IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. CHARLES R. ALBRIGHT, Defendant-Appellant.	)))))))))	SUPREME COURT 17-1286

APPEAL FROM THE IOWA DISTRICT COURT
FOR FRANKLIN COUNTY
HONORABLE GREGG R. ROSENBLADT, JUDGE

APPELLANT'S BRIEF AND ARGUMENT AND REQUEST FOR ORAL ARGUMENT

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FINAL

CERTIFICATE OF SERVICE

On the 14th day of August, 2018, 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 Charles Albright, #1065220, Anamosa State Prison, 406 North High Street, Anamosa, IA 52205.

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ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court. Albright requests this Court clarify the proper scope and procedure to consider the defendant's reasonable ability to pay criminal restitution and/or overrule conflicting case law. Iowa R. App. P. 6.903(2)(d), 6.1101(2)(b), and 6.1101(2)(f). Published Supreme Court case law is conflicting. See e.g. State v. Harrison, 351 N.W.2d 526, 529 (Iowa 1984)(The offender's reasonable ability to make restitution is an express condition on the determination of the amount of restitution for court costs and attorney fees.); State v. Haines, 360 N.W.2d 791, 797 (Iowa 1985)(Restitution for court costs and attorney fees to the county is limited "to the extent that the offender is reasonably able to do so."); State v. Blank, 570 N.W.2d 924, 927 (Iowa 1997)("The focus is not on whether a defendant has the ability to pay the entire amount of restitution due but on his ability to pay the current installments."); State v. Swartz, 601 N.W.2d 348, 354 (Iowa 1999)(Without a plan of payment and exhausting remedy provided in section 910.7, defendant may

not advance reasonable ability to pay claim in appellate court.); State v. Jackson, 601 N.W.2d 354, 357 (Iowa 1999)(same as Swartz); State v. Jose, 636 N.W.2d 38, 45 (Iowa 2001)(Distinguishing Swartz and Jackson as a challenge to the "restitution plan of payment," from Jose's challenge to the total amount of restitution or the "plan of restitution."); State v. Jenkins, 788 N.W.2d 640, 646-647 (Iowa 2010)("A contingent postdeprivation remedy where the offender may be unrepresented does not give this court comfort in the context of procedural due process."). This Court should clarify the proper procedure and scope of the "reasonable ability to pay" provision.

STATEMENT OF THE CASE

Nature of the Case: Charles Albright appeals following a jury trial, judgment and sentence, to the charges of willful injury causing bodily injury in violation of Iowa Code sections 708.4(1) and 708.4(2) (2015) and kidnapping in the first degree in violation of Iowa Code sections 710.1(3) and 710.2 (2015).

Course of Proceeding and Disposition Below: On October 28, 2016, the State charged Albright with Count I: willful injury and Count II: kidnapping in the first degree, for alleged acts on October 7, 2016. (TI)(App. pp. 13-14).

A jury trial began on July 11, 2017. (Vol. 1 p. 1L1-25). Prior to the presentation of evidence, the State amended to the Trial Information to charge in Count I: willful injury causing bodily injury. Count II was not amended. (Vol. 1 p. 6L16-p. 7L18; Amended TI; Order Amending TI)(App. pp. 35-38). On July 14, 2017, the jury found Albright guilty as charged. (Order on Verdicts)(App. pp. 49-51).

On August 11, 2017, Albright was sentenced to be incarcerated for the remainder of his life (Ct. II) and not to exceed five years (Ct. I) to be served concurrently. The court ordered Albright pay court costs including the costs of his legal assistance. (Judgment)(App. pp. 52-54). Notice of Appeal was filed on August 14, 2017. (Notice)(App. pp. 55-56).

Facts: Kim Hartman and Charles Albright dated for two to two and half years. (Vol. 2 p. 19L11-13, p. 106

L21-p. 107L4; Vol. 3 p. 19-22). They lived together in several locations including campgrounds. (Vol. 2 p. 20L23-p. 21L6, p. 107L5-p. 109L22; Vol. 3 p. 64L14-p. 66L17, p. 83L1-15, p. 84L2-10, p. 85L15-p. 86L7). In May 2016, Hartman and Albright moved into a house located at 201 Virginia in Meservey. (Vol. 2 p. 19L14-19, p. 20L3-22; Vol. 3 p. 8-14). Hartman was unemployed. She did not have a vehicle or a cell phone. Albright had a cell phone and a Chevy Truck. (Vol. 2 p. 21L7-25).

