ELECTRONICALLY FILED JUN 29, 2023 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA
CASE NO. 22-0771

STATE OF IOWA,
Plaintiff-Appellee,

vs.

B.C.D.,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT IN AND FOR SCOTT COUNTY

THE HON. CHRISTINE DALTON
DISTRICT ASSOCIATE JUDGE

APPELLANT'S REPLY BRIEF (IN FINAL FORM)

Respectfully submitted by:

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CERTIFICATE OF SERVICE

I certify that on or before June 29, 2023, I, the undersigned counsel served a copy of the "Appellant's Reply Brief (in Final Form)" upon the State by electronically transmitting a copy of the same to Assistant Attorney General Martha Trout of the Criminal Appeals Division of the Iowa Attorney General's Office through the use of the EDMS system. I also served a copy of the same by mailing a copy of the same by first-class or priority mail, postage prepaid to B.C.D. at her address of record or by sending a file containing a copy of such as an attachment to a secure e-mail on or before June 29, 2023.

By: /s/ Richard Hollis________________________________

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. The District Court lacked the authority to enter restitution for the dismissed and expunged charge partly because the District Court lacked the subject matter jurisdiction to order restitution for a dismissed and expunged charge.

Christie v. Rolscreen Co., 448 N.W.2d 447, 450 (Iowa 1989).

In re Estate of Falck, 672 N.W.2d 785, 789 (Iowa 2003).

Wederath v. Bryant, 287 N.W.2d 591, 594 (Iowa 1980).

Iowa Code Section 803.1(1).

Iowa Constitution, Article V, Section 6.

2. The District Court lacked authority to order restitution for a dismissed and expunged offense.

Iowa R. Crim. P. 2.24(5).

Iowa Code Section 907.1.

Iowa Code Section 910.1.

Iowa Code Section 910.2.

Iowa Constitution, Article I, Sections 1 and 9; Article V, Section 6.

United States Constitution, Fifth and Fourteenth Amendments.

DeLong v. State, 638 So.2d 1054 (Fla. App., 2nd Dist. 1994).

In re Marriage of Seyler, 559 N.W.2d 7, 10 n.3 (Iowa 1997).

Noble v. Iowa Dist. Court for Muscatine Cty., 919 N.W.2d 625, 632 (Iowa Ct. App. 2018).

State v. Brown, 905 N.W.2d 846, 857 (Iowa 2018).

State v. Burgess, 639 N.W.2d 564, 571 (Iowa 2001).

State v. Copenhaver, 844 N.W.2d 442, 447 (Iowa 2014).

State v. Cowman, 29 N.W.2d 238, 239, 240, 239 Iowa 57, 58, 59 (Iowa 1947)

State v. Iowa District Court for Warren Cty., 828 N.W.2d 607, 616-617 (Iowa 2013).

State v. Jose, 636 N.W.2d. 38 (Iowa 2001).

State v. Lathrop, 781 N.W.2d 288, 292-93 (Iowa 2010).

State v. Mandicino, 509 N.W.2d 481, 483 (Iowa 1993). *State v. Jose,* 636 N.W.2d. 38 (Iowa 2001).

State v. Stessman, 460 N.W.2d 461 (Iowa 1990).

State v. Tindell, 629 N.W.2d 357, 359 (Iowa 2001).

State v. Woody, 613 N.W.2d 215, 218 (Iowa 2000).

Wederath v. Bryant, 287 N.W.2d 591, 594 (Iowa 1980).

4. The restitution order was improper because it lacked an adequate factual basis and did not articulate the basis for the restitution amount.

In re Marriage of Seyler, 559 N.W.2d 7, 10 n.3 (Iowa 1997).

Olson v. Nieman's Ltd., 579 N.W.2d 299, 309 (Iowa 1998).

State v. Bonstetter, 637 N.W.2d 161, 170 (Iowa 2001).

State v. Petrie, 478 N.W.2d 620, 622 (Iowa 1991).

State v. Roach, 920 N.W.2d 93, 99 (Iowa 2018)

3. Certiorari is the appropriate form of review to address the question of whether the District Court lacked authority to order restitution for a "dismissed and expunged" offense.

Iowa R. Crim. P. 2.24(5)

Iowa Code Section 907.1.

Iowa Code Section 910.1.

Iowa Code Section 910.2.

Iowa Constitution, Article I, Sections 1 and 9.

United States Constitution, Fifth and Fourteenth Amendments.

DeLong v. State, 638 So.2d 1054 (Fla. App., 2nd Dist. 1994).

Earnest v. State, 508 N.W.2d 630, 633 (Iowa 1993).

In re Marriage of Seyler, 559 N.W.2d 7, 10 n.3 (Iowa 1997).

Noble v. Iowa Dist. Court for Muscatine Cty., 919 N.W.2d 625, 632 (Iowa Ct. App. 2018).

State v. Brown, 905 N.W.2d 846, 857 (Iowa 2018).

State v. Burgess, 639 N.W.2d 564, 571 (Iowa 2001).

