

IN THE SUPREME COURT OF IOWA
Supreme Court No. 21-0672

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROYRIGUEZ PATTERSON,
Defendant-Appellant.

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

APPELLEE'S BRIEF

THOMAS J. MILLER
Attorney General of Iowa

MARTHA E. TROUT
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
(515) 281-8894 (fax)
martha.trout@ag.iowa.gov

JOHN SARCONI
Polk County Attorney

KAILEY GRAY
Assistant County Attorney

ATTORNEYS FOR PLAINTIFF-APPELLEE

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

- I. There is no need to grant review of the dismissed simple misdemeanor traffic case NTAO948898 because a decision would have no impact on this or any other case.**

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Daughenbaugh v. State, 805 N.W.2d 591 (Iowa 2011)
State v. Abbasi, No. 14-1576, 2015 WL4935705
(Iowa Ct. App. Aug. 19, 2015)
State v. Alspach, 552 N.W.2d 882 (Iowa 1996)
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Thomas A. Mayes & Anuradha Vaitheswaran, *Error Preservation in Civil Appeals in Iowa: Perspectives on Present Practice*, 55 Drake L. Rev. 39 (2006)

II. The defendant does not enjoy a statutory right to appeal an order for restitution entered after the judgment and sentence; he may only seek a writ of certiorari under Iowa Code section 910.7(5).

Authorities

Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961)
Higgs v. Neven, No. 3:10-cv-00050-RCJ-WGC, 2013 WL 5663127 (D. Nev. Oct. 16, 2013)
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People v. Roundtree, 301 P.3d 150 (Cal. 2013)
State v. Bonstetter, 637 N.W.2d 161 (Iowa 2001)
State v. Bruegger, 773 N.W.2d 862 (Iowa 2009)
State v. Ceaser, 585 N.W.2d 192 (Iowa 1998)
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III. Certiorari need not be granted because the State established the amount of the pecuniary damages the victim suffered as a result of the defendant’s criminal activity.

Authorities

State v. Ihde, 532 N.W.2d 827 (Iowa 1995)
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ROUTING STATEMENT

This case presents an issue of first impression and a question of changing legal principles and should be retained by the Iowa Supreme Court. Iowa R. App. P. 6.1101(2)(c) and (f). That is, this case involves the application of recently enacted provisions of Iowa Code chapter 910 and the proper means to seek review of a restitution order that was not entered as part of the original sentence. The resolution of this case will have long-standing impact on the manner in which restitution orders may be challenged. Iowa R. App. P. 6.

STATEMENT OF THE CASE

Nature of the Case

Royriguez Patterson appeals the restitution order entered following his conviction for serious injury by vehicle. The Honorable Christopher Kemp presided over the proceedings in Polk County. The issues on appeal are whether this court should grant review of the restitution order imposed in NTAO948898, whether the defendant may directly appeal the restitution order in OWOM088283, and whether the amount of restitution imposed is supported by the record.

Course of Proceedings

Following a car accident on February 12, 2020, that resulted in serious injury to James Tidwell, the State charged Patterson with two counts of serious injury by vehicle, a violation of Iowa Code section 707.6A(4), and punishable as a class D felony (counts I and II), and one count of operating while intoxicated, a violation of Iowa Code section 321J.2, and punishable as a serious misdemeanor. Trial Info. OWOMo88283 (3/20/20); App. 11. The State also cited Patterson for failure to maintain control, a violation of Iowa Code section 321.288. Preliminary Complaint NTA00948898 (2/12/20); App. 9-10.

The parties entered into a plea agreement whereby the State would dismiss one count of serious injury by vehicle (count I), the operating while intoxicated (count III) charge, and the traffic violation in exchange for his plea to the remaining count of serious injury by vehicle (count II). Pet. To Plead Guilty (10/9/20); App. 14-15. The plea also provided that Patterson could request a sentence of probation. Pet. To Plead Guilty (10/9/20); App. 14-15. Patterson also agreed “to pay full court costs & victim restitution for any dismissed counts and/or cases . . .” Pet. To Plead Guilty (10/9/20); App. 14-15. The district court accepted Patterson’s guilty plea and found there

was a factual basis for it and that the plea was knowingly, voluntarily, and intelligently entered. Order Accepting Plea (10/12/20); App. 16-18.

On December 21, 2020, the district court sentenced Patterson to a five-year term of incarceration. Sent. Order (12/21/20); App. 20-25. The court suspended the sentence and placed Patterson on probation for two years. Sent. Order (12/21/20); App. 20-25. The sentencing order required Patterson to pay victim pecuniary damages in an amount to be determined. Sent. Order (12/21/20); App. 20-25.

On February 8, 2021, the state moved to amend the sentence to include victim restitution. Mot. to Amend Sent. (2/8/21); App. 27. The State sought restitution for damages to the car sustained in the crash and for the victim's lost wages. Mot. to Amend Sent. (2/8/21); App. 27. The total amount sought was \$42,100.92. Mot. to Amend Sent. (2/8/21); App. 27. The district court approved the requested amount. Order To Approve Rest. (2/8/21); App. 28.

