

IN THE SUPREME COURT OF IOWA

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STATE OF IOWA,

Plaintiff-Appellee,

v.

ROYRIGUEZ PATTERSON,

Defendant-Appellant.

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SUPREME COURT 21-0672

APPEAL FROM THE IOWA DISTRICT COURT  
FOR POLK COUNTY  
HONORABLE CHRISTOPHER KEMP, JUDGE

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APPELLANT'S BRIEF AND ARGUMENT  
AND  
REQUEST FOR ORAL ARGUMENT

---

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## **CERTIFICATE OF SERVICE**

On the 13<sup>th</sup> day of July, 2022, 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 Royriguez Patterson, 4115 Pamela Ct., Apt. 9, West Des Moines, IA 50266.

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MJL/sm/2/22  
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## **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

### **I. The Supreme Court should grant review in Polk County number NTA0948898.**

#### **Authorities**

Iowa R. App. P. 6.106(2)

Iowa R. App. P. 6.107(2)

Iowa R. App. P. 6.907

Iowa Code § 910.1(1) (2019)

Iowa Code § 910.2(1)(a) (2019)

#### *Petition for Writ of Certiorari*

Iowa R. App. P. 1.107(1)

Iowa Code § 910.1(1) (2019)

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

State v. Bonstetter, 637 N.W.2d 161, 166 (Iowa 2001)

Iowa Code § 910.1(1) (2019)

Iowa Code § 910.2(1)(a) (2019)

State v. Mandicino, 509 N.W.2d 481, 483 (Iowa 1993)

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

Iowa R. Crim. P. 2.24(5)

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

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

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

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

State v. Ceretti, 871 N.W.2d 88, 96-98 (Iowa 2015)

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

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

Iowa R. App. P. 6.107(1)(d)

*Application for Discretionary Review*

Iowa Code § 81406(2)(e) (2021)

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

State v. Mathes, No. 17-1909, 2019 WL 1294098 (Iowa Ct. App. March 20, 2019), affirmed by an equally divided Court in State v. Mathes, No. 17-1909, 2020 WL 2267274 (Iowa May 8, 2020)

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

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

Iowa Code § 707.6A(4) (2019)

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

Jamison v. Knosby, 423 N.W.2d 2, 6 (Iowa 1988)

State v. Klawonn, 688 N.W.2d 271, 276 (Iowa 2004)

State v. Paxton, 674 N.W.2d 106, 109 (Iowa 2004)

Iowa R. App. P. 6.108

**II. Patterson has a right of appeal from the pecuniary damages restitution order entered after judgment and sentence. Alternatively, Patterson should be granted a writ of certiorari in Polk County number OWOM088283.**

### **Authorities**

Iowa R. App. P. 6.108

Iowa R. App. P. 6.103(1)

Iowa Code § 814.5 (2021)

Iowa Code § 814.6 (2021)

Iowa R. App. P. 6.107(2)

Iowa R. App. P. 6.907

State v Dudley, 766 N.W.2d 606, 612 (Iowa 2009)

### *Right of Appeal*

Iowa R. App. P. 6.101(1)(b)

Iowa R. App. P. 6.103(1)

Iowa Code § 814.6(1)(a)(b)(3)(2021)

State v. Lacey, 968 N.W.2d 792, 798 (Iowa 2021)

Iowa Code § 910.3(8) (2021)

Iowa Code § 910.3 (2019)

Iowa Code § 910.3(9) (2021)

State v. Propps, 897 N.W.2d 91, 96 (Iowa 2017)

State v. Bonstetter, 637 N.W.2d 161, 166 (Iowa 2001)

State v. Alspach, 554 N.W.2d 882, 883 (Iowa 1996)

State v. Mayberry, 415 N.W.2d 644, 646 (Iowa 1987)

Black's Law Dictionary (11<sup>th</sup> ed. 2019)

State v. Richardson, 890 N.W.2d 609, 617 (Iowa 2017)

State v. Lathrop, 781 N.W.2d 288, 295 (Iowa 2010)

Hester v. United States, 139 S.Ct. 509, 511 (2019)

Iowa Code § 910.7A (2021)

Iowa R. App. P. 6.101(1)(b)

Iowa R. App. P. 6.103(1)

Iowa Code § 814.6(1)(a)(3)(2021)

State v Roby, 897 N.W.2d 127, 135 (Iowa 2017)

### *Jurisdiction*

Iowa Code § 814.6(1)(a)(3) (2021)

Iowa Code § 707.6A(4)(2021)

State v. Damme, 944 N.W.2d 98, 104 (Iowa 2020)

State v. Mischke, No. 19-1510, 2022 WL 246244, at \* 1 (Iowa Ct. App. Jan. 27, 2022)

State v. Hutchcroft, No. 20-0301, 2021 WL 2452153, at \*1 n.1 (Iowa Ct. App. June 16, 2021)

State v. Jauregui, No. 20-0629, 2021 WL 1663598, at \*1 n.1 (Iowa Ct. App. April 28, 2021)

*If Patterson does not have a right of appeal, he has been denied equal protection and due process.*

Iowa Code § 910.1(3) (2019)

Iowa Code § 910.1(6) (2021)

State v. Bonstetter, 637 N.W.2d 161, 165 (Iowa 2001)

### *Equal Protection*

U.S. Const. amend. XIV

Iowa Const. art. I § 6

Varnum v. Brien, 763 N.W.2d 862, 878 (Iowa 2009)

State v. Doe, 927 N.W.2d 656, 661 (Iowa 2019)

Iowa R. App. P. 6.103(1)

Shortridge v. State, 478 N.W.2d 613, 615 (Iowa 1991),  
superseded by statute on other grounds, 1992 Iowa Acts ch.  
1212, § 38 (codified as Iowa Code § 822.9 (1993))

Iowa Code § 910.3(5) (2021)

State v. Blakley, 534 N.W.2d 645, 648-49 (Iowa 1995)

Iowa Code § 910.3(10) (2021)

*Due process*

U.S. Const. amend. V

U. S. Const. XIV, § 1

Iowa Const. art. I, § 9

Lewis v. Jaeger, 818 N.W.2d 165, 181 (Iowa 2012)

Exira Community Sch. Dist. v. State, 512 N.W.2d 787, 792-93  
(Iowa 1994)

State v. Reyes, 744 N.W.2d 95, 101 (Iowa 2008)

Iowa Code § 910.3(10) (2021)

State v. Jose, 636 N.W.2d 38, 46 (Iowa 2001)

State v. Alspach, 554 N.W.2d 882, 883-84 (Iowa 1996)

State v. Blank, 570 N.W.2d 924, 926 (Iowa 1997)

State v. Janz, 358 N.W.2d 547 (Iowa 1984)

State v. Ashley, 462 N.W.2d 279, 281 (Iowa 1990)

State v. Delano, 161 N.W.2d 66, 72 (Iowa 1968)

State v. Jenkins, 788 N.W.2d 640, 646 (Iowa 2010)

*If Patterson does not have an appeal of right in OWOM088283, and his constitutional rights have not been violated, he requests the Court treat his notice of appeal as a petition for writ of certiorari.*

Iowa Code § 910.7(5)(2021)

Iowa R. App. P. 6.108

Ary v. Iowa Dist. Ct., 735 N.W.2d 621, 624 (Iowa 2007)

Christensen v. Iowa Dist. Ct., 578 N.W.2d 675, 678 (Iowa 1998)

Amro v. Iowa Dist. Ct., 429 N.W.2d 135, 138 (Iowa 1988)

**III. The pecuniary damages restitution order lacks substantial evidentiary support.**

#### **Authorities**

State v. Bonstetter, 637 N.W.2d 161, 167-68 (Iowa 2001)

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

State v. Klawonn, 688 N.W.2d 271, 274 (Iowa 2004)

Iowa Code § 910.2 (2021)

State v. Jenkins, 788 N.W.2d 640, 644 (Iowa 2010)



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)

State v. Dudley, 766 N.W.2d 606, 620 (Iowa 2009)

Iowa Code § 910.1(10) (2021)

Iowa Code § 910.1(6) (2021)

State v. Holmberg, 449 N.W.2d 376, 377 (Iowa 1989)