State v. Copenhaver, 844 N.W.2d 442, 447 (Iowa 2014).

State v. Cowman, 29 N.W.2d 238, 239, 240, 239 Iowa 57, 58, 59 (Iowa 1947)

State v. Iowa District Court for Warren Cty., 828 N.W.2d 607, 616-617 (Iowa 2013).

State v. Jose, 636 N.W.2d. 38 (Iowa 2001).

State v. Lathrop, 781 N.W.2d 288, 292-93 (Iowa 2010).

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State v. Stessman, 460 N.W.2d 461 (Iowa 1990).

State v. Tindell, 629 N.W.2d 357, 359 (Iowa 2001).

State v. Woody, 613 N.W.2d 215, 218 (Iowa 2000).

5. Discretionary review is the appropriate form of review to address the question of whether the restitution order lacked adequate factual support in the record and did not state the basis for the restitution amount.

Iowa Code § 814.6(2)(e) (2021).

State v. Mathes, No. 17-1909, 2019 WL 1294098 (Iowa Ct. App. March 20, 2019).

State v. Stessman, 460 N.W.2d 461, 464 (Iowa 1990).

NOW COMES THE APPELLANT, B.C.D., by counsel, and hereby notes states the following in response to the State's Brief.

The undersigned counsel respectfully notes that he amended the main brief filed in this case twice and sought the Court's permission *once* in order to do so. The undersigned counsel indulged his perfectionist tendencies once by filing an amended brief within the time provided by Iowa R. App. 6.901(6) and long before the State submitted its request for an extension of time to file its brief. Amended Brief, pgs. 1-29. Therefore, the undersigned counsel did not require the Court's time in order to effectuate this amendment. The undersigned counsel was not seeking advice as to how to present this case to this Court when the undersigned counsel spoke with another attorney about this case nearly two months later. This attorney casually mentioned an idea as to how to better present this appeal. Because of this unexpected insight which the undersigned counsel was grateful for but had not sought, any reservations the undersigned counsel had about requesting permission to amend (precisely because of appearances) were overridden by the undersigned counsel's desire to best present a case of first impression to this Court. To that end, the undersigned counsel sought the Court's permission for the first time to amend the brief that the undersigned counsel had previously amended without the need to seek the Court's permission

I. RESPONSE TO THE STATE'S STATEMENT OF THE CASE

The State asserts that Appellant B.C.D. (hereinafter "B.C.D.") "damaged C.B.'s cars. Trial Info. AGCR408554 and Mins of Testimony (4/8/20); App. [pgs.] 7-9; Conf. App. [pgs.] 5-15." State's Brief, pg. 10.[1] The Trial Information itself charges B.C.D. with Criminal Mischief in the Third Degree but apparently the Scott County Attorney's Office administrative assistant apparently failed to correctly adapt a prior Trial Information in an unrelated case to this case because the means of the alleged commission of this offense was entirely different. Trial Information, pg. 1, Appendix hereinafter "A"), pg. 7. Minutes of Testimony and Attachments, Police Report, pgs. 8 and 9, Confidential Appendix (hereinafter "CA"), pgs. 10-11. Indeed, C.B.'s own testimony as noted in the Police Report accused B.C.D. of scratching the Hyundai and makes no reference to B.C.D. doing any other damage to the Hyundai or to the other vehicle, a Ford. Police Report, pgs. 8 and 9. CA, pgs. 10-11. The video footage corroborates this as well. Exhibit 5, cellphone video footage. The cellphone video clearly shows that T.W. engaged in the vast majority of the destructive conduct. Exhibit 5, cellphone video footage.

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[1] When quoting from the State's Brief, the undersigned counsel has changed references to the names of certain individuals to initials as ordered by this Court but has otherwise literally reproduced the statements in the State's Brief.

B.C.D.'s involvement is limited to the early phase of this incident, and B.C.D. quickly disappears from view on the cellphone video. Exhibit 5, cellphone video.

B.C.D. clarified in the written guilty plea document filed in connection with this case that B.C.D. damaged one vehicle and T.W. damaged two vehicles. Plea of Guilty, pg. 1, par. 2., A, pg. 16. B.C.D. noted in the factual basis portion of the Plea of Guilty that "I scratched the hood of a sedan … Ms. T.W. proceeded to cause further damage to another vehicle at the same location". Plea of Guilty, pg. 1, par. 2, A, pg. 16. The Order Deferring Judgment did not set a restitution hearing but merely informed B.C.D. that she could "be heard on the issue of reasonable ability to pay Category B restitution" and briefly noted the procedural requirements for doing so. Order Deferring Judgment, pg. 2, A, pg. 22.

