanor. Trial Info. AGCR113502 (2/10/20); App. 5. On October 29, 2020, McCalley

entered a written plea to the charge. Pet. Plead Guilty (10/29/20); App. 7-9. On December 8, 2020, the district court sentenced McCalley to six days in jail, suspended the fine and surcharge, and determined she was "able to pay category B costs as well as court appointed attorney fees." Judg. and Sent. (12/8/20); App. 12-14. McCalley filed a notice of appeal on December 23, 2020. Not. of Appeal (12/23/20); App. 16.

Facts

On January 13, 2020, Boone police officer Daniel Lynch observed McCalley driving a green pickup truck. Lynch Minute and Report; Conf. App. 4-7. He identified her as the driver after checking a license photo. Lynch Minute and Report; Conf. App. 4-7. Officer Lynch learned that McCalley's driver's license was barred on March 20, 2019, as a habitual violator. Lynch Minute and Report; Conf. App. 4-7. Additional facts will be discussed below as relevant to the State's case.

ARGUMENT

I. The district court acted within its discretion when it sentenced the defendant to six days in jail.

Jurisdiction/Preservation of Error

The State does not contest McCalley's sentencing challenge. McCalley entered a guilty plea to driving while barred as a habitual offender. Pet. Plead Guilty (10/29/20); App. 7-9. Iowa Code section 814.6 specifically excludes the right to an appeal when the defendant has pled guilty except in a case "where the defendant establishes good cause." Iowa Code § 814.6(1)(a)(3). In *State v. Damme*, 944 N.W.2d 98, 104 (Iowa 2020), this court determined that "good cause" under section 814.6 means a "legally sufficient reason." In *Damme*, the defendant sought to challenge the sentence imposed following her guilty plea. *Id.* at 103-04. The court held:

> . . . that good cause exists to appeal from a conviction following a guilty plea when the defendant challenges his or her sentence rather than the guilty plea. Damme received a discretionary sentence rather that was neither mandatory nor agreed to as part of her plea bargain, and she is appealing that sentence and asking for resentencing without challenging her guilty plea or conviction. 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. We same for another day the question of what constitutes good cause to appeal to challenge a guilty plea.

Id. at 105. Because McCalley is challenging the sentence imposed, not the underlying guilty plea, this constitutes "good cause" under *Damme*.

Standard of Review

When a sentence is within the statutory limits, we review the sentence for an abuse of discretion. *State v. Gordon*, 921 N.W.2d 19, 24 (Iowa 2018). "We will find an abuse of discretion when 'the district court exercise its discretion on grounds or for reasons that were clearly untenable or unreasonable. *Id.* (quoting *State v. Thompson*, 856 N.W.2d 915, 918 (Iowa 2014)). To the extent that McCalley raises a constitutional challenge, review is de novo. *State v. Bruegger*, 773 N.W.2d 862 (Iowa 2009).

Merits

When a district court sentences a defendant for a criminal conviction:

> Each judge must grapple with the facts and circumstances in the case before him [or her] and arrive at the sentence he [or she] regards as right. The sentencing function of judges is an arduous and lonely one but it is a part of judging.

State v. Jackson, 204 N.W.2d 915, 916 (Iowa 1973). Iowa Code section 901.5 directs a district court to receive and examine:

> All pertinent information, including the presentence investigation report and victim impact statements, if any, the court shall consider the following sentencing options. The court shall determine which of them 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 the 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.

In this case, the district court heard the recommendations from each of the parties. Sent. Tr. p. 2, line 24 through p. 5, line 2. In her recommendation, defense counsel admitted McCalley had a "little bit of criminal history" which included an OWI and other driving charges dating back to 2007. Sent. Tr. p. 2, line 24 through p. 3, line 8. Counsel also acknowledged McCalley's license was barred "due to nonpayment of fines and child support over the last couple of years." Sent. Tr. p. 2, line 24 through p. 3, line 8. Defense counsel asked the court to sentence McCalley to:

> . . . a suspended sentence with probation or community service or any other requirements the Court would deem appropriate instead of jail time. She – obviously with the nonpayment of fines and child support, she has had license issues, but she hasn't had any criminal charges since 2007. She is looking to get her license back by getting re-enrolled in the license or payment plans. . .

Sent. Tr. p. 3, lines 9-17. Counsel informed the court that McCalley "had a lot going on in her personal life" which included a divorce and the loss of her home in a fire. Sent. Tr. p. 3, lines 18-20. Counsel noted McCalley works two part-time jobs; one at a restaurant and one as a cosmetologist. Sent. Tr. p. 3, line 21 through p. 4, line 1. She was also helping her boyfriend take care of his father. Sent. Tr. p. 4, lines 1-12. Counsel requested that given the number of COVID cases in Iowa at the time, and the non-violent nature of the offense, McCalley be sentenced to probation. Sent. Tr. p. 4, line 13 through p. 5, line 2.

The State, however, recommended a six-day jail sentence. Sent. Tr. p. 5, line 9 through p. 6, line 19. The prosecutor noted:

> . . . .when you look at her driving history, I show that she has three driving under suspensions just in 2018, so within the last two years she has three driving under suspensions. Although the state is not unsympathetic to some of the concerns raised by Ms. Sparks [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 that she is not yet paying. In a case like this jail time does have a 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 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. You could give her four months to serve that jail sentence if there are serious concerns about COVID and allow her to break them up over the course of weekends and 48-hour increments. That is fine by the State.

Sent. Tr. p. 5, line 9 through p. 6, line 19. After hearing the parties' recommendations, and offering McCalley an opportunity to speak in mitigation of punishment, the district court imposed a six-day jail sentence. Sent. Tr. p. 5, line s 3-6, p. 7, line 1 through p. 8, line 18.

The court informed McCalley of the reasons it imposed the jail sentence. Sent. Tr. p. 7, line 9 through p. 8, line 18. The court stated:

> The Court considers the purposes of disposition to rehabilitate defendant and prevent further 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.

Sent. Tr. p. 7, line 21 through p. 8, line 7. The district court's sentence was a proper and considered choice.

The court's sentence was within the range of possible sentences for an aggravated misdemeanor conviction. An aggravated misdemeanor carries a maximum term of two-years in prison and a

fine between $625 and $6250. Iowa Code § 903.1(2) (2019). A suspended sentence was also an option. Iowa Code § 907.1(4) (2019).

The court was aware of the personal and financial problems McCalley faced. However, she continued to drive while her license was barred and made no attempt to correct her illegal actions. As the prosecutor noted, she had three separate driving while suspended convictions in 2018 alone. Sent. Tr. p. 5, line 9 through p. 6, line 19. Moreover, McCalley could have sought a temporary restricted license that would allow her to drive to and from work. Iowa Code § 321.215. Even defense counsel acknowledged McCalley could do more towards getting her license back. Sent. Tr. p. 3, lines 9-17. McCalley's prior behavior and her disregard for her driving status required the court to fashion a sentence that would rehabilitate her and protect the community. Given that her past sentences for the same offense brought about no change in behavior and a sentence of probation would have just added to her mounting debt, the six-day sentence would force McCalley to think about her actions. It would also prevent her from future criminal acts at least while she was in jail. That is, she had to come to terms with the fact that she is prohibited

from driving and could not flagrantly disregard the law for years on end without any consequences for her actions.