State v. Tutor, 538 N.W.2d 894, 897 (Iowa Ct. App. 1995)

State v. Waigand, 953 N.W.2d 689, 694 (Iowa 2021)

State v. Shears, 920 N.W.2d 527, 541 (Iowa 2018)

State v. Watts, 587 N.W.2d 750, 751 (Iowa 1998)

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

State v. Wagner, 484 N.W.2d 212, 216 (Iowa Ct. App. 1992)

Iowa Code § 707.6A(4) (2019)

State v. Edouard, 854 N.W.2d 421, 450 (Iowa 2014)

Iowa R. Evid. 5.1101(c)(4)

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

Lackman v. Liedman, No. 15-1062, 2016 WL 3002744, at \*3  
(Iowa Ct. App. May 25, 2016)

Hopping v. College Block Partners, 599 N.W.2d 703, 706 (Iowa 1999)

Jamison v. Knosby, 423 N.W.2d 2, 6 (Iowa 1988)

*If the Court finds the district court's pecuniary damages restitution order is supported by substantial evidence, a remand is nevertheless required.*

Iowa Code § 910.3(1)(2021)

Iowa Code § 915.86(2) (2021)

State v. Waigand, 953 N.W.2d 689, 695-696 (Iowa 2021)

State v. Klawonn, 688 N.W.2d 271, 276 (Iowa 2004)

State v. Paxton, 674 N.W.2d 106, 109 (Iowa 2004)

## **ROUTING STATEMENT**

This case should be retained by the Iowa Supreme Court because the issues raised involve a substantial issue of first impression in Iowa and substantial questions of enunciating or changing legal principles. Iowa R. App. P. 6.903(2)(d), 6.1101(2)(c), and 6.1001(2)(f). Specifically, the Supreme Court should decide the following questions: (1) what is the proper form of review of a “restitution” order entered in a dismissed case; (2) whether there is a right of appeal from a pecuniary damages restitution order entered after judgment and sentencing; (3) if there is not a right of appeal from a pecuniary damages restitution entered after judgment and sentencing, does this violate due process and equal protection as guaranteed by the United States and Iowa Constitutions; and (4) whether the pecuniary damages restitution order lacked substantial evidentiary support.

## **STATEMENT OF THE CASE**

Nature of the Case: Appellant Royriguez Patterson appeals the pecuniary damages restitution order entered in Polk County number NTA0948898 (failure to maintain control in violation of Iowa Code section 321.288(1) (2019)) and Polk County number OWOM088283 (serious injury by motor vehicle- reckless driving in violation of Iowa Code section 707.6A(4) (2019)).

Course of Proceeding and Disposition Below: On February 12, 2020, Patterson was charged with failure to maintain control in violation of Iowa Code section 321.288(1) (2019) after an automobile collision on an entrance ramp to I-235. (NTA0948898 Complaint)(App. pp. 5-7). He was also arrested for operating while intoxicated. (OWOM088283 Complaint)(App. pp. 8-10).

On March 20, 2020, Patterson was formally charged by Trial Information with Count I: serious injury by vehicle (OWI) in violation of Iowa Code section 707.6A(4); Count II: serious

injury by vehicle (reckless) in violation of Iowa Code section 707.6A(4); and Count III: operating while intoxicated in violation of Iowa Code section 321J.2. (OWOM088283 TI) (App. pp. 11-13). Patterson reached a plea agreement with the prosecution. Patterson entered a guilty plea to Count II: serious injury by vehicle (reckless). (OWOM088283 Plea)(App. pp. 14-15). As part of the plea agreement, the remaining counts and NTA0948898 were dismissed with the requirement Patterson “pay court costs and any victim restitution associated with these counts and/or cases.” (12/21/20 Order p. 5)<sup>1</sup> (App. p. 24).

After sentencing in OWOM088283, the State sought victim pecuniary damages restitution. (2/8/21 Motion to Amend Sentence to Include Restitution)(App. p. 27). The district court entered a supplemental order requiring Patterson to pay \$42,100.92 in victim restitution. (Suppl. Order)(App. pp. 28-29). Patterson objected to the

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<sup>1</sup> References to court documents without a case number are documents filed in both cases.

supplemental order. (3/5/21 Motion to Amend Sentence)  
(App. pp. 30-33).

A restitution hearing was held on April 13, 2021. (Tr. p. 1L1-25)<sup>2</sup>. The district court ordered Patterson to pay restitution in the amount of \$34,512.93 for lost wages for the entire year of 2020. (4/13/21 Ruling)(App. pp. 34-38). Patterson filed a Notice of Appeal from the restitution order. (NOA) (App. p. 39).

The Supreme Court ordered statements regarding its jurisdiction in NTA0948898. (6/1/21 SCt Order)(App. pp. 40-42). After the parties submitted statements, the Supreme Court ordered the jurisdiction issues briefed and submitted with the appeal. (App. for Discretionary Review/Petition for Cert.; Resistance; Reply; 10/13/21 SCt Order)(App. pp. 43-75).

Facts: Patterson admitted that “[o]n 2/12/2020 in Polk County, Iowa, [he] unintentionally caused serious injury

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<sup>2</sup> All references to the restitution transcript are ‘Tr.’ without further description.

including a broken leg to James Tidwell by willfully driving in a manner that was with wanton disregard for the safety of others and in the process rear-ended Mr. Tidwell's vehicle." (OWOM088283 Plea p. 2)(App. p. 15).

James Tidwell testified at the April 13, 2021 restitution hearing. (Tr. p. 5L1-7). On February 12, 2020, Tidwell's vehicle was struck from behind which caused his vehicle to hit the dividing wall head-on and to ricochet back across the interstate. (Tr. p. 5L14-19). Tidwell later learned that Patterson was the driver of the vehicle which hit him. (Tr. p. 6L13-23).

Tidwell described his injuries resulting from the accident. He suffered a broken humerus bone (upper arm), dislocated left shoulder, a dislocated right hip, fractured acetabulum (hip socket), fractured vertebrae, and a spleen injury. (Tr. p. 5L19-25). Tidwell stated that he was hospitalized for approximately 19 days. He had participated in physical therapy and was then awaiting insurance approval for additional therapy.

Tidwell stated that he still struggled to walk. (Tr. p. 6L1-12).

Tidwell stated that it would take 18 to 24 months for him to recover from the hip injury. (Tr. p. 6L8-10, 12L9-12).

Tidwell testified that he had not worked since the accident. (Tr. p. 7L1-5, p. 9L6-7, p. 29L20-p. 30L2). He had previously worked construction for 30 years. (Tr. p. 6L10-11). When asked which medical provider indicated he was unable to work, Tidwell did not answer the question. Instead he stated that he had not been released to return to work and did not need a doctor's note. (Tr. p. 12L13-p. 14L16). Tidwell applied for disability, but was denied and was in the appeal process. (Tr. p. 14L-24, p. 26L18-p. 27L4). Tidwell had not attempted to obtain a job which encompassed "light duty." (Tr. p. 35L2-15).

In 2019, Tidwell was employed by A1 Concrete Leveling. (Tr. p. 16L8-20, p. 17L11-19). He was laid off somewhere between November 27, 2019 and December 1, 2019. (Tr. p. 18L21-p. 19L25). Tidwell's 2019 W2 was admitted as



evidence. (Ex. 1)(Conf. App. p. 13). Tidwell stated his 2019 W2 did not include \$6,000 in unemployment benefits he received while laid-off and an estimated \$6,000-7,000 earned from other employment. (Tr. p. 7L9-18).

Tidwell first testified that he did not work in 2020 and did not file taxes in 2020. (Tr. p. 12L4-8). He later said he was working on-contract in January and February 2020 as a detailer for a transport company. He did not have the 1099 for the job due to a move. He estimated that he made approximately \$700 and did not need to file taxes in 2020. (Tr. p. 7L9-18, p. 14L25-p. 15L25).

When Tidwell was laid off in late 2019, he did not apply for unemployment because he was working for the transport company. (Tr. p. 18L21-p. 19L20). Tidwell stated that he stopped getting unemployment benefits approximately two to three months before the accident on February 12, 2020. (Tr. p. 20L8-21). Tidwell testified that his unemployment benefits stopped because he could no longer say that he was ready and

available to work. He had informed his boss at A1 that he was not returning to work after the seasonal lay-off. He instead was signing up on the Labors' Union hiring list. (Tr. p. 20L22-p. 21L18, p. 31L8-25). Tidwell testified that he had put his name on the hiring list prior to the accident but had not worked any jobs through the union in 2020. (Tr. p. 23L2-8).