RESPONSE TO THE STATE'S ARGUMENT

I. AN APPLICATION FOR DISCRETIONARY REVIEW MAY BE THE APPROPRIATE FORM OF REVIEW.

As noted in the Appellant's main brief filed in the above-captioned matter, certiorari is the appropriate form of review where a party claims an associate district court judge exceeded the judge's jurisdiction or otherwise acted illegally. Iowa R. App. 1.107(1). Discretionary Review is available from an "order raising a question of law important to the judiciary and the profession." Iowa Code § 814.6(2)(e) (2021). In *State v. Stessman*, 460 N.W.2d 461, 464 (Iowa 1990), this

Court found that the question of how a defendant may properly seek review of a restitution order following the entry of a deferred judgment was an important question justifying the grant of discretionary review. *State v. Stessman*, 460 N.W.2d 461, 464 (Iowa 1990). B.C.D.'s case presents a similar question worthy of discretionary review: how may an individual seek review of a restitution judgment in a dismissed and expunged case? Counsel is unaware of any cases which directly answer this question. Entry of a restitution judgment in dismissed cases is a widespread on-going practice in criminal law.[2] Counsel is aware of only one case which presented a similar issue but it was not decided by this Court. State v. Mathes, No. 17-1909, 2019 WL 1294098 (Iowa Ct. App. March 20, 2019), affirmed by an equally divided Court in State v. Mathes, No. 17-1909, 2020 WL 2267274 (Iowa May 8, 2020).

Specifically, B.C.D. noted in the main brief filed in this matter that discretionary review would be appropriate to address the question of whether the restitution order lacked factual support in the record and did not articulate a basis for the restitution amount. Appellant's Brief, pg. . However, B.C.D. noted in her main brief that certiorari was appropriate to address the question of whether the

[2] See Final Brief of Amicus Curiae Iowa County Attorney Association, p. 6, filed in State v. Mathes, # 17-1909 on December 2019 (stating "[i]n every courtroom in this state, criminal cases are routinely disposed of by a dismissal at the defendant's cost."). (unavailable on Westlaw)

District Court exceeded its authority to order restitution for a "dismissed and expunged charge". Appellant's Brief, pg. 28 . The State cites to *State v. Iowa Dist. Ct.,* 828 N.W.2d 607, 611 (Iowa 2013) (quoting *State Pub. Def. v. Iowa Dist. Ct.,* 747 N.W.2d 218, 220 (Iowa 2008)) for the proposition that certiorari is appropriate "when the court's findings lack substantial evidentiary support, or when the court has not properly applied the law. *State v. Iowa Dist. Ct.,* 828 N.W.2d 607, 611 (Iowa 2013) (quoting *State Pub. Def. v. Iowa Dist. Ct.,* 747 N.W.2d 218, 220 (Iowa 2008)). State's Brief, pg. 16. The State may be correct that the factual basis for the amount of restitution may be appropriately challenged through a writ of certiorari on the basis of this precedent. However, it is not clear that *State v. Iowa Dist. Ct.,* 828 N.W.2d 607, 611 (Iowa 2013) and *State Pub. Def. v. Iowa Dist. Ct.,* 747 N.W.2d 218, 220 (Iowa 2008) address the question explicitly of whether certiorari is the appropriate form of review for addressing the procedural and substantive issue of whether the District Court erred by not articulating the basis for the restitution amount.

The State may also be correct that "the changes to section 910.3 and 910.7 have statutorily overruled" *State v. Stessman,* 460 N.W.2d. 461, 464 (Iowa 1990). State's Brief, pg. 17. If so, this Court has not yet addressed this issue. The State does not cite to any Iowa case stating that *State v. Stessman,* 460 N.W.2d. 461, 464 (Iowa 1990) has been statutorily overruled by Iowa Code Sections 910.3 and

910.7. The undersigned counsel has been unable to find any case that explicitly notes that *State v. Stessman,* 460 N.W.2d. 461, 464 (Iowa 1990) has been explicitly overruled. However, although this Court in *State v. Patterson,* 984 N.W.2d 449, 454 (Iowa 2023) did not explicitly reference *State v. Stessman,* 460 N.W.2d. 461, 464 (Iowa 1990), the Court did grant certiorari in that case on the basis that Iowa Code Section 910.3(10) and Iowa Code Section 910.7(5) prescribe certiorari as the appropriate form of review for restitution orders.

II. THE DISTRICT COURT LACKED AUTHORITY TO ORDER RESTITUTION FOR A DISMISSED AND EXPUNGED OFFENSE PARTLY BECAUSE THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION OVER THE DISMISSED AND EXPUNGED OFFENSE.

The District Court's lack of subject matter jurisdiction over a dismissed case is a defense to any error preservation argument the State may mistakenly raise (and which B.C.D. is not conceding). In addition, the District Court's lack of subject matter over a dismissed case is also a substantive argument. The District Court lacked subject matter jurisdiction to enter the restitution order after the case had been dismissed, and subject matter jurisdiction cannot be waived. *In re Estate of Falck,* 672 N.W.2d 785, 789 (Iowa 2003). "Subject matter jurisdiction" refers to the power of a court to deal with a class of cases to which a particular case belongs." *In re Estate of Falck,* 672 N.W.2d 785, 789 (Iowa 2003). The term "subject matter jurisdiction" denotes "the authority of a court to hear and