Hartman testified that Albright had been controlling and abusive in the past. (Vol. 50L4-p.52L14, p. 112L11-15, p. 113L11-21, p. 115L5-22, p. 128L12-p. 129L17, p. 132L9-20, p. 133L3-12). Albright's friend Shawn Rockwell and his mother did not see signs of abuse. (Vol. 3 p. 50L16-p. 51L4, p. 52L6-14, p. 55L6-9, p. 66L18-p. 67L9, p. 70L15-p. 71L15). Albright denied trying to keep Hartman from her family. (Vol. 3 p. 86L15-p. 87L8). Albright admitted to assaulting Hartman one time a couple of weeks prior to October 7, 2016, and Hartman left the home. Hartman returned home after Albright

said he wanted to work it out and agreed to do couples counseling. (Vol. 2p. 31L8-25, p. 114L15-p. 115L4; Vol. 3 p. 89L2-p. 90L5, p. 90L16-24, p. 116L10-p. 117L2, p. 119L4-13).

Hartman and Albright had different versions of events on October 6th and 7th.

Hartman's testimony

On October 7, 2016, Albright did not go into work. Albright believed Hartman had men visiting her when he was at work. He believed Hartman had a secret cell phone. Albright was paranoid and angry. (Vol. 2 p. 23L11-p. 25L16). He began to assault Hartman at approximately 1:30 a.m. (Vol. 2 p. 33L21-p. 34L4). Albright hit Hartman in the face. He called her names. (Vol. 2 p. 26L7-22). When Hartman tried to leave the house, Albright grabbed her by her coat and threw her against the wall. Albright told Hartman that she was not going anywhere. (Vol. 2 p. 26L23-p. 27L15, p. 86L16-23). Albright threw Hartman onto the floor and slammed her head on the floor. (Vol. 2 p. 27L22-p. 28L6). Albright then threw Hartman onto the mattress on the living room floor and continued to hit

her. (Vol. 2 p. 28L9-19). Albright's German Shepard also bit Hartman. Hartman did not remember if Albright told the dog to stop. Albright also hit Hartman in the pelvic area with a cordless drill. (Vol. 2 p. 29L15-p. 31L5, p. 125L13-25). Hartman tried to block the blows with her arms. Albright used a knife to cut behind Hartman's ear. (Vol. 2 p. 32L3-24). Albright used a Taser on Hartman's wrist. (Vol. 2 p. 48L24-p. 49L22). Hartman testified the beating went on for hours. (Vol. 2 p. 33L2-3, p. 34L23-p. 35L13).

At some point, Albright made her leave the house to take the puppy to the veterinarian in Sheffield. Hartman did not want to go but she got into the truck. Albright took the back roads. He continued to punch her in the truck. (Vol. 2 p. 36L5-p. 39L5; Vol. 3 p. 26L13-p. 27L12). Albright spoke to Rockwell during the drive to the vet. Albright continued to hit her. (Vol. 2 p. 39L6-p. 40L18, p. 121L12-p. 123L12; Vol. 3 54L2-p. 55L5, p. 58L1-20). Albright told Hartman that he would bury her up to her neck in a cornfield and let a combine take her head off and nobody would find her. (Vol. 2 p.

40L19-p. 41L8). Hartman tried to talk him out of his belief that she was cheating. She told him she did not have a phone or hidden telephone numbers and nobody came to see her. (Vol. 2 p. 41L9-14).

Albright took the puppy into the veterinary clinic. Hartman stayed in the truck. Albright then drove across the street to the Casey's. (Vol. 2 p. 41L21-p. 42L23). Hartman testified Albright hit her before exiting the truck and told her not to move. (Vol. 2 p. 42L24-p. 43L1). Albright went into the store. Hartman got out of the truck and ran to the Dollar General. (Vol. 2 p. 43L2-p. 44L4).