Although the district court did not sentence McCalley to the suspended sentence as she wanted, the jail term was not an abuse of discretion. As the court noted, if it sentenced her to probation it would have only added to her debt. Sent. Tr. p. 7, line 9 through p. 8, line 18. The court allowed McCalley to serve the six days in 48-hour increments and suspended the minimum fine and surcharge. Sent. Tr. p. 7, line 9 through p. 8, line 18. The court was cognizant of the challenges she faced but fashioned a sentence that the court believed would rehabilitate McCalley and protect the public as chapter 901 requires.

McCalley contends, however, that the district court "improperly considered McCalley's poverty as a factor supporting incarceration." Def. Brief at 37. She further argues that the court violated her right to equal protection and due process by "imposing a jail sentence because McCalley did not have the financial means to pay a fine." Def. Brief at 37. This claim is not supported by the record. The court did not sentence her to a six-day jail term because she could not pay a fine but because she *had not* paid her previous fines and child support.

In *Griffin v. Illinois*, 351 U.S.12, 19 (1956), the United States Supreme Court declared that "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin*'s principle of "equal justice," which the Court applied there to strike down a state practice of granting appellate review only to persons able to afford a trial transcript, has been applied in numerous other contexts. *See, e.g., Douglas v. California,* 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963) (indigent entitled to counsel on first direct appeal); *Roberts v. LaVallee,* 389 U.S. 40, 88 S.Ct. 194, 19 L.Ed.2d 41 (1967) (indigent entitled to free transcript of preliminary hearing for use at trial); *Mayer v. Chicago,* 404 U.S. 189, 92 S.Ct. 410, 30 L.Ed.2d 372 (1971) (indigent cannot be denied an adequate record to appeal a conviction under a fine-only statute). Similarly, in *Williams v. Illinois,* 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970), the court held that a state cannot subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely because they are too poor to pay the fine. *Williams* was followed and extended in *Tate v. Short,* 401 U.S. 395 (1971), which held that a State cannot convert

a fine imposed under a fine-only statute into a jail term solely because the defendant is indigent and cannot immediately pay the fine in full. The rule of *Williams* and *Tate,* then, is that the State cannot "impos[e] a fine as a sentence and then automatically conver[t] it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full." *Tate, supra,* at 398. That is, if the State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he lacks the resources to pay it.

Both *Williams* and *Tate* carefully distinguished this substantive limitation on the imprisonment of indigents from the situation where a defendant was at fault in failing to pay the fine. As the Court made clear in *Williams,* "nothing in our decision today precludes imprisonment for willful refusal to pay a fine or court costs." 399 U.S., at 242, n. 19. Likewise in *Tate,* the Court "emphasize[d] that our holding today does not suggest any constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses or neglects to do so." 401 U.S., at 400.

Due process and equal protection principles converge in the Supreme Court's analysis in these cases. *See Griffin v. Illinois,*

supra, 351 U.S., at 17. Most decisions in this area have rested on an equal protection framework, although Justice Harlan in particular has insisted that a due process approach more accurately captures the competing concerns. *See, e.g., Griffin v. Illinois,* 351 U.S., at 29-39 (Harlan, J., dissenting); *Williams v. Illinois,* 399 U.S. 235, 259-266, (1970) (Harlan, J., concurring). As the court recognized in *Ross v. Moffitt,* 417 U.S., at 608-609, we generally analyze the fairness of relations between the criminal defendant and the State under the Due Process Clause, while we approach the question whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants under the Equal Protection Clause. *Bearden v. Georgia*, 461 U.S. 660, 665 (1983).

The reason a defendant does not pay his or her outstanding obligations is critical to the analysis of this case. *Bearden* 461 U.S. at 668-69. When a defendant has willfully refused to pay her outstanding obligations when she has the means to pay, the court was justified in sentencing her to six-days in jail. *Id.* (if the probationer has willfully refused to pay the fine or restitution when he has the means to pay, the State is perfectly justified in using imprisonment as a sanction to enforce collection). Similarly, a defendant's failure to

make sufficient bona fide efforts to seek employment to pay the outstanding obligation may reflect an insufficient concern for paying the debt he owes to society for his crime. In such a situation, the State is likewise justified in revoking probation and using imprisonment as an appropriate penalty for the offense. *Id.* But if a defendant has made all reasonable efforts to pay the obligations, and yet cannot do so through no fault of his own, this lack of fault provides a "substantial reaso[n] which justifie [s] or mitigate[s] the violation and make[s] revocation inappropriate." *Gagnon v. Scarpelli, supra,* 411 U.S., at 790, 93 S.Ct., at 1764. Cf. *Zablocki v. Redhail,* 434 U.S. 374, 400 (1978) (Powell, J., concurring) (distinguishing, under both due process and equal protection analyses, persons who shirk their moral and legal obligation to pay child support from those wholly unable to pay).

The State has a fundamental interest in appropriately punishing persons-rich and poor-who violate its criminal laws. A defendant's poverty in no way immunizes him or her from punishment. *Bearden*, 461 U.S. at 669-670. Thus, when determining initially whether the State's penological interests require imposition of a term of imprisonment, the sentencing court can consider the

entire background of the defendant, including his employment history and financial resources. *See Williams v. New York,* 337 U.S. 247, 250, and n. 15 (1949). As we said in *Williams v. Illinois,* "[a]fter having taken into consideration the wide range of factors underlying the exercise of his sentencing function, nothing we now hold precludes a judge from imposing on an indigent, as on any defendant, the maximum penalty prescribed by law." 399 U.S., at 243.

In this case, the court sentenced McCalley to a six-day jail term because she refused to pay her outstanding obligations despite being given several opportunities to do so. The court also had the responsibility to make McCalley accountable for her past behavior which was indicative of a flagrant disregard for the rule of law. McCalley had options – which defense counsel mentioned--available to her to hold a temporary restricted license but did not avail herself of those opportunities. The court necessarily found McCalley had the ability to pay her obligations because it found she could pay category B restitution. Sent. Tr. p. 7, lines 21 through p. 9, line 8. The court did not sentence her to jail because she could not pay her fines or child support but because she willfully failed to do so and granting

probation would not act to rehabilitate or deter her criminal conduct. McCalley's sentence must stand.

II. The district court correctly sentenced the defendant under the changes to Iowa Code chapter 910 that went into effect on June 25, 2020.

