IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. ERICA WEST VANGEN, Defendant-Appellant.	SUPREME COURT NO. 20-1647

APPEAL FROM THE IOWA DISTRICT COURT
FOR LINN COUNTY
HONORABLE RUSSELL G. KEAST, ASSOCIATE JUDGE

APPELLANT'S BRIEF AND REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF SERVICE

On the 26th day of October, 2021, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Erica West Vangen, P.O. Box 517, Vinton, IA 52349.

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ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because this case involves two issues of first impression in Iowa. R. App. P. 6.903(2)(d) and 6.1101(2)(c). Specifically, this case challenges the constitutionality of last year's amendments to Iowa Code chapter 910's restitution recoupment scheme. See 2020 Iowa Acts ch. 1074, Div. XIII. Further, this appeal challenges the constitutionality of recently enacted Iowa Code section 814.28 purporting to prohibit the appellate courts from reversing a conviction based on a general verdict "on the basis of a defective or insufficient theory if one or more of the theories presented and described in the complaint, information, indictment, or jury instruction is sufficient to sustain the verdict on at least one count."

STATEMENT OF THE CASE

Nature of the Case: Erica West Vangen appeals her conviction, judgment and sentence for fourth degree criminal mischief, a serious misdemeanor in violation of Iowa Code

sections 716.1. 716.6(1)(a)(1), 716.6(1)(b), and 703.1 (2019) following a jury trial in the Linn County District Court.

Course of Proceedings: The State charged Erica West Vangen with criminal mischief in the fourth degree. (Trial Information) (App. pp. 5-7). West Vangen pled not guilty and the case proceeded to a jury trial. (Written Arraignment; Trial Tr. Day 1, p. 1) (App. p. 8).

The court entered a notice advising West Vangen that the court would presume she had the reasonable ability to pay Category B restitution if she did not request the court determine whether she had that ability and she would lose any chance to challenge her ability to pay Category B restitution in full. (Notice Regarding Restitution) (App. pp. 9-11).

The State amended the trial information to include an aiding and abetting theory, and the trial information was approved. (Motion to Amend; Amended Trial Information; Order Approving Trial Information) (App. pp. 12-15).

A jury convicted West Vangen as charged. (Order following Verdict) (App. pp. 26-27). The district court sentenced West Vangen to 30 days in jail, but suspended the term and placed her on unsupervised probation for two years. (Judgment and Sentence) (App. pp. 28-29). The court assessed all costs and attorney fees against West Vangen without making a finding that she had the reasonable ability to pay and ordered that she pay all sums ordered as a condition of her probation. (Sentencing Tr. p. 8 L. 20 – p. 9 L. 17). In the court's written sentencing order, the court found West Vangen had not shown by a preponderance of the evidence that she lacked the reasonable ability to pay all applicable Category B costs. (Judgment and Sentence) (App. pp. 28-29).

West Vangen filed a timely notice of appeal. (Notice of Appeal) (App. pp. 30-31).

Facts: On the morning of March 30, 2020, Jonnae Cole's Buick Rendezvous was parked on the street in front of the home she shared with her mother, Monick Williams and Monick's

husband, Alex. (Trial Tr. Day 1 p. 10 L. 7 – 24; p. 27 L. 7-23). At about 4:00am, Monick and Alex used the Rendezvous to pick up Alex's friend because Alex was receiving threats from someone named Yayo. When they returned at 5:19am, they parked the car in the street in front of the house. (Trial Tr. Day 1, p. 16 L. 17-23; p. 28 L. 1 – p. 29 L. 5). Shortly after, the car was vandalized. The two driver's side windows were shattered, the driver's side mirror was broken, and the front driver's side tire was slashed. (Trial Tr. Day 1 p. 11 L. 15-24; p. 29 L. 6 – p. 30 L. 6; State's Exs. 1 and 6) (App. pp. 16-17). A neighbor's security camera captured the incident. (Trial Tr. Day 1, p. 46 L. 7 – p. 47 L. 22; State's Ex. 13).

When the damage was discovered later that morning, Monick suspected Erica West Vangen as the culprit. Alex had had a brief extramarital relationship with West Vangen, and Monick testified that West Vangen had confronted them about the affair recently. (Trial Tr. Day 1 p. 32 L. 23 – p. 36 L. 15).

West Vangen testified that Alex owed her about $200 from when he had stayed with her previously. (Trial Tr. Day 1, p. 81 L. 12 – p. 82 L. 6). However, she denied causing any damage to the car. She testified that a mutual acquaintance named Yayo was at her house that night. Throughout the night and into the morning of March 30, 2020, her husband and Yayo were messaging with Alex. (Trial Tr. Day 1, p. 79 L. 6 – p. 80 L. 20). In the early morning, Yayo and her husband told West Vangen to come along with them to get the money Alex owed her. (Trial Tr. Day p. 81 L. 11-17; p. 82 L. 16 – p. 83 L. 4). They all got in her car: West Vangen driving, her husband in the passenger seat and Yayo in the backseat. (Trial Tr. Day 1 p. 84 L. 8-10). She pulled up in front of Monick and Alex's house, and Yayo told her to stop on the street near the Rendezvous. "The next thing I know he's out and all I see is bashing." Yayo had gotten out of the car and hit the Rendezvous repeatedly with a baseball bat while her husband got out of the passenger side of the car and stabbed the tire of the Rendezvous. (Trial

Tr. Day 1 p. 83 L. 25 – p. 85 L. 20). She testified that she did not cause any damage to the car, nor did she know or intend that that anyone else would damage the car. (Trial Tr. Day 1, p. 83 L. 85 L. 14-20; p. 89 L. 14 – p. 90 L. 9).

Cedar Rapids Police Officer Tyler Richardson investigated the incident. After interviewing Jonnae and Monick and Alex Williams, he took photos of the damaged car and determined that the incident was recorded by a security camera on a neighbor's house. (Trial Tr. Day 1, p. 43 L. 10-14; p. 45 L. 11 – p. 47 L. 16; State's Ex. 13). He eventually interviewed West Vangen. (Trial Tr. Day 1, p. 50 L. 5 – p. 51 L. 4). During the interview, she initially denied having any involvement in the incident, but later admitted that she drove the car. She did not mention that Yayo was in the car with them. She, however, consistently and adamantly denied causing any of the damage to the Rendezvous. (Trial Tr. Day 1, p. 56 L. 7-24; State's Ex. 14). The officer located her car and confirmed it was consistent with the car seen in the surveillance video. He also found a

small baseball bat behind the driver's seat. (Trial Tr. Day 1, p. 51 L. 5 – p. 52 L. 11).

ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT ERICA WEST VANGEN'S CONVICTION AS EITHER A PRINCIPAL OR AS AN AIDER AND ABETTOR.