Tidwell agreed that the W2 from A1 Concrete did not accurately reflect his 2020 income. Tidwell asserted that his 2020 wages would have been more because he would have been working jobs through the union hall. (Tr. p. 23L9-12). However, he could not definitively say that he would not have returned to A1 Concrete if his former boss has come back to him with a "sweet offer." (Tr. p. 31L8-25).

Tidwell removed his name from the hiring list at the union hall sometime after the accident. He did not need to provide a doctor's note because he did not work for the Union. (Tr. p. 23L5-25). Tidwell did not believe that Covid would have affected his work opportunities in 2020. However, in the

wintertime the hiring list is very long because everyone was on lay-off. (Tr. p. 24L15-p. 25L13).

Tidwell received \$6,000 from the attorney general's office for lost wages in 2020. (Tr. p. 27L12-24). He did not receive any payments from an insurance policy. But he did receive a government stimulus check. (Tr. p. 29L3-15).

## **ARGUMENT**

### **I. The Supreme Court should grant review in Polk County number NTA0948898.**

#### **Preservation of Error.**

The case was dismissed on December 21, 2020. (12/21/20 Order)(App. pp. 20-26). Upon the State's motion, the district court entered a supplemental order imposing \$42,100.92 in pecuniary damages. (2/8/21 Motion to Amend Sentence to Include Restitution; 2/8/21 Suppl. Order)(App. pp. 27-29). Patterson objected to the inclusion of the restitution. (3/5/21 Motion to Amend Sentence)(App. pp. 30-33). After hearing, the district court entered a ruling imposing \$34,512.93 for lost wages for the entire year of 2020.

(4/13/21 Ruling)(App. pp. 34-38). Patterson filed a timely notice of appeal. (NOA)(App. p. 39).

The Supreme Court ordered statements regarding its jurisdiction. (6/1/21 SCt Order)(App. pp. 40-42). The Supreme Court granted appellate counsel additional time to file the statement in order to obtain the transcripts. (6/1/21 SCt Order) (App. pp. 40-42). After the parties submitted statements, the Supreme Court ordered the issue briefed and submitted with the appeal. (10/13/21 SCt Order)(App. pp. 73-75).

Error is preserved by the timely notice of appeal, the subsequent applications to treat the notice of appeal as an application for discretionary review or a petition for writ of certiorari and the Supreme Court's October 13, 2021 Order. (NOA; App. for Discretionary Review/Petition for Cert.; 10/13/21 SCt Order)(App. pp. 39, 43-56, 73-75). Iowa R. App. P. 6.108.

### **Standard of Review.**

The Rules of Appellate Procedure guide the Court's granting an application for discretionary review and a petition for writ of certiorari. See Iowa R. App. P. 6.106(2) (Discretionary Review); Iowa R. App. P. 6.107(2) (Certiorari). The appellate courts "constitute courts for correction of errors at law." Iowa R. App. P. 6.907.

### **Discussion.**

Polk County case number NTA0948898 was dismissed and no conviction was entered. (12/21/20 Order p. 5)(App. p. 24). However, a "restitution" order has been entered in the dismissed case. (4/13/21 Ruling)(App. pp. 34-38). Had Patterson been convicted of the simple misdemeanor offense of failure to maintain control, he would not be subject to a restitution order for pecuniary damages. See Iowa Code § 910.1(1) (2019) (stating "[h]owever, "*criminal activities*" does not include simple misdemeanors under chapter 321."); Iowa Code § 910.2(1)(a) (2019) (stating "In all criminal cases in

which there is a plea of guilty, verdict of guilty, or special verdict upon which a judgment of conviction is rendered, the sentencing court shall order that restitution be made by each offender to the victims of the offender's *criminal activities* ...)(emphasis added).

*Petition for Writ of Certiorari*

A writ of certiorari is applicable where a party claims an associate district court judge exceeded the judge's jurisdiction or otherwise acted illegally. Iowa R. App. P. 1.107(1). Iowa Code 910.1(1) (2019) specifically exempts simple misdemeanors under Iowa Code Chapter 321 from the definition of "criminal activity" for restitution purposes. Iowa Code § 910.1(1) (2019).

Patterson agreed to pay victim restitution as appropriate. (OWOM088283 Plea; Sent. Tr. p. 11L14-20)(App. pp. 14-15). The dismissal order entered in NTA0948898 did not impose victim restitution in the dismissed case. The paragraph ordering Patterson to pay victim pecuniary damages in the

amount to be determined only applied to case number OWOM088283 (serious injury by vehicle). (12/21/20 Order p. 3)(App. p. 22). The order specifically stated that the matters related to sentencing were set out above and only the serious injury by vehicle was listed. (12/21/20 Order p. 1)(App. p. 20). The order further stated, pursuant to the plea agreement, that Patterson pay “court costs and any victim restitution *associated with these counts and/or cases.*” (12/21/20 Order p. 5)(App. p. 24) (emphasis added). James Tidwell’s injuries resulted from the automobile crash. The plea agreement did not encompass additional pecuniary damages incurred in NTA0948898. Tidwell did not have independent or separate pecuniary damages from the dismissed counts or the simple misdemeanor traffic offense. The plea agreement did not authorize the district court to enter a restitution order not permitted by Iowa Code sections 910.1(1) and 910.2(1)(a) (2019).

If this Court finds Patterson’s plea agreement included a restitution order in NTA0948898, granting a Petition for Writ of Certiorari is still appropriate. “Restitution is purely a creature of statute in Iowa.” Earnest v. State, 508 N.W.2d 630, 633 (Iowa 1993). “A court is authorized to order criminal restitution pursuant to the statutes. In the absence of such statutes, the court has no power to issue a restitution order.” State v. Bonstetter, 637 N.W.2d 161, 166 (Iowa 2001). The district court lacked authority to enter a restitution order for payment of the victim’s pecuniary damages in a dismissed case as well as a simple misdemeanor under Iowa Code Chapter 321. Iowa Code §§ 910.1(1) and 910.2(1)(a) (2019). However, there is an entry of a judgment in favor of the State for the benefit of Tidwell against Patterson. What kind of judgment is this when there is no authority for it?

The court’s lack of authority “can be obviated by consent, waiver or estoppel.” State v. Mandicino, 509 N.W.2d 481, 483 (Iowa 1993). This Court interpreted the decision in Mandicino



to mean that “a court’s lack of authority is not conclusively fatal to the validity of an order.” In re Marriage of Seyler, 559 N.W.2d 7, 10 n.3 (Iowa 1997). Yet, in the context of a criminal conviction, an illegal sentence cannot be waived by failing to challenge the sentence on direct appeal. Iowa R. Crim. P. 2.24(5)(“The court may correct an illegal sentence at any time.”). See also State v. Tindell, 629 N.W.2d 357, 359 (Iowa 2001)(“The exclusion of illegal sentences from the principles of error preservation is limited to those cases in which a trial court has stepped outside the codified bounds of allowable sentencing. In other words, the sentence is illegal because it is beyond the power of the court to impose.”). It is also well established the parties cannot agree upon an illegal sentence. See State v. Copenhaver, 844 N.W.2d 442, 447 (Iowa 2014) (stating “[a]n illegal sentence is a sentence that is not permitted by statute.”); State v. Woody, 613 N.W.2d 215, 218 (Iowa 2000) (stating “[n]either party may rely on a plea agreement to uphold an illegal sentence.”); Noble v. Iowa Dist.

Court for Muscatine Cty., 919 N.W.2d 625, 632 (Iowa Ct. App. 2018) (stating “we conclude the violation of the *Ceretti* rule constitutes an illegal sentence that cannot be waived.”)<sup>3</sup>.