Jurisdiction/Preservation of Error

The State does not agree that McCalley may challenge the district court's restitution order as an illegal sentence without any need to preserve error on her claim. The district court sentenced McCalley on December 8, 2020. Judg. and Sent. (12/8/20); App. 12-14. In June of 2020, the restitution chapter changed significantly and limited a defendant's right to appeal a permanent restitution order. Iowa Code ch. 910 (2020). These legislative changes, had an immediate effective date, such that they went into effect on June 25, 2020, with Governor Reynold's signature. See 2020 Iowa Acts ch. 1074, § 83; Iowa Supreme Ct. Supervisory Order, *In re Interim Procedures Governing Ability to Pay Determinations and Conversion of Restitution Orders* p. 1 (July 7, 2020)(referencing the newly-enacted provisions of S.F.457 related to criminal convictions); *State v. Hawk*, 952 N.W.2d 314, 316 (Iowa 2020) (acknowledging the statutory amendment to S. F. 457 took effect June 25, 2020, and

applies to all defendants sentenced on or after that date); *State v. Smith*, No. 18-2248, 2021 WL 1400772, at *4 n.7 (Iowa Ct. App. Apr.14, 2021); *State v. Washington*, No. 18-2092, 2021 WL 815865, at *2, n. 3 (same); *State v. Schmitt*, No. 20-0701, 2021 WL 374530, at *2 (Iowa Ct. App. Feb. 3, 2021) (same); *State v. Redden*, No. 19-0735, 2020 WL 6482730, at *1 n.1 (Iowa Ct. App. Nov. 4, 2020) (same).

There are several provisions of the recently-enacted changes that prevent review of this case. Section 910.2A(2) provides:

> 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 sentence 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.

Iowa Code § 910.2A(2). Also of import to the discussion is 910.2A(3)(a) and (b) which precludes direct review if an offender fails to make a timely request:

> 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.

Iowa Code § 910.2A(3).

Had she followed the law and sought a determination below, she would be able to challenge restitution on direct appeal. *See State v. Damme*, 944 N.W.2d at 104-05 (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). McCalley did not ask the court to make a reasonable ability to pay

determination below and is precluded from raising it for the first time on appeal. Iowa Code § 910.2A(3). In fact, a review of the sentencing transcript shows that the district court provided McCalley with an opportunity to "address reasonable ability to pay category B costs" but that McCalley elected "reserve" it for a later date. Sent. Tr. p. 8, lines 16-20. "Reserving" the claim to raise it on appeal for the first time is not allowed under the new statute.

"It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002); *accord Lamasters v. State*, 821 N.W.2d 856,864 (Iowa 2012); *State v. Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999) (nothing is more basic in the law of appeal and error than the axiom that a party cannot sing a song to us that was not first sung in the trial court). Error preservation rules preserve judicial resources by allowing the district court the first opportunity to address an issue. It would be unfair to fault a district court on an issue it never had the opportunity to consider. *See Otterberg v. Farm Bureau Mut. Ins. Co.*, 696 N.W.2d 24, 28 (Iowa 2005); *DeVoss v.*

State, 648 N.W.2d 56, 60 (Iowa 2002). Thus, under our error preservation rules, an issue must ordinarily be raised in and decided by the district court before we will address it on appeal. *See Stammeyer v. Div. Narcotics Enforcement*, 721 N.W. 2d 541, 548 (Iowa 2006).

Moreover, McCalley could have also sought to challenge restitution under section 910.7 but again failed to follow the statute. Iowa Code section 910.7(4) now provides:

> *An appellate court shall not review or modify an offender's plan of restitution*, restitution plan of payment, or any other issue related to an offender's restitution under this subsection, *unless the offender has exhausted the offender's remedies under this section and obtained a ruling from the district court prior to the issue being raised in the appellate courts.*

Iowa Code § 910.7(4) (emphases added). Even if McCalley failed to timely request a hearing under section 910.2A(2), she had another opportunity to seek a hearing under section 910.7. Again, she failed to follow the statute and her claim cannot be considered.

McCalley argues, however, that "criminal restitution is a criminal sanction that is a part of the sentence." Def. Brief at 44. She cites to *State v. Alspach*, 554 N.W.2d 882, 883 (Iowa 1996) and *State v. Mayberry*, 415 N.W.2d 644, 646 (Iowa 1987) to support her proposition. While these cases hold that the imposition of restitution

is a "phase" of sentencing, those cases have no bearing on the new statute which requires the matter to be addressed either at the time of sentencing or thirty days after a permanent restitution order has been entered under section 910.2A or through a later modification under section 910.7. The recent legislative changes discussed above have foreclosed any claim that a district court's restitution award is an illegal sentence and subject to challenge at any time. *MidWestOne Bank v. Heartland Co-op*, 941 N.W.2d 876, 883 (Iowa 2020) ("To the extent 'there is a conflict or ambiguity between specific and general statutes, the provisions of the specific statutes control.' " (quoting *Oyens Feed & Supply, Inc. v. Primebank*, 808 N.W.2d 186, 194 (Iowa 2011))); *see also* Iowa Code § 4.7 ("If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision.").

McCalley must first raise her claims below, make a record, and challenge the claim in a direct appeal or seek modification at the district court and seek certiorari before an appellate court can consider the challenge. This claim cannot be considered.

Standard of Review

Our review is for legal error, and our sole task is to "determine whether the court's findings lack substantial evidentiary support, or whether the court has not properly applied the law." *State v. DeLong*, 943 N.W.2d 600, 604 (Iowa 2020) (quoting *State v. Jenkins*, 788 N.W.2d 640, 642 (Iowa 2010)). To the extent that McCalley's claim raises constitutional challenge, review is de novo. *State v. Izzolena*, 609 N.W.2d 541, 545 (Iowa 2000).

Merits

At the time the district court sentenced McCalley in December of 2020, and ordered her to pay restitution, the court sentenced her under the newly-enacted provisions of Iowa Code chapter 910 that had gone into effect in June of 2020. Iowa Supreme Ct. Supervisory Order, *In re Interim Procedures Governing Ability to Pay Determinations and Conversion of Restitution Orders* p. 1 (July 7, 2020). The court followed the law, ordered that McCalley pay category B restitution, and correctly presumed she had the reasonable ability to do so. Sent. Tr. p. 8, line 21 through p. 9, line 9.

McCalley, however, contends that the court erred when it presumed she had the reasonable ability to pay category B restitution.

She attacks this court's supervisory order as unconstitutional and argues the general savings provision applies because her criminal acts occurred before section 910.2A went into effect. She also asserts that the statute violates the ex post facto provisions of the state and federal constitutions. The district court's order, which complied with the supervisory order and the new provisions, is proper and must stand.

Supervisory order

On July 7, 2020, this court issued a supervisory order providing guidance to district courts as to implementing the new provisions of Senate File 457, codified as chapter 910 (2020). In this order, the court 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 re Interim Procedures Governing Ability to Pay Determinations and Conversion of Restitution Orders* p. 5, § C (July 7, 2020). The supervisory order discussed the change in procedure for reasonable ability to pay determinations, including filing a financial affidavit, and waiver of a defendant's claim if she fails to file an affidavit or request a hearing. Iowa Supreme Ct. Supervisory Order, *In re Interim Procedures*

Governing Ability to Pay Determinations and Conversion of Restitution Orders p. 5, § C (July 7, 2020). Subsequent cases have also affirmed this position. *State v. Hawk*, 952 N.W.2d 314, 316 (Iowa 2020) (acknowledging the statutory amendment to S. F. 457 took effect June 25, 2020 and apply to all defendants sentenced on or after that date); *State v. Smith*, No. 18-2248, 2021 WL 1400772, at *4 n.7 (Iowa Ct. App. Apr.14, 2021); *State v. Washington*, No. 18-2092, 2021 WL 815865, at *2, n. 3 (same); *State v. Schmitt*, No. 20-0701, 2021 WL 374530, at *2 (Iowa Ct. App. Feb. 3, 2021) (same); *State v. Redden*, No. 19-0735, 2020 WL 6482730, at *1 n.1 (Iowa Ct. App. Nov. 4, 2020) (same).