A. Error Preservation. To preserve error on a sufficiency-of-the-evidence claim, defendants are generally expected to make a motion for judgment of acquittal which "identif[ies] specific elements of the charge not supported by the evidence." State v. Albright, 925 N.W.2d 144, 150 (Iowa 2019). Error was preserved when West Vangen moved for judgment of acquittal at the close of the State's evidence. She argued that the evidence did not establish that "the driver of vehicle got out – got out of the vehicle, despite the insistence of Officer Richardson; that there is no physical evidence, no fingerprints or anything along those lines, that would tie Ms. Vangen to the event." (Trial Tr. Day 1, p. 73 L. 24 – p. 74 L. 9). The court denied the motion without asking the State for a response. (Trial Tr. Day 1 p. 74 L. 12-15).

At the close of the defense's presentation of evidence, the motion was renewed. (Trial Tr. Day 2, p. 38 L. 22-25). The motion was again denied, without argument from the State. (Trial Tr. Day 2, p. 39 L. 1-5).

Although trial counsel never specifically mentioned the lack of evidence supporting an aiding and abetting theory, the court "recognize[s] an exception to the general error-preservation rule when the record indicates that the grounds for a motion were obvious and understood by the trial court and counsel." State v. Williams, 695 N.W.2d 23, 27 (Iowa 2005). When the "fighting issue at trial" is obvious and the trial record "clearly reveals the trial court and counsel understood" the target of the motion for judgment of acquittal, error is preserved. Williams, 695 N.W.2d at 28. In this case, just as in Williams, the fighting issue was clear throughout trial. The defense conceded West Vangen drove the car and was present the morning when the Rendezvous was damaged. (Trial Tr. Day 2, p. 52 L. 4 – p. 53 L. 8) (closing argument)). The disagreement

at trial was whether West Vangen stayed in the car during the attack or participated in the vandalism and whether, if she stayed in the car, she knew that her husband and Yayo were planning when she drove them to the house. (Trial Day 2, p. 53 L. 9 – p. 55 L. 10; p. 55 L. 16-21; p. 56 L. 3-11; p. 56 L. 12-23) (closing argument)). Accordingly, error has been preserved on West Vangen's claim that the evidence was insufficient on both theories of liability.

B. Standard of Review. Challenges to the sufficiency of evidence are reviewed for errors at law. State v. Folkers, 941 N.W.2d 337, 338 (Iowa 2020). "Evidence is sufficient to support a conviction if, viewing it in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Polly, 657 N.W.2d 462, 467 (2003). The court will consider "all of the evidence presented at trial, not just evidence that supports the verdict." State v. Kemp, 688 N.W.2d 785, 789 (Iowa 2004).

C. Discussion. The appellate court will uphold a verdict "if substantial record evidence supports it." State v. Nitcher, 720 N.W.2d 547, 556 (Iowa 2006). "Evidence is considered substantial if, when viewed in the light most favorable to the State, it can convince a rational jury that the defendant is guilty beyond a reasonable doubt." State v. Sanford, 814 N.W.2d 611, 615 (Iowa 2012).

1. *Evidence as a principal*. To convict West Vangen of criminal mischief as a principal, the State had to prove that West Vangen "did an act . . . that damaged a vehicle belonging to Jonnae Cole"; that she did the act "with the specific intent to damage the property"; and she did not have the right to do so. (Jury Instr. No. 12) (App. p. 23). In this case, the evidence was insufficient to prove that West Vangen did an act that damaged Jonnae Cole's vehicle.

West Vangen admitted that she transported the two men who damaged Cole's car, but denied having any knowledge of their intent to damage the car until she saw them in the act.

(Trial Tr. Day 1, p. 56 L. 7-24; p. 79 L. 6 – p. 85 L. 20; State's Ex. 14 at 3:58 – 5:50; 8:03 – 8:19; 12:25 – 13:35). The neighbor's surveillance video provided the only "eyewitness" account of the incident. (State's Ex. 13; Trial Tr. Day 1, p. 20 L. 23 – p. 21 L. 4; p. 29 L. 10-22).

The video shows West Vangen's car pull up next to Cole's car and a man get out of the front passenger seat, run around to Cole's car, puncture the tire, and get back in West Vangen's car. (State's Ex. 13 at 0:06 – 0:19).

The video also shows someone on the driver's side hitting Cole's car with what is presumed to be a baseball bat. (State's Ex. 13 at 0:10-0:25). The State alleged this was West Vangen. The video is too grainy to make out much about this person, but the video does show that the brake lights remained illuminated on West Vangen's car throughout the incident, meaning the driver must have remained seated with her foot depressing the brake pedal throughout the incident. (State's Ex. 0:03 - 0:23; Trial Tr. Day 2 p. 14 L. 25 – p. 17 L. 21; p. 32 L. 1 – 12; p. 32 L.

23 – p. 33 L. 12). Thus, West Vangen, as the driver, could not have been the person actually damaging Cole's car. Therefore, the State's evidence was insufficient to support a verdict against West Vangen as a principal, and the district court erred in denying West Vangen's motion for judgment of acquittal.

2. *Evidence of aiding and abetting*. To prove West Vangen guilty of aiding and abetting criminal mischief, the State had to establish West Vangen aided and abetted another in committing an act that damaged Cole's vehicle; she acted with the specific intent to damage the vehicle; and she did not have the right to do so. (Jury Instr. No. 10) (App. p. 21). To establish she aided and abetted, the State must have shown that she "knowingly approve[d] and agree[d] to the commission" of the crime, "either by active participation in it or by knowingly advising or encouraging the act in some way before or when it is committed." (Jury Instr. No. 12) (App. p. 23). "Mere nearness to, or presence at, the scene of the crime, without more evidence, is not 'aiding and abetting'." Likewise, mere

knowledge of the crime is not enough to prove aiding and abetting. (Jury Instr. No. 12) (App. p. 23). See also State v. Hearn, 797 N.W.2d 577, 580 (Iowa 2011).

"To sustain a conviction under a theory of aiding and abetting, 'the record must contain substantial evidence the accused assented to or lent countenance and approval to the criminal act by either actively participating or encouraging it prior to or at the time of its commission.' " Hearn, 797 N.W.2d at 580 (Iowa 2011) (quoting State v. Ramirez, 616 N.W.2d 587, 591-92 (Iowa 2000)).

As described above, West Vangen admitted she drove the car that transported the two men who damaged Cole's car. However, she consistently denied knowing of their plan until she saw them in the act. (Trial Tr. Day 1, p. 56 L. 7-24; p. 79 L. 6 – p. 85 L. 20; State's Ex. 14 at 3:58 – 5:50; 8:03 – 8:19; 12:25 – 13:35). She explained that she was told they were driving to the Williams' house to collect the money that Alex Williams owed her. (Trial Tr. Day p. 81 L. 11-17; p. 82 L. 16 –

p. 83 L. 4). The existence of this debt was confirmed by Alex's wife, Monick. (Trial Tr. Day 1, p. 32 L. 23 – p. 33 L. 15; p. 40 L. 25 – p. 41 L. 10). Monick also confirmed that Yayo and Alex texted throughout the night and made no claim that West Vangen was involved in the messaging. (Trial Tr. Day 1, p. 28 L. 1 – p. 29 L. 1; p. 38 L. 5-14). Accordingly, the circumstantial evidence that West Vangen knew and lent countenance to the plan to damage the car amounts to mere speculation and conjecture. It is insufficient to sustain her conviction under an aiding and abetting theory.