On March 5, 2021, Patterson sought to challenge the restitution order. Mot. To Appeal Rest. (3/5/21); App. 30-33. The district court set a hearing and at the hearing, the victim, James Tidwell, testified about his lost wages and the damage to his car caused by the crash.

Rest. Tr. p. 5, line 1 through p. 34, line 16. The district court ordered Patterson to pay \$34,512.93 to Tidwell for lost wages due to his inability to work following the accident. Ruling on Rest. (4/13/21); App. 34-37. The district court did not include restitution for damage to the car. Ruling on Rest. (4/13/21); App. 34-37. Patterson filed a notice of appeal on May 12, 2021. Not. of Appeal (5/12/21); App. 39.

Facts

Shortly after midnight on February 12, 2020, Patterson rear-ended James Tidwell's vehicle on the Keo Way entrance ramp to westbound Interstate 235 in Des Moines. Min. of Testimony (Roupe Report); Conf. App. 4-7. When Patterson's vehicle struck Tidwell's vehicle, it pushed Tidwell's vehicle across two lanes of traffic and into the concrete barrier. Min. of Testimony (Roupe Report); Conf. App. 4-7. Tidwell's vehicle was totaled and he sustained multiple injuries. Min. of Testimony (Roupe Report), Rest. Tr. p. 9, lines 3-5; Conf. App. 4-7. He suffered a broken humerus, dislocated his left shoulder, dislocated his right hip, fractured his acetabulum, fractured his L4 – L5 vertebrae, and injured his spleen. Rest. Tr. p. 5, lines 16-25. Tidwell was hospitalized for 19 days, confined to wheelchair for four months, underwent months of physical therapy, and still has

difficulty walking. Rest. Tr. p. 6, lines 1-12. Additional facts will be discussed below as relevant to the State's case.

ARGUMENT

I. **There is no basis or need to grant review of the dismissed simple misdemeanor traffic case NTAO948898.**

Jurisdiction

This court lacks jurisdiction to consider this claim. Patterson seeks to appeal a dismissed simple misdemeanor case but there is no right to appeal a dismissed simple misdemeanor. In *State v. Jones*, No. 12-0736, 2013 WL 5761822, at *3 (Iowa Ct. App. Oct. 23, 2013), the Iowa Court of Appeals concluded that the right to appeal does not exist from a simple misdemeanor restitution order. The *Jones* court reviewed the case law to conclude that no right to appeal exists from an order in a simple misdemeanor case on a hearing to modify a restitution order. *Id.* The court explicitly rejected Jones's argument that an order issued after a hearing pursuant to section 910.7 of the Code constituted an independent and separate judgment. *Id.* Rather, the court concluded that the hearing under section 910.3 and 910.7 are extensions of the criminal sentence and are subject to appeal in accordance with section 814.6(1)(a). *Id.* The court then concluded that because the sentencing order in that case arose from a simple

misdemeanor there was no right to appeal. *Id.* The ruling is consistent with both *State v. Janz*, 358 N.W.2d 547, 549 (Iowa 1984) and *State v. Alspach*, 552 N.W.2d 882, 884 (Iowa 1996). *Jones* established that the right to appeal a restitution order in a simple misdemeanor case does not exist.

In addition, under the terms of the plea agreement the State agreed to dismiss the simple misdemeanor traffic violation. Pet. To Plead Guilty (10/9/20); App. 14-15. An appeal is not permitted from a dismissal. Iowa Code section 814.6(1)(a) grants an appeal from a “final judgment of sentence.” Iowa Code § 814.6(1)(a). A final judgment in a criminal case means the sentence. *See State v. Propps*, 897 N.W.2d 91, 96 (Iowa 2017) (quoting *Daughenbaugh v. State*, 805 N.W.2d 591, 595 (Iowa 2011)). While the State does not dispute that dismissals of criminal cases even with an agreement of costs or fees or pecuniary damages are commonplace, an appeal is only authorized by statute and the right applies in a narrow set of circumstances; a dismissal of the criminal case is not one of them.

The State notes that in *State v. Abbasi*, No. 14-1576, 2015 WL4935705, at *1-2 (Iowa Ct. App. Aug. 19, 2015), the Court of Appeals determined that the defendant could appeal costs associated

with a dismissed simple misdemeanor case. The court found that because the costs for the simple misdemeanor were assessed through the sentencing order in the serious misdemeanor case that could be appealed, the court could “consider the claim of an illegal sentence at anytime.” *Id.* at *2; accord *State v. Tielebein*, No. 21-0352, 2022 WL 610558, at n. 6 (Iowa Ct. App. Mar. 2, 2022). These cases do not impact the analysis of whether this court should grant review because the restitution at issue here were not for court costs but for victim restitution. OWOMo88283 Supp. Order (2/8/21); App. 28. In this case, the amount of restitution was not entered as part of the original sentencing order but was entered *after* the original sentencing order. Order Plea and Sent. (12/21/20); App. 20-25. After the State obtained the amount of pecuniary damages and filed a statement, the district court approved the amount. Motion to Amend. Sent. (2/8/21), OWOMo88283 Supp. Order (2/8/21); App. 27-28. Patterson challenged the amount and the district court held a hearing. Motion to Amend Sent. Appeal Rest. (3/5/21), Order Setting Hearing (3/11/21); App. 30, - -. Patterson had an opportunity to challenge restitution below and can only challenge the amount of restitution – from a final judgment which was entered in