determine cases of the general class to which the proceedings in question belong, not merely the particular case then occupying the court's attention." *Christie v. Rolscreen Co.,* 448 N.W.2d 447, 450 (Iowa 1989) (quoting *Wederath v. Bryant,* 287 N.W.2d 591, 594 (Iowa 1980)). Furthermore, "[a] constitution or a legislative enactment confers subject matter jurisdiction on the courts." *In re Estate of Falck,* 672 N.W.2d 785, 789 (Iowa 2003). If the district court lacks subject matter jurisdiction, the judgment is void. *In re Estate of Falck,* 672 N.W.2d 785, 789 (Iowa 2003). A void judgment is subject to collateral attack. *In re Estate of Falck,* 672 N.W.2d 785, 789 (Iowa 2003). Unlike personal jurisdiction, a party cannot waive or vest by consent subject matter jurisdiction. *In re Estate of Falck,* 672 N.W.2d 785, 789 (Iowa 2003). A party cannot confer subject matter jurisdiction on the court by an act or procedure. *In re Estate of Falck,* 672 N.W.2d 785, 789 (Iowa 2003).

Iowa Code Section 803.1(1) gives Iowa Courts subject matter jurisdiction over "an offense which the person commits within or without this state". Iowa Code Section 803.1(1). Because of the presumption of innocence, if a case is dismissed, then a person cannot be deemed to have committed "an offense" within the meaning of Iowa Code Section 803.1(1). Since B.C.D.'s case was dismissed and expunged prior to the District Court's issuance of the restitution order, B.C.D. cannot be deemed to have committed the "offense" for which the District Court

subsequently ordered restitution. Iowa Code Section 803.1(1). Therefore, once the District Court dismissed B.C.D.'s case, the District Court thereafter lost subject matter jurisdiction over the dismissed case and lacked the subject matter jurisdiction (and thus the authority) to order B.C.D. to pay restitution after the case was dismissed. Iowa Code Section 803.1(1). Iowa Code Section 803.1(1) only gives the District Court subject matter jurisdiction over active criminal cases pending before the District Court, and once the District Court dismissed B.C.D.'s case, the Court automatically lost subject matter jurisdiction to decide any issue pertaining to the dismissed and expunged case.

Similarly, because a deferred judgment was not a final judgment, this case does not fit within the category of cases described by Iowa Code Section 910.1(1)(a) because there was no "plea of guilty, verdict of guilty, or special verdict upon which a judgment of conviction is rendered". Iowa Code Section 910.1(1)(a). Since a deferred judgment is by definition "deferred" and not "final", it is therefore not a "verdict of guilty or special verdict upon which a judgment of conviction is rendered" within the meaning of Iowa Code Section 910.1((a). For this reason as well, the district court lacked authority to enter a restitution order for payment of the victim's pecuniary damages in a dismissed case because the order "dismissing and expunging" the charge reversed and nullified the guilty plea and

because judgment in this case was deferred and never entered. Iowa Code §§ 910.1(1) and 910.2(1)(a) (2019).

Furthermore, Article V, Section 6 of the Iowa Constitution states that "[t]he district court shall … have jurisdiction in civil and criminal matters arising in their respective districts, in such manner as shall be prescribed by law". Iowa Constitution, Article V, Section 6. The use of the present tense "arising" clearly indicates an intent that the District Courts have subject matter jurisdiction only over pending criminal cases, not over cases such as B.C.D.'s that were dismissed and expunged. Iowa Constitution, Article V, Section 6. This language clearly limits the subject matter of the District Courts to cases "arising in their respective districts". Iowa Constitution, Article V, Section 6. Article V, Section 6 of the Iowa Constitution emphatically does not give the District Courts jurisdiction over cases that *arose* (past tense) "in their respective [judicial] districts." Iowa Constitution, Article V, Section 6. Once the District Court dismissed B.C.D.'s case, B.C.D.'s case ceased to be a case that was presently "arising" in the District Court within the meaning of Article V, Section 6 of the Iowa Constitution. Iowa Constitution, Article V, Section 6. Once the District Court dismissed B.C.D.'s case, the District Court thereafter lacked authority under the Iowa Constitution to subsequently order

restitution for the dismissed and expunged offense. Iowa Constitution, Article V, Section 6.

Moreover, the language in Article V, Section 6 of the Iowa Constitution that refers to "in such manner as shall be prescribed by law" confers authority on the Iowa Legislature to determine the scope of the subject matter jurisdiction of the Iowa Courts over pending civil and criminal cases. Iowa Constitution, Article V, Section 6. As noted above, Iowa Code Section 803.1(1) limits the authority of the Iowa District Court to consider matters pertaining to *active* criminal cases, not cases that were dismissed and expunged, such as B.C.D.'s. Iowa Code Section 803.1(1). Thus, Article V, Section 6 of the Iowa Constitution, by conferring authority upon the Legislature to determine the precise scope of the District Courts' subject matter jurisdiction over criminal cases, thereby strengthens the argument that Iowa Code Section 803.1(1) gives the District Courts subject matter jurisdiction only over pending criminal cases, not cases that were dismissed and expunged, such as B.C.D.'s. The order subsequently dismiss[ing] and expunge[ing] the charge nullified the guilty plea. Deferred Judgment Review Order, pg. 1. A, pg. 39. Therefore, this case is oot a case in which "a defendant has pled guilty" within the meaning of Iowa Code Section 910.2(1)(a).