D. Remedy. Because the evidence was insufficient under both theories of liability submitted to the jury, West Vangen's conviction should be vacated and her case remanded for dismissal. However, if the court concludes only one theory was unsupported by the evidence, West Vangen's conviction should be vacated and her case remanded for a new trial.

The jury instructions did not require the jury to indicate which theory of culpability supported the guilty verdict, there is

no way to know which theory they relied on. (Forms of Verdict) (App. pp. 24). "[U]nanimity of the jury as to the mode of commission of the crime is not required" and submission of multiple alternatives to the jury is permissible *only* "[i]f substantial evidence is presented to support *each* alternative method of committing a single crime." State v. Bratthauer, 354 N.W.2d 774, 776 (Iowa 1984) (emphasis in original). (Jury Instr. No. 8 – Alternative Theories) (App. p. 20). Accordingly, West Vangen's conviction should be vacated and her case remanded for a new trial. See State v. Tyler, 873 N.W.2d 741, 753–54 (Iowa 2016) (holding reversal of a general verdict is appropriate when not all theories are supported by sufficient evidence). See also State v. Hogrefe, 557 N.W.2d 871, 881 (Iowa 1996) (reversing and remanding for a new trial where general verdict was returned on marshalling instruction which allowed jury to consider three theories of culpability, only one of which was supported by the evidence).

Recently enacted section 814.28 does not prevent the court from reversing and remanding West Vangen's case in these circumstances because the law which purports to prohibit appellate courts from providing a remedy for insufficiently supported general verdicts is unconstitutional.

Both the United States Supreme Court and the Iowa Supreme Court have addressed the topic of general verdicts involving alternative theories. Their approaches have varied.

In Griffin v. United States, the U.S. Supreme Court held that due process was not violated when the jury returned a general verdict involving alternative theories, one of which was not supported by sufficient evidence. Griffin v. United States, 502 U.S. 46 (1991). The Court recognized that the common law recognized a general verdict as valid "so long as it was legally supportable on one of the submitted grounds—even though that gave no assurance that a valid ground, rather than an invalid one, was actually the basis for the jury's action." Id. at 49. The Court declined to recognize a ground for reversal where the

general verdict was not potentially based on a legally insufficient ground but on a factually insufficient ground. Id. at 56, 58-59. The jury was presumed to understand whether a theory was factually sufficient or insufficient, but not whether a theory was legally inadequate. Id. at 59.

The Iowa Supreme Court, meanwhile, has historically reversed convictions involving general verdicts regardless of whether the alternate theory in question was legally or factually insufficient. See, e.g., State v. Neff, 228 Iowa 383, 291 N.W. 415 (1940); State v. Mays, 204 N.W.2d 862 (Iowa 1973); State v. Hogrefe, 557 N.W.2d 871 (Iowa 1996); State v. Martens, 569 N.W.2d 482 (Iowa 1997); State v. Heemstra, 721 N.W.2d 549 (Iowa 2006). In State v. Mays, for example, the Iowa Supreme Court found the giving of an aiding and abetting instruction to be prejudicial where there was no indication anyone else was involved in the crime. State v. Mays, 204 N.W.2d 862, 864-65 (Iowa 1973) ("an instruction submitting an issue unsubstantiated by evidence is generally prejudicial").

The Iowa Supreme Court described its differing approach to general verdicts in State v. Taylor:

> Griffin of course is binding on us to the extent it describes a federal due process minimum. However, the Griffin Court also stated that "if the evidence is insufficient to support an alternative legal theory of liability, it would generally be preferable for the court to give an instruction removing that theory from the jury's consideration." Id. at 60, 112 S.Ct. at 474, 116 L.Ed.2d at 383. And, as a matter of sound judicial administration, we have decided to go in a different direction in Iowa. In State v. Hogrefe, 557 N.W.2d 871, 881 (Iowa 1996), we reversed for a new trial when the jury returned a general verdict and not all the theories were supported by substantial evidence. We explained,
>
> > What we have then is a marshalling instruction that allows the jury to consider three theories of culpability, only one ... of which is supported by the evidence. With a general verdict of guilty, we have no way of determining which theory the jury accepted. Because there was insufficient evidence to support an instruction to consider all the checks, the district court erred in giving the marshalling instruction.
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> Id.; see also State v. Thorndike, 860 N.W.2d 316, 321 (Iowa 2015) (collecting cases). This is our precedent and we see no reason to overturn it.

State v. Taylor, 873 N.W.2d 741, 754 (Iowa 2016). The Court noted it was not alone among states in broadening the protections for defendants who received general verdicts. Id. at 754 n.11.

The Iowa Supreme Court has made the determination as a matter of "sound judicial administration" that it will reverse general verdicts where one of the theories presented to the jury lacks factual support. Newly enacted Iowa Code section 814.28 purports to take that authority away from the Court:

> When the prosecution relies on multiple or alternative theories to prove the commission of a public offense, a jury may return a general verdict. If the jury returns a general verdict, an appellate court shall not set aside or reverse such a verdict on the basis of a defective or insufficient theory if one or more of the theories presented and described in the complaint, information, indictment, or jury instruction is sufficient to sustain the verdict on at least one count.

Iowa Code § 814.28 (2019).

This provision violates the Iowa Constitution by violating the separation of powers, equal protection, and due process.

1. Separation of Powers. The Iowa Constitution provides that "The supreme court . . . *shall* exercise a supervisory and administrative control over all inferior judicial tribunals throughout the state." Iowa Const. art. V § 4.

The rule in Tyler has been judicially employed in Iowa since at least 1888. See Fisk v. Chicago Ry., 74 Iowa 424 (Iowa 1888); Gordon v. Noel, 356 N.W.2d 559, 565 (Iowa 1984); State v. Shorter, 893 N.W.2d 65, 76 (Iowa 2017). The longstanding rule has been employed "as a matter of sound judicial administration" when error in a general jury verdict undermines the reliability of the outcome in the district court proceeding warranting a new trial. State v. Tyler, 873 N.W.2d 741, 754 (Iowa 2016). It therefore falls squarely within the Supreme Court's constitutional power and duty[1] to "exercise supervisory

[1] Originally, the Iowa Constitution stated only that the Supreme Court "shall have *power* to… exercise a supervisory control" over inferior courts. Iowa Const. Art. V § 4 (1857). But a 1962 amendment made explicit that the Supreme Court has not only a power but also a *duty* to exercise supervisory (and now also administrative) control over inferior courts. Const. Art. V § 4 (1962) ("*shall* exercise a supervisory and administrative").

and administrative control over all inferior judicial tribunals throughout the state." Iowa Const. art. V § 4. Such a rule, pronounced by our Court pursuant to its constitutionally conferred supervisory power and responsibility, cannot be abrogated by legislative enactment.