OWOMo88283 through a certiorari action in accordance with Iowa Code § 910.7(5). He cannot appeal the dismissed simple misdemeanor through the OWOMo88283 case. In the event that this court rejects these claims, the State asks this court to overrule *Abbasi* and *Tielebein* because they conflict with Iowa Code section 814.6(1)(a)(1) which prohibits an appeal from a simple misdemeanor. To allow a defendant to appeal a simple misdemeanor simply because the order was jointly filed with another more serious offense contravenes the plain language of the statute and legislative intent. There is no basis for direct appellate review.

Preservation of Error

The State does not agree error was preserved on this claim. Patterson asserts that “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.” Def. Brief at 28. The Court of Appeals has noted on many occasions that although:

...this is a common statement in briefs, it is erroneous, for the notice of appeal has nothing to do with error preservation. In fact, the two concepts are mutually exclusive. As a general rule, the error preservation rules require a party to raise an issue in the trial court and obtain a ruling from the trial court.

State v. Erwin, No. 18-0523, 2018 WL 6706247, at *2 (Iowa Ct. App. Dec. 19, 2018) (quoting Thomas A. Mayes & Anuradha Vaitheswaran, *Error Preservation in Civil Appeals in Iowa: Perspectives on Present Practice*, 55 Drake L. Rev. 39, 48 (2006) (footnotes omitted)); accord *State v. Lange*, 831 N.W.2d 844, 846–47 (Iowa Ct. App. 2013).

Even if it could be argued that Patterson’s objection to the district court’s original restitution order preserved error, he is precluded from challenging the order because he agreed, under the terms of the plea agreement, to “to pay full court costs & victim restitution for any dismissed counts and/or cases . . .” Pet. To Plead Guilty (10/9/20); App. 14-15. The payment of costs and victim restitution for “any dismissed counts and/or cases” was part of the agreement. See generally *State v. McMurry*, 925 N.W.2d 592, 601 (Iowa 2019) (the parties are free to agree to the apportionment of fees and costs in a plea agreement). Because this was part of the plea agreement, Patterson should not be able to renege on the agreement, especially when it was a bargained for condition of the agreement.

Standard of Review

“An appellate court reviews restitution orders for correction of errors at law.” *State v. Jenkins*, 788 N.W.2d 640, 642 (Iowa 2010).

Merits

A direct appeal is not the appropriate means to review a dismissed simple misdemeanor case. Rather, the better option is either an application for discretionary review or a petition for writ of certiorari. Neither should be granted in this case as the claim lacks any merit.

Discretionary review

Under Iowa Rule of Appellate Procedure 6.106 and/or Iowa Rule of Criminal Procedure 2.73(6), the applicant must advance persuasive legal grounds to hear the case. *See State v. Shortridge*, 478 N.W.2d 613, 615 (Iowa 1991) (court’s discretion to deny such applications is intended to conserve scarce judicial resources). Typically, in a discretionary review, persuasive legal grounds should present an issue of importance to the judiciary and the profession. Iowa Code § 814.6(2)(e). Further, good cause to grant discretionary review under Iowa Code section 814.6(1)(a)(3) is usually unavailable when there is an agreed-upon disposition. *See State v. Damme*, 966

N.W.2d 98, 105 (Iowa 2020) (good cause to appeal a non-mandatory sentence nor agreed to as part of the plea agreement).

In *State v. Petrie*, 478 N.W.2d 620, 622 (Iowa 1991), the court noted that Iowa Code section 815.13 (1989) authorizes the collection costs of a criminal prosecution from a defendant “unless the defendant is found not guilty.” The court stressed that “nothing in this opinion prevents the parties to a plea agreement from making a provision covering the payment of costs and fees.” *Id.* The plea agreement in this case provided: “Counts I and III and companion citation NTA0948898 to be dismissed at Defendant’s cost.” Pet. Plead Guilty (10/9/20); App. 14-15. Patterson presents no issue to review. The court’s order followed existing law and he offers no persuasive reason to overturn it.