Hartman got the phone from the Dollar General clerk and went into the bathroom. (Vol. 2 p. 44L7-p. 45L3). She locked herself in the bathroom and called 911. (Vol. 2 p. 45L4-19). Sheffield Chief of Police Sam Cain responded to the 911 cal. (Vol. 2 p. 134L3-6, p. 135L13-16). Cain observed the injuries to Hartman's face – her eyes were almost swollen shut and it appeared her cheeks and nose were broken. (Vol. 2 p. 139L18-p. 140L2). An EMT who was shopping in the store

evaluated Hartman. An ambulance was called. (Vol. 2 p. 48L8-15, p. 140L14-19, p. 141L17-p. 142L12, p. 148L25-p. 151L8). Hartman's nose was broken in two places. (Vol. 2 p. 52L16-25, p. 172L3-p. 173L14). She has lots of bruises and swelling. (Vol. 2 p. 53L1-p 54L8, p. 175L15-p. 179L22).

Albright's testimony

According to Albright, Hartman had been different the week of October 2, 2016. She was crying and had a hard time looking Albright in the eyes. (Vol. 3 p. 88L23-p. 89L1, p. 90L25-p. 91L4). Albright found out what was bothering Hartman. Hartman told Albright she had been raped. Albright was in a blind rage. (Vol. 3 p. 91L20-22, p. 109L10-15). Albright testified that he threw Hartman on the mattress and the German Shepard latched onto her left leg. Albright denied hitting her at that time. (Vol. 3 p. 109L16-19, p. 113L11-19). Albright left the residence and drove around for approximately thirty-five minutes. (Vol. 3 p. 99L24-p. 100L5). During the late evening hours of October 6, 2016, Hartman called Rockwell using Albright's cell phone. Albright

was out driving around. (Vol. 3 p. 53L15-p. 54L1, p. 57L24-p. 57L22). Albright returned to the house and they talked more. They eventually slept. Albright denied confining Hartman in the house. (Vol. 3 p. 100L6-20).

On October 7th, they overslept, and Albright missed work. Hartman called the vet to alert they might be late for the appointment. (Vol. 3 p. 100L21-p. 101L7). Albright picked up the dog and took him to the truck. He asked Hartman to go with him. She agreed to go; he did not force her. (Vol. 3 p. 101L8-22). On the way to the vet, Rockwell called him. Albright testified that he was "hurt" because he found out Hartman had not been raped but had consensual sex with someone other than him. Albright described his feelings as "hurt", "raged", "very upset", "very emotional", and "distraught." (Vol. 3 p. 102L11-25). Albright hit Hartman several times on the trip to the vet clinic. (Vol. 3 p. 103L1-12, p. 110L1-22).

Albright took the dog into the clinic. He was inside the office for approximately 15-20 minutes. The dog had a broken leg and needed to stay at the clinic. (Vol. 3 p. 103L13-p.

104L6). Albright was distraught about the dog and Hartman. He told Hartman he needed to get a drink and cigarettes. Albright believed Hartman was lying to him again. He struck her again in the Casey's parking lot. (Vol. 3 p. 104L16-p. 105L6, p. 128L20-24). Albright denied confining her or removing her against her will. (Vol. 3 p. 106L9-15).

Albright called his mother and admitted he hit Hartman. Albright was very upset. He acknowledged that he should not have hit her. (Vol. 3 p. 74L18-p. 75L1).

The days following October 7th

Albright attempted to contact Hartman using Facebook. Hartman did not response to the messages. (Vol. 2 p. 54L20-p. 56L19; Vol 3 p. 119L22-p. 121L3, p. 121L25-p. 122L16, p. 123L3-p. 123L10; Ex. 35)(Ex. App. pp. 19-25).

On October 18, 2016, the Iowa Division of Criminal Investigation (DCI) was asked to assist in the case. (Vol. 3 p. 9L15-22). Albright had not been located as of October 18th. (Vol. 3 p. 9L12-14, p. 11L3-11). A warrant had been issued on October 10th and law enforcement was actively looking for

Albright. (Vol. 3 p. 11L12-p. 12L11). Albright was located on October 19th and arrested. (Vol. 3 p. 13L2-p. 14L5).