To the extent that this Court has held otherwise in *State v. Kluesner,* 389 N.W.2d 370 (Iowa 1986), B.C.D. respectfully requests that this Court overrule *State v. Kluesner,* 389 N.W.2d 370 (Iowa 1986). B.C.D. respectfully submits that it is against public policy to require a defendant (particularly an indigent defendant, such as herself) to pay restitution when the defendants' circumstances reflect sufficiently favorably on the defendant so as to warrant the granting of a deferred judgment.

Therefore, the District Court was not required to impose restitution in this case and therefore lacked the subject matter jurisdiction over this dismissed case and therefore lacked the legal authority to enter the restitution order.

The State notes in its brief that because the District Court scheduled a restitution hearing "roughly two hours … after the charges were 'dismissed,' the reasonable conclusion is that the court – and the parties ---- understood the court still had to enter the amount of restitution". State's Brief, pg. 22. Deferred Judgment Review Order, pgs. 1 and 2, A, pgs. 39-40. Order Setting Restitution Hearing Date, pgs. 1-2, A, pgs. 41-42. The issuance of the Deferred Judgment Review Order about two hours prior to the issuance of an Order Setting Restitution Hearing Date are not evidence of what B.C.D. thought or reasonably should have thought regarding whether the Court would or was required to enter a restitution

order. Deferred Judgment Review Order, pgs. 1 and 2, A, pgs. 39-40. Order Setting Restitution Hearing Date, pgs. 1-2, A, pgs. 41-42. Indeed, the issuance of the Deferred Judgment Review Order about two hours prior to the issuance of an Order Setting Restitution Hearing Date are not evidence of an understanding by either the judge that issued the Deferred Judgment Review Order or the judge that entered the "Order Setting Restitution Hearing Date" that the Court still had to order restitution because these orders were entered by two different judges. Deferred Judgment Review Order, pgs. 1 and 2, A, pgs. 39-40. Order Setting Restitution Hearing Date, pgs. 1-2, A, pgs. 41-42. For the timing of these orders to be relevant to show that the judge who issued the Deferred Judgment Review Order knew she had to subsequently order restitution, the same judge would have had to have issued both orders. Deferred Judgment Review Order, pgs. 1 and 2, A, pgs. 39-40. Order Setting Restitution Hearing Date, pgs. 1-2, A, pgs. 41-42.

III. THE DISTRICT COURT LACKED AUTHORITY TO IMPOSE RESTITUTION FOR A DISMISSED AND EXPUNGED OFFENSE.

B.C.D. disagrees with the State's assertion that "B.C.D. consented to the imposition of restitution by participating in the hearing." State's Brief, pg. 25. The only way for B.C.D. to challenge the imposition of restitution was through a restitution hearing. Therefore, by participating in the restitution hearing, B.C.D. was implicitly challenging the imposition of restitution, not merely the amount of

restitution. In addition, the State appears to argue that "B.C.D. waived any claim by and failing "to challenge the court's authority to enter a restitution order below." State's Brief, pg. 25.

As discussed at length above, this challenge implicates the Court's subject matter jurisdiction to enter an order imposing restitution in a dismissed and expunged case. Therefore, this issue cannot be waived on any alleged failure by B.C.D. and/or her attorney to present this issue to the District Court because subject matter jurisdiction cannot be waived. Unlike personal jurisdiction, a party cannot waive or vest by consent subject matter jurisdiction. *In re Estate of Falck,* 672 N.W.2d 785, 789 (Iowa 2003). A party cannot confer subject matter jurisdiction on the court by an act or procedure. *In re Estate of Falck,* 672 N.W.2d 785, 789 (Iowa 2003).

If the district court lacks subject matter jurisdiction, the judgment is void. *In re Estate of Falck,* 672 N.W.2d 785, 789 (Iowa 2003). A void judgment is subject to collateral attack. *In re Estate of Falck,* 672 N.W.2d 785, 789 (Iowa 2003). The court's lack of authority "can be obviated by consent, waiver or estoppel." *State v. Mandicino*, 509 N.W.2d 481, 483 (Iowa 1993). This Court interpreted the decision in Mandicino to mean that "a court's lack of authority is not conclusively fatal to the validity of an order." *In re Marriage of Seyler*, 559 N.W.2d 7, 10 n.3 (Iowa