The Iowa Supreme Court held as much in Frink v. Clark, 285 N.W. 681, 684 (1939). There, the Court recognized the legislature could not abrogate a purely court-based rule of immunity from service of process for nonresidents attending Iowa judicial proceedings. The Court had repeatedly declined to abandon that court-based rule, stating it was "so conducive to the proper administration of justice that we are not disposed to overrule it." Id. (quoting Moseley v. Ricks, 274 N.W. 23, 24 (1937)). When the legislature responded by enacting a statute to abolish the court-based rule, the Court held:

Unlike the preceding clause (which is separated by a semicolon), the constitutionally conferred power and duty to exercise supervisory and administrative control over inferior courts is not qualified by the phrase "under such restrictions as the general assembly may, by law, prescribe." Iowa Const. art. V § 4.

> [I]t is readily apparent that said section is unconstitutional and void. The decision, as to the validity of service of process, properly challenged because of immunity extended to a non-resident litigant while in attendance at the trial of a case in which he was a defendant, is a judicial function. The legislature is without power to control the exercise of such function by the courts. When it undertook to dictate to the courts what the decision should be in cases pending before the statute was enacted, it assumed to exercise power that it does not possess.

Id. at 685. It would appear that the constitutional infirmity in Frink was not just the retroactive application of the statute to already pending cases, but more fundamentally the legislative retraction of the longstanding court-based rule grounded in the judiciary's concern for the "proper administration of justice." The 1937 statute was invalidated in Frink, and the court-based rule concerning immunity from service continued to apply in future cases. See LaRose v. Curoe, 343 N.W.2d 153 (Iowa 1983).

Further, the statute seeks to limit only what the appellate court can do, but does not affect the district court. Even after the amendment, district courts may grant new trials following

general verdicts on both supported and unsupported alternatives. Iowa R. Crim. P. 2.24. Error may exist in the district court's determination of whether to grant a new trial following a general verdict. Pursuant to its supervision of inferior courts, the Supreme Court has the responsibility to determine whether such error exists and also whether a new trial remedy is warranted. The same is also true as to any error underlying the district court's submission of the factually unsupported alternative to the jury in the first place.

Courts have inherent power to grant a new trial when, in their judgment, justice has not been done. Hensley v. Davison Bros., Co., 135 Iowa 106, 112 N.W. 227, 227–28 (1907). To "set aside or vacate a judgment" is "a judicial function, to be exercised by the courts," not the legislature. State v. Prouty, 84 N.W. 670, 673 (1900). Both constitutionally and statutorily, the Iowa Supreme Court is "a court for the correction of errors at law." Iowa Const. Art I § 4; Iowa Code §§ 602.4102, 602.5103 (2019). The determinations of when

error exists, and how it may be corrected on appeal, are fundamentally judicial functions.

A statutory enactment which "prescribe[s] a rule for the decision of a cause in a particular way" necessarily violates separation of powers in encroaching upon the judiciary. United States v. Klein, 80 U.S. 128, 146 (1871). The legislature cannot inflict upon the appellate courts the legislature's own "arbitrary rule of decision" under which "the court is forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely contrary." Id. at 147. See also State v. Abrahamson, 696 N.W.2d 589, 593 (Iowa 2005); State ex rel. Allee v. Gocha, 555 N.W.2d 683, 685 (Iowa 1996); Richardson v. Fitzgerald, 109 N.W. 866, 867 (1906).

Insofar as Section 814.28 now directs the appellate court to withhold relief for general verdict error in a lower court proceeding—without or in spite of the appellate court's own assessment of whether such error may have prejudiced the

litigant—it amounts to a legislative encroachment on the inherent power of the judiciary. The determination of whether a trial court error arising from a general verdict warrants an appellate remedy must be that of the appellate courts and not the legislature. State v. Abrahamson, 696 N.W.2d at 593 (judgment exercised "must be that of the court – not the sheriff").

2. Equal Protection. Iowa Code section 814.28 violates equal protection by treating persons who are similarly situated with respect to the purposes of the law differently. U.S. Const. amend. XIV; Iowa Const. art. I § 6; State v. Doe, 927 N.W.2d 656, 662 (Iowa 2019); Varnum v. Brien, 763 N.W.2d 862, 883 (Iowa 2009).

The Iowa Supreme Court's rule concerning new trials following general verdicts with factually flawed alternatives applies in the context of civil, as well as criminal, cases. See Fisk, 74 Iowa at 432-34 (Iowa 1888); Alcala v. Marriott Int'l, 880 N.W.2d 699, 710 (Iowa 2016). However, Section 814.28 seeks

only to prohibit the granting of relief in the context of criminal cases, leaving the more protective rule intact as to general verdicts in civil cases. But, if anything, due process requires greater protection in the criminal context than in the civil context.

The right to not be convicted on an unsupported alternative and the right to be free from bodily restraint are both fundamental rights. In re Winship, 397 U.S. 358, 364 (1970); State v. Hernandez-Lopez, 369 N.W.2d 226, 238 (Iowa 2002). Strict scrutiny should thus apply. But regardless of whether strict or only rational basis scrutiny is applied, the statute cannot stand.

The U.S. Supreme Court's rule in Griffin, drawing a distinction between legally unsupported alternatives and factually unsupported alternatives, is grounded in the notion that there is a risk jurors may convict on legally flawed alternatives but no risk that jurors will convict on factually unsupported alternatives. Griffin v. United States, 502 U.S.

46, 59-60 (1991). If this understanding of jurors is accurate, it applies equally both to criminal and civil cases. But section 814.28 abrogates the general verdict rule only in criminal cases. Criminal and civil litigants are similarly situated concerning the risk that a general jury verdict may have rested on the factually unsupported alternative rather than the properly submitted alternatives. And, if anything, criminal defendants are entitled to greater protection than are civil litigants against the danger the jury may have relied on the factually unsupported alternative. Behm v. City of Cedar Rapids, 922 N.W.2d 524, 566 (Iowa 2019); see also State v. Jones, 29 P.3d 351, 370 (Haw. 2001) (rejecting Griffin; "If a person is to be incarcerated, ... in fairness there must be evidentiary support for each theory of guilt on which the judge tells the jury they may find the defendant guilty.") (quoting Com. v. Plunkett, 664 N.E.2d 837 (Mass. 1996)). Yet, section 814.28 specifically alters the rule to provide less protection to criminal litigants affected by general verdict errors than to civil litigants affected by the same

errors. This distinction survives neither strict scrutiny nor rational basis review.

3. Due Process. Griffin's assumption that jurors would never convict on a factually unsupported theory is plainly contravened by a multitude of cases wherein convictions have been reversed on appeal despite the submission of only one alternative to the jury (which alternative, it is determined, was actually unsupported and rested only on speculation or conjecture). See e.g., State v. Brubaker, 805 N.W.2d 164, 173 (Iowa 2011); State v. Reed, 875 N.W.2d 693, 708–09 (Iowa 2016); State v. Truesdell, 679 N.W.2d 611, 619 (Iowa 2004).