This Court has analogized one type of legal action or proceeding to another to assist it in resolving the ultimate question presented on appeal. See e.g. State v. Iowa District Court for Warren Cty., 828 N.W.2d 607, 616-617 (Iowa 2013)(consent decree is analogous to the suspended judgment); Id. at 626-627 (Appel, J. dissenting)(consent decree is analogous to a deferred judgment). The judgment for pecuniary damages restitution is most akin to a criminal sentence which includes restitution pursuant to Iowa Code Chapter 910. The pecuniary damages restitution judgment in a dismissed case is the equivalent of an illegal sentence. Cf. State v. Brown, 905 N.W.2d 846, 857 (Iowa 2018)(stating “[t]he State agrees with Brown that an assessment of court costs for the dismissed simple misdemeanor charge would be an illegal

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<sup>3</sup> State v. Ceretti, 871 N.W.2d 88, 96-98 (Iowa 2015).

sentence.”). A pecuniary damages restitution judgment in a dismissed simple misdemeanor under Chapter 321 case is void and is not subject to waiver, consent or estoppel. Cf. Noble v. Iowa Dist. Court for Muscatine Cty., 919 N.W.2d at 629-30 (stating “[i]t is thus well established courts are not bound by concessions or agreements relating to the administration of the criminal laws where the agreements are legally erroneous or factually untrue and would result in the maladministration of the criminal law.”).

This issue was not raised in the district court. Iowa R. App. P. 6.107(1)(d). The order entered in NTA0948898 materially affects Patterson’s economic interests. Additionally, Patterson contests the district court’s decision to order restitution for victim’s pecuniary damages which is not supported by the evidence. While Patterson asserts he has an appeal of right in OWOM088283, the appeal in that case will not afford him any relief if NTA0948898 is not included in the appellate review and decision. Unless this Court affirmatively

orders that the victim restitution judgment is not subject to enforcement or execution in the dismissed traffic case, Patterson is subject to the judgment.

*Application for Discretionary Review*

Discretionary Review is available from an “order raising a question of law important to the judiciary and the profession.” Iowa Code § 81406(2)(e) (2021). In Stessman, this Court found that the question of how a defendant may properly seek review of a restitution order following the entry of a deferred judgment was an important question justifying the grant of discretionary review. State v. Stessman, 460 N.W.2d 461, 464 (Iowa 1990). Patterson’s case presents a similar question worthy of discretionary review: how may an individual seek review of a restitution judgment in a dismissed case? Counsel is unaware of any caselaw which answers this question. Entry of a restitution judgment in dismissed cases is a widespread

on-going practice in criminal law.<sup>4</sup> Counsel is aware of only one case which presented a similar issue but it was not decided by this Court. State v. Mathes, No. 17-1909, 2019 WL 1294098 (Iowa Ct. App. March 20, 2019), affirmed by an equally divided Court in State v. Mathes, No. 17-1909, 2020 WL 2267274 (Iowa May 8, 2020). Without guidance from this Court regarding the proper method of seeking review, the question of the district court's authority to enter a restitution order in a dismissed case will continue to evade review.

The State has the burden of proof to recover damages due a victim. State v. Bonstetter, 637 N.W.2d at 170. The district court ordered Patterson to pay \$34,512.93 in pecuniary damages. The district court's findings lack substantial evidentiary support. State v. Roach, 920 N.W.2d 93, 99 (Iowa 2018) (stating "[e]vidence is substantial when a

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<sup>4</sup> Final Brief of Amicus Curiae Iowa County Attorney Association, p. 6, filed in State v. Mathes, # 17-1909 on December 13, 2019 (stating "[i]n every courtroom in this state, criminal cases are routinely disposed of by a dismissal at the defendant's cost.") (unavailable on Westlaw).

reasonable mind would accept it as adequate to reach a conclusion.”).

Patterson does not dispute that Tidwell sustained a serious injury in the accident as this is an element of the offense of serious injury by vehicle. Iowa Code § 707.6A(4) (2019). But the prosecution did not present any medical information regarding the duration of Tidwell’s injuries and his inability to be employed. Tidwell testified that his doctor told him he was unable to work. Tidwell later testified that he had never been told that he was able to go back to work. (Tr. p. 12L13-p. 14L16). Tidwell’s testimony alone is insufficient to prove he could not obtain any type of employment. The State failed to prove Tidwell sustained damages for lost wages because he was not able to work at any time during 2020.

Additionally, the district court found the State had proven the amount of damages by presenting information of Tidwell’s income from 2019. (4/13/21 Ruling pp. 3-4)(App. pp. 36-37). However, Tidwell was no longer working for

A1Concrete, the 2019 employer, as he had informed the company he would not return to work in 2020 after the winter lay-off. (Tr. p. 20L8-p. 21L13). The Supreme Court has stated:

There is a distinction between proof of the fact that damages have been sustained and proof of the amount of those damages. Damages are denied where the evidence is speculative and uncertain whether damages have been sustained. But “[if] the uncertainty lies only in the amount of damages, recovery may be had if there is proof of a reasonable basis from which the amount can be inferred or approximated.”

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

(other citations omitted). The State presented no evidence of any employment income Tidwell had after he was laid off from A1 Concrete in November 2019. (Tr. p. 20L1-21, p. 21L2-13; Ex. 1)(Conf. App. p. 13). The prosecutor acknowledged Tidwell’s W-2 (Exhibit 1) “from a single employer from the year” was an “estimate” what his wages would have been in 2020. (Tr. p.35L10-20; Ex. 1)(Conf. App. p. 13). However, the amount of Tidwell’s lost wages for 2020 is merely speculative. Tidwell testified that he could not honestly say whether he

would have returned to A1 Concrete in 2020. (Tr. p. 31L8-25). The State did not present evidence from A1 Concrete it would have again hired Tidwell after he quit in late 2019 or early 2020. Nor did the State present evidence regarding the actual availability of jobs through the Union Hall. Nor did the State present evidence regarding what Tidwell would have earned performing the hypothetical jobs from the Union Hall. It is further speculative that Tidwell, if he had not been injured, would have been employed in 2020 within the construction field during the Covid-19 pandemic. “Under general damage principles, overly speculative damages cannot be recovered.” Jamison v. Knosby, 423 N.W.2d 2, 6 (Iowa 1988).

Additionally, Tidwell received \$6,000 from the Attorney General’s Office for lost wages in 2020. (Tr. p. 27L12-24). The district court noted that Tidwell had received a \$6,000 payment but did not offset the income amount the State claimed Tidwell lost because of the accident. If the Court determines the estimated lost wages is sufficient to uphold the



order, the failure to offset the \$6,000 payment for lost wages is error. Cf. State v. Klawonn, 688 N.W.2d 271, 276 (Iowa 2004)(stating defendant was entitled to a reduction of the restitution in order to avoid a windfall); State v. Paxton, 674 N.W.2d 106, 109 (Iowa 2004) (stating “the pro tanto credit rule, “is designed to prevent a double recovery by the injured party.””).

The erroneous order requiring Patterson to pay \$34,512.93 in victim pecuniary damages restitution has not provided Patterson substantial justice. If this application for discretionary review is not granted, Patterson will not have an opportunity for any review of the victim’s pecuniary damages restitution order in NTA0948898. Patterson may not seek postconviction relief pursuant to Iowa Code Chapter 822 because he was not convicted of a criminal offense in NTA0948898. Patterson will have no legal avenue to challenge the validity of the restitution order.

The Supreme Court should grant Patterson review in NT0948898. The Court should treat his timely Notice of Appeal as an Application for Discretionary Review and/or Petition for Writ of Certiorari as supplemented by the September 14, 2021 application, the October 1, 2021 reply and this brief. (NOA; App. for Discretionary Review/Petition for Cert.; Reply)(App. pp. 39, 43-56, 66-72). See Iowa R. App. P. 6.108 (form of review).

**II. Patterson has a right of appeal from the pecuniary damages restitution order entered after judgment and sentence. Alternatively, Patterson should be granted a writ of certiorari in Polk County number OWOM088283.**

**Preservation of Error.**

The district court entered a supplemental order imposing \$42,100.92 in pecuniary damages. (2/8/21 Motion to Amend Sentence to Include Restitution; Suppl. Order)(App. pp. 27-29). Patterson objected to the inclusion of the restitution. (3/5/21 Motion to Amend Sentence)(App. pp. 30-33). After hearing, the district court entered a ruling imposing \$34,512.93 for lost wages for the entire year of 2020.

