IN THE SUPREME COURT OF IOWA
Supreme Court No. 19-0089

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOSEPH SCOTT WAIGAND,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR UNION COUNTY
THE HONORABLE JOHN D. LLOYD, JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

Transfer to the Court of Appeals is appropriate because the issues raised involve the application of existing legal principles. Iowa R. App. P. 6.1101(3)(a).

Despite Defendant Joseph Scott Waigand's plea to the contrary, this case is not appropriate for retention. Waigand argues that the issue of whether the Sixth Amendment and Article I, section 9 require that a jury find the facts underlying a restitution order presents a substantial question of enunciating or changing legal principles. Although a discussion of that question may be interesting, the Court need not reach the issue in this case for several reasons.

To start, Waigand did not preserve this argument. In preparation for his restitution hearing, Waigand filed two separate documents outlining his objections to the district court's restitution order, neither of which mentioned an *Apprendi*-type challenge. Nor did Waigand hint at such a challenge during the restitution hearing itself. Even if restitution is considered to be a phase of sentencing, this is the type of claim that must be made in the district court in the first instance to be preserved on appeal.

Nor does Waigand's alternative ineffective-assistance-of-counsel claim necessitate retention. Waigand's restitution counsel was not ineffective both because the argument Waigand now makes is substantively meritless and without support in any jurisdiction, and because Waigand did, in fact, admit to the facts underlying the district court's restitution order. For all of those reasons, this Court should transfer Waigand's case to the Court of Appeals.

STATEMENT OF THE CASE

Nature of the Case

Defendant Joseph Scott Waigand pleaded guilty to one count of ongoing criminal conduct, in violation of Iowa Code sections 706A.1, 706A.2(1), and 706A.4, a class B felony. Waigand did not appeal his conviction and sentence. Instead, he appeals from the district court's restitution order, entered three months after the court's sentencing order. The Honorable John D. Lloyd presided over Waigand's restitution hearing and entered judgment.

Facts and Course of Proceedings

Background

Waigand ran a large farming operation in Union County. Plea Hearing Transcript, June 15, 2018 ("Plea Hr'g Tr.") 9:9-23. To support the operation, Waigand took out a commercial line of credit

with Iowa State Savings Bank in Creston, Iowa ("the bank"). Plea Hr'g Tr. 9:9-10:2; Restitution Hearing Transcript, Nov. 21, 2018 ("Rest. Hr'g Tr.") 4:21-5:8. The loans were secured by "a general pledge of cattle assets," a UCC financing statement listing the proceeds of all crops produced on the land, and "mortgages on real estate pledged." Rest. Hr'g Tr. 4:21-5:14; Plea Hr'g Tr. 10:3-7.

Waigand entered into his first loan agreement with the bank in 2009; but, on March 23, 2015, he signed a balance sheet that resulted in new loans of about "$286,000 for cattle and $1,250,000 for operating expenses." Rest. Hr'g Tr. 5:15-6:2; Sentencing Hearing Transcript, June 15, 2018 ("Sent. Hr'g Tr.") 40:14-41:20; *see also* Minutes of Testimony; Conf. App. 103. The estimated net worth set forth in Waigand's 2015 balance sheet was "just a little under 1.8 million." Sent. Hr'g Tr. 43:2-4.

In early 2016, the bank became concerned about the status of Waigand's loan, and it ultimately called it due. Sent. Hr'g Tr. 44:2-18. The bank began to believe it had not received all the crop proceed payments to which it was entitled; a fear that was confirmed during Waigand's bankruptcy proceedings. Sent' Hr'g Tr. 44:19-45:15; 46:24-47:18.

The bank also discovered that Waigand had misrepresented assets on his balance sheet. *See* Sent. Hr'g Tr. 45:25-46:23; 49:12-17. The bank ultimately foreclosed on the loan, resulting in a civil judgment for its loss of "[r]ight at a million dollars" after "liquidating all available assets" and crediting Waigand for payments he had made. Sent. Hr'g Tr. 48:4-10.

Charges and Plea Hearing

On December 8, 2017, the State charged Waigand by trial information with eleven counts, including ten counts of theft in the first or second degree, in violation of Iowa Code sections 714.1(5) and 714.2(1) or (2); and ongoing criminal conduct, in violation of Iowa Code sections 706A.1, 706A.2(1), and 706A.4. Trial Information; App. 4.

Specifically, the State alleged that, on several occasions, Waigand took, destroyed, concealed, or disposed of property in which someone else had a security interest. Trial Information; App. 4. The State further charged that, between August of 2014 and October of 2016, Waigand knowingly received the proceeds of his unlawful activity "to use or invest, directly or indirectly" those proceeds "in the acquisition of any interest in any enterprise or any real property, or in

the establishment or operation of any enterprise." Trial Information; App. 4.

On June 15, 2018, Waigand pleaded guilty to one count of ongoing criminal conduct. Order Following Guilty Plea. In exchange for Waigand's guilty plea, the State agreed to dismiss the ten theft counts. Plea Hr'g Tr. 2:14-18. As part of his plea, Waigand admitted that, between August 2014 and October 2016, he had a line of credit with Iowa State Savings Bank to support his farming operation. Plea Hr'g Tr. 9:9-10:2. The bank held as collateral a mortgage and security agreements that secured real estate and crops produced by Waigand's operation. Plea Hr'g Tr. 10:3-7. Waigand acknowledged that he "engaged in activities that allowed [him] to sell those crops and not apply the proceeds to the loan with [the bank]." Plea Hr'g Tr. 10:8-13.

Specifically, Waigand admitted to forty "[s]ignificant transactions" involving the sale or transfer of grain, all of which belonged to the bank pursuant to the security agreements and mortgage. Plea Hr'g Tr. 10:14-25; Plea Hr'g Exhibit 1; App. 13. Waigand acknowledged that each of the transactions—outlined in a defense-provided exhibit—was a theft under Iowa law and that he conducted the transactions "with the intent to defraud the bank

regarding its ability to collect amounts under those security agreements and mortgages[.]" Plea Hr'g Tr. 11:11-19. Waigand further admitted that the purpose of each transaction was financial gain and that, "in manner, shape or form th[e] funds were invested in [his] farming operation[.]" Plea Hr'g Tr. 11:20-12:4.