Patterson contends, however, that the court’s restitution order included language that he “pay court costs and any victim restitution associated with these counts and/or cases” suggesting that the restitution order of approximately \$34,000 applies to in both the indictable and non-indictable cases. Therefore, without including the misdemeanor case in the appeal, the argument suggests that complete relief may not be had. Although there is a slight discrepancy between

the words contained in the plea agreement in which Patterson agreed to pay the costs of the dismissed action and the words used in the judgment entry, the court's order essentially acknowledges what the plea agreement contained. Pet. Plead Guilty. (10/9/20), Order Plea and Sent. (12/21/20); App. 14-15, 20-25. However, the court did not have an amount of pecuniary damages provided to it at that stage in the proceedings. The order of disposition in the case filed on December 21, 2021, had already dismissed NTA0948898 at the defendant's cost and ordered any restitution associated with the case at the time of dismissal. Order Plea and Sent. (12/21/20); App. 20-25. The judgment entry cannot be read as ordering \$34,000 in restitution in the simple misdemeanor case that was dismissed. Order Plea and Sent. (12/21/20); App. 20-25. No other restitution, other than the costs of prosecuting the simple misdemeanor, is intended by the court's order. The court later ordered restitution in the OWOM case in the amount of \$34,512.93, which appeared to be the total of lost wages that the victim, James Tidwell, sustained in 2020. Ruling on Rest. (4/13/21); App. 34-37. In the end, the restitution for the victim's damages is not ordered in the simple misdemeanor. Ruling on Rest. (4/13/21); App. 34-37. The order

containing that amount is cross-filed, perhaps as a function of electronic document filing, but there was no intent to include an order for restitution in the simple misdemeanor filed. Ruling on Rest. (4/13/21); App. 34-37. Later costs assessed in OWOMo88283 are not “associated” with the dismissed charge.

Patterson does not have a right to appeal and discretionary review is unwarranted because the defendant does not present a case of importance to the profession. While the cross-filing of orders may create ambiguity, it does not work to the substantial detriment of the defendant. *Winneshiek Cty. State Bank v. Dist. Court of Allamakee Cty.*, 212 N.W. 391, 393 (Iowa 1927) (erroneous order is not necessarily legal). Ultimately, it does not seem a review of the simple misdemeanor is even necessary in this case. The State does not take the position that it could collect restitution in the simple misdemeanor case if the order in the OWOM case was reversed. *See e.g.*, Iowa Code § 910.1(3) (criminal activities does not include simple misdemeanors under chapter 321). Pragmatically, it does not appear from the State’s perspective that granting review on the simple misdemeanor will have any impact on the issue presented. The issue is the same with or without the inclusion of that matter. Yet, a

problem exists with the appeal as a whole. The restitution order is not an appealable order.

Writ of Certiorari

While the State agrees that a restitution order that is part of a final judgment of sentence is appealable, the restitution in OWOMo88283 was not ordered as part of the final judgment of sentence. Iowa Code section 910.3 provides that a permanent order entered at the time of sentence is part of the final judgment and may be appealed in a properly perfected appeal. Iowa Code § 910.3. The restitution order at issue here was not ordered at the time of sentencing. The judgment of sentence was entered on December 21, 2020. Judg. and Sent. (12/21/20); App. 20-25. An order to approve restitution was entered on February 8, 2021. Motion to Amend. Sent. (2/8/21); App. 27. Patterson challenged the restitution amount and, after a restitution hearing, the district court entered a final order of restitution for \$34,512.93 for lost wages on April 13, 2021. Order on Rest. (4/13/21); App. 34-37. Obviously, an order entered on April 13, 2021, was not entered at the time of sentencing when sentencing occurred months earlier in December of 2021. Review of any subsequent order for category A restitution has to be reviewed by writ

of certiorari. Iowa Code §§ 910.7(4) and 910.7(5) (attempt to review or modify “any issue related to the offender’s plan of restitution” must be raised in the district court and appealed by writ of certiorari).

While the court may have suggested that unknown amounts of restitution could be litigated at a later date, that advice cannot create an appeal right that is not provided by the Code. Patterson provides no compelling argument that warrants review of the category A restitution order.

II. The defendant does not enjoy a statutory right to appeal an order for restitution entered after the judgment and sentence; he may only seek a writ of certiorari under Iowa Code section 910.7(5).

Jurisdiction

Patterson does not have a right to an appeal from an order for restitution entered after judgment and sentence was pronounced. Although Patterson may seek review, he must do so in accordance with Iowa Code section 910.7(5) and file a petition for writ of certiorari. Iowa Code § 910.7(5). His claim does not merit consideration either as an appeal or a certiorari action because the court did not err in ordering Patterson to pay category A restitution for lost wages the victim suffered as a result of Patterson’s criminal acts.

The district court sentenced Patterson to a two-year term of probation following his conviction for serious injury by vehicle. Sent. Order (12/21/20); App. 20-25. As to pecuniary damages to the victim, the sentencing order provided, “Defendant is ordered to pay VPD in the amount of \$TBD for the costs inflicted on the victim(s) of this crime.” Sent. Order (12/21/20); App. 20-25. The court did not set any amount of pecuniary damages in the sentencing order. Sent. Order (12/21/20); App. 20-25.