Note also that Iowa's approach to general verdicts is not to automatically reverse but, rather, to undertake a prejudice inquiry – requiring non-harmlessness for preserved error, and Strickland prejudice for unpreserved error. See State v. Thorndike, 860 N.W.2d 316, 320–23 (Iowa 2015) (ineffective); State v. Shorter, 893 N.W.2d 65, 72–73 (Iowa 2017) (harmlessness). Griffin and Section 814.28, on the other hand,

create an irrebuttable presumption that a general verdict is proper and grounded only on the factually supported alternative, without allowing for any judicial evaluation of whether the trial record reveals a danger that jurors may have relied on the unsupported alternative. This does not comport with due process. U.S. Const. amend XIV; Iowa Const. art. I § 9.[2]

Griffin "describes a federal due process minimum." State v. Tyler, 873 N.W.2d 741, 754 (Iowa 2016). But a different approach is proper under the Iowa Constitution and is supported by our Court's longstanding adherence to the Tyler rule to protect litigants from general verdicts resting on

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2. Notably, Iowa Code section 814.28 appears to suggest that a reversal of a general verdict would be prohibited so long as a factually-supported theory was presented in the complaint, information, or indictment. Iowa Code § 814.28 (2019). This specific language in the statute is facially unconstitutional, as a defendant's guilt for any offense must be proven beyond a reasonable doubt and found by a jury. Mussachio v. United States, 136 S.Ct. 709, 715 (2016); State v. Lewis, 242 N.W.2d 711, 719 (Iowa 1976). This language is not implicated in West Vangen's case, however, as the jury was actually instructed on both alternative theories.

unsupported alternatives. See Fisk v. Chicago Ry., 74 Iowa 424, 432-34 (Iowa 1888); Gordon v. Noel, 356 N.W.2d 559, 565 (Iowa 1984); State v. Tyler, 873 N.W.2d 741, 754 (Iowa 2016). See also State v. Jones, 29 P.3d 351, 371 (Haw. 2001) (rejecting Griffin under state Constitution); State v. Ortega-Martinez, 881 P.2d 231, 235 (Wash. 1994) (same).

Because Iowa Code Section 814.28 violates the Iowa Constitution, it should not be considered in determining whether West Vangen is entitled to relief on appeal.

E. Conclusion. Because the evidence was insufficient under both theories of liability submitted to the jury, West Vangen's conviction should be vacated and her case remanded for dismissal. However, if the court concludes only one theory was unsupported by the evidence, West Vangen's conviction should be vacated and her case remanded for a new trial.

II. The district court erred in assessing against West Vangen category B restitution without considering her reasonable ability to pay.

A. Preservation of Error. West Vangen did not object the imposition of category B restitution in the district court. Nor did she challenge the Iowa Code section 910.2A which declares that an offender is presumed to have the reasonable ability to make payments for the full amount of category B restitution. Nevertheless, West Vangen may now assert on appeal the statute is unconstitutional. Criminal restitution is a criminal sanction that is part of the sentence. Iowa Code § 910.2(1)(a) (2021)); State v. Alspach, 554 N.W.2d 882, 883 (Iowa 1996); State v. Mayberry, 415 N.W.2d 644, 646 (Iowa 1987). Procedurally defective, illegal, or void sentences may be corrected at any time and are not subject to the usual concept of waiver or requirement of error preservation. State v. Lathrop, 781 N.W.2d 288, 293 (Iowa 2010). See also State v. Bruegger, 773 N.W.2d 862, 871 (Iowa 2009) (stating "a challenge to an illegal sentence includes claims that the court

lacked the power to impose the sentence or that the sentence itself is somehow inherently legally flawed, including claims that the sentence is outside the statutory bounds or that the sentence itself is unconstitutional").

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

C. Discussion. The court assessed all costs and attorney fees against West Vangen without considering whether she had the reasonable ability to pay such restitution and ordered that she pay all sums ordered as a condition of her probation. (Sentencing Tr. p. 8 L. 20 – p. 9 L. 17). In the written sentencing order, the court found West Vangen had not shown by a preponderance of the evidence that she lacked the reasonable ability to pay all applicable Category B costs. (Judgment and Sentence) (App. pp. 28-29). Because the court is constitutionally required to consider an indigent defendant's reasonable ability to pay before ordering repayment of attorney

fees and other costs, the amendments to Iowa Code chapter 910 relieving the court of this obligation are unconstitutional. Accordingly, this court should vacate that portion of the district court's sentencing order and remand West Vangen's case for a new sentencing hearing to consider her ability to pay.

1. Background. Three key cases of the United States Supreme Court have established the basic features that ensure a recoupment or restitution program is constitutionally acceptable. See Fuller v. Oregon, 417 U.S. 40, 47-54, 94 S.Ct. 2116, 2121-2125 (1974 (finding no violation of right to counsel or due process in Oregon recoupment scheme because the statute was tailored to impose an obligation only upon those with a foreseeable ability to meet it without "manifest hardship" and "those who remain indigent . . . are forever exempt from any obligation to repay."); James v. Strange, 407 U.S. 128, 135-139, 92 S.Ct. 2027, 2031-2034 (1972) (Kansas recoupment statute found to violate equal protection because because it "embodie[d] elements of punitiveness and discrimination which violate the

rights of citizens to equal treatment under the law" by providing for unequal treatment between indigent defendants and other civil judgment debtors); and Bearden v. Georgia, 461 U.S. 660, 672-673, 103 S.Ct. 2064, 2073 (1983) (Fourteenth Amendment prohibits a State from revoking an indigent defendant's probation for failure to pay a fine and restitution unless the probationer willfully refused to pay or make bona fide efforts to acquire assets to pay).

A reading of these cases reveals that a constitutionally acceptable recoupment program must satisfy certain requirements:

- The system must "under all circumstances" "guarantee the indigent defendant's fundamental right to counsel without cumbersome procedural obstacles designed to determine whether he is entitled to court-appointed representation."
- The decision to require repayment cannot be made without providing notice to the defendant and a "meaningful opportunity to be heard."
- The decision whether to require payment must take into account "the individual's resources, the other demands on his own and family's finances, and the hardships he or his family will endure if repayment is required. The purpose

of this inquiry is to assure repayment is not required as long as he remains indigent."

- "The defendant accepting court-appointed counsel cannot be exposed to more severe collection practices than the ordinary civil debtor."
- The indigent defendant ordered to repay his attorney's fees as a condition of work-release, parole, or probation cannot be imprisoned for failing to pay the debt if the failure to pay is due to his poverty rather than his willful refusal to pay.
- A person obligated to repay must be able to petition the court at any time to have his obligation reviewed and his ability to pay without hardship reassessed.

See Alexander v. Johnson, 742 F.2d 117, 124 (4th Cir. 1984); Olson v. James, 603 F.2d 150, 153-155 (10th Cir. 1979). See also State v. Rogers, 251 N.W.2d 239, 245 (Iowa 1977) (observing "that recoupment of attorney fees as a condition of probation must satisfy constitutional criteria").