Waigand then stated that he had reviewed the minutes of testimony and that, "to the extent that there [we]re transactions outlined in [the] minutes of testimony" that were not included or referred to in the exhibit, he did not "disagree with the information contained in the minutes of testimony[.]" Plea Hr'g Tr. 12:7-18.

The parties agreed that there would likely be some issues related to the calculation of victim restitution and that the numbers were not final. *See* Plea Hr'g Tr. 3:1-11; 4:5-14. The State's position was "that restitution [wa]s already requested in the approximate amount of $270,000." Plea Hr'g Tr. 3:4-6. Although further "auditing and exact calculation" of the number would be necessary, the State said that, "for purposes of [the] plea today," it would be asking for at least $268,788.91, corresponding to the transactions outlined in the minutes. Plea Hr'g Tr. 3:7-11. The State stated that it intended "to

request that amount or near that based upon the final arithmetic calculations." Plea Hr'g Tr. 3:9-11.

Sentencing and Restitution Challenge

On August 29, 2018, the parties appeared before the district court for a contested sentencing hearing. *See generally*, Sent. Hr'g Tr. Waigand called several character witnesses, introduced certificates showing that he and his wife had completed credit counseling, and asked the court to enter a deferred judgment. *See* Sent. Hr'g Tr. 21:1-32:8; Defendant's Sentencing Exhibits 100 & 101. He also "consent[ed] to the use of the presentence investigation for sentencing[,]" which, in turn, stated that Waigand "admitted to the information as it was reported in the Minutes of Testimony." Sent. Hr'g Tr. 20:13-23; PSI at 8.

The State called Kevin Stewart, the president of the Iowa State Savings Bank, and submitted multiple exhibits, including Waigand's March 2015 balance sheet and documents supporting Waigand's fraudulent transactions. State's Sentencing Exhibits 1-19; Sent. Hr'g Tr. 40:4-52:4; 52:5-57:4. The State asked the district court to sentence Waigand to a term of imprisonment. Sent. Hr'g Tr. 64:6-9.

The State also asked the court to order Waigand to pay one million dollars in restitution to the bank. Sent. Hr'g Tr. 48:4-10. According to the State, this represented the total loss the bank suffered from Waigand's conduct; indeed, it was the award entered against Waigand in the bank's civil forfeiture case against him. Sent. Hr'g Tr. 48:4-10. Stewart testified that with a farming operation the size of Waigand's—with a projected net worth of around $1.8 million—the bank could anticipate a loss of up to $500,000 in a "bad year," but that anything above that would be highly unusual. Sent. Hr'g Tr. 41:4-44:1; 49:8-11.[1]

The State then provided documents supporting over fifty instances in which Waigand kept or diverted proceeds from his farming operation that were supposed to go to the bank. *See* Sent. Hr'g Tr. 52:5-57:2; 61:15-23; Exhibits 2-19. According to the State, these transactions totaled $286,000, and provided support for the bank's million-dollar loss. Sent. Hr'g Tr. 56:12-24. Waigand did not

[1] *See also* Rest. Hr'g Tr. 12:4-15:17 (bank CEO and CFO testifying that, given the balance sheet Waigand signed in March 2015, "you would not expect any kind of loss approaching a million dollars to be realized").

contest the State's restitution calculations. *See generally*, Sent. Hr'g Tr.

The district court sentenced Waigand to a twenty-five-year term, all but one day of which it suspended, and ordered five years of supervised probation. Order of Disposition; App. 15; Sent. Hr'g Tr. 69:5-24. The court also ordered that Waigand pay restitution to the bank, but "in an amount to be set per separate order." Order of Disposition; App. 16. The court indicated that it would impose the amount cited by the bank, but that it needed a specific number from the State within thirty days. *See* Sent. Hr'g Tr. 72:10-20. Waigand did not appeal his conviction or sentence.

On September 19, 2018, the State filed its supplemental restitution request, asking the district court to order that Waigand pay restitution in the amount of $988,636.25 to Iowa State Savings Bank, Creston, Iowa. Application for Supplemental Restitution Order; Conf. App. 111. The court entered the order that same day, but gave Waigand thirty days "to notify the Court of any objection to th[e] amount." Order for Restitution; App. 18.

Twenty-nine days later, Waigand did object to the district court's restitution order and requested a hearing. Objection to

Restitution; App. 20. Waigand asked the court to take judicial notice of the state forfeiture proceeding, Union County case number EQCV018051—in particular that court's January 20, 2017 decree. Objection to Restitution and Request for Hearing; App. 20. Waigand then argued that it was inappropriate for the court to enter a restitution order in a criminal case for the same amount, to the same victim, as was previously ordered in a civil judgment. Objection to Restitution and Request for Hearing; App. 20. Waigand also noted that, in his plea, he had admitted to certain transactions, which totalled $276,518.66, and which were themselves included in the bank's civil judgment. Objection to Restitution and Request for Hearing; App. 20.

On the day of the hearing, Waigand supplemented his objection, this time submitting that the $276,518.66 amount should be reduced to a total restitution amount of $172,499.66 because, although the bank held a security interest in the remaining proceeds, "certain amounts were legitimately directed at sustaining the farming operation which the original loan was intended to service." Supplement to Objection; App. 22. Thus, Waigand argued, although these amounts were appropriately part of the civil judgment against

him, they should be deducted from the restitution order. Supplement to Objection; App. 22.

At the restitution hearing, the State called the CEO and CFO of the Iowa State Savings Bank, Adam Snodgrass, to provide support for the bank's claim of pecuniary damages. Rest. Hr'g Tr. 3:21-9:19. Snodgrass stated that, after foreclosing on Waigand's loans and liquidating all assets, the bank suffered a loss of $988,636.25. Rest. Hr'g Tr. 5:3-6:15; 8:19-9:15. Snodgrass also testified that the bank suffered harm from the diverted proceeds even if Waigand used them to further the farm operation because they ultimately resulted in pledged assets that were not there when the bank moved to liquidate. Rest. Hr'g Tr. 7:12-8:18.