On February 8, 2021, the State sought to amend the sentencing order to include victim restitution for items damaged in the car crash that gave rise to the charges as well as lost wages the victim incurred. Mot. to Amend Sent. Rest. (2/8/21); App. 27. On that same date, the court entered a supplemental order of restitution in the amount of \$42,100.92 for pecuniary damages to the victim. Supp. Order (2/8/21); App. 28. This order allowed Patterson to challenge the amount of pecuniary damages and he did. Supp. Order (2/8/21), Mot. to Amend Sent. (3/5/21); App. 28, 30-33. The district court held a hearing and ordered Patterson to pay victim restitution for lost wages in the amount of \$34,512.93. Ruling on Challenge (4/13/21); App. 34-37.

Patterson filed a notice of appeal to challenge the court's order on restitution. Not. of Appeal (5/12/21); App. 39. He does not have a statutory right to appeal the court's supplemental ruling. Had Patterson appealed from his original sentence, which occurred on December 21, 2020, he would have a right to a direct appeal under Iowa Code section 910.3(8). That section provides in pertinent part:

A permanent restitution order entered at the time of sentencing is part of the final judgment of sentence as defined in section 814.6 and shall be considered in a properly perfected appeal.

Iowa Code § 814.6. But, that did not happen in this case as the amount of pecuniary damages was not available. In fact, the court did not impose any amount of pecuniary damages.

When the amount of pecuniary damages were requested and ordered on February 8, 2021, that order became a permanent order. Patterson subsequently challenged the amount of victim restitution, the court's order of April 13, 2021, superseded the February 8, 2021 order. Under Iowa Code section 910.3(10):

A permanent restitution order entered after the time of sentencing shall only be challenged pursuant to section 910.7.

Iowa Code § 910.3(10). Under section 910.7(5), "Appellate review of a district court ruling under this section shall be by writ of certiorari."

Iowa Code § 910.7(5). The legislature contemplated a situation such

as this and the determined that a defendant who seeks to challenge an order of restitution “entered after the time of sentencing” shall be by certiorari. Iowa Code § 910.7(5).

Patterson contends that the sentencing order of December 21, 2020 did not constitute a permanent order for pecuniary damages. Def. Brief at 47. He continues that the permanent order for pecuniary damages was not entered until April 13, 2021. Def. Brief at 48. While the State does not dispute either of these contentions, the permanent order of restitution entered on April 13, 2021, is not separately appealable as Patterson asserts. When, as in this case, the restitution permanent order for restitution is entered after sentencing, appellate review is limited to a writ of certiorari. Iowa Code §§ 910.3(10) and 910.7(5).

Patterson next asserts that the “Supreme Court has not yet determined that a contested pecuniary damages restitution order establishes good cause to appeal.” Def. Brief at 52. He cites to several Court of Appeals’ decisions in which the court considered restitution challenges that arose from restitution orders that were imposed after the sentencing order: *State v. Mischke*, No. 19-1510, 2022 WL246244, at *1 (Iowa Ct. App. Jan. 27, 2022); *State v. Hutchcroft*,

No. 20-0301, 2021 WL2452153, at n.1 (Iowa Ct. App. June 16, 2021); *State v. Jauregui*, No. 20-0629, 2021 WL1663598, at n. 1 (Iowa Ct. App. Apr. 28, 2021). Although the State conceded the defendants had “good cause” to appeal the restitution orders in two of the three cases, these concessions were improper and the Court of Appeals’ decisions failed to follow the language of the statute. That is, the provisions of Iowa Code section 901.3(10) control. Iowa Code §910.3(10). That is, a “permanent order entered after the time of sentencing shall only be challenged pursuant to section 910.7.” Iowa Code § 910.3(10). Under section 910.7(5), review of the district court’s order is through certiorari. Iowa Code § 910.7(5).

Constitutional challenges

Next, Patterson contends that if he does not have a right to appeal the restitution order that was entered after the sentencing order, he has been denied equal protection and due process. Patterson cannot establish a violation of either constitutional principle and his claims must be rejected.

Equal Protection

The United States and Iowa Constitutions guarantee the equal protection of the law to all persons. The Fourteenth Amendment to

the United States Constitution provides, “No State shall ... deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. The Iowa Constitution provides, “All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens.” Iowa Const. art. I, § 6. The court interprets this provision of the Iowa Constitution to mean “similarly situated persons [should] be treated alike under the law.” *In re Det. of Williams*, 628 N.W.2d 447, 452 (Iowa 2001) (en banc). Generally, “[w]e apply the same analysis in considering the state equal protection claim as we do in considering the federal equal protection claim.” *In re Morrow*, 616 N.W.2d 544, 547 (Iowa 2000) (en banc) (quoting *State v. Ceaser*, 585 N.W.2d 192, 196 (Iowa 1998), *overruled on other grounds by State v. Bruegger*, 773 N.W.2d 862 (Iowa 2009)). At its core, the federal and state “equal protection guarantee requires that laws treat all those who are similarly situated with respect to the purposes of the law alike.” *Varnum v. Brien*, 763 N.W.2d 862, 883 (Iowa 2009) (emphasis omitted). Notably, Patterson does not argue that the analysis under the Iowa Constitution should differ from the analysis

under the federal constitution. *Nguyen v. State*, 878 N.W.2d 744, 757 (Iowa 2016). This court should decline to apply divergent analyses. *Id.*

The first step in our equal protection analysis is to determine whether the challenged law makes a distinction between similarly situated individuals with respect to the purposes of the law. *See id.* at 882. This is a threshold test. *See id.* If the defendant “cannot show as a preliminary matter that [he is] similarly situated, [we] do not further consider whether ... different treatment under a statute is permitted.” *Id.*; *see also State v. Tucker*, 959 N.W.2d 140, 145–46 (Iowa 2021).