(4/13/21 Ruling)(App. pp. 34-38). Patterson filed a timely notice of appeal. (NOA)(App. p. 39).

The Supreme Court ordered statements regarding its jurisdiction to hear the appeal in NTA0948898. (6/1/21 SCt Order)(App. pp. 40-42). The State, in its response to Patterson's application in NTA0948898, contested the right of appeal in OMOW088283. (Resistance ¶7)(App. p. 63-64). Patterson filed a reply regarding his right of appeal and requesting in the alternative the court grant discretionary review or a writ of certiorari. (Reply)(App. pp. 66-72). The Supreme Court ordered the issue briefed and submitted with the appeal. (10/13/21 SCt Order)(App. pp. 73-75).

Error is preserved by the timely notice of appeal, the subsequent reply asserting the right of appeal from the victim pecuniary damage order and/or to treat the notice of appeal as an application for discretionary review or a petition for writ of certiorari and the Supreme Court's October 13, 2021 Order.

(NOA; Reply; 10/13/21 SCt Order)(App. pp. 39, 66-75). Iowa R. App. P. 6.108.

**Standard of Review.**

The right of appeal is governed by the Iowa Rules of Appellate Procedure and the Iowa Code. Iowa R. App. P. 6.101(1)(b) (“A notice of appeal must be filed within 30 days after the filing of the final order or judgment.”); Iowa R. App. P. 6.103(1) (“All final orders and judgments of the district court involving the merits or materially affecting the final decision may be appealed to the supreme court, except as provided in this rule, rule 6.105, and Iowa Code sections 814.5 and 814.6.”); Iowa Code § 814.5 (2021)(State as appellant or applicant); Iowa Code § 814.6 (2021)(defendant as appellant or applicant).

The Rules of Appellate Procedure guide the Court’s granting a petition for writ of certiorari. See Iowa R. App. P. 6.107(2) (Certiorari).

The appellate courts “constitute courts for correction of errors at law.” Iowa R. App. P. 6.907. Constitutional claims are reviewed de novo. State v Dudley, 766 N.W.2d 606, 612 (Iowa 2009).

**Discussion.**

On February 12, 2020, Patterson was involved in the vehicle accident. (OMOW088283 TI)(App. pp. 11-13). He entered his guilty plea to serious injury by vehicle – reckless driving on October 9, 2020. (OMOW088283 Plea)(App. pp. 14-15). Patterson was sentenced on December 21, 2020. (12/21/20 Order (OMOW088283 sentencing))(App. pp. 20-26).

At the time of sentencing in late December 2020, the prosecutor stated he did not have the amount of pecuniary damages available. (Sent. Tr. p. 6L17-21). The court informed Patterson that because the State did not have the amount of pecuniary damages at that time, the State would submit documents “*if and when they are available.*” (Sent. Tr. p. 11L14-18) (emphasis added). The court also advised Patterson

that once the documents were filed he would “have an opportunity to litigate that amount at another time.” (Sent. Tr. p. 11L18-20).

Forty-nine days after sentencing, the State filed a motion to amend the sentence to include victim restitution. (2/8/21 Motion to Amend Sentence to Include Restitution)(App. p. 27). The same day, the court entered a supplemental order imposing \$42,100.92 in victim pecuniary damages. The order required Patterson to contest the order within 30 days. (Suppl. Order)(App. pp. 28-29). Patterson contested the pecuniary damage order. (3/5/21 Motion to Amend Sentencing)(App. pp. 30-33). After hearing, the district court entered a ruling which reduced the amount of pecuniary damages to \$ 34,512.93. The ruling was filed 113 days after the original sentence was imposed. (4/16/21 Ruling)(App. pp. 34-38).

### *Right of Appeal*

The right of appeal is granted from a final order. Iowa R. App. P. 6.101(1)(b) (judgments appealable as a matter of right); Iowa R. App. P. 6.103(1)(defining final order); Iowa Code § 814.6(1)(a)(b)(3)(2021)(appeal from final judgment of sentence demonstrating good cause). Patterson has an appeal of right from the April 13, 2021 Ruling imposing pecuniary damage restitution.

In Lacey, the Supreme Court discussed when a sentence was a final order. The Court stated:

Criminal defendants have a right to appeal from “[a] final judgment of sentence.” Iowa Code § 814.6(1)(a). The requirement that a judgment be final before a party may appeal as a matter of right is foundational and long-established in this state. *See, e.g., State v. Davis*, 47 Iowa 634, 635 (1878) (“[S]tatute provides for appeals to this court only from final judgments.”). A judgment is final and appealable “when it terminates the litigation between the parties on the merits” and “leaves nothing to be done but to enforce by execution what has been determined.” *State v. Propps*, 897 N.W.2d 91, 96 (Iowa 2017) (quoting *State v. Aumann*, 236 N.W.2d 320, 321–22 (Iowa 1975)). Generally, “[f]inal judgment in a criminal case means sentence.” *Id.* (alteration in original) (quoting *Daughenbaugh v. State*, 805 N.W.2d 591, 595 (Iowa 2011)).

State v. Lacey, 968 N.W.2d 792, 798 (Iowa 2021).

The sentencing order did not constitute a permanent order for pecuniary damages. (12/21/20 Order p. 3)(App. p. 22). Iowa Code section 910.3(8) (2021) requires the court to enter a permanent order setting out the *amount* of restitution. Iowa Code § 910.3(8) (2021) (emphasis added). See also Iowa Code § 910.3 (2019)(stating “the court shall set out the amount of restitution...”). If the full amount cannot be determined, the court shall enter an order setting forth the amount known at that time. Iowa Code § 910.3(9) (2021). See also Iowa Code § 910.3 (2019)(stating “the court shall issue a temporary order determining a reasonable amount for restitution identified up to that time.”). No amount of pecuniary damages was known at the time of sentencing. (Sent. Tr. p. 6L17-21, L14-20; 12/21/20 Order p. 3)(App. p. 22). The sentencing order stated, “[d]efendant is ordered to pay VPD in the amount of \$TBD for the costs inflicted on the victim(s) of this crime.” (12/21/20 Order p. 3)(App. p. 22).



The sentencing order which imposed “\$TBD” in pecuniary damages did not terminate the litigation regarding victim restitution and provided nothing to be enforced by execution. State v. Propps, 897 N.W.2d 91, 96 (Iowa 2017). A permanent restitution order for pecuniary damages was not entered until the Ruling filed on April 13, 2021 which set out the amount. (4/16/21 Ruling)(App. pp. 34-38). This ruling terminated the litigation as it relates to the victim pecuniary damages judgment and is appealable as a matter of right as an order which amended the sentencing order.

The court is only authorized to order criminal restitution pursuant to Chapter 910. Absent such statute, the court has no power to issue a criminal restitution order. State v. Bonstetter, 637 N.W.2d 161, 166 (Iowa 2001). Criminal restitution is a criminal sanction that is part of the sentence. State v. Alspach, 554 N.W.2d 882, 883 (Iowa 1996); State v. Mayberry, 415 N.W.2d 644, 646 (Iowa 1987). In Bonstetter, the Supreme Court declared that restitution is a penal

sanction. State v. Bonstetter, 637 N.W.2d at 165. A criminal sanction is “attached to a criminal conviction, such as a fine or restitution.” Black’s Law Dictionary (11<sup>th</sup> ed. 2019) (Sanction; criminal sanction, also termed penal sanction). A sentence is the judgment imposing the punishment to be inflicted. State v. Richardson, 890 N.W.2d 609, 617 (Iowa 2017); State v. Lathrop, 781 N.W.2d 288, 295 (Iowa 2010). The above authority makes clear that an order imposing restitution for victim pecuniary damages is a part of the criminal sentence. See Cf. Hester v. United States, 139 S.Ct. 509, 511 (2019)(Gorsuch, J. dissenting from denial of certiorari)(stating federal statutes and cases describe restitution as a “penalty” imposed on the defendant as part of his criminal sentence).