Waigand again argued that he should only have to pay the foreclosure judgment once, that his crime was more akin to conversion than fraud, and that restitution in his case should be limited to the amount corresponding to "the acts" he admitted to during the plea colloquy. Rest. Hr'g Tr. 16:5-18:17.

On December 24, 2018, the district court denied Waigand's objection and, in a written ruling, again ordered that Waigand pay Iowa State Savings Bank restitution in the amount of $988,636.25.

Order on Restitution; App. 24. The court found that the full amount of damages suffered by the bank was caused by Waigand's conduct and that the amount was "within the scope of liability that [Waigand] should have anticipated when he converted the [bank's] collateral." Order on Restitution; App. 24. Waigand, who was facing financial difficulties, "engaged on a course of action that could have no other effect than to cause more trouble." Order on Restitution; App. 24. That trouble, the court pointed out, would be the liquidation of Waigand's farming operation. Order on Restitution; App. 24. And as the district court stated, "[t]he foreseeability of losses when a troubled farming operation is liquidated is too certain to be gainsaid." Order on Restitution; App. 24. Thus, the court concluded, the proper amount of restitution here was "the losses as measured in the civil action that the bank brought against [Waigand]." Order on Restitution; App. 24.

Waigand now appeals the district court's restitution order, arguing that the court erred in calculating the amount of restitution, in that the State failed to establish a causal connection between the acts to which he pleaded guilty and the total amount of loss in the civil judgment against him. Waigand also contends that the court

should have ordered an offset for any amounts Waigand pays toward satisfying the civil judgment, and that the court entered an illegal sentence by ordering restitution without affording him a right to a jury trial. Finally, Waigand contends that his restitution hearing counsel was ineffective for failing to argue that the State was equitably estopped from requesting a restitution amount greater than that suggested during the plea hearing. For the reasons set forth below, Waigand's arguments have no merit.

ARGUMENT

I. The district court's restitution order was well-within its discretion. There are sufficient facts in the record supporting the court's conclusion that Waigand's conduct caused the bank $988,636.25 in loss.

Preservation of Error

Waigand first challenges the sufficiency of the evidence supporting the district court's restitution order. Specifically, Waigand contends that there is not enough evidence in the record to support the fact that the bank's decision to foreclose was caused by Waigand's multiple thefts of the bank's collateral. Waigand preserved this issue by challenging the amount of restitution below and asking that it be limited to the $288,000 in lost collateral. Objection to Restitution and Request for Hearing; App. 20; Supplement to Objection; App. 22;

see State v. Christensen, No. 09-1457, 2010 WL 5276884, at *1-2 (Iowa Dec. 17, 2010) (per curiam) (in the restitution context, stating that error is preserved where the party raises the issue in the district court, the court rules on the issue, and the party raises the issue again on appeal). *But see State v. Sims*, No. 10-0883, 2011 WL 2076332, at *1 (Iowa Ct. App. May 25, 2011) (discussing whether a defendant must object to the sufficiency of the State's evidence supporting a restitution order to preserve the issue for appeal).

Standard of Review

This Court reviews restitution orders for correction of errors at law. *State v. Klawonn*, 688 N.W.2d 271, 274 (Iowa 2004). "On appeal, [the Court] is bound by the district court's findings of fact so long as they are supported by substantial evidence." *State v. Shears*, 920 N.W.2d 527, 530 (Iowa 2018). The district court is granted "broad discretion in determining the amount of restitution when the record contains proof of a reasonable basis from which the amount may be inferred." *Id.*

Merits

Waigand argues that the district court erred by ordering restitution in "the full $988,636.25 remaining on the civil judgment

ordered in Waigand's foreclosure case[.]" *See* Appellant's Brief at 28-29. Waigand claims that the court did so despite the fact that there was "inadequate evidence to indicate the bank's decision to foreclose" was caused by what Waigand claims were his admitted acts. *See* Appellant's Brief at 29.

Restitution "to the victims of the offender's criminal activities" is mandatory in all criminal cases in which the defendant pleads or is found guilty. Iowa Code § 910.2(1)(a); *see also Shears*, 920 N.W.2d at 532. "Restitution" is defined as, among other things, "payment of pecuniary damages to a victim in an amount and in the manner provided by the offender's plan of restitution." Iowa Code § 910.1(4). As relevant here, "pecuniary damages," are "all damages to the extent not paid by an insurer on an insurance claim by the victim, which a victim could recover against the offender in a civil action arising out of the same facts or event . . . ." Iowa Code § 910.1(3).

The amount of restitution is not "limited by the parameters of the offense to which" the defendant pleaded guilty. *See State v. Holmberg*, 449 N.W.2d 376, 377 (Iowa 1989). Nevertheless, for a restitution order to be proper "there must be 'a causal connection between the established criminal act and the injuries to the victim.'"

Shears, 920 N.W.2d at 534 (quoting *Holmberg*, 449 N.W.2d at 377). The standard of causation has been interpreted broadly to be the same as the one that is "generally applicable in civil matters[.]" *Shears*, 920 N.W.2d at 539.

Once causation "is established, the statute allows recovery of 'all damages' (with exceptions not involved here) which the State can show by a preponderance of the evidence." *Holmberg*, 449 N.W.2d at 377. The Court will affirm a restitution award "if it is within a reasonable range of the evidence." *State v. Sogard*, No. 06-0341, 2007 WL 461318, at *1 (Iowa Ct. App. Feb. 14, 2001) (citing *State v. Storrs*, 351 N.W.2d 520, 522 (Iowa 1984) and *State v. Watts*, 587 N.W.2d 750, 752 (Iowa 1998)).