According to Patterson, “[i]f 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.” Def. Brief at 54. He continues that the failure to provide an appeal of right of the equivalent judgment entered in a criminal case violates equal protection. To succeed, he would have to establish that criminal defendants and civil litigants are similarly situated. This is not the case.

In *State v. Sanchez*, No. 14-1912, 2016 WL530409, at *5 (Iowa Ct. App. Feb. 16, 2016), the Court of Appeals rejected an equal protection challenge to a district court’s failure to instruct the jury that an acquittal need not be unanimous. The Court of Appeals found that the defendant has not shown “how he is similarly situated to civil litigants” whose claims may be resolved without unanimous verdicts. *Id.* at *5-6. And courts around the country have also rejected defendants’s claims that they are similarly situated to civil litigants. *See e.g., Woods v. State*, 864 S.E.2d 194, 198-99 (Ga. Ct. App. 2021) (one challenging a statute on equal protection grounds must initially establish that he is similarly situated to members of the class who are treated differently from him. The equal protection clause does not exact uniformity of procedure. The legislature may classify litigation and adopt one type of procedure for one class and a different type for another.); *Higgs v. Neven*, No. 3:10-cv-00050-RCJ-WGC, 2013 WL 5663127, at *16 (D. Nev. Oct. 16, 2013) (“A civil litigant and a criminal defendant are not ‘similarly situated’ and therefore they are not entitled to identical treatment. Petitioner, a criminal defendant, is not similarly situated to a civil litigant, the fact that different state rules exist in criminal and civil contexts provides no basis for an equal

protection claim.” (citation omitted)); *People v. Roundtree*, 301 P.3d 150, 180 (Cal. 2013) (“Criminal defendants are also not situated similarly to civil litigants.”); *State v. Lang*, 954 N.E.2d 596, 617 (Ohio 2011) (“Lang’s equal protection argument can be rejected because criminal defendants and civil litigants have vastly different stakes and concerns and are not similarly situated.”); *McDole v. State*, 6 S.W.3d 74, 81 (Ark. 1999) (“While both criminal and civil defendants may be called litigants, they are far from similarly situated.”). Because Patterson cannot establish that he is “similarly situated” to a civil litigant, his equal protection challenge fails.

Due Process

Patterson also claims that that he has been denied procedural due process if he is required to challenge the amount of restitution under section 910.7. Under the facts of this case, Patterson was given notice, an opportunity to be heard, and he had counsel at the restitution hearing. Under these facts, he cannot establish a denial of procedural due process.

Procedural due process requires notice and the opportunity to be heard prior to depriving one of life, liberty, or property. *Knight v. Knight*, 525 N.W.2d 841, 843 (Iowa 1994). However, “due process ‘is

not a technical conception with fixed content unrelated to time, place and circumstances.’ ” *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961) (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring)). Rather, it is “flexible and calls for such procedural protections as the particular situation demands.” *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the United States Supreme Court identified relevant criteria to look for in determining what process is due prior to depriving one of a property interest. The Court said a procedural due process analysis must balance (1) the private interest affected, (2) the risk of erroneous deprivation and probable value, if any, of additional or substitute procedural safeguards, and (3) the government’s interest. *Id.* at 335.

Applying this test to these facts, the private interest here is the property interest in the offender’s assets. The risk of erroneous deprivations is small given that an offender may seek a hearing under section 910.7 “on any matter related to the plan of restitution...” Iowa Code § 910.7(1). Although the court has discretion whether to grant a hearing, it did grant Patterson a hearing where he challenged the

pecuniary damages imposed. Iowa Code § 910.7(1). The government has a legitimate interest in seeking pecuniary damages to a victim. This court has long recognized that requiring an offender to pay for these costs instills responsibility in the offender for their actions. *State v. Bonstetter*, 637 N.W.2d 161, 165 (Iowa 2001) (citing *State v. Kleusner*, 389 N.W.2d 370, 372-73 (Iowa 1986)). There is no denial of procedural due process under section 910.7.

Indeed, in this case, Patterson received sufficient due process. He had notice of the district court's February 8, 2021, order because he sought to challenge the amount in his March 5, 2021 request. Mot. to Appeal Rest. (3/5/21); App. 30-33. The district court granted him a hearing which provided him with an opportunity to be heard. Rest. Tr. p. 1, lines 1-25. Moreover, he had counsel at that hearing. Rest. Tr. p. 1, lines 1-25.