The Iowa Supreme Court considered the constitutionality of Iowa's recoupment scheme in State v. Haines, 360 N.W.2d 791 (Iowa 1985). Haines was required, as a term of probation, to reimburse the county for the costs of court appointed attorney's fees associated with his case by paying cash or

performing community service. Haines, 360 N.W.2d at 792. When concluding the program did not violate Haines' right to counsel by discouraging or punishing the exercise of this right, the court stated:

> [T]he Iowa statute only authorizes the court to order the offender to make restitution of court costs and court-appointed attorney's fees "to the extent that the offender is reasonably able to do so." § 910.2. The key difference between the Oregon and Iowa statutes is that the Iowa statute states that "[w]hen the offender is not reasonably able to pay all or a part of the court costs, court-appointed attorney's fees or the expense of a public defender, the court may require the offender . . . to perform a needed public service." § 910.2. Thus, the court "may require" an offender to perform a public service, if he is not reasonably able to pay the court costs and court - appointed attorney's fees, only "to the extent his is reasonably able to do so"; this belies defendant's assertion that the statute mandates restitution, either in the form of direct payment or in the form of public service. An offender is given the opportunity to show "impairment which would limit or prohibit the performance of public services." § 910.3. Public service is not mandated when an offender is not reasonably able to perform public service.
>
> The Iowa statute provides further protection. The restitution plan is subject to modification by the court following hearing. § 910.7. Keeping in mind the purpose of the statutes when read in conjunction, we interpret these statutes to provide a defendant

> required to perform public service work as a term of probation a means to obtain modification of an order specifying public service when circumstances dictate. Thus, if a probationer later becomes unable to meet the plan of restitution, a mechanism has been established to provide relief. Chapter 910 includes sufficient safeguards to overcome a sixth amendment challenge.

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

The court also concluded the system did not violate Haines' due process rights under the Fourteenth Amendment and article I, section 9. The court rejected Haines' argument that the system was fundamentally unfair because indigent defendants are given no input into the selection of an attorney or the cost of legal services and because he personally was never given notice that he might be expected to pay for the attorney provided to him "at public expense." Haines, 360 N.W.2d at 795-796. The court reasoned there was no basic unfairness to defendants under the plan which provides counsel for the indigent when needed and prescribes protective standards under which reimbursement may be ordered only after a hearing. Haines, 360 N.W.2d at 796.

Since Haines, the Iowa Supreme Court has continued to reaffirm that a consideration of defendant's reasonable ability to pay is a constitutional prerequisite for a criminal restitution order. See State v. Harrison, 351 N.W.2d 526, 529 (Iowa 1984). See also Goodrich v. State, 608 N.W.2d 774, 776 (Iowa 2000) ("Constitutionally, a court must determine a criminal defendant's ability to pay before entering an order requiring such defendant to pay criminal restitution pursuant to Iowa Code section 910.2."); State v. Dudley, 766 N.W.2d 606, 615 (Iowa 2009) ("A cost judgment may not be constitutionally imposed on a defendant unless a determination is first made that the defendant is or will be reasonably able to pay the judgment."); State v. Albright, 925 N.W.2d 144, 161 (Iowa 2019) (holding that an order of restitution is not enforceable until the court has taken into account the offender's reasonable ability to pay); State v. Davis, 944 N.W.2d 641, 646 (Iowa 2020) (stating "[w]e reiterate that the district court does not have an obligation to conduct the reasonable-ability-to-pay determination until all

items of restitution are before it and the final order of restitution is entered").

Thus the "reasonable ability to pay" requirement in Iowa Code § 910.2 (2019) enabled it to withstand constitutional attack. Haines, 360 N.W.2d at 794, 796 (Iowa 1985); Goodrich v. State, 608 N.W.2d 774, 776 (Iowa 2000); State v. Jenkins, 788 N.W.2d 640, 646 (Iowa 2010) (denying defendant an opportunity to challenge, before the district court, the amounts of the restitution order implicates his right to due process). In the 2020 legislative session, however, SF457 was enacted, changing "the procedure by which a defendant's ability to pay Category 'B' restitution is determined, including shifting presumptions, imposing statutory waivers, and requiring financial affidavits." State v. Hawk, 952 N.W.2d 314, 316 (Iowa 2020); see also 2020 Iowa Acts ch. 1074, Div. XIII (now codified in Chapter 910 (2021)).

When SF457 changed the scheme for imposing repayment of category B restitution, it eliminated the key safeguards of

former Chapter 910 that enabled it to withstand constitutional challenges. See e.g. State v. Harrison, 351 N.W.2d 526, 529 (Iowa 1984) (stating "[p]rocedures thus exist in chapter 910 from the inception of the sentence to assure that the [constitutional] criteria are satisfied"); State v. Haines, 360 N.W.2d 791, 794 (1985) (stating "Chapter 910 includes sufficient safeguards to overcome a sixth amendment challenge").

As before, the amended scheme provides that an indigent defendant who is appointed an attorney, "shall be required to reimburse the state for the total cost of legal assistance provided to the person pursuant to this section." Iowa Code § 815.9(3) (2021). If the person is convicted, "the court shall order [the total costs and fees incurred for legal assistance] as restitution, to the extent to which the person is reasonably able to pay, or order the performance of community service in lieu of such payments, in accordance with chapter 910." Iowa Code § 815.9(5) (2021).

The amendments provide that legal assistance fees, along with court costs, are considered are included in "Category B" restitution. Iowa Code § 910.1(2) (2021). "Category B" restitution shall be ordered subject to an offender's reasonable ability to make payments pursuant to section 910.2A." Iowa Code § 910.2(1)(a)(2) (2021). Iowa Code section 910.2A provides:

> 1. An offender is presumed to have the reasonable ability to make restitution payments for the full amount of category "B" restitution.
>
> 2. If an offender requests that the court determine the amount of category "B" restitution payments the offender is reasonably able to make toward paying the full amount of such restitution, the court shall hold a hearing and make such a determination, subject to the following provisions:
>
> a. To obtain relief at such a hearing, the offender must affirmatively prove by a preponderance of the evidence that the offender is unable to reasonably make payments toward the full amount of category "B" restitution.
>
> b. The offender must furnish the prosecuting attorney and sentencing court with a completed financial affidavit. Failure to furnish a completed financial affidavit waives any claim regarding the offender's reasonable ability to pay.

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

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

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

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

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

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

Iowa Code § 910.2A (2021).

Under the new scheme, the district court is no longer required to considered an offender's reasonable ability to pay before imposing repayment of attorney fees and court costs. Iowa Code § 910.2A(1), (2), (3), (5). Instead, the new scheme puts the onus on the defendant to request that the court conduct such an analysis. Iowa Code § 910.2A(2), (3). Further, even when the defendant makes such a request, the court shall presume that the defendant has the ability to pay category B restitution, and the burden is on the defendant to "affirmatively prove by a preponderance of the evidence" that she does not have the ability to pay. Iowa Code § 910.2A(1) & (2). If the offender does not make a request at the time of sentencing or within 30 days of sentencing, the court must order her to pay the entire amount of category B restitution. Iowa Code § 910.2A(3) (2021).

An order setting out the amount of category B restitution is immediately enforceable. Iowa Code §§ 910.3(8), (9) (2021)

(stating the court shall enter a permanent restitution order); Iowa Code § 910.7 (2021) (stating an order requiring an offender to pay restitution constitutes a judgment and lien against all property of a liable defendant); State v. Albright, 925 N.W.2d 144, 161 (Iowa 2019) (stating final orders are enforceable). After the order is entered, an offender may only seek modification of the order for category B restitution "during the period of probation, parole, or incarceration." Iowa Code § 910.7(1) (2021). Upon such a petition for modification, the court is not required to hold a hearing, but shall do so if "it appears a hearing is warranted." Iowa Code § 910.7(1) (2021). Appellate review of a ruling under 910.7 is not guaranteed but is only available by a writ of certiorari. Iowa Code § 910.7(5) (2021).