The district court did not abuse its discretion in awarding the full $988,636.25 here. There was sufficient evidence to support a causal link between Waigand's offense and the restitution ordered. To start, by pleading guilty, Waigand admitted to the facts underlying the district court's award. Rather than pleading guilty to one or more of the charged theft counts, Waigand chose to plead to the ongoing criminal conduct count, which broadly incorporated all of the illegal acts set forth in the trial information and the minutes of testimony.

Compare Holmberg, 449 N.W.2d at 377-78 (approving the use of the minutes of testimony in determining whether the restitution amount was supported, but concluding that, because he pled guilty to a lesser offense, the defendant only admitted as true the facts in the minutes that supported that offense). In seeking leniency at sentencing, Waigand himself touted that by pleading guilty to the ongoing criminal conduct count, he "took responsibility for all of the actions, not just picking and choosing one here, one there, but an umbrella of everything." Sent. Hr'g Tr. 33:16-21.

At both the plea hearing and at sentencing, Waigand also agreed to the facts outlined in the minutes of testimony. At the plea hearing, Waigand admitted to, on at least forty occasions, selling crops and keeping the proceeds, rather than applying them to the loan. Plea Hr'g Tr. 10:8-25; Plea Hr'g Exhibit 1; App. 13. Waigand acknowledged that each of these transactions was a theft, and that he conducted the transactions "with the intent to defraud the bank regarding its ability to collect amounts under those security agreements and mortgages[.]" Plea Hr'g Tr. 11:11-19. Waigand then stated that he had reviewed the minutes of testimony and that, "to the extent that there [we]re transactions outlined in [the] minutes of

testimony" that were not included or referred to in the exhibit, he did not "disagree with the information contained in the minutes of testimony[.]" Plea Hr'g Tr. 12:7-18.

At sentencing, Waigand "consent[ed] to the use of the presentence investigation for sentencing[,]" which, in turn, stated that Waigand "admitted to the information as it was reported in the Minutes of Testimony." Sent. Hr'g Tr. 20:13-23; PSI at 8. Waigand cannot complain that he only admitted to certain improper transactions or only those that sound in conversion, rather than fraud. By pleading guilty to the greater charge, rather than a lesser one, and stating that he agreed with the facts set forth in the minutes of testimony, Waigand admitted each of the facts set forth in those minutes.

The minutes of testimony, in turn, include the facts necessary to support the full amount of the restitution order. The minutes set forth the loans and their dates, the collateral that secured those loans, and the actions Waigand took to thwart the bank in recovering its assets. *See* Minutes of Testimony; Conf. App. 103. In particular, the minutes outline forty-eight transactions—for a total of $288,788.91—in which Waigand sold crops and diverted the funds rather than delivering

them to the bank as required. Minutes of Testimony; Conf. App. 103. The minutes also set forth misrepresentations Waigand made as to the value of his assets. Minutes of Testimony; Conf. App. 103.

Most importantly, however, the minutes state that, "[a]lthough Iowa State Savings Bank has pursued any/all reasonable efforts to collect on the outstanding obligations, there remains an unsatisfied amount/balance due in the approximate amount of one million dollars ($1,000,000.00)." Minutes of Testimony; Conf. App. 108. Under these circumstances, Waigand cannot now claim that the restitution order is improper. *See, e.g.*, *State v. Stanton*, No. 16-1193, 2018 WL 1182617, at *3 (Iowa Ct. App. March 7, 2018) (concluding that, because the defendant agreed that the district court could accept the minutes of testimony as true, and the minutes "provide[d] the necessary causal connection between the criminal act and the victims' damages[,]" the court's restitution order was proper); *State v. Hagen*, 840 N.W.2d 140, 145-46 (Iowa 2013) (allowing restitution for a longer period of time than that to which the defendant pleaded guilty because "the minutes of testimony filed with the State's trial information, which [the defendant] consented to as further factual support for his pleas, revealed a longer period of unfiled tax returns

and unpaid taxes than those years for which he was charged and ultimately convicted").

Even if this Court disagrees that Waigand's admissions resolve the question, the evidence presented at sentencing and at the restitution hearing independently supports the district court's order. The State attached to its statement of pecuniary damages a document from the Iowa State Savings Bank showing total unpaid principal of $988,636.25. *See* Restitution Hearing Exhibit 1; App. 112. It submitted as an exhibit part of the transcript from the bankruptcy proceeding, during which Waigand admitted that 80,000 bushels of corn listed in his financial statement may not have ever existed. *See* State's Sentencing Exhibits 1 & 3. Finally, it provided testimony from Stewart and Snodgrass that the full unpaid foreclosure amount was the result of Waigand's conduct. *See* Sent. Hr'g Tr.; Rest. Hr'g Tr.

Testimony from both bank executives and documents filed in the foreclosure action support a finding that, without the missing collateral and misrepresentations in Waigand's financial statements, the bank would not have had to foreclose on Waigand's loans. Nor would it have suffered such a significant loss. The district court pressed the State on whether the full amount of the bank's loss could

fairly be passed on to Waigand because of other factors such as the declining value of his real estate. Rest. Hr'g Tr. 9:20-11:23. In response, Snodgrass testified that, in deciding whether to extend the loan, the bank took into account possible losses—including the reduction of real estate values—and determined the loan was sound. *See* Rest. Hr'g Tr. 11:8-15:19. Because Waigand both misrepresented his assets on the 2015 balance sheet and converted nearly $300,000 in crop proceeds for his own use, however, the bank's calculus turned out to be incorrect, resulting in foreclosure of the loan. Rest. Hr'g Tr. 12:24-15:21. That answer satisfied the district court, and it should satisfy the Court here.

II. The district court also acted within its discretion in declining to put an offset provision in its restitution order.

Preservation of Error

Waigand next asserts that the district court erred by not including in the restitution order an offset for any payments made toward the civil forfeiture judgment. Waigand preserved this argument by bringing it to the attention of the district court and receiving a ruling. Objection to Restitution and Request for Hearing; App. 20; Order on Restitution; App. 24.