The Virginia Street residence was searched on October 18th. (Vol. 3 p. 25L16-25). A cordless drill was located on a chair next to the mattress in the living room. (Vol. 3 p. 28L10-p. 30L21). A couple of knives seized from the Meservey house were sent to the DCI lab but no DNA or fingerprints were found. (Vol. 3 p. 39L10-p. 40L15)

In February 2017, the person who owned the residence where Albright was arrested turned over some property to law enforcement. The person found items in the basement that did not belong to her or her family. (Vol. 3 p. 19L15-p. 21L18, p. 25L1-13). Hartman identified the items as belonging to Albright. Albright's fingerprint was found on a paper item. (Vol. 3 p. 22L11-p. 23L2). Among the items were knives including a knife labeled "pig sticker" and a rope noose. (Vol. 3 p. 23L3-24). None of the knives were sent to the DCI lab for DNA testing. (Vol. 3 p. 39L7-9).

ARGUMENT

I. THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO PROVE ALBRIGHT COMMITTED KIDNAPPING IN THE FIRST DEGREE.

Preservation of Error.

Albright moved for a judgment of acquittal. (Vol. 3 p. 42L18-p. 45L2, p. 129L5-p. 130L11). The motion for judgment of acquittal minimally preserved error on the issue presented. State v. Allen, 304 N.W.2d 203, 206 (Iowa 1981). If this Court determines defendant's motion for judgment of acquittal was insufficient to preserve error on the deficiency in the State's proof, counsel's failure to preserve error deprived him of the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). See State v. Crone, 545 N.W.2d 267, 270 (Iowa 1996) (motion for judgment of acquittal does not preserve error where there was no reference to specific grounds in district court.).

Standard of Review.

The Court reviews challenges to the sufficiency of the evidence for corrections of legal error. State v. Heard, 636 N.W.2d 227, 229 (Iowa 2001). The alternative claim of ineffective assistance of counsel is accorded de novo review. State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987).

Discussion.

The jury's findings of guilt are binding on appeal if supported by substantial evidence. State v. Hopkins, 576 N.W.2d 374, 377 (Iowa 1998). Substantial evidence is such evidence as would convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt. State v. Allen, 348 N.W.2d 243, 247 (Iowa 1984). In deciding if there is substantial evidence the court views the evidence in the light most favorable to the state, but it considers all the evidence presented at trial and not just the evidence which supports the verdict. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980). The evidence must raise a fair inference of guilt as to each essential element of the crime. Evidence which merely raises

suspicion, speculation, or conjecture is insufficient. State v. Casady, 491 N.W.2d 782, 787 (Iowa 1992). Evidence that allows two or more inferences to be drawn, without more, is insufficient to support guilt. State v. Truesdell, 679 N.W.2d 611, 618-19 (Iowa 2004).

The State was required to prove the following elements of kidnapping in the first degree:

1. On or about October 7, 2016, in Franklin County, Iowa, Defendant confined Kim Hartman or removed her from one place to another.

2. Defendant did so with the specific intent to inflict serious injury upon Kim Hartman.

3. Defendant knew he did not have the consent or authority of Kim Hartman to do so.

4. As a part of the confinement or removal Kim Hartman was intentionally subjected to torture.
***

(Ins. 23)(App. p. 40). The jury was also instructed:

For purposes of these instructions, a person is "confined" when her freedom to move about is substantially restricted by force, threat, or deception. The person may be confined either in the place where the restriction began or in a place to which she has been removed. No minimum time of confinement or distance of removal is required, but it must be more than slight.

The confinement or removal must have significance apart from any other crime committed against the person and must substantially increase the risk of harm to the person, significantly reduce the risk to Defendant of detection, or significantly ease the escape of Defendant.

(Ins. 27)(App. p. 44).