The concerns this court had relative to due process in *State v. Jenkins*, 788 N.W.2d 640, 646 (Iowa 2010) do not exist in this case. Prior to *Jenkins*, a district court was unable to review payments made to crime victims awarded by the Crime Victim Compensation Program. *Id.* at 645. In *Jenkins*, the court found that “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 opportunity to be heard.” This case presents a different procedural history than what occurred in *Jenkins*. *Id.* 642. Patterson had notice, he sought a hearing, and was granted one. Rest. Tr. p. 1, lines 1-25. He also had counsel at the hearing and successfully challenged the restitution award. Rest. Tr. p. 1, lines 1-25. The court afforded Patterson sufficient procedural due process.

Writ of Certiorari

Even though Patterson does not enjoy a statutory right to a direct appeal, he may petition this court for certiorari under Iowa Code § 910.7(5). Iowa Code § 910.7(5). The State also acknowledges that the court may consider his notice of appeal as a petition for writ of certiorari. Iowa R. App. P. 6.108. Although the court may consider the notice of appeal as a petition for writ of certiorari, the court should decline to grant it as the petition has no merit.

III. Certiorari need not be granted because the State established the amount of the pecuniary damages the victim suffered as a result of the defendant’s criminal activity.

Preservation of Error

The State does not contest error preservation.

Standard of Review

The court reviews restitution orders for correction of errors at law. *State v. Hagen*, 840 N.W.2d 140, 144 (Iowa 2013).

Merits

Restitution is a creature of statute. *State v. Hagen*, 840 N.W.2d 140, 149 (Iowa 2013). The framework for restitution is found in Iowa Code chapter 910. When ordering criminal restitution, a court applies the provisions of that chapter. *Id.*

Under the statute, “restitution” is defined as the “payment of pecuniary damages to a victim in an amount and in the manner provided by the offender’s plan of restitution.” Iowa Code § 910.1(4). “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 or event, except punitive damages and damages for pain, suffering, mental anguish, and loss of consortium.” Iowa Code § 910.1(6) (2021). The purpose of these criminal restitution statutes is to protect the public by compensating victims for criminal activities and rehabilitate the offender by instilling responsibility in the offender. *State v. Shears*, 920 N.W.2d 527, 530–31 (Iowa 2018) (citing *State v. Izzolena*, 609 N.W.2d 541, 548 (Iowa 2000)); *State v. Kluesner*, 389 N.W.2d 370, 372 (Iowa 1986).

Restitution is mandatory “[i]n 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.” Iowa Code § 910.2; *State v. Watts*, 587 N.W.2d 750, 751 (Iowa 1998) (noting that restitution is mandatory when a defendant pleads guilty); *State v. Kluesner*, 389 N.W.2d 370, 373 (Iowa 1986) (requiring that sentencing court order restitution where defendant pled guilty and was granted a deferred judgment). The burden is on the State to show the victim is entitled to restitution. *Shears*, 920 N.W.2d at 532. The State must produce evidence on the amount of damages sought. *Id.*

The State sought, and the district court initially ordered restitution in the amount of \$42,100.92 for damages to James Tidwell’s car (\$6981.00 (car), \$290.00 (rims), \$316.99 (subwoofers)) following the car accident that served as the basis for the criminal charges as well as lost wages (\$34,512.93) for the year that Tidwell spent recovering from the accident. Supp. Order (2/8/21); App. 28. After a restitution hearing, at which Tidwell elected not to seek damages for his vehicle, the district court entered an order imposing restitution for lost wages in the amount of \$34,512.93. Ruling on Rest. (4/13/21); App. 34-37. The district court’s order must be

affirmed because a causal connection exists between the amount of restitution sought for lost wages and Patterson’s criminal activities of serious injury by vehicle.

In calculating a restitution order, the district court must find 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 damage must have been caused by the offender's criminal act to justify the restitution order. *Ihde*, 532 N.W.2d at 829. Once the causal connection is established by a preponderance of the evidence, “the statute allows recovery of ‘all damages’... which the state can show by a preponderance of the evidence.” *Id.* (quoting *Holmberg*, 449 N.W.2d at 377). A restitution order is not excessive “if it bears a reasonable relationship to the damage caused.” *Mayberry*, 415 N.W.2d at 647. In the criminal context, failure of the State to satisfy its burden of proof as to damages does not preclude pursuit of civil recovery for the costs.

In his brief, Patterson concedes that “Tidwell sustained a serious injury in the accident as this is an element of the offense of serious injury by vehicle.” Def. Brief at 67. But, he contends the

evidence supporting the lost wages –Tidwell’s testimony and his W-2 form are insufficient to prove the amount of his loss. This is not true.