Iowa Code section 4.13

McCalley asserts that the general savings clause found at Iowa Code section 4.13(1)(c) mandates that the restitution the district court imposed for her conviction be governed by the law in effect at the time she committed the offense in January of 2020 rather than the newly-enacted provisions that were in effect at the time she was sentenced. Def. Brief at 45. That is, the district court was required to make a reasonable ability to pay determination under Iowa Code section 910.2(1) (2019) for category B restitution the court ordered

rather than presume she had the reasonable ability to pay under the newly-enacted 910.2A(1) (2020).

The general savings clause provides:

> The reenactment, revision, amendment, or repeal of a statute does not affect any of the following:
>
> c. *Any violation of the statute or penalty, forfeiture, or punishment* incurred in respect to the statute, prior to the amendment or repeal.

Iowa Code § 4.13(1)(c) (emphasis added); *State v. Chrisman*, 514 N.W.2d 57, 61 (Iowa 1994) (for purposes of section 4.13 a penalty is imposed at the time of sentencing).

At the outset, McCalley's claim must fail because a change in *procedure* does not violate the general savings provision. Under both the 2019 and 2020 versions of chapter 910, the court was required to order restitution. *Compare* Iowa Code § 910.2 (2019) *with* Iowa Code § 910.2A (2020). Even if one were to consider restitution as a penalty—which the State does not concede—the penalty is the same. Namely, she had to pay restitution both before and after the statutory change. The only thing that has changed is that there is now a presumption—that is rebuttable—as to an offender's reasonable ability to pay. The presumption is not a penalty.

Moreover, McCalley assumes that because restitution is a "phase" of sentencing it is necessarily punishment. Def. Brief at 48. This interpretation is too broad and fits only McCalley's narrative.

Simply because a court orders restitution during a sentencing proceeding does not mean that restitution is punishment. *State v. Mayberry*, 415 N.W.2d 644, 647 (Iowa 1987) (restitution is a phase of sentencing). There are any number of actions that occur at sentencing but not all are punishment. For example, a court is directed to consider victim impact statements, the parties' recommendations, the defendant's statement in allocution. *See* Iowa Code § 901.5, Iowa R. Crim. P. 2.23(3)(d). Like restitution, these are statutorily required but are not punishment. Rather, they assist the court in selecting the appropriate sentence. Additionally, after the court imposes a sentence and restitution, the court is also required to inform a defendant of his or her appeal rights. Iowa R. Crim. P. 2.23(3)(e). Much like the imposition of restitution, these occur at sentencing, but the purposes of each of these "phases" of sentencing cannot be deemed punishment.

While restitution is a broad term, not all parts of restitution are punitive. In this case, McCalley's claim deals only with category B

restitution and specifically, restitution for court costs and attorney fees. *Schark v. Gorski*, 4231 N.W.2d 527, 528 (Iowa 1988)(court costs are taxable only to the extent provided by statute; because costs were not recoverable at common law statutes providing for their recovery are strictly construed). But, the recovery of costs and fees is part and parcel of any litigation be it civil or criminal. Iowa Code § 625.1 (costs shall be recoverable by the successful party against the losing party). This provision pre-dates the enactment of chapter 910 in 1982. *See* Iowa Code § 625.1 (1979).

Likewise, restitution is designed to rehabilitate an offender. *Teggatz v. Ringleb*, 610 N.W.2d 527, 529 (Iowa 2000) (citing *Speer v. Blumer*, 483 N.W.2d 599, 601 (Iowa 1992) (the purpose of the restitution statute is to protect the public by compensating victims of criminal activities and to rehabilitate criminal defendants). If restitution is designed to protect the public and rehabilitate an offender, it is not punishment. As such, the general savings provision does not apply.

Ex Post Facto

But, even if the court finds category B restitution is a civil penalty, it does not violate the ex post facto clauses of the federal and

state constitutions. U.S. Const. art. I, § 10, cl. 1; Iowa Const. art. I, § 21; *State v. Ihde*, 532 N.W.2d 827, 829 (Iowa 1995) (the rationale of restitution under criminal law is similar to the rationale of tort under civil law). A criminal law constitutes an ex post facto law if two elements are present:

> First, the law must be retrospective, that is, it must apply to events occurring before its enactment. Second, the law must either alter the definition of criminal conduct or increase the penalty by which a crime is punishable.

State v. Lopez, 907 N.W.2d 112, 122-23. "[T]he prohibition of ex post facto laws applies only to penal and criminal actions." *State v. Flam,* 587 N.W.2d 767, 768 (Iowa 1998). As a result, "[p]urely civil penalties ... are not subjected to such restrictions," *Corwin,* 616 N.W.2d at 601, "even where the civil consequences are 'serious' in nature," *Hills v. Iowa Dep't of Transp.,* 534 N.W.2d 640, 641 (Iowa 1995). Although McCalley's crime occurred prior to the effective date of the statute, the statutory change did not "increase the penalty by which a crime is punishable." The requirement that an offender pay restitution for court costs and fees existed before the statutory change went into effect. Iowa Code § 910.2 (2019). For this reason, McCalley's claims must fail.

In her brief, McCalley concedes that the requirement to pay restitution for court costs and attorney fees existed before the legislative change occurred. Def. Brief at 48. She now contends that the new "process" whereby an offender is presumed to have the reasonable ability to pay shifts the burden to the offender rather than on the district court who was previously required to make a reasonable ability to pay determination. Def. Brief at 49. McCalley is incorrect in her assertion that a change in the *process* increases the penalty by which a crime is punishable.

McCalley has not cited to any case, nor can she, that stands for the proposition that a change in the *procedure* during a sentencing proceeding increases the penalty. Def. Brief at 48-52. Rather, the United States Supreme Court has held that "even though it may work to the disadvantage of a defendant, a procedural change is not ex post facto." *Dobbert v. Florida*, 432 U.S. 282, 293 (1977); *State v. Hayes*, 430 P.2d 427, 429 (Kan. 2018) (legislature's change of the hard 50 sentencing procedure did not substantively change the definition of the enhanced version of premeditated murder and is not an ex post facto violation); *State v. Matthews*, 951 A.2d 415, 420 (N.H.2008) (the appropriate focus in ex post facto analysis is not on whether a

law imposes disadvantages or additional burdens , but rather on whether it increases the punishment for or alters the elements of an offense, or changes the ultimate facts required to prove guilt.)