Standard of Review

As stated above, this Court reviews restitution orders for correction of errors at law. *State v. Jenkins*, 788 N.W.2d 640, 642 (Iowa 2010). It determines "whether the court's findings lack substantial evidentiary support, or whether the court has not properly applied the law." *State v. Bonstetter*, 637 N.W.2d 161, 165 (Iowa 2001).

Merits

Waigand argues that the district court erred by not including in its order a provision ensuring that the restitution award would be offset by any payments made toward the civil judgment. The State agrees that the Iowa Supreme Court has interpreted Iowa Code section 910.8 to require that a defendant's restitution obligation be reduced by settlement payments made to resolve a prior civil suit "arising out of the same facts or event[.]" Iowa Code § 910.8; *State v. Paxton*, 674 N.W.2d 106 (Iowa 2004); *Klawonn*, 688 N.W.2d at 275-76; *State v. Driscoll*, 839 N.W.2d 188, 191 (Iowa 2013). It does not object to the proposition that, should payments be made toward the bank's civil judgment, those amounts should then reduce the amount of restitution Waigand owes.

That does not, however, mean that the district court abused its discretion here. At the time of the restitution order, the State presented documents supporting the amount Waigand owed the bank—after the bank had liquidated the available assets and received certain payments it was due. The nearly one-million-dollar figure represents the outstanding judgment against Waigand. If, for some reason, the bank discovers additional assets or Waigand makes payments toward the civil judgment rather than the restitution ordered, Waigand could successfully move to reduce the amount of restitution he owes. Unlike in *Klawonn* and *Driscoll*, where payments had been made to settle prior civil actions, all previous payments here have already been taken into account. For that reason, an offset provision was not required here.

III. Waigand's unpreserved claim that a jury must find facts supporting a restitution order has no merit and, even if it did, has no bearing on Waigand's case. Nor can Waigand show that his restitution counsel breached an essential duty and that he was prejudiced as a result.

Preservation of Error

Waigand next contends that the district court erred by setting the amount of restitution without jury findings supporting the amount. Because Waigand did not make this argument to the district

court or receive a ruling on the issue, it is not preserved for appeal. *C.f. State v. Turner*, No. 15-2191, 2016 WL 7393894, at *1 (Iowa Ct. App. Dec. 21, 2016) (citing *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002)); *see also*, *e.g.*, *United States v. Burns*, 800 F.3d 1258, 1261 (10th Cir. 2015) (reviewing the defendant's *Apprendi* argument for plain error because he did not make it to the district court); *United States v. Wolfe*, 701 F.3d 1206, 1216 (7th Cir. 2012) (same).

Waigand seeks to sidestep his error preservation problem by asserting that the challenge he now makes is one to the legality of his sentence, which the court may correct at any time. *See* Appellant's Brief at 52. Although Waigand is correct that "restitution is part of a sentence," *see State v. Gross*, 935 N.W.2d 695, 698-99 (Iowa 2019), that does not mean that all restitution challenges, made at any time, are free from error preservation requirements. As the Court in *Gross* stated, "when a party appeals a sentence, *some issues* may be raised for the first time on appeal even though they were not raised in the district court." *Id.* at 698 (emphasis added) (citing *State v. Gordon*, 921 N.W.2d 19, 22-23 (Iowa 2018)).

The Court identified a reasonability-to-pay challenge as the type of restitution claim that could be made for the first time on appeal.

Gross, 935 N.W.2d at 698-99. It went on to say, however, that "[t]his does not mean that such an award of restitution is illegal and may be challenged at any time by filing a motion to correct an illegal sentence." *Id.* at 699; *see also*, *e.g.*, *State v. Lang*, No. 10-0577, 2010 WL 5050568, at *3 (Iowa Ct. App. Dec. 8, 2010) (stating that "the sentencing court's discretionary determination of the amount of restitution does not constitute an illegal sentence"). Once the time for a direct appeal has run, the Court said, "the defendant is limited to filing a petition to modify restitution (or the plan of restitution) under Iowa Code section 910.7." *Gross*, 935 N.W.2d at 699.

Thus, when challenging a district court's restitution order, there are both substantive and temporal limits on when a claim may be made for the first time on appeal. *See Jose v. State*, 636 N.W.2d 38, 47 (Iowa 2001). And just because the amount of restitution is part of the sentencing order and may be directly appealed, that does not mean that the error preservation rules do not apply. As identified in *Gordon*, there are some sentencing challenges that must be made before the district court before they can be considered on appeal. *Gordon*, 921 N.W.2d at 22-23.

Here, Waigand objected to the district court's restitution order and was granted a hearing. He filed two separate documents outlining his challenges to the court's order and was given the opportunity for argument during the hearing. *See* Objection to Restitution and Request for Hearing; App. 20; Supplement to Objection; App. 22; *See generally*, Restitution Hr'g Tr. This is not the type of alleged sentencing error to which a challenge during the hearing could somehow prejudice the defendant. Waigand had the opportunity to raise this issue before the district court, and he did not do so. Accordingly, error was not preserved. *But see Goodwin v. Iowa District Court for Davis County*, -- N.W.2d --, No. 18-0737, 2019 WL 6973596, at *7-8 (Iowa Dec. 20, 2019) ("A proper motion to challenge an illegal sentence 'includes claims that the court lacked the power to impose the sentence . . ., including claims that the sentence is outside the statutory bounds or that the sentence itself is unconstitutional.").

There is also some question here as to whether this is a sentencing challenge at all. Should the Court conclude that Waigand's objection and request for hearing was made under Iowa Code section 910.7, rather than section 910.3, the district court's subsequent order would no longer be part of sentencing. The challenge would be a civil

matter, without the benefit of constitutionally-effective counsel, and any issues appealed would need to be raised in the district court to be preserved. *See State v. Janz*, 358 N.W.2d 547, 549 (Iowa 1984) (stating that, if "time for appeal from the original judgment of conviction and sentence has expired, the defendant must initially obtain a ruling from the district court on a petition for modification before seeking modification on appeal"). *But see State v. Alspach*, 554 N.W.2d 882, 883-84 (Iowa 1996) (providing for court-appointed counsel so long as the restitution challenge is one under Iowa Code section 910.3, rather than 910.7) *and State v. Blank*, 570 N.W.2d 924, 926 (Iowa 1997) (holding that, "[t]o be considered an extension of the criminal proceedings, . . . the defendant's petition under section 910.7 must be filed within thirty days from the entry of the challenged order").