1997). In the context of a criminal conviction, the issue of the illegality of a sentence cannot be waived by failing to challenge the sentence on direct appeal. Iowa R. Crim. P. 2.24(5) ("The court may correct an illegal sentence at any time."). *State v. Lathrop,* 781 N.W.2d 288, 292-93 (Iowa 2010). See also *State v. Tindell*, 629 N.W.2d 357, 359 (Iowa 2001) ("The exclusion of illegal sentences from the principles of error preservation is limited to those cases in which a trial court has stepped outside the codified bounds of allowable sentencing. In other words, the sentence is illegal because it is beyond the power of the court to impose."). It is also well established the parties cannot agree upon an illegal sentence. See *State v. Copenhaver*, 844 N.W.2d 442, 447 (Iowa 2014) (stating "[a]n illegal sentence is a sentence that is not permitted by statute."); *State v. Woody*, 613 N.W.2d 215, 218 (Iowa 2000) (stating "[n]either party may rely on a plea agreement to uphold an illegal sentence."); *Noble v. Iowa Dist. Court for Muscatine Cty.*, 919 N.W.2d 625, 632 (Iowa Ct. App. 2018) (stating "we conclude the violation of the *Ceretti* rule constitutes an illegal sentence that cannot be waived."). .

> The District Court stated the following in its Order re Restitution:
>
> Whenever a defendant has pled guilty the sentencing court shall order restitution be made by each offender to the victim(s) of the criminal activity. *Iowa code section 910.2(1).* Criminal activity is defined as "any crime for which there is a plea of guilty … and any other crime commited after July 1, 1982 which is admitted or not contested by the

> offender, whether or not prosecuted." *Iowa code section 910.1(1).* The amount of restitution is not limited by the level of the crime to which the defendant pled guilty. Earnest v State, 508 N.W.2d 630, 633 (Ia 1993). As long as the State establishes a reasonable causal connection between the damages the criminal activity and a reasonable basis in the evidence to support the amount of restitution, the Court must order victim restitution. State v. Holmes [sic. *Holmberg*], 449 N.W.2d 376 (Ia 1989), State v. Bonsettter, 637 N.W.2d 161 (Ia 2001).
>
> Order Re: Restitution, pg. 1. A, pg.

In the Deferred Judgment Review Order the Court specifically stated that "[i]t is hereby ordered that the charge(s) should now be dismissed and expunged". Deferred Judgment Review Order, pg. 1. The District Court appears to have believed that because B.C.D. pled guilty her situation automatically comes within the categories of situations described by Iowa Code Section 910.2(1)(a) in which the District Court is required to impose restitution. Order Granting Deferred Judgment, pg. 1. Order re: Restitution, pg. 1. A, pg. 46. However, the order subsequently dismiss[ing] and expunge[ing] the charge nullified the guilty plea. Deferred Judgment Review Order, pg. 1. A, pg. 39.

Therefore, this situation does not fit within the category of cases described by Iowa Code Section 910.2(a)(a) in which "there is a plea of guilty". Therefore, the District Court lacked the legal authority to order B.C.D. to pay restitution. To the extent that this Court has held otherwise in *State v. Kluesner,* 389 N.W.2d 370 (Iowa 1986), B.C.D. respectfully requests that this Court overrule *State v. Kluesner,* 389 N.W.2d 370 (Iowa 1986). B.C.D. respectfully submits that it is

against public policy to require a defendant (particularly an indigent defendant, such as herself) to pay restitution when the defendants' circumstances reflect sufficiently favorably on the defendant so as to warrant the granting of a deferred judgment.

With all due respect, the District Court's order imposing restitution on B.C.D. is essentially the same as an order requiring a defendant to pay restitution for a crime of which the defendant was acquitted. In *DeLong v. State,* 638 So.2d 1054 (Fla. App., 2nd Dist. 1994) the Florida Court of Appeal reversed that part of a restitution order requiring a defendant to pay restitution for an offense of which the Defendant was acquitted. Order Deferring Judgment, pg. 1. A, pg. 21. By the same reasoning, in the case at bar, this Court should reverse the April 8, 2022 Restitution Order and remand this case to the District Court with instructions not to order B.C.D. to pay restitution. The Court's order dismissing and expunging B.C.D.'s charge is the same as an acquittal because B.C.D. can truthfully say she was never convicted of the charge. Order Deferring Judgment, pg. 1. A, pg. 21.

In *State v. Burgess,* 639 N.W.2d 564, 571 (Iowa 2001) this Court assumed that dismissal of a charge constituted acquittal of that charge. The Court stated that "[e]ven if the dismissal of theft by appropriation constituted an acquittal of the charge." *State v. Burgess,* 639 N.W.2d 564, 571 (Iowa 2001).

In *State v. Cowman,* 29 N.W.2d 238, 239, 240, 239 Iowa 57, 58, 59 (Iowa 1947) this Court used the *Webster's International Dictionary,* 2nd Ed. definition of "acquittal" to define this term, namely "'a setting free or deliverance from the charge of an offense by verdict of a jury, sentence of a court, or other legal process.'" *State v. Cowman,* 29 N.W.2d 238, 239, 240, 239 Iowa 57, 58, 59 (Iowa 1947). The dismissal and expungement of B.C.D.'s offense was "'a setting free or deliverance from the charge of an offense by … other legal process" and thus fits within the legal definition of "acquittal" as defined by this Court in *State v. Cowman,* 29 N.W.2d 238, 239, 240, 239 Iowa 57, 58, 59 (Iowa 1947). *State v. Cowman,* 29 N.W.2d 238, 239, 240, 239 Iowa 57, 58, 59 (Iowa 1947).