The April 13, 2021 Ruling imposing restitution for pecuniary damages amended the original sentencing order by increasing Patterson’s penal sanction. Cf. Hester v. United States, 139 S.Ct. at 510 (Gorsuch, J. dissenting from denial of

certiorari) (stating “statutory maximum for restitution is usually zero, because a court can’t award any restitution without finding additional facts about the victim’s loss.” The factfinder “must find any facts necessary to authorize a steeper prison sentence or fine, it would seem to follow that a [factfinder] must find any facts necessary to support a (nonzero) restitution order.”). The subsequent order imposing restitution for pecuniary damages entered a new judgment. Iowa Code § 910.7A (2021). For all practical purposes, the supplemental order for restitution constitutes a resentencing order. The Iowa Code and the Iowa Rules of Appellate Procedure provide a right of appeal from resentencing. Iowa Rs. App. P. 6.101(1)(b) and 6.103(1), Iowa Code § 814.6(1)(a)(3)(2021). See Cf. State v Roby, 897 N.W.2d 127, 135 (Iowa 2017)(appeal of right from resentencing following the court’s holding in Null, Pearson, Ragland); State v. Propps, 897 N.W.2d at 96 (the denial of a motion to correct an illegal sentence “neither disturbed the underlying sentence nor

entered a new judgment of sentence.”). The April 13, 2021 Ruling was a final order. Iowa R. App. P. 6.103(1).

### *Jurisdiction*

Iowa Code section 814.6(1)(a)(3) permits a defendant an appeal as a matter of right from a conviction entered where the defendant has pled guilty only when the conviction is for a class “A” felony or the defendant establishes good cause. Iowa Code § 814.6(1)(a)(3) (2021). Patterson was convicted of a class D felony. (12/21/20 Order)(App. pp. 20-26). See Iowa Code § 707.6A(4)(2021). Therefore, he must establish good cause to appeal the restitution order imposing pecuniary damages.

The Supreme Court concluded that “good cause” means a “legally sufficient reason.” State v. Damme, 944 N.W.2d 98, 104 (Iowa 2020). “[G]ood cause exists to appeal from a conviction following a guilty plea when the defendant challenges his or her sentence rather than the guilty plea.” Id. at 105.

The Supreme Court has not yet determined that a contested pecuniary damages restitution order establishes good cause to appeal. The Iowa Court of Appeal has held that challenges to a restitution order for pecuniary damages established good case to appeal. See State v. Mischke, No. 19-1510, 2022 WL 246244, at \* 1 (Iowa Ct. App. Jan. 27, 2022) (stating because “she challenges the court’s determination regarding restitution—an extension of her sentence—the State concedes Mischke has good cause”; the court agreed); State v. Hutchcroft, No. 20-0301, 2021 WL 2452153, at \*1 n.1 (Iowa Ct. App. June 16, 2021) (stating Hutchcroft had a right to file a direct appeal); State v. Jauregui, No. 20-0629, 2021 WL 1663598, at \*1 n.1 (Iowa Ct. App. April 28, 2021)(stating the “State agrees Jauregui has good cause to appeal because he is challenging a component of his sentence as opposed to his guilty plea.”). Patterson’s appeal in OWOM088283 only challenges the pecuniary damages restitution order entered on April 13, 2021 which amended his sentencing order. He has

established good cause for an appeal of right.

*If Patterson does not have a right of appeal, he has been denied equal protection and due process.*

“*Pecuniary damages*” means 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, except punitive damages and damages for pain, suffering, mental anguish, and loss of consortium.” Iowa Code § 910.1(3) (2019); Iowa Code § 910.1(6) (2021). “The rationale of restitution under criminal law is similar to the rationale of tort under civil law.” State v. Bonstetter, 637 N.W.2d at 165. “Since restitution is a penal sanction separate from civil remedies, it makes it possible to avoid the necessity of a separate civil action and ensures the efficient use of time and resources in the sentencing process.” Id.

### *Equal Protection*

Both the federal and state constitutions provide for equal protection of citizens under the law. U.S. Const. amend. XIV;

Iowa Const. art. I § 6. “Like the Federal Equal Protection Clause found in the Fourteenth Amendment to the United States Constitution, Iowa’s constitutional promise of equal protection is essentially a direction that all persons similarly situated should be treated alike.” Varnum v. Brien, 763 N.W.2d 862, 878 (Iowa 2009) (citations omitted)(internal quotation marks omitted). See also State v. Doe, 927 N.W.2d 656, 661 (Iowa 2019) (“[O]n a basic level, both constitutions establish the general rule that similarly situated citizens should be treated alike.”).

If Tidwell had sued Patterson in a civil action to recover damages from the automobile collision and obtained a judgment, Patterson would have a right of appeal from that judgment. Iowa R. App. P. 6.103(1). The failure to provide an appeal of right of the equivalent judgment entered in a criminal case violates equal protection. This Court has stated:

It is true that the right of appeal is purely statutory, not constitutional, and may be granted or denied by the legislature as it determines. This court has held, however, that once a right of appeal is provided “[i]t may not be extended to some

and denied to others.” When procedures enacted by the State serve to deny one person the right of appeal granted to another, equal protection of the law is denied.

Shortridge v. State, 478 N.W.2d 613, 615 (Iowa 1991), superseded by statute on other grounds, 1992 Iowa Acts ch. 1212, § 38 (codified as Iowa Code § 822.9 (1993)) (other citations omitted). “... [I]f a state establishes a right of appeal, it cannot administer its appellate process in a discriminatory manner and still be consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment.” State v. Doe, 927 N.W.2d at 669 (Appel, J. dissenting).

Under the State’s position in its resistance filed prior to briefing, a defendant will have a right of appeal if the State knows the amount of victim restitution at the time of sentencing. However, the State is not required to seek pecuniary damages at sentencing or within 30 days of sentencing. See Iowa Code § 910.3(5) (2021) (“The statement of pecuniary damages shall ordinarily be provided no later than thirty days after sentencing. However, a prosecuting



attorney may file a statement of pecuniary damages within a reasonable time after the prosecuting attorney is notified by a victim of any pecuniary damages incurred.”). See also State v. Blakley, 534 N.W.2d 645, 648-49 (Iowa 1995) (stating the “thirty-day requirement in section 910.3 is merely directory and not mandatory” and concluding that language “was not intended to be jurisdictional.”). Here, the State filed its motion to amend the sentence to include victim restitution forty-nine days after sentencing. (12/21/20 Order; 2/8/21 Motion to Amend Sentence to Include Restitution)(App. pp. 20-27). When the State does not know the amount of pecuniary damages or does not to seek pecuniary damages restitution at sentencing, the State would eliminate an appeal of right. See Iowa Code § 910.3(10) (2021). This too violates equal protection and due process. Shortridge v. State, 478 N.W.2d at 615. Patterson must be granted an appeal of right.

*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. “Under procedural due process, notice and an opportunity to be heard are required when a person’s property interests are at stake.” Lewis v. Jaeger, 818 N.W.2d 165, 181 (Iowa 2012). 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). Appellant does not assert that the federal constitutional right to due process and the state constitutional right to due process should be analyzed differently. State v. Reyes, 744 N.W.2d 95, 101 (Iowa 2008).

Iowa Code section 910.3(10) (2021) provides, “[a] permanent restitution order may be superseded by subsequent orders if additional or different restitution is ordered. A permanent restitution order entered after the time

of sentencing shall only be challenged pursuant to section 910.7.” Iowa Code § 910.3(10) (2021). Does Iowa Code section 910.3(10) apply to supplemental orders entered after notice and the right to be heard with assistance of counsel? Or does this statute permit the district court to enter a supplemental order imposing restitution without notice, hearing and an opportunity to be heard and, instead place the burden on the defendant to object by petitioning for a hearing pursuant to section 910.7?

In Jose, the Supreme Court discussed the procedure to contest restitution entered after sentencing. The Court held that the defendant could have filed a petition pursuant to section 910.7 to modify the supplemental order while his appeal was pending. State v. Jose, 636 N.W.2d 38, 46 (Iowa 2001). Regarding the right to court-appointed counsel, the Jose Court discussed its decision in State v. Alspach, 554 N.W.2d 882, 883-84 (Iowa 1996):

We recognized the well-established constitutional principle that sentencing procedures are a critical stage of the criminal

proceeding, and for that reason an indigent defendant has the right to court-appointed counsel at such proceeding. We noted that our prior cases acknowledged that restitution is a phase of sentencing. We also noted that section 910.3 authorizes the State to compile a statement of damages after sentencing. We reasoned that the right to court-appointed counsel guaranteed at all critical stages of the criminal proceedings should not rest on the “mere fortuity of whether restitution figures were available at sentencing.” We, however, limited our ruling to challenges of restitution orders imposed as part of the original sentencing order, or supplemental orders, issued under section 910.3.