The only case McCalley cites, for comparison purposes, in this portion of her brief is *State v. Corwin*, 616 N.W.2d 600, 601-02 (Iowa 2000). In *Corwin*, the defendant pleaded guilty to two counts of vehicular homicide. *Id.* at 601. He was sentenced to two ten-year consecutive terms of incarceration and he appealed claiming the district court failed to state reasons for imposing the sentences. *Id.* The Court of Appeals reversed the sentences and remanded the case for resentencing. *Id.*

While the case was pending on appeal, the legislature enacted Iowa Code section 910.3B which requires an offender convicted of a felony which caused the death of another to pay the victim's estate a minimum of $150,000. *Id.* At Corwin's resentencing, the district court ordered him to pay $150,000 to the estates of both of his victims. *Id.* Corwin appealed again and alleged the imposition of the $150,000 violated ex post facto prohibitions because it was not in effect at the time he committed his crimes. *Id.*

This court again reversed the district court's order and found that the imposition of the $150,000 restitution award under section 910.3B was improper. *Id.* The court relied on cases interpreting section 910.3B which deemed that provision a "fine." *Id.* at 602. The court also considered that the purpose in enacting the statute was "to enhance the punishment for crimes resulting in death." *Id.* at 602. The provisions of section 910.3B are punitive but the new statutory provisions of section 910.2A are not. The district court correctly determined McCalley had the reasonable ability to pay category B restitution for court costs and attorney fees. Her statutory and ex post facto claims are unconvincing.

III. The recently-enacted provisions of Iowa Code section 910.2A are constitutional.

Preservation of Error

The State does not agree McCalley can challenge the constitutionality of section 910.2A. As set forth above is issue II and incorporated herein, the imposition of restitution is not an illegal sentence that can be challenged at any time. Rather, the new provisions of chapter 910 require an offender to preserve error on the claim before being able to directly appeal a restitution order. Iowa Code §§ 910.2A(2) and (3). McCalley did not raise the claim below

and the district court did not rule on it. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). She also did not seek additional review under section 910.7 or file a petition for certiorari. Iowa Code § 910.7(4) and (5). This claim cannot be considered.

Standard of Review

Appellate review of a restitution order is for legal error. *DeLong*, 943 N.W.2d at 604. To the extent that McCalley's claim raises constitutional challenge, review is de novo. *State v. Dudley*, 766 N.W.2d 606, 612 (Iowa 2009).

Merits

Iowa Code section 910.2A, which presumes a defendant has the reasonable ability to pay category B restitution, is constitutional. This change in the statute does not impact due process, McCalley's right to counsel, nor is it an excessive fine. Her constitutional challenges must fail.

Iowa Code section 815.9 provides for the appointment of counsel at State expense for indigent defendants. Iowa Code § 815.9(1)(a). It also imposes a repayment obligation on indigent defendants for the cost of legal assistance provided by the State. Iowa Code § 815.9(3). The court shall order the payment of legal assistance

as restitution, to the extent that the person is reasonably able to pay, or order the performance of community service in accordance with chapter 910. Iowa Code § 815.9(5).

Section 910.2 is the vehicle by which a court orders the repayment of those costs. Section 910.2 provides:

> In all criminal cases in which there is a plea of guilty, verdict of guilty, or special verdict upon which a judgment of conviction is rendered the sentencing court shall order that pecuniary damages be paid to each offender to the victims of the offender's criminal activities, and that all other restitution be paid to the clerk of court subject to the following:
>
> (1) Pecuniary damages and category "A" restitution shall be ordered without regard to an offender's reasonable ability to make payments.
>
> (2) 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)(1) and (2). In June of 2020, the legislature added a new section, 910.2A, that deals specifically with the reasonable ability to pay category "B" restitution. 2020 Iowa Acts ch. 1074, § 72 (now codified as section 910.2A). This new section 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 sentence 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 § 902A.2A (2020). The enactment of section 910.2A changed the procedure by which a defendant's ability to pay category B restitution is determined, including shifting presumptions, imposing statutory waivers, and requiring financial affidavits. *State Hawk*, 952 N.W.2d 314, 316 (Iowa 2020).

The changes to chapter 910 are designed to streamline the procedure for ordering and challenging restitution. Prior to the enactment of 2020 Iowa Acts chapter 1074, sections 59-83, this court issued several decisions dealing with restitution covering topics that ranged from temporary to permanent orders, the reasonable ability to pay, the exhaustion of remedies, and the nature of a restitution order as civil or criminal. *State v. Davis*, 944 N.W.2d 641, 646 (Iowa 2020); *State v. Gross*, 935 N.W.2d 695, 703-05 (Iowa 2019); *State v. Albright*, 925 N.W.2d 144, 159-60 (Iowa 2019). The legislature

responded to these changes by setting out the procedure it deemed appropriate to challenge a restitution order and do not offend any constitutional protections. 2020 Iowa Acts ch. 1074, §§ 59-83.

Specifically, section 910.2A discusses the procedures an offender is required to go through to challenge the imposition of restitution. An offender is now presumed to have the reasonable ability to pay category B restitution. Iowa Code § 910.2A(1). If an offender wants the court to determine the amount of category B restitution the offender is reasonably able to pay, the court shall hold a hearing but, the offender must prove by a preponderance of the evidence he or she does not have the reasonable ability to pay, must furnish a completed financial affidavit, be subject to questions by the prosecuting attorney and the court before the court makes its determination. Iowa Code § 910.2A(2)(a-d). If the offender does not request the determination be made either at the time of sentencing or within 30 days of the court entering a permanent restitution order, the claim is waived except as provided in section 910.7. Iowa Code § 910.2A(3)(a-b). These provisions have changed the procedure by which an offender may challenge restitution. A change in the

procedure does mean that the new statutory provisions are unconstitutional.

This court addressed the constitutionality of recoupment of court costs and attorney fees in *State v. Haines*, 360 N.W.2d 791, 794 (Iowa 1985). In *Haines,* the district court sentenced the defendant to probation and, as a condition of his probation, ordered him reimburse the count for the cost of his court appointed attorney fees either in cash or by community service. *Id.* at 792. Haines appealed and argued that the recoupment of court-appointed counsel costs and fees violated due process, his right to counsel, and equal protection. *Id.* at 793.

The *Haines* court found there was no infringement on the right to counsel. Id. at 793-94. The court held that "a statute allowing recoupment of court costs and court-appointed attorney's fees does not violate per se the right to counsel guaranteed in the Iowa Constitution." Id. at 794. Likewise, the court found that the recoupment provision did not violate the sixth amendment to the federal constitution. *Id.* at 794. Relying on *Fuller v. Oregon*, 417 U.S. 40, 54 (1974), the court held that the statutes at issue in *Fuller* and *Haines* authorize the court to order the offender to make restitution

of court-appointed attorney's fee "to the extent that the offender is reasonably able to do so." That is still the case. Iowa Code section 910.2(1)(a)(2) requires the court to order "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). Although section 910.2A now presumes an offender has the reasonable ability to pay category "B" restitution, that presumption is rebuttable and constitutional. Iowa Code § 910.2A(1); *In re Hagemeier's Estate*, 244 Iowa 703, 708, 58 N.W.2d 1, 3 (1953) (a presumption is rebutted when facts to the contrary are established).