Anticipating error preservation issues, Waigand alternatively argues that his restitution counsel was constitutionally-ineffective for failing to make the *Apprendi* argument below. *See* Appellant's Brief at 53 & 75-81. Waigand's ineffective-assistance claim is not bound by traditional error-preservation rules. *State v. Ondayog*, 722 N.W.2d 778, 784 (Iowa 2006).

Standard and Scope of Review

Again, the Court reviews restitution claims for errors at law. *See Jenkins*, 788 N.W.2d at 642. It reviews illegal sentence and ineffective-assistance-of-counsel claims de novo. *See State v. Coleman*, 907 N.W.2d 124, 134 (Iowa 2018). This Court can reject Waigand's ineffective-assistance claim on direct appeal without further development of the record.

Merits

A. If the Court reaches the merits, it should join the rest of the courts that have addressed this issue and conclude that the jury-trial right does not apply to restitution.

Waigand contends that the district court erred by determining the amount of restitution he owed based on facts it found rather than those found by a jury. Waigand cannot succeed on this claim, even if the Court does reach the merits.

Waigand's argument is based on the United States Supreme Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Blakely v. Washington*, 542 U.S. 296 (2004); and *Southern Union Co. v. United States*, 567 U.S. 343 (2012). In *Apprendi*, the Supreme Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory

maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. In *Blakely*, the Court clarified that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." 542 U.S. at 303. "In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." *Id.* at 303-04.

In 2012, the Supreme Court extended the rule in *Apprendi* to fines. *See Southern Union Co.*, 567 U.S. at 348-49. The Court found "no principled basis under *Apprendi* for treating criminal fines different" from punishments of "imprisonment or a death sentence." *Id.* at 349. It noted that, "[i]n stating *Apprendi*'s rule, we have never distinguished one form of punishment from another." *Id.* at 350.

Waigand argues that, like fines, imprisonment, or a death sentence, restitution is a form of punishment to which the Sixth Amendment applies. The problem is that every court to squarely address this issue—even since the Supreme Court's decision in *Southern Union Company*—has found that the principle outlined in

Apprendi does not apply to orders of restitution. *See*, *e.g.*, *United States v. Churn*, 800 F.3d 768, 782 (6th Cir. 2015) (holding that the Supreme Court's decision in *Southern Union Company* does not require facts underlying a restitution order to be found by a jury, and noting that "[t]he weight of authority supports [its] conclusion"); *United States v. Bengis*, 783 F.3d 407, 412 (2d Cir. 2015) (joining its "sister circuits in concluding that judicial factfinding to determine the appropriate amount of restitution under a statute that does not prescribe a maximum does not implicate a defendant's Sixth Amendment rights"); *see also*, *e.g.*, *Turner*, 2016 WL 7393894, at *2-3 (rejecting the defendant's argument that *Apprendi* applies to restitution); *State v. Deslaurier*, 371 P.3d 505, 506 (Ore. Ct. App. 2016) (concluding that the *Southern Union Company* decision did not impact its prior precedent that the jury-trial right "does not require a jury determination of the facts underlying restitution"); *State v. Huff*, 336 P.3d 897, 898 (Kan. Ct. App. 2014) (holding that "[b]ecause restitution is neither a penalty nor an increase in a defendant's maximum sentence, . . . *Apprendi* is inapplicable to restitution").

While some circuit courts have concluded that *Apprendi* does not apply to restitution because it is "civil in nature" rather than a criminal punishment, *see Wolfe*, 701 F.3d at 1217 (collecting cases), and others have found *Apprendi* inapplicable to restitution because there is no "statutory maximum" associated with it, *see Churn*, 800 F.3d at 782 and *Bengis*, 783 F.3d at 412-13, every court to address the issue has found a way to distinguish restitution from fines and incarceration and has continued to allow judges to find facts underlying a defendant's restitution order. This Court should do the same and reject Waigand's *Apprendi* argument.

Waigand acknowledges that the Iowa Supreme Court found in *State v. Mayberry*, 415 N.W.2d 644, 647 (Iowa 1987), that a defendant's jury-trial rights do not apply to restitution and that the remainder of the caselaw is not in his favor. He argues instead that "a recent progression of case law from the United States Supreme Court suggests criminal restitution amounts must be supported by jury findings." *See* Appellant's Brief at 53. As set forth above, the Supreme Court's decision in *Southern Union Company* has not had the dramatic impact that some commentators expected, and for good reason. Restitution, unlike fines, is "an odd duck" that does not fall

neatly in either the criminal or civil category. *See Shears*, 920 N.W.2d at 530-31. Its purpose "is said to include protecting the public by compensating victims for criminal activities and rehabilitating the offender by instilling responsibility in the offender." *Id.* at 530. And it "is different from other penal sanctions" because, "[i]n restitution, the criminal actor is forced to confront the effects of his or her wrongdoing." *State v. Wagner*, 484 N.W.2d 212, 215 (Iowa Ct. App. 1992) (stating that, "only in restitution is the criminal actor made to answer directly for the consequences of his or her action").

Although Waigand cites several law review articles highlighting the issue, the only "case" on which he can hang his hat is a dissent from a denial of petition for certiorari. *Hester v. United States*, 139 S. Ct. 509, 509-511 (Jan. 7, 2019) (Gorsuch, J., dissenting from denial of petition for writ of certiorari). For the reasons discussed in every federal circuit case on this topic, that dissent is not convincing; nor is it even persuasive authority. Again, it appears that every court that has squarely addressed the issue has concluded that *Apprendi* does not apply to restitution orders. This Court should conclude the same.