State v. Jose, 636 N.W.2d at 46 (other citations omitted).

State v. Blank modified the Alspach holding. The Blank Court held:

When timeliness is factored into the analysis, it becomes clear—and we now hold—that the criminal due process requirements outlined in *Alspach* can be claimed only if protected by a timely challenge. Fairness dictates that a defendant who delays challenging a restitution order should not be treated the same as one who files a timely appeal. Courts are permitted under section 910.3 to delay entry of judgment for restitution when, for good cause, restitutionary sums are not ascertainable at the time of sentencing. A defendant, however, is granted no such statutory reprieve.

*Janz* instructs that a defendant challenging a restitution order entered as part of the original sentence has two options: to file a petition in district court under section 910.7, or to file a direct appeal. Considerations of judicial economy may favor giving the sentencing court the opportunity to consider the challenge in the first instance. To be considered an extension

of the criminal proceedings, however, the defendant's petition under section 910.7 must be filed within thirty days from the entry of the challenged order. Failing that, or a timely appeal, a later action under section 910.7 would still provide an avenue for relief. But the action would be civil, not criminal, in nature.

State v. Blank, 570 N.W.2d 924, 926 (Iowa 1997) (other citations omitted).

What Janz, Alspach, Blank, and Jose do not address is whether the district court was required to provide a defendant with notice of additional restitution and the right to be heard with the assistance of counsel without the requirement of requesting a hearing. State v. Janz, 358 N.W.2d 547 (Iowa 1984); State v. Alspach, 554 N.W.2d 882 (Iowa 1996); State v. Blank, 570 N.W.2d 924 (Iowa 1997); State v. Jose, 636 N.W.2d 2001). The Supreme Court has "recognized that the right to counsel extends to the sentencing proceedings, ... and acknowledged that restitution is a phase of sentencing." State v. Alspach, 554 N.W.2d at 883 (other citations omitted). The Iowa Supreme Court has stated that sentencing hearings need not "conform with all of the requirements of a criminal or even

of the usual administrative hearing; but ... *the hearing must measure up to the essentials of due process and fair treatment.*” State v. Ashley, 462 N.W.2d 279, 281 (Iowa 1990)(emphasis in original) (quoting State v. Delano, 161 N.W.2d 66, 72 (Iowa 1968)).

If Iowa Code section 910.3(10)(2021) is interpreted to require a defendant to request a hearing pursuant to Iowa Code section 910.7 to contest the initial amount of victim restitution or hold the State to its burden to prove the amount, section 910.3(10) (2021) violates due process.

This Court noted in Jenkins ... denying [a defendant] an opportunity to challenge the amount of the restitution order before the district court implicates his right to procedural due process. The overwhelming weight of federal and state authorities agree that procedural due process in the context of criminal restitution orders requires some kind of notice and an opportunity to be heard.

State v. Jenkins, 788 N.W.2d 640, 646 (Iowa 2010). The Jenkins Court rejected that any due process problem is avoided by the ability to request a hearing pursuant to Iowa

Code section 910.7. The Court stated:

While the offender may bring a claim under Iowa Code section 910.7, this is a postdeprivation remedy where a hearing is a discretionary matter, not a matter of right. In addition, an offender is not entitled to appointed counsel as a matter of right. 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 646-47. Patterson must be granted an appeal of right.

*If Patterson does not have an appeal of right in OWOM088283, and his constitutional rights have not been violated, he requests the Court treat his notice of appeal as a petition for writ of certiorari.*

If Patterson’s appellate review is by writ of certiorari as provided by Iowa Code section 910.7(5) (2021), Patterson requests this Court treat his timely notice of appeal as a petition for writ of certiorari. See Iowa Code § 910.7(5) (2021) (stating “[a]ppellate review of a district court ruling under this section shall be by writ of certiorari.”); Iowa R. App. P. 6.108 (form of review). In the review of a certiorari action, the Court “can only examine “the jurisdiction of the district court and the legality of its actions.” “ Ary v. Iowa Dist. Ct., 735 N.W.2d

621, 624 (Iowa 2007)(quoting Christensen v. Iowa Dist. Ct., 578 N.W.2d 675, 678 (Iowa 1998)). “When the court’s findings of fact are not supported by substantial evidence, or when the court has not applied the law properly, an illegality exists.” Id. (citing Amro v. Iowa Dist. Ct., 429 N.W.2d 135, 138 (Iowa 1988)). As argued in Division III, the pecuniary damages restitution order is not supported by substantial evidence. A grant of a writ of certiorari is warranted.

**III. The pecuniary damages restitution order lacks substantial evidentiary support.**

**Preservation of Error.**

Patterson preserved error by challenging the supplemental order and the restitution amount. (Suppl Order; 3/5/21 Motion to Amend)(App. pp. 28-33). Following the hearing, the court granted the State’s request for restitution. (4/13/21 Ruling)(App. pp. 34-38). State v. Bonstetter, 637 N.W.2d 161, 167-68 (Iowa 2001).



### **Standard of Review.**

The appellate court reviews “the district court’s restitution order for correction of errors at law.” State v. Roach, 920 N.W.2d 93, 99 (Iowa 2018). When reviewing a restitution order, the court determines whether the district court’s findings lack substantial evidentiary support, or whether the district court has not properly applied the law. State v. Klawonn, 688 N.W.2d 271, 274 (Iowa 2004). “Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion.” State v. Bonstetter, 637 N.W.2d at 165.

### **Discussion.**

Restitution is a mandatory part of criminal sentencing under Iowa law. Iowa Code § 910.2 (2021); State v. Jenkins, 788 N.W.2d 640, 644 (Iowa 2010). It 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). The legislature

has inserted restitution, which otherwise would normally be civil, into the criminal proceeding. State v. Dudley, 766 N.W.2d 606, 620 (Iowa 2009). The court is authorized to order criminal restitution pursuant to the restitution statutes. State v. Bonstetter, 637 N.W.2d at 166.

Restitution includes “pecuniary damages.” Iowa Code § 910.1(10) (2021). “Pecuniary damages” means all damages to the extent not paid by an insurer, which a victim could recover against the offender in a civil action arising out of the same facts or event, except punitive damages and damages for pain, suffering, mental anguish, and loss of consortium.” Iowa Code § 910.1(6) (2021).

The Iowa Supreme Court has interpreted these provisions as requiring a restitution order to rest on “a causal connection between the established criminal act and the injuries to the victim.” State v. Holmberg, 449 N.W.2d 376, 377 (Iowa 1989). The State has the burden to prove the amount of damages caused by a defendant’s criminal conduct. State v. Tutor, 538

N.W.2d 894, 897 (Iowa Ct. App. 1995). Patterson’s “criminal conduct must have been the cause in fact of the loss and within the scope of liability.” State v. Waigand, 953 N.W.2d 689, 694 (Iowa 2021) (citing State v. Shears, 920 N.W.2d 527, 541 (Iowa 2018)). The State may recover all damages it can establish by a preponderance of the evidence. State v. Holmberg, 449 N.W.2d at 377. “Sentencing courts should not rubber-stamp victim restitution claims.” State v. Roach, 920 N.W.2d at 108.

Restitution is not limited to the parameters of the offense to which a defendant enters a guilty plea. State v. Watts, 587 N.W.2d 750, 751 (Iowa 1998); Earnest v. State, 508 N.W.2d 630, 633 (Iowa 1993). Rather, “the order can be extended to any amount which would be appropriate for tort recovery.” State v. Holmberg, 449 N.W.2d at 377. Even so, there must still be evidence tying the defendant’s admitted conduct to the amount of restitution ordered. Id. at 377-78. A restitution order “is not excessive ‘if it bears a real reasonable

relationship to the damage caused.” State v. Wagner, 484 N.W.2d 212, 216 (Iowa Ct. App. 1992) (quoting State v. Mayberry, 415 N.W.2d at 647).