A presumption is a deduction that the law expressly direct to be made from particular facts. *Bridges v. Welzein*, 231 Iowa 6, 10, 300 N.W. 659, 662 (1941). One treatise writer distinguishes between a rebuttable and an irrebuttable presumption this way:

> The term presumption as used above always denotes a rebuttable presumption, i.e., *the party against whom the presumption operates can always introduce proof in contradiction.* In the case of what is commonly called a conclusive or irrebuttable presumption, when fact B is proven, fact A must be taken as true, and *the adversary is not allowed to dispute this at all.* For example, if it is proven that a child is under seven years of age, the courts have stated that it is conclusively presumed that he could not have committed a felony. *In so doing, the courts are not stating a presumption at all, but simply expressing the rule of law that someone under seven years old cannot legally be convicted of a felony.*

LuGrain v. State, 479 N.W.2d 312, 315 (Iowa 1991) (citing *McCormick on Evidence* § 342, at 804 (E. Cleary 2d ed. 1972) (emphasis added); *accord Farnsworth v. Hazelett,* 197 Iowa 1367, 1370–71, 199 N.W. 410, 411–12 (1924). The italicized language says three things. First, in the case of a rebuttable presumption, the party against whom the presumption operates can always introduce evidence to rebut the presumption. Second, in the case of an irrebuttable presumption, no such evidence is permitted. Third, an irrebuttable presumption is not a rule of evidence at all; it is a substantive rule of law.

The United States Supreme Court has "uniformly condemned irrebuttable presumptions" as violations of federal due process. *See, e.g., Vlandis v. Kline,* 412 U.S. 441, 446, 93 S.Ct. 2230, 2233, 37 L.Ed.2d 63, 68 (1973) ("permanent irrebuttable presumptions have long been disfavored under the due process clauses of the fifth and fourteenth amendments"); *see also, Cleveland Bd. of Educ. v. LaFleur,* 414 U.S. 632, 647–48, 94 S.Ct. 791, 799–800, 39 L.Ed.2d 52, 64 (1974) (irrebuttable presumption that pregnant women are incapacitated from teaching is invalid under due process clause of the fourteenth amendment); *Stanley v. Illinois,* 405 U.S. 645, 654–58, 92

S.Ct. 1208, 1214–16, 31 L.Ed.2d 551, 560–62 (1972) (statute containing irrebuttable presumption that unmarried fathers are incompetent to raise their children violates due process under the fourteenth amendment).

The presumption at issue here is a *rebuttable* presumption. The statute allows an offender to ask the court to make a reasonable ability to pay determination. Iowa Code § 910.2A(2). The offender then bears the burden of establishing he or she does not have the reasonable ability to pay and must provide a completed financial affidavit. Iowa Code § 910.2A(2)(a-d). Section 910.2A does not create an irrebuttal presumption but provides an offender with a means to challenge his or her ability to pay category "B" restitution.

Right to counsel

McCalley also argues that section 910.2A "chills" her right to counsel under the Iowa and federal constitutions. U.S. Const. amend. VI; Iowa Const. art. 1, § 10. She continues that "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." Def. Brief at 71-72. This claim was raised and rejected in *Haines*. As set forth above, and

incorporated herein, the fact that a defendant may still seek to have the district court make a reasonable ability to pay determination satisfies the constitution. *Haines*, 360 N.W.2d at 794. In addition, a defendant may also seek modification under Iowa Code section 910.7. *Id.*; Iowa Code § 910.7. There can be no "chilling" of the right to counsel when an offender is given the opportunity to challenge the reasonable ability to pay. In addition, the fact that an offender must seek a reasonable ability to pay determination either at sentencing or within thirty days provides an offender with the right to counsel as a critical stage in the proceeding. Iowa Code § 910.2A(3)(a); *State v. Alspach*, 554 N.W.2d 882, 883-84 (Iowa 1996) (a defendant is entitled to counsel when restitution is imposed as part of the original sentencing order or supplemental order).

Due Process

McCalley next contends that Iowa Code section 910.2A violates the right to due process guaranteed by the Fifth and Fourteenth Amendments to the federal constitution and Article I, section 9 of the Iowa constitution because it is "fundamentally unfair." While she does not specify whether she is alleging a denial of procedural due

process or substantive due process, she cannot demonstrate a denial of either and her claim must fail.

Procedural due process

Procedural due process requires notice and the opportunity to be heard prior to depriving one of life, liberty, or property. *Knight v. Knight,* 525 N.W.2d 841, 843 (Iowa 1994). However, "due process 'is not a technical conception with fixed content unrelated to time, place and circumstances.' " *Cafeteria & Restaurant Workers Union v. McElroy,* 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230, 1236 (1961) (quoting *Joint Anti–Fascist Refugee Comm. v. McGrath,* 341 U.S. 123, 162, 71 S.Ct. 624, 643, 95 L.Ed. 817, 849 (1951) (Frankfurter, J., concurring)). Rather, it is "flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer,* 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484, 494 (1972).

In *Mathews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), the Supreme Court identified relevant criteria to look for in determining what process is due prior to depriving one of a property interest. The Court said a procedural due process analysis must balance (1) the private interest affected, (2) the risk of erroneous

deprivation and probable value, if any, of additional or substitute procedural safeguards, and (3) the government's interest. *Id.* at 335, 96 S.Ct. at 903, 47 L.Ed.2d at 33.

Applying this test to these facts, the private interest here is the property interest in the offender's assets and financial future. The risk of erroneous deprivations is small given that an offender may seek a hearing either under sections 910.2A or 910.7 on his or her reasonable ability to pay category "B" restitution and may offer evidence to support his or her claim that he or she does not have that ability. Iowa Code § 910.2A (2)(a-d). The government has a legitimate interest in recovering the costs of the prosecution as well as the cost of attorney fees for indigent defense. This court has long recognized that requiring an offender to pay for these costs instills responsibility in the offender for his or her actions. *State v. Bonstetter*, 637 N.W.2d 161, 165 (Iowa 2001) (citing *State v. Kleusner*, 389 N.W.2d 370,372-73 (Iowa 1986). There is no denial of procedural due process under section 910.2A.

Substantive due process

Under the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution, the state is forbidden

from infringing on certain fundamental liberty interests, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest. *Reno v. Flores,* 507 U.S. 292, 302 (1993). Article I, section 9 of the Iowa Constitution provides the same due process protections found in the Fourteenth Amendment to the United States Constitution. Because McCalley does not allege the that the federal right to due process and her right under the Iowa constitution should be analyzed differently, there should be no separate analysis. *State v. Miner,* 331 N.W.2d 683, 688 (Iowa 1983).