Waigand also argues that, should this Court find that restitution is civil, rather than criminal, the civil jury provisions in Article I,

section 9 of the Iowa Constitution apply to mandate the same result. *See* Appellant's Brief at 70-75. But the Seventh Amendment—on which this Iowa constitutional provision is based—likewise does not apply to restitution because "the Seventh Amendment applies to suits at common law for damages, a class to which restitution orders do not belong." *United States v. Printz*, 594 F. App'x 883, 886 (7th Cir. 2015) (unpublished) (citing *United States v. Bonner*, 522 F.3d 804, 807 (7th Cir. 2008)).

Regardless of whether this Court agrees that defendants have a Sixth or Seventh Amendment right to have a jury find facts supporting a restitution order, however, Waigand still cannot succeed here because the principles of *Apprendi* do not apply to the facts of his case. By pleading guilty to ongoing criminal conduct and accepting the minutes of testimony as true, Waigand admitted to each of the facts supporting the district court's restitution order. Thus, even if this Court were to accept Waigand's argument and extend the jury-trial right to restitution, the result in this case would be the same. For those reasons, this Court should reject Waigand's objections and uphold the district court's restitution order.

B. Nor can Waigand show that his restitution counsel breached an essential duty here because counsel had no duty to make a meritless argument.

Waigand argues in the alternative that his restitution counsel was ineffective for failing to raise the *Apprendi* issue below. *See* Appellant's Brief at 75-81. Waigand contends that counsel's alleged errors resulted in either structural error or caused him prejudice. For many of the same reasons identified in the previous section, Waigand's claim has no merit.

To succeed on a claim of ineffective assistance of counsel, a defendant must show that (1) his counsel failed to perform an essential duty, and (2) counsel's failure resulted in prejudice. *See Carroll*, 767 N.W.2d at 644. If the Court determines that "a claimant has failed to establish either" breach of an essential duty or prejudice, it "need not address the remaining element." *State v. Thorndike*, 860 N.W.2d 316, 320 (Iowa 2015).

In determining whether trial counsel has breached an essential duty, "counsel's performance is measured against the standard of a reasonably competent practitioner with the presumption that the attorney performed his duties in a competent manner." *State v. Dalton*, 674 N.W.2d 111, 119 (Iowa 2004) (quotation omitted); *see*

also Diaz v. State, 896 N.W.2d 723, 728-29 (Iowa 2017) (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)) (stating that, to meet this prong, a defendant must establish that his counsel's "representation 'fell below an objective standard of reasonableness.'").

Waigand cannot show that his restitution counsel breached an essential duty here. Counsel has no duty to pursue a meritless course of action and, as set forth above, an *Apprendi* challenge would not have succeeded here. *See State v. Tompkins*, 859 N.W.2d 631, 637-38 (Iowa 2015). Not only would the district court have concluded that the principles outlined in *Apprendi* and its progeny do not apply to restitution, it would also have found that the question has no impact on Waigand's case. Again, Waigand admitted to each of the facts underlying the district court's restitution order.

Moreover, even if this Court disagrees with the State's position on the *Apprendi* issue, Waigand still cannot show that his restitution counsel's representation fell below an objective standard of reasonableness. As Waigand recognizes, "counsel is not expected to be a 'crystal gazer' who can predict future changes in established rules of law in order to provide effective assistance to a criminal

defendant.'" *See* Appellant's Brief at 76 (citing *State v. Schoelerman*, 315 N.W.2d 67, 72 (Iowa 1982)) (internal marks omitted).

At the time of Waigand's restitution hearing, "established case law in Iowa and the federal circuits had not applied jury trial rights to . . . restitution." *See* Appellant's Brief at 77 (citing *State v. Mayberry*, 415 N.W.2d 644, 647 (Iowa 1987) and Cortney E. Lollar, *What is Criminal Restitution?*, 100 Iowa L. Rev. 93, 150 (Nov. 2014)). To perform within the standard of a reasonably competent practitioner, counsel is not required to familiarize himself with every legal argument identified in the "academic commentary." *See* Appellant's Brief at 77. Nor must he seize on every discussion in dicta about interesting legal issues not raised by the parties. *See Jenkins*, 788 N.W.2d at 643. Counsel here was simply not required to anticipate that the Iowa Supreme Court would go against the overwhelming authority and conclude that *Apprendi* trial rights apply to restitution. For all of those reasons, Waigand cannot demonstrate that his restitution counsel breached an essential duty.

That alone is enough to allow the Court to reject Waigand's ineffective assistance claim. Should it reach the prejudice prong, however, it should conclude that structural error does not apply here.

Structural errors are those that "'affect[] the framework within which the trial proceeds.'" *Lado v. State*, 804 N.W.2d 248, 252 (Iowa 2011) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)). Under these limited circumstances, the defendant is not required to specifically show prejudice because "the criminal adversary process itself is 'presumptively unreliable.'" *Id.* (quoting *United States v. Cronic*, 466 U.S. 648, 658 (1984)).

As the United States Supreme Court has held and again, as Waigand admits, "[f]ailure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error." *Washington v. Recuenco*, 548 U.S. 212, 218-222 (2006); *see* Appellant's Brief at 80-81. Thus, to succeed on his ineffective-assistance claim here, Waigand must show that he suffered prejudice as a result of counsel's alleged errors.

To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *See Coleman*, 907 N.W.2d at 141-42. "Reasonable probability" means "a probability sufficient to undermine confidence in the outcome." *Ledezma v. State*, 626 N.W.2d 134, 143 (Iowa 2001) (quotation omitted).

Waigand cannot make that showing here because a jury reviewing the evidence that was before the district court would have come to the same conclusion as to restitution. The bank's nearly one-million-dollar loss is supported by the minutes of testimony, the trial information, the bank representatives' testimony at sentencing and during the restitution hearing, the financial statement submitted at the restitution hearing, and the record of the foreclosure action, of which the court took judicial notice. On these facts, Waigand is unable to prove that he was prejudiced as a result of counsel's alleged errors. Waigand has not met his burden of demonstrating that he received ineffective assistance of counsel here.