Furthermore, Iowa Code Section 907.1 defines "deferred judgment" as "a sentencing option whereby both the adjudication of guilt and the imposition of a sentence are deferred by the Court. Iowa Code Section 901.1(1). In *State v. Stessman,* 460 N.W.2d 461 (Iowa 1990) this Court held that "[a]n order deferring judgment is interlocutory and cannot meet the final judgment requirement imposed by section 814.6". *State v. Stessman,* 460 N.W.2d 461 (Iowa 1990). This Court further noted that "[b]ecause a final judgment does not exist [in the context of an order deferring judgment], defendant's case is not appealable to him as a matter of right." *State v. Stessman,* 460 N.W.2d 461 (Iowa 1990). However, in a situation in which the Court had a granted a deferred judgment, the "Defendant could … have

requested discretionary review of the restitution order". *State v. Stessman,* 460 N.W.2d 461, 463 (Iowa 1990).

Because a deferred judgment was not a final judgment, this case does not fit within the category of cases described by Iowa Code Section 910.1(1)(a) because there was no "plea of guilty, verdict of guilty, or special verdict upon which a judgment of conviction is rendered". Iowa Code Section 910.1(1)(a). Since a deferred judgment is by definition "deferred" and not "final", it is therefore not a "verdict of guilty or special verdict upon which a judgment of conviction is rendered" within the meaning of Iowa Code Section 910.1((a). For this reason as well, a deferred judgment functions as an acquittal, and B.C.D. should accordingly not be required to pay restitution in connection with this charge.

To the extent that this Court has held otherwise in *State v. Kluesner,* 389 N.W.2d 370 (Iowa 1986), B.C.D. respectfully requests that this Court overrule *State v. Kluesner,* 389 N.W.2d 370 (Iowa 1986). B.C.D. respectfully submits that it is against public policy to require a defendant (particularly an indigent defendant, such as herself) to pay restitution when the defendants' circumstances reflect sufficiently favorably on the defendant so as to warrant the granting of a deferred judgment.

IV. THE RESTITUTION ORDER WAS IMPROPER BECAUSE IT LACKED AN ADEQUATE FACTUAL BASIS AND DID NOT ARTICULATE THE BASIS FOR THE RESTITUTION AMOUNT.

There are no photographs or video in this record of the vehicles as they appeared before the incident in question. The only evidence that the vehicles had not sustained damage prior to this incident was the testimony of the sole alleged victim of this alleged criminal conduct, that of C.B.. Transcript, pgs. 12, Lines 13-25 – pg. 13, Lines 1-6. Obviously, C.B. has a motivation to lie about this very issue.

The most serious damage to either vehicle appearing in these photographs is in the fourth image of State's Exhibit 4, namely to the front passenger side of the Hyundai. Exhibit 4, Image 4 (hereinafter "Image 4"). Image 4 appears to show not only that the right front turn signal was damaged or destroyed but that part of the front right hood panel was partially pushed back from the frame by up to a few inches. Such damage is consistent with a collision of some sort and inconsistent with the actions of B.C.D. and T.W. shown on the video constituting Exhibit 5. Exhibit 4, Image 4, Image 5. It would not appear that either B.C.D. or T.W. attempted to cause damage to the passenger side of the Hyundai. Exhibit 5. It would not appear that any of the objects used by either B.C.D. or T.W. to cause damage to the vehicles would have the ability to cause the degree and type of damage shown in Exhibit 4, Image 4. Exhibit 5.

The cellphone video clearly shows that T.W. engaged in the vast majority of the destructive conduct. Exhibit 5, cellphone video footage. B.C.D.'s involvement is limited to the early phase of this incident, and B.C.D. quickly disappears from view on the cellphone video. Exhibit 5, cellphone video.

The State has the burden of proof to recover damages due a victim. *State v. Bonstetter*, 637 N.W.2d 161, 170 (Iowa 2001). The district court ordered T.W. and B.C.D. to pay $6,067.44 in victim restitution and held both to be "jointly and severally liable" for this restitution. Order Re: Restitution, pg. 2. In *State v. Roach*, 920 N.W.2d 93, 99 (Iowa 2018) the Court stated that "[e]vidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion."). *State v. Roach*, 920 N.W.2d 93, 99 (Iowa 2018). There is a distinction between proof of the fact that damages have been sustained and proof of the amount of those damages. *Olson v. Nieman's Ltd.*, 579 N.W.2d 299, 309 (Iowa 1998) (other citations omitted). Damages are denied where the evidence is speculative and uncertain whether damages have been sustained. *Olson v. Nieman's Ltd.*, 579 N.W.2d 299, 309 (Iowa 1998) (other citations omitted). However, "[if] the uncertainty lies only in the amount of damages, recovery may be had if there is proof of a reasonable basis from which the amount can be inferred or approximated." *Olson v. Nieman's Ltd.*, 579 N.W.2d 299, 309 (Iowa 1998) (other citations omitted).