Once the causal connection is established, the statute allows for the recovery of “all damages”... which the state can show by a preponderance of the evidence. *State v. Bonstetter*, 637 N.W.2d 161, 168 (Iowa 2001) (citing *State v. Holmberg*, 449 N.W.2d 376, 377 (Iowa 1989)). The W-2 from 1999 combined with Tidwell’s testimony regarding his wages, his work history, his injuries, his rehabilitation, and his physical abilities also support the court’s order. *State v. DeLong*, 943 N.W.2d 600, 607 (Iowa 2020) (there are no doubt other means to provide evidence of causation beyond a particular form, including but not limited to direct testimony of a family member or medical provider, other forms of documentation, or a combination of both); *In the Interest of N.H.*, No. 21-1111, 2022 WL 244863, at *3 (Iowa Ct. App. Jan. 27, 2022) (substantial evidence supports lost wages incurred by D.R. including a job listing with the state, D.R.’s testimony regarding missing unpaid days of work and her testimony regarding previous and current rates of pay); *State v. Jaregui*, No. 20-0629, 2021 WL 1663598, at *3 (Iowa Ct. App. Apr. 28, 2021)

(mother's lost wages form submitted with mother's time cards sufficient to establish lost wages).

Patterson argues that the State failed to supplement Tidwell's testimony with medical records or other evidence. He cites to *State v. Edouard*, 854 N.W.2d 421, 450 (Iowa 2014) as support for his claim that the State should have supplemented Tidwell's testimony with additional evidence because his testimony alone is not sufficient. Def. Brief at 68. While the court in *Edouard* found that the verification forms provided by medical providers attesting in writing that the treatments were "crime related," the decision in no way suggests that verification forms are the exclusive means to establish the requisite damages. *Id.* The *Edouard* court also stated it "did not believe restitution proceedings are subject to strict rules of evidence." *Id.* Simply because a victim's damages for medical expenses can be established by medical records does not mean that is the only way that damages can be determined. *State v. DeLong*, 943 N.W.2d at 607. In this case, Tidwell, who sustained the serious injuries that included a broken humerus, a dislocated left shoulder, a dislocated right hip, a fractured acetabulum, fractured vertebrae, and injured his

spleen was unable to work for more than a year. Tidwell provided substantial evidence through his testimony and his W-2.

Patterson next complains that the district court erred when it imposed the amount of wages from Tidwell's 2019 W-2 because he was not working for the employer listed in the document. Def. Brief at 69. Tidwell testified he was doing contract work detailing trucks. Rest. Tr. p. 14, line 25 through p. 15, line 9. He received a 1099 from that company but could not locate it given a recent move. Rest. Tr. p. 5, lines 5-9.

Despite not working in 2020 due to the severe injuries he suffered, Tidwell had an extensive work history dating back to the age of 14. Tr. p. 16, lines 5-9. He worked for A-1 Concrete Leveling for 16 years and also became a journeyman laborer in the Laborer's Union Hall. Rest. Tr. p. 16, line 10 through p. 17, line 6. He had the classification of a journeyman and would earn up to \$26 per hour. Rest. Tr. p. 16, line 21 through p. 17, line 6. He had a specialized job doing "mud jacking." Rest. Tr. p. 18, lines 10-24. Even though Tidwell was no longer working for A-1, it is of little consequence as the W-2 represents actual wages from an employer he worked for in the months prior to the accident. In addition, his classification as a

“journeyman” and work history would allow him to earn far more money that was requested. The State provided substantial evidence of the lost wages James Tidwell incurred due to Patterson’s criminal activities through his testimony and the W-2. The district court’s order must stand.

Finally, Tidwell contends that the case must be remanded to the district court to reduce the restitution award by \$6,000, the amount Tidwell received from the Crime Victim Compensation Fund. Rest. Tr. p. 27, lines 12-24. The State acknowledges that an offset may be appropriate in certain circumstances, but in this case other factors must be considered. Iowa Code § 910.8. The accident which gave rise to the criminal conviction and the restitution order occurred in February of 2020. Trial Info. (3/20/20); App. 11-12. At the time the restitution hearing was held in April of 2021, approximately 14 months elapsed between the accident and the hearing. If one divides the total amount of lost wages on the W-2 by 12 – the number of months in a year – the amount of monthly income is \$2876. Tidwell actually incurred 14 months of unemployment due to the accident—February of 2020 to April of 2021. If two additional months are added to the total that would be an addition \$5752 he is entitled to

receive. Thus, if any offset is allowed it would be a nominal sum of \$248. In all other respects, this court should affirm the district court's restitution order.

CONCLUSION

This court should reject the defendant's restitution challenges.

REQUEST FOR ORAL SUBMISSION

This case involves novel challenges to the interpretation of a recently-enacted statute. Oral argument would likely assist the court in deciding these claims.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa



MARTHA E. TROUT
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
martha.trout@ag.iowa.gov

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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Dated: July 14, 2022



MARTHA E. TROUT

Assistant Attorney General

Hoover State Office Bldg., 2nd Fl.

Des Moines, Iowa 50319

(515) 281-5976

martha.trout@ag.iowa.gov