IV. Waigand's restitution counsel had no duty to raise an equitable estoppel claim because such an argument would have been meritless.

Preservation of Error

Finally, Waigand contends that his restitution counsel provided constitutionally-ineffective assistance for failing to argue that the doctrine of equitable estoppel limited the State to the amount of restitution discussed during Waigand's plea proceedings.

As set forth above, this claim is not bound by traditional error-preservation rules. *Ondayog*, 722 N.W.2d at 784 (Iowa 2006).

Standard and Scope of Review

This Court reviews ineffective-assistance-of-counsel claims de novo. *Coleman*, 907 N.W.2d at 134. The record here is sufficient to reject Waigand's claim on direct appeal.

Merits

Waigand argues that his restitution counsel failed to perform an essential duty by neglecting to argue that equitable estoppel barred the State from requesting an amount of restitution that was higher than that contemplated during the plea proceedings. Because restitution counsel had no duty to make this meritless argument, Waigand cannot meet his burden here. *See Tompkins*, 859 N.W.2d at 637-38.

"Equitable estoppel is a common-law affirmative defense 'preventing one party who has made certain representations from taking unfair advantage of another when the party making the representations changes its position to the prejudice of the party who relied upon the representations.'" *Markey v. Carney*, 705 N.W.2d 13, 21 (Iowa 2005). The party raising the defense has the burden to prove, by clear and convincing evidence, "(1) a false representation or concealment of material facts; (2) lack of knowledge of the true facts

on the part of the actor; (3) the intention that it be acted upon; and (4) reliance thereon by the party to whom made, to his prejudice and injury." *Id.* (quotation and citation omitted).

There are several reasons why an equitable estoppel argument would have been meritless in this case. To start, as Waigand acknowledges, the doctrine does not generally apply to government actors. *Bailiff v. Adams County Conference Bd.*, 650 N.W.2d 621, 627 (Iowa 2002). Courts "have held that the doctrine of estoppel may be raised against the government only if, in addition to the traditional elements of estoppel, the party raising the estoppel proves affirmative misconduct or wrongful conduct by the government or a government agent." *Poyner v. Iowa Dist. Court, Montgomery Cty.*, No. 02-1349, 2003 WL 21543536, *1 (Iowa Ct. App. July 10, 2003) (quotation omitted). Waigand makes no such showing of affirmative misconduct here, nor can he.

Waigand argues instead that the State, having promised to ask for a certain amount of restitution—an amount that Waigand contends induced him to plead guilty—cannot later ask the court for a larger amount. Waigand overstates the State's representations during the plea proceedings. At the plea hearing, the State told the district

court that there was "no specific agreement as to the ultimate sentence . . . ." Plea Hr'g Tr. 2:19-25. The State went on to say that there would "be some potential questions regarding restitution," and that it was the State's position that restitution would be at least $270,000. Plea Hr'g Tr. 3:1-11. Although the State was clear that it would request at least that amount, it never agreed to be bound by that number. Waigand agreed that the State "correctly set forth" the parties' agreement and that "some detailed arithmetic" would need "to be done regarding restitution." Plea Hr'g Tr. 4:5-10.

Nor can Waigand demonstrate that he lacked knowledge of the true facts. The bank already had a civil judgment against him for nearly one million dollars; indeed, he likely knew the full extent of the bank's loss before the State did. And the minutes of testimony made clear that "there remain[ed] an unsatisfied amount/balance due in the approximate amount of one million dollars ($1,000,000.00)." Minutes of Testimony; Conf. App. 108.

Finally, and perhaps most importantly, any reliance on Waigand's part was improper. As was outlined during his plea colloquy, the district court was not bound by the parties' sentencing agreements, to the extent there were any. Plea Hr'g Tr. 8:7-11; 8:25-

9:8; *see State v. Wenzel*, 306 N.W.2d 769, 771 (Iowa 1981); Iowa R. Crim. P. 2.10. There are some instances in which the State could be bound by its initial restitution calculation. For example, in *State v. Wagner*, the State agreed during a pretrial hearing convened for the purpose of determining the defendant's restitution payment that it would request restitution in the amount of $109,000. 484 N.W.2d 212, 217 (Iowa 1992). The State agreed again at trial to be bound by that amount. *Id.* Then, after hearing the evidence, the district court ordered $1,000,000 in restitution. *Id.*

The Court of Appeals reversed the court's order, stating that, although the district court "generally is not bound, unless it agrees, to the State's recommendation on sentencing[,]" here the State told the court and the defendant the "precise amount" of restitution it was seeking, and the court included the number in an order. *Id.* at 217-18. In such a case, the court held, the district court "abused its discretion by imposing a higher amount of restitution than the State had stipulated to . . . ." *Id.* at 218.

Unlike in *Wagner*, the parties here never came to an agreement as to the amount of restitution for which Waigand would be liable. Nor did the State make an affirmative statement as to the final

restitution amount until the sentencing hearing. In short, Waigand cannot show that he justifiably relied on the preliminary number the State provided during the plea hearing. For all of those reasons, any equitable estoppel argument would have been meritless, and Waigand's ineffective-assistance claim must fail.

CONCLUSION

For all the reasons set forth above, the State respectfully requests that this Court affirm the district court's restitution order.

REQUEST FOR NONORAL SUBMISSION

The State requests that this case be submitted without oral argument. Should the Court grant oral argument, the State asks to be heard.

Respectfully submitted,

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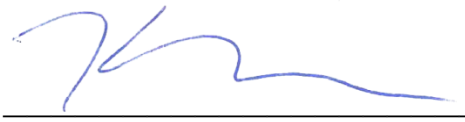
Attorney General of Iowa



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CERTIFICATE OF COMPLIANCE

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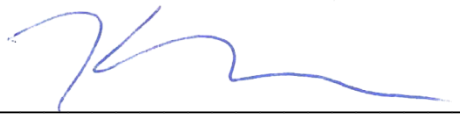

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