Because of these changes, Iowa Code chapter 910 (2021) does not satisfy the constitutional criteria laid out in Fuller v. Oregon, 417 U.S. 40, 94 S.Ct. 2116 (1974); James v. Strange, 407 U.S. 128, 92 S.Ct. 2027 (1972); Alexander v. Johnson, 742

F.2d 117 (4th Cir. 1984); Olson v. James, 603 F.2d 150 (10th Cir. 1979); State v. Haines, 360 N.W.2d 791, 794 (Iowa 1985) and State v. Rogers, 251 N.W.2d 239 (Iowa 1977). Under these authorities the court shall not order an offender to pay category B restitution unless she is able to pay or will be able to pay in the future without undue hardship. Haines, 360 N.W.2d at 794. The district court must make this determination prior to entering an order. See State v. Dudley, 766 N.W.2d 606, 615 (2009) (reimbursement obligation "may not be constitutionally imposed on a defendant unless a determination is *first* made that the defendant is or will be reasonably able to pay the judgment.") (emphasis added). If the offender is unlikely to able to pay, no requirement is imposed. Olson v. James, 603 F.2d 150, 155 (10th Cir. 1979); State v. Harrison, 351 N.W.2d 526, 529 (Iowa 1984). A person who is obligated to repay costs should be able to petition the court *any time* for remission of the payment of cost. Olson v. James, 603 F.2d 150, 155 (10th Cir. 1979).

Thus, the amended scheme violates West Vangen's right to counsel and right to due process under both the United States and Iowa Constitutions.

2. Right to Counsel. The accused in a criminal proceeding is guaranteed a right to assistance of counsel. U.S. Const. amend. VI; Iowa Const. art. I, § 10. Iowa Code section 910.2A (2021) violates the right to assistance of counsel as guaranteed by the 6th Amendment and Iowa Constitution Article 1, Section 10. Iowa, like every jurisdiction, has an irrevocable constitutional duty to provide court appointed counsel to an indigent defendant once she requests it. Gideon v. Wainwright, 372 U.S. 335, 344-45, 83 S. Ct. 792, 796-97 (1963).

The United States Supreme Court found Oregon's recoupment statute avoided a Sixth Amendment violation because the statute was "carefully designed to ensure that only those who *actually* become capable of repaying the State will ever be obligated to do so." Fuller, 417 U.S. at 53, 94 S.Ct. at

2124 (emphasis added). Similarly, the Iowa Supreme Court found Iowa's previous scheme did not violate article I, section 10 because, "[l]ike the Oregon statute[,] the Iowa statute only authorizes the court to order the offender to make restitution of court costs and court-appointed attorney's fees 'to the extent that the offender is reasonably able to do so.' " Haines, 360 N.W.2d at 794.

Because Iowa's new recoupment scheme no longer contains the requisite protection to ensure defendants who are unable to repay attorney fees are not required to do so, the scheme "chills" a defendant's constitutional right to counsel. The knowledge that a defendant will be obligated to repay the expenses of her legal representation unless she can prove by a preponderance of the evidence may impel her to decline the services of an appointed attorney. Fuller v. Oregon, 417 U.S. 40, 51, 94 S.Ct. 2116, 2123 (1974).

The new recoupment statute requires a court to presume a defendant has the ability to pay and order the defendant to

repay attorney fees unless the defendant affirmatively requests the court make the determination, completes a lengthy financial affidavit under penalty of perjury, and ultimately rebuts the presumption by a proving by a preponderance of the evidence that she does not have the reasonable ability to pay category B restitution. Iowa Code § 910.2A(1)-(4). Further, once the order is entered requiring the payment of category B restitution, the statute virtually insulates the district court's decision from appellate review because the court is not required to explain its decision and is presumed to have properly exercised its discretion. Iowa Code § 910.2A(5). If an offender is not on probation, parole or incarcerated, she cannot seek modification of the restitution order. These burdens do not protect an indigent offender from being required to repay the State for the cost of her attorney, and instead would impermissibly pressure a defendant to decline the services of an attorney in a criminal case in violation of her right to counsel under the Sixth Amendment and article I, section 10.

The presumption that a defendant has the ability to pay category B restitution and the lack of safeguards to ensure an indigent defendant will not be ordered to pay the costs of legal assistance chills the assertion of the constitutional right to counsel by penalizing those who choose to exercise it. Fuller v. Oregon, 417 U.S. 40, 54, 94 S.Ct. 2116, 2125 (1974). See cf. State v. Dudley, 766 N.W.2d 606, 614 (Iowa 2009) (stating "[t]he very safeguard that sustained the constitutionality of the recoupment statutes applied to convicted defendants in *Fuller* and *Haines* is absent here."). The question is not whether the chilling effect is incidental rather than intention; the question is whether that effect is unnecessary and therefore excessive. United States v. Jackson, 390 U.S. 570, 582, 88 S.Ct. 1209, 1216 (1968).

3. *Due Process.* No person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. V; U. S. Const. XIV, § 1; Iowa Const. art. I, § 9. This Court has applied the federal and state due process protections

equally in scope, import and purpose. Exira Community Sch. Dist. v. State, 512 N.W.2d 787, 792-93 (Iowa 1994).

The United States Supreme Court has generally analyzed "the fairness of relations between the criminal defendant and the State under the Due Process Clause." Bearden v. Georgia, 461 U.S. 660, 665, 103 S.Ct. 2064, 2069 (1983). "The test of whether due process has been violated is whether the challenged practice or rule 'offends some principle of justice so rooted in the traditions and conscience of our people to be ranked as fundamental.'" State v. Haines, 360 N.W.2d 791, 796 (Iowa 1985) (other citations omitted). The United States Supreme Court in Bearden noted that when considering a due process challenge to a recoupment statute, "The . . . appropriate question is whether consideration of a defendant's financial background in setting or resetting a sentence is so arbitrary or unfair as to be a denial of due process." Bearden v. Georgia, 461 U.S. at 666 n.8, 103 S.Ct. at 2069 n.8.

The Iowa Supreme Court concluded that the previous recoupment scheme satisfied due process concerns because it not only ensured an indigent defendant has counsel when counsel is needed, but that the indigent defendant may be required to pay the costs of that attorney "[o]nly after conviction and a determination that the criminal defendant is reasonably able to pay for the services of an attorney, despite his indigency at an earlier time." Haines, 360 N.W.2d at 796.

> It is not fundamentally unfair to recoup court costs and attorney fees from those indigents who are reasonably able to pay or to perform a public service. . . . We conclude there is no basic unfairness to defendant under this carefully devised plan which provides counsel for the indigent when needed and prescribes protective standards under which reimbursement may be ordered only after a hearing.

Haines, 360 N.W.2d at 796.