The first step in analyzing a substantive due process challenge is to identify the nature of the individual right involved. *Reno v. Flores,* 507 U.S. 292, 302 (1993); *Santi v. Santi,* 633 N.W.2d 312, 317 (Iowa 2001); *State v. Cronkhite,* 613 N.W.2d 664, 667 (Iowa 2000); *State v. Klawonn,* 609 N.W.2d 515, 519 (2000). If the asserted right is fundamental, we apply strict scrutiny analysis. *Flores,* 507 U.S. at 305; *Klawonn,* 609 N.W.2d at 519. We must then determine whether the government action infringing the fundamental right is narrowly tailored to serve a compelling government interest. *Santi,* 633 N.W.2d at 318; *Klawonn,* 609 N.W.2d at 519. Alternatively, if we find the asserted right is not fundamental, the statute must merely survive

the rational basis test. *Klawonn,* 609 N.W.2d at 519. To withstand rational basis review, there must be a reasonable fit between the government interest and the means utilized to advance that interest. *Flores,* 507 U.S. at 305; *Santi,* 633 N.W.2d at 317.

McCalley asserts that the provisions of section 910.2A are "fundamentally unfair." Def. Brief at 73-74. Aside from this general claim, she has not affirmatively set forth the right being infringed. The State, however, disputes that McCalley's claim impacts a fundamental right. Rather, it should be analyzed under the rational basis test. The rational basis test under a substantive due process challenge is:

> There is no dispute about the rule that, to be constitutional, [a statute] must have a definite, rational relationship to a legitimate purpose. . .
> ....
>
> A party who challenges [a statute] has the burden of proving it unconstitutional, and must negate every reasonable basis upon which the ordinance must be sustained. This means that the challenger has the burden of producing the evidence, and persuading the court, of the [statute's] lack of ration nexus with its supposed purpose.
> . . .
>
> If reasonableness of the [statute's nexus to is purported end is fairly debatable, it must be allowed to stand.

State v. Klawonn, 609 N.W.2d 515, 519 (Iowa 2000) (citing *Exira Community Sch. Dist. v. State*, 512 N.W.2d 787, 793 (Iowa 1994)(additional citations omitted).

As argued above, the requirement that an offender repay the costs of the prosecution and court-appointed attorney fees serves a remedial purpose in reimbursing the respective counties for the costs of the prosecution as well as the indigent defense fund for the cost of attorney fees. This requirement allows for the normal business of the county to proceed and replenishes the coffers of the indigent defense fund to keep that program working. An offender may feel he or she is being punished by having to pay costs but the repayment of those costs serves a rehabilitative purpose in instilling responsibility in the offender. *Bonstetter*, 637 N.W.2d at 165.

It is also important to note that in *State v. Klawonn*, 609 N.W.2d 515, 520 (Iowa 2000), this court considered and rejected a similar due process challenge to Iowa Code section 910.3B. Section 910.3B requires an offender who is:

> convicted of a felony in which the act or acts committed by the offender caused the death of another person . . . the court shall also order the offender to pay at least one hundred fifty thousand dollars in restitution to the victim's estate.

Iowa Code § 910.3B. In *Klawonn*, the defendant alleged that the $150,000 award bore no rational relationship to any governmental interest. *Id.* at 519. This court disagreed and held:

> The government interests in restitution awards under section 910.3B are both compensation to the family and punishment for the defendant. We find the award pursuant to section 910.3B is a "reasonable fit" between the above government interests and the means through which the legislature has chosen to accomplish them.

Id. at 520. The same is true in this case. The presumption that an offender can pay restitution for the court costs and legal assistance serves to compensate the State for the costs incurred for the prosecution. The amount ordered in this case reflect the actual amount of costs incurred; no more, no less. Requiring an offender to repay these court costs and attorney fees and is a reasonable fit between the government's interest and the means by which the legislature has elected to accomplish them. There is no substantive due process violation.

Excessive Fines

Finally, McCalley argues that Iowa Code section 910.2A violates the Excessive Fines clauses of the United States and Iowa constitutions. Def. Brief at 75. Again, this claim must fail because the requirement that an offender pay for category "B" restitution is not a

fine and the amount ordered bears a rational relationship to the actual costs of the prosecution because they are the actual costs.

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The Iowa constitution states that "Excessive bail shall not be required; excessive fines shall not be imposed, and cruel and unusual punishment shall not be inflicted." Iowa Const. art. I, § 17. At the time the Constitution was adopted, "the word 'fine' was understood to mean a payment to a sovereign as punishment for some offense." *Browning–Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265, 109 S.Ct. 2909, 2915, 106 L.Ed.2d 219 (1989).

The Excessive Fines Clause thus "limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.' " *Austin v. United States,* 509 U.S. 602, 609–610 (1993) (emphasis deleted). Excessive-fine analysis primarily focuses "on the amount of the punishment as it relates to the particular circumstances of the offense." *Izzolena*, 609 N.W.2d at 551. "The 'fine' must bear some relationship to the gravity of the offense it is designed to punish." *Klawonn*, 609 N.W.2d at 518 (citing *Bajakajian*,

524 U.S. at 327, 118 S.Ct. at 2028, 141 L.Ed.2d at 325). The issue is whether "the restitution award [is] grossly disproportionate to the offense." *Rohm*, 609 N.W.2d at 514.

As set forth earlier, the amount of restitution ordered for court costs and attorney fees is not a fine. The provisions of 910.2A are unlike the provisions of 910.3B in which this court treated the $150,000 restitution award as a fine. In *State v. Izzolena*, 609 N.W.2d 541, 547 (Iowa 2000), this court considered whether victim restitution under Iowa Code section 910.3B ordered as part of a criminal case violates the Excessive Fines Clause on its face. *Id.*; *State v. Richardson*, 890 N.W.2d 609, 620 (Iowa 2017). The *Izzolena* court recognized that "it is not always clear whether restitution constitutes a fine, a civil claim, or some hybrid." *Izzolena*, 609 N.W.2d at 548 (citing *State v. Mayberry*, 415 N.W.2d 644, 646 (Iowa 1987)). The court recognized that the purpose of restitution is two-fold. It not only serves to protect the public by compensating victims for criminal activities, but it also serves to rehabilitate the defendant. *State v. Kluesner,* 389 N.W.2d 370, 372 (Iowa 1986). Restitution goes beyond revenue recovery and is designed to instill

responsibility in criminal offenders. *State v. Haines,* 360 N.W.2d 791, 795 (Iowa 1985).

> Restitution "forces the defendant to confront, in concrete terms, the harm his actions have caused. Such a penalty will affect the defendant differently than a traditional fine, paid to the State as an abstract and impersonal entity, and often calculated without direct regard to the harm the defendant has caused. Similarly, the direct relation between the harm and the punishment gives restitution a more precise deterrent effect than a traditional fine."

Mayberry, 415 N.W.2d at 646–47 (quoting *Kelly v. Robinson,* 479 U.S. 36, 49 n. 10, 107 S.Ct. 353, 360 n. 10, 93 L.Ed.2d 216, 228 n. 10 (1986) (citing Note, *Victim Restitution in the Criminal Process: A Procedural Analysis,* 97 Harv. L.Rev. 931, 937–41 (1984))).