The district court ordered Patterson to pay \$34,512.93 in pecuniary damages. The district court’s findings lack substantial evidentiary support. State v. Roach, 920 N.W.2d at 99 (stating “[e]vidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion.”).

Patterson does not dispute that Tidwell sustained a serious injury in the accident as this is an element of the offense of serious injury by vehicle. Iowa Code § 707.6A(4) (2019). Yet, the prosecution maintains the burden to prove Patterson’s criminal conduct was the cause in fact of the loss by substantial evidence. The State only called Tidwell and admitted his 2019 W2 statement. The prosecution did not present any medical information regarding the duration of Tidwell’s injuries and his inability to be employed in any occupation.

Restitution proceedings are not subject to strict rules of evidence. State v. Edouard, 854 N.W.2d 421, 450 (Iowa 2014)(citing Iowa R. Evid. 5.1101(c)(4) (stating the rules of evidence do not apply in sentencing proceedings)). Tidwell testified that his doctor told him he was unable to work. Tidwell later testified that he had never been told that he was able to go back to work. (Tr. p. 12L13-p. 14L16). While the State is permitted to present hearsay evidence which was attributed to Tidwell's unnamed doctor, the value of this evidence does not amount to substantial evidence. (Tr. p. 12L13-14L16). The State did not supplement Tidwell's testimony with medical records, witness testimony or any other evidence. See State v. Edouard, 854 N.W.2d at 450 (stating that the medical provider attested in writing that all the treatments were related to the crime amount to substantial evidence when combined with testimony from the CVCP about the process in which the evidence was assembled). Tidwell's testimony alone is insufficient to prove

he could not obtain any type of employment. He testified that he had not attempted to obtain a job which would be “light duty.” (Tr. p. 35L2-15). The State failed to prove Tidwell sustained damages for lost wages because he was not able to work, due to the accident, at any time in any job during 2020.

Additionally, the district court found the State had proven the amount of damages by presenting information of Tidwell’s income from 2019. (4/13/21 Ruling pp. 4-5)(App. pp. 37-38). However, Tidwell was no longer working for A1Concrete, the 2019 employer, as he had informed the company he would not return to work in 2020 after the winter lay-off. (Tr. p. 20L8-p. 21L13). The Supreme Court has stated:

There is a distinction between proof of the fact that damages have been sustained and proof of the amount of those damages. Damages are denied where the evidence is speculative and uncertain whether damages have been sustained. But “[if] the uncertainty lies only in the amount of damages, recovery may be had if there is proof of a reasonable basis from which the amount can be inferred or approximated.”

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

(other citations omitted).

“The purpose of loss-of-wage recovery is to compensate plaintiffs for the reasonable value of the time they are displaced from their occupation.” Lackman v. Liedman, No. 15-1062, 2016 WL 3002744, at \*3 (Iowa Ct. App. May 25, 2016). “When the occupation is as a wage earner, the value of the lost time is properly measured by the claimant’s regular earnings.” Hopping v. College Block Partners, 599 N.W.2d 703, 706 (Iowa 1999). At the time of the accident, Tidwell was not working for A1 Concrete. He had informed this former boss that he was not returning in 2020 after the winter lay-off. (Tr. p. 20L22-p. 21L18, p. 31L8-25). Tidwell testified that he had been employed in early 2020 as a detailer for a transport company. He did not have a 1099 form for this income but estimated he made approximately \$700. (Tr. p. 14L25-p. 15L25). Tidwell was not receiving unemployment benefits. (Tr. p. 20L8-21). The State presented no supporting

documentation of any employment income Tidwell had after he was laid off from A1 Concrete in November 2019. (Tr. p. 20L1-21, p. 21L2-13; Ex. 1)(Conf. App. p. 13).

The prosecutor acknowledged Tidwell's W-2 (Exhibit 1) "from a single employer from the year" was an "estimate" what his wages would have been in 2020. (Tr. p.35L10-20; Ex. 1)(Conf. App. p. 13). However, the amount of Tidwell's lost wages for 2020 is merely speculative. He had terminated his employment with A1 Concrete. (Tr. p. 20L22-p. 21L18, p. 31L8-25). Tidwell testified that he could not honestly say whether he would have returned to A1 Concrete in 2020. (Tr. p. 31L8-25). The State did not present evidence from A1 Concrete it would have again hired Tidwell after he quit in late 2019 or early 2020. Nor did the State present evidence regarding the actual availability of jobs through the Union Hall. Nor did the State present evidence regarding what Tidwell would have earned performing the hypothetical jobs from the Union Hall. It is further speculative that Tidwell, if



he had not been injured, would have been employed in 2020 within the construction field during the Covid-19 pandemic. “Under general damage principles, overly speculative damages cannot be recovered.” Jamison v. Knosby, 423 N.W.2d 2, 6 (Iowa 1988).

The restitution order is not supported by substantial evidence. The district court erred in awarding Tidwell pecuniary damages unsupported by the evidence. The restitution order must be vacated.

*If the Court finds the district court’s pecuniary damages restitution order is supported by substantial evidence, a remand is nevertheless required.*

Tidwell received \$6,000 from the Attorney General’s Office for lost wages in 2020. (Tr. p. 27L12-24). The prosecution did not file a statement regarding an award by the crime victim compensation program for lost wages. Iowa Code § 910.3(1)(2021). The crime victim compensation program shall award compensation, as appropriate, for economic losses incurred as a direct result of an injury to the victim. The

program will award compensation for “[l]oss of income from work the victim would have performed and for which the victim would have received remuneration if the victim had not been injured not to exceed six thousand dollars.” Iowa Code § 915.86(2) (2021). Tidwell received the maximum award from the crime victim compensation program for lost wages but the record does not show the basis for this award.

The district court noted that Tidwell had received a \$6,000 payment but did not subtract this amount from the damage award because the court believed the \$6,000 would not fully compensate Tidwell for the seasonal unemployment benefits he annually received. (4/13/21 Ruling p. 4)(App. p. 37). The district court erred.

The State did not present evidence that Tidwell would have been entitled to unemployment benefits in 2020. Tidwell testified he was not eligible for unemployment benefits approximately two to three months prior to the accident. This is because he had quit working at A1 Concrete. (Tr. p. 20L22-

p. 21L18, p. 31L8-25). Tidwell was working on-contract in early 2020. (Tr. p. 14L25-p. 15L25).

The State also did not present any evidence that Tidwell would have been working for an employer during the winter of 2020. Tidwell's plan was to work jobs through the Union Hall. (Tr. p. 21L8-p. 22L8). The jobs through the Labors' Union were described as temporary. Tidwell testified:

... they send you to different jobs that the company would ask for. When the company was done with us, they would release us. We would go back on the list and then they would - - when another job come up, they would send you to a different job.

(Tr. p. 21L14-p. 22L1). The district court had no basis to conclude Tidwell would have received seasonal unemployment benefits in 2020.

The award from the crime victim compensation program is not a civil judgment which would offset by operation of law. State v. Waigand, 953 N.W.2d at 695-96. If the Court determines the estimated lost wages is sufficient to uphold the order, the failure to offset the \$6,000 payment for lost wages is

error. Cf. State v. Klawonn, 688 N.W.2d 271, 276 (Iowa 2004)(stating defendant was entitled to a reduction of the restitution in order to avoid a windfall); State v. Paxton, 674 N.W.2d 106, 109 (Iowa 2004) (stating “the pro tanto credit rule, “is designed to prevent a double recovery by the injured party.””).

### **CONCLUSION**

Royriguez Patterson respectfully requests this Court grant him review in Polk County NTA0948898, and find he has a right of appeal in Polk County OWOM088283 or grant review by certiorari. Patterson respectfully request this Court vacate the pecuniary damages restitution order because it is not supported by substantial evidence. Alternatively, Patterson requests the Court reduce the restitution order by \$6,000 and remand the case to the district court to enter a corrected restitution order.

### **REQUEST FOR ORAL ARGUMENT**

Counsel requests to be heard in oral argument.

## **ATTORNEY'S COST CERTIFICATE**

Counsel hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was \$8.70, 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**

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

[X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 9,593 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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