As noted previously, the damage shown to the Hyundai in Image 4, Exhibit 4 is inconsistent with what the video shows. Image 4, Exhibit 4, Exhibit 5. Furthermore, the Court did not specify exactly how the Court arrived at a figure of $6,067.44 as the amount of restitution. Order Re: Restitution, pg. 2. A, pg. 47.

As noted above, the order subsequently dismiss[ing] and expunge[ing] the charge nullified the guilty plea. Deferred Judgment Review Order, pg. 1. Therefore, this situation does not fit within the category of cases described by Iowa Code Section 910.2(a)(a) in which "there is a plea of guilty". To the extent that this Court has held otherwise in *State v. Kluesner,* 389 N.W.2d 370 (Iowa 1986), B.C.D. respectfully requests that this Court overrule *State v. Kluesner,* 389 N.W.2d 370 (Iowa 1986). B.C.D. respectfully submits that it is against public policy to require a defendant (particularly an indigent defendant, such as herself) to pay restitution when the defendants' circumstances reflect sufficiently favorably on the defendant so as to warrant the granting of a deferred judgment. Therefore, the District Court lacked the legal authority (including but not limited to the necessary subject matter jurisdiction) to order B.C.D. to pay restitution.

The State asserts that "the repair estimate for the Escape was $3,512.60", citing to State's Exhibit 3. However, State's Exhibit 3 merely notes the repair estimate for the windshield as being $234.84, as the State also notes on page 29 of

its brief and cites to State's Exhibit 3 for the proposition that the estimate for repairing the Ford's windshield was $234.84. State's Brief, pg. 29. The Bluebook value of the Hyundai was the "Private Party Value" within the "Private Party Range" of between "1,479 - $3,460." State's Exhibit 1, Appendix, pg. 43. These figures also reflected the condition of the Hyundai as being "good". State's Exhibit 1, A, pg. 43. C.B.'s testimony did not establish that the Hyundai was in good shape at the time of this incident. Transcript, pg. 10, Lines 3-25. Therefore, the State has not proven that the Bluebook Value for C.B.'s Hyundai were correct because the State failed to prove that the Hyundai was in "good" condition at the time of this incident.

V. CERTIORARI IS THE APPROPRIATE FORM OF REVIEW TO ADDRESS THE QUESTION OF WHETHER THE DISTRICT COURT LACKED AUTHORITY TO ORDER RESTITUTION FOR A "DISMISSED AND EXPUNGED" OFFENSE.

A writ of certiorari is applicable where a party claims an associate district court judge exceeded the judge's jurisdiction or otherwise acted illegally. Iowa R. App. 1.107(1). "Restitution is purely a creature of statute in Iowa "A court is authorized to order criminal restitution pursuant to the statutes. In the absence of such statutes, the court has no power to issue a restitution order." *State v. Bonstetter*, 637 N.W.2d 161, 166 (Iowa 2001).

Since a deferred judgment is by definition "deferred" and not "final", it is therefore not a "verdict of guilty or special verdict upon which a judgment of conviction is rendered" within the meaning of Iowa Code Section 910.1((a). For this reason as well, a deferred judgment functions as an acquittal, and B.C.D. should accordingly not be required to pay restitution in connection with this charge.

To the extent that this Court has held otherwise in *State v. Kluesner,* 389 N.W.2d 370 (Iowa 1986), B.C.D. respectfully requests that this Court overrule *State v. Kluesner,* 389 N.W.2d 370 (Iowa 1986). B.C.D. respectfully submits that it is against public policy to require a defendant (particularly an indigent defendant, such as herself) to pay restitution when the defendants' circumstances reflect sufficiently favorably on the defendant so as to warrant the granting of a deferred judgment.

CONCLUSION AND PRAYER FOR RELIEF

With all due respect to the District Court, the District Court lacked jurisdiction to order restitution in connection with a dismissed and expunged offense. Certiorari is the appropriate form of review for this issue. With all due respect, the District Court's restitution order lacked an adequate factual basis and did not articulate the basis for the restitution amount. Discretionary review is the appropriate form of review to address this question.

WHEREFORE, B.C.D. requests that this Court please reverse and remand the District Court's April 8, 2022 restitution order with instructions that the District Court not require B.C.D. to pay restitution in connection with the criminal offense at issue.

WHEREFORE, in the alternative, B.C.D. requests that this Court please reverse and remand the District Court's April 8, 2022 restitution order with instructions that the District Court not order restitution in connection with alleged damage to C.B.'s vehicles.

WHEREFORE, B.C.D. requests that this Court please enter an order granting any other relief that this Court deems to be in the interest of justice.

REQUEST FOR ORAL ARGUMENT

B.C.D. respectfully requests that she please be heard in oral argument in this matter.

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

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this brief contains 5,680 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(3) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using a version of Microsoft Word that was produced on or before 2003 in Times New Roman, 14 point type.

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