In *Izzolena*, the State argued that the $150,000 restitution award was not a fine because it was not payable to the State but rather the victim. *Izzolena*, 609 N.W.2d at 649. The court rejected this assertion and found that "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. *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 268 (1989). The idea was to limit government power to punish an individual, not necessarily limit its power to raise revenue. *Izzolena*, 609 N.W.2d at 649. Thus, the focus of the clause is on the

impact of the punishment to the individual. *Browning-Ferris*, 492 U.S. at 275.

The *Izzolena* court concluded that although section 910.3B may serve a remedial purpose, it is still subject to the Excessive Fines Clause if it can only be explained as serving in part to punish. *Austin*, 509 U.S. at 621-22. The court held:

> Accordingly, we conclude the restitution award under section 910.3B does not only serve a remedial purpose but also serves other purposes normally associated with punishment such as retribution and deterrence. The award is a "fine" within the Eighth Amendment of the United States Constitution and article I, section 17 of the Iowa Constitution.

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

After concluding the restitution under section 910.3B is a fine, the question then becomes whether it is excessive. *Id.* The test is whether the penalty is "grossly disproportionate to the gravity of the defendant's offense." *Bajakajian*, 524 U.S. at 337. Before applying the standard, the court recognized three "important" limitations. First, "judgments concerning the appropriate punishment for an offense rests in the first instance with the legislature." Id. at 336. This court must give "substantial deference" to the legislator's choice of penalties for criminal offenses. *Izzolena*, 609 N.W.2d at 549. Second, "any judicial determination of the gravity of the criminal

offense is inherently imprecise. *Id.* This relates to the first limitation to remind the court not to substitute its judgment for that of the legislature. *Id.* The third limitation was the "absence of guiding authority" at the time *Izzolena* was decided. *Id.* As to section 910.3B, this court has found the award not to be excessive. *State v. Richardson*, 890 N.W.2d 609, 624 (Iowa 2017) (section 910.3B does not on its face violate the excessive fines clause of the Iowa Constitution as it relates to juvenile homicide offenders); *State v. Izzolena*, 609 N.W.2d 541, 551 (Iowa 2000) (section 910.3B does not on its face violate the excessive fines clause of the state and federal constitutions).

The same should be true in this case. Requiring an offender who has committed a crime to pay for the ministerial costs and costs of representation is not excessive but rationally related to the harm the defendant has caused to society as a whole. If this court failed to find the imposition of $150,000 for conviction of a felony resulting in the death of another, the imposition of $680.54 for costs in this case is not "grossly disproportionate" to McCalley's conviction for driving while suspended as a habitual offender. See Iowa Courts Online https://www.iowacourts.state.ia.us/ESAWebApp/TIndexFrm *State v.*

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This court has also found that the provisions of section 910.3B withstand as applied challenges to an Excessive Fines claim. *State v. Richardson*, 890 N.W.2d 609, 626 (Iowa 2017) (Iowa Code section 910.3B does not on its face violate the excessive fines clause as it relates to juvenile homicide offenders); *Klawonn*, 509 N.W.2d at 519 (the $150,000 restitution award is not grossly disproportionate to the gravity of the offense of involuntary manslaughter involving the reckless operation of a motor vehicle); *State v. Rohm*, 609 N.W.2d 504, 514 (Iowa 2000) (the defendant's conduct in supplying large amounts of liquor to her sons who hosted a party where a fourteen-year-old learning-disabled boy consumed alcohol and died of alcohol poisoning was extremely serious under the circumstances of the case). This court also rejected an excessive fines claim in a juvenile delinquency proceeding in *In re Property Seized from Terrell*, 639 N.W.2d 18, 21 (Iowa 2002), the juvenile challenged the forfeiture of his vehicle valued between $8850 and $9050 following the attempted burglary of a vehicle. The juvenile claimed that the forfeiture of his property was grossly disproportionate to the sanction imposed –

restitution of $35.81. *Id.* The court denied the juvenile relief and held that the "comparison of disproportionality analysis must be made between the value of the property forfeited and the severity of the offense as viewed by the legislature. *Id.*

In this case, it cannot be shown that requiring an offender to pay for the cost of prosecution or for attorney fees is "grossly disproportionate to the gravity of the offense committed." The requirement that McCalley pay $680.54 for driving while barred as a habitual offender is not grossly disproportionate.

Finally, McCalley asserts that to satisfy the constitutional criteria outlined in federal and state cases, "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." Def. Brief at 83. That argument contradicts the express statutory language. *State v. Wickes*, 910 N.W.2d 554, 571 (Iowa 2018) (to interpret a statute, we look first to the plain language and apply the statute as written if it is unambiguous). Simply because the court may presume McCalley has the reasonable ability to pay category B restitution does not mean that she is left without any means to rebut the presumption. She is not. Section 910.2A(2) provides an avenue whereby McCalley

can ask the court to make a reasonable ability to pay determination. Iowa Code § 910.2A(2). The statute now requires an offender to provide something more tangible than asserting "I cannot pay." Iowa Code § 910.2A(2)(a). The responsibility is on the offender to rebut the presumption. There is nothing improper or unconstitutional about this provision.

McCalley also asserts that Iowa Code section 910.7 does not "rescue" section 910.2A and make it constitutional. Under section 910.7, an offender may seek modification of the restitution order for category B restitution "at any time during the period of probation, parole, or incarceration." Iowa Code § 901.7. McCalley asserts that if an offender is not on probation, parole, or incarcerated, she cannot seek modification of the restitution order. Def. Brief at 87. This is true but it does not render section 910.2A unconstitutional. If an offender seeks to challenge the reasonable ability to pay determination, he or she must do so at the time of sentencing or within thirty days after the court enters a permanent restitution order. Iowa Code § 910.2(3)(a). An offender must seek to challenge restitution on the front end rather than waiting until a later date to do so. This requirement is no different than requiring an offender to file

a notice of appeal within 30 days or seek postconviction relief within three years of the date of conviction or from the entry of procedendo if an appeal is taken. Iowa R. App. P. 6.101(b) (a notice of appeal must be filed within 30 days after the filing of the final order or judgment); Iowa Code § 822.3. Section 910.2A provides an offender with an avenue of relief but it is incumbent upon the offender to exercise that right. Moreover, it behooves an offender to timely seek a reasonable ability to pay determination under section 910.2A(2) because an offender would have the right to counsel. This requirement is consistent with one of the purposes of restitution in that it makes the offender responsible for his or actions and if he or she wants to challenge it, the offender must take the initiative to do so. The newly-enacted provisions of section 910.2A are constitutional. McCalley is not entitled to relief.

CONCLUSION

The district court's sentence and restitution order must be affirmed.

REQUEST FOR NONORAL SUBMISSION

This case involves a routine challenge to the district court's sentencing order and novel issues of statutory interpretation. Because of the novel issues raised, the State requests to be heard in oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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) or (2) because:

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Dated: September 8, 2021

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