The amended recoupment scheme violates due process because it is no longer tailored to ensure an indigent offender will not be required to pay category B restitution unless he is reasonably able. Instead, due to the built-in presumptions and lack of meaningful review, the new recoupment statute is

crafted with the contrary goal of requiring indigent offenders to pay category B restitution. The new scheme requires a court to presume a defendant has the ability to pay and order the defendant to repay attorney fees unless the defendant affirmatively requests the court make the determination, completes a lengthy financial affidavit under penalty of perjury, and ultimately rebuts the presumption by a proving by a preponderance of the evidence that she does not have the reasonable ability to pay category B restitution. Iowa Code § 910.2A(1)-(4). Further, once the order is entered requiring the payment of category B restitution, the statute provides the court's decision is virtually unreviewable by an appellate court because the court is not required to explain its decision and is presumed to have properly exercised its discretion. Iowa Code § 910.2A(5). If an offender is not on probation, parole or incarcerated, she cannot seek modification of the restitution order. Iowa Code § 910.7(1) (an offender may only seek

modification of the order for category B restitution "during the period of probation, parole, or incarceration.").

If the offender qualifies to and does petition the court for a modification, the court is not required to hold a hearing, but shall do so if "it appears a hearing is warranted." Iowa Code § 910.7(1) (2021). An offender is not entitled to counsel for such a hearing. State v. Alspach, 554 N.W.2d 882, 883 (Iowa 1996). Appellate review of a ruling under 910.7 is not guaranteed but is only available by a writ of certiorari, which requires a party to show that the judge exceed the judge's jurisdiction or otherwise acted illegally. Iowa Code § 910.7(5) (2021); Iowa R. App. 6.107(1). The availability of a "contingent postdeprivation remedy where the offender may be unrepresented does not give this court comfort in the context of procedural due process." State v. Jenkins, 788 N.W.2d at 647.

Thus the new scheme is fundamentally unfair because it is designed with the primary goal of requiring indigent offenders

to pay category B restitution without a fair consideration of their reasonable ability to pay.

D. Conclusion. Because the court is constitutionally required to consider an indigent defendant's reasonable ability to pay before ordering repayment of attorney fees and other costs, the amendments to Iowa Code chapter 910 relieving the court of this obligation are unconstitutional. Accordingly, this court should vacate that portion of the district court's sentencing order and remand West Vangen's case for a new sentencing hearing to consider her ability to pay.

III. During sentencing, any consideration of West Vangen's exercise of her constitutional right to demand was a trial was improper and the district court erred by considering it when imposing sentence.

A. Preservation of Error: The appellate court may review a defendant's argument that the district court considered improper factors and abused its discretion during his sentencing on direct appeal, even without an objection in the district court. See State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994); State v. Young, 292 N.W.2d 432, 434–35 (Iowa

1980) (reviewing an improper factor claim despite no objection was made at the sentencing hearing). Thus, these arguments are not subject to the usual concept of waiver or the requirement of error preservation. State v. Woody, 613 N.W.2d 215, 217 (Iowa 2000); see also State v. Cooley, 587 N.W.2d 752, 754 (Iowa 1998) ("It strikes us as exceedingly unfair to urge that a defendant, on the threshold of being sentenced, must question the court's exercise of discretion or forever waive the right to assign the error on appeal.").

B. Standard of Review: Review of a sentence imposed in a criminal case is for correction of errors at law. Iowa R. App. P. 6.907 (2017); see also State v. Formaro, 638 N.W.2d 720, 724 (Iowa 2002). "A sentence will not be upset on appellate review unless the defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure such as the trial court's consideration of impermissible factors." State v. Witham, 583 N.W.2d 677, 678 (Iowa 1998).

C. <u>Discussion</u>: In this case, the district court improperly relied on the fact that West Vangen exercised her right to a demand a jury trial when it sentenced her.

When making a sentencing recommendation, the State argued,

> *[t]he defendant had multiple opportunities to take responsibility and do the right thing. It took a day and a half of evidence and argument in the middle of a pandemic for the defendant to be brought to justice in this matter.* It's the State's position that 34 days with 4 days to do and one year of unsupervised probation is justified based on the defendant's actions and her refusal to take responsibility.

(Sentencing Tr. p. 3 L. 15-23) (emphasis added).

The district court explained its reason for selecting the sentence it did.

> The reasons for this sentence are the facts and circumstances surrounding the case, this Court's knowledge of the testimony at trial, the need to have victim restitution paid in this matter, *the defendant's non-acceptance of responsibility in this case*. Furthermore, it's the Court's feeling that the sentence provides the maximum protection for the community as well as the maximum opportunity for rehabilitation to the defendant.

(Sentencing Tr. p. 9 L. 18 – p. 10 L. 1) (emphasis added).

The sentencing court is authorized to determine and impose the sentence it determines in its discretion that is best suited to rehabilitate a defendant and protect society. Iowa Code § 901.5 (2017). When choosing a sentence, the court must consider all pertinent matters, including the nature of the offense, the attending circumstances, defendant's age, character, and propensities, and chances for reform. Formaro, 638 N.W.2d at 725. However,

> the fact a defendant has exercised the fundamental and constitutional right of requiring the state to prove at trial his guilt as charged and his right as an accused to raise defenses thereto is to be given no weight by the trial court in determining the sentence to be imposed after the defendant's guilt has been established.

State v. Nichols, 247 N.W.2d 249, 255 (Iowa 1976). In this case, the court's statements that it relied upon West Vangen's "refusal to take responsibility" was a clear reference to the State's argument that West Vangen refused to take responsibility by forcing the State to prove her guilt in a trial, during a pandemic, no less. (Sentencing Tr. p. 3 L. 15-23). Just as in Nichols, the "trial court's remarks in the case at bar

cannot be shrugged off as merely 'unfortunate phraseology.' A defendant's right to demand a trial and to force the state to present its evidence to a fact finder is too fundamental to be so easily dismissed." Nichols, 247 N.W.2d at 255. Thus, the district court abused its discretion by relying on an improper factor when sentencing West Vangen.

When it is shown that a sentencing court relied on an improper factor, the sentence must be vacated and the matter remanded for resentencing. State v. Carrillo, 597 N.W.2d 497, 501 (Iowa 1999). This is so even if the impermissible factor was "merely a secondary consideration." State v. Lovell, 857 N.W.2d 241, 243 (Iowa 2014). "The important focus is whether an improper sentencing factor crept into the proceedings; not the result it may have produced of the manner it may have motivated the court." Thomas, 520 N.W.2d at 313. Additionally, "[i]n order to protect the integrity of our judicial system from the appearance of impropriety," resentencing must be "before a different judge." Lovell, 857 N.W.2d at 243.

Accordingly, West Vangen is entitled to a new sentencing hearing in front of a different judge. See Lovell, 857 N.W.2d at 243.

D. Conclusion. Because the district court improperly considered West Vangen's exercise of her right to a trial when imposing sentence, her sentence should be vacated and her case remanded for a new sentencing hearing before a new judge.

ORAL SUBMISSION

Counsel requests to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $5.74, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR BRIEFS

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

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/s/ Melinda J. Nye Dated: 10/26/21

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