A. confinement and/or removal

In Rich, the Supreme Court adopted the "incidental rule" in kidnapping offenses. State v. Rich, 305 N.W.2d 739, 745 (Iowa 1981); State v. Robinson, 859 N.W.2d 464, 475 (Iowa 2015). The Court recognized every assault, rape, and robbery involves some act of intentional confinement or movement. State v. Rich, 305 N.W.2d at 745; State v. Robinson, 859 N.W.2d at 475; State v. Misner, 410 N.W.2d 216, 223 (Iowa 1987). The Rich Court concluded:

Applying these principles of construction, we conclude that our legislature, in enacting section 710.1, intended the terms "confines" and "removes" to require more than the confinement or removal that is an inherent incident of commission of the crime of sexual abuse. Although no minimum period of confinement or distance of removal is required for conviction of kidnapping, the confinement or removal must definitely exceed that normally incidental to the commission of sexual abuse. Such confinement or removal must be more than slight, inconsequential, or an incident inherent in the crime of sexual abuse so that it has a significance independent from sexual

abuse. Such confinement or removal may exist because it *substantially* increases the risk of harm to the victim, *significantly* lessens the risk of detection, or *significantly* facilitates escape following the consummation of the offense.

State v. Rich, 305 N.W.2d at 745 (emphasis added).

The Rich Court did not believe the "legislature intended to afford the prosecution a choice of two penalties of such a disparate nature" for the typical underlying crime. Id. "Although the plain language of section 710.1 appears to encompass the usual case of [the underlying crime], in which some movement or confinement occurs, a literal interpretation of the statutory language would not be sensible or just." Id. The Court concluded that "because of the substantial disparity between sentences the legislature intended the kidnapping statute to be applicable only to those situations in which confinement or removal definitely exceeds that which is merely incidental to the commission of [the underlying crime]." Id.

The Misner Court addressed the propriety of kidnapping convictions after an uprising at the Iowa State Penitentiary.

State v. Misner, 410 N.W.2d at 217-218. The Court recognized the

difficulty in clearly identifying when a kidnapping occurs and is properly charged. At one extreme is the classic kidnapping case in which an individual is abducted for the express purpose of holding the person for ransom or as a hostage. In such cases kidnapping is the central crime and any confinement or movement is sufficient to support the charge. The "merely incidental" rule can have no role when there is no underlying crime.

At the other extreme is the case in which a person is moved or confined wholly as part of a murder, sexual abuse, or other crime. In such cases the movement or confinement has no independent significance, but rather is only that confinement or movement necessarily inherent in the type of crime committed. We conclude the *Rich* principles prevent kidnapping charges from being prosecuted in such cases.

State v. Misner, 410 N.W.2d at 223. The Misner Court stated a "proper *Rich* instruction, modified to fit the potential underlying charges, will properly present to the jury" the alternatives of the "classic kidnapping" and the merely incidental movement or confinement which has no independent significance. Id. The Misner Court also provided that the "jury should be instructed that if it determines defendant's activity was undertaken with the central purpose of holding an individual hostage or as a

shield or interfering with the performance of any government function, any movement or confinement intended to accomplish this purpose will be sufficient to support the confinement or removal element of kidnapping." Id.

The question becomes "whether, on the totality of the circumstances, the State offered sufficient evidence that a jury could find beyond a reasonable doubt that the defendant's confinement of the victim *substantially* increased the risk of harm, *significantly* lessened the risk of detection, or *significantly* facilitated escape." State v. Robinson, 859 N.W.2d at 481.

Confinement at the Meservey house

On the totality of the circumstances, the State failed to present sufficient evidence that any confinement of Hartman at the Meservey house had significance apart from the assault and it *substantially* increased the risk to her, *significantly* reduced the risk of detection to Albright or *significantly* eased the escape of Albright.

Hartman testified Albright hit her with his fist and called her names. (Vol. 2 p. 26L5-22). Hartman put on her coat and went to the door. Albright then grabbed her and threw her against the wall and the door. Albright told her she was going anywhere because she'd "be going to screw around and see someone else." (Vol. 2 p. 26L23-p. 27L21). Albright continued to beat her. He threw her to the floor and slammed her head on the floor. (Vol. 2 p. 27L22-p. 28L6). The assault did not end; Albright threw her onto the mattress in the living room and continued to hit her. (Vol. 2 p. 28L9-19, p. 29L20-25, p. 30L13-p. 31L5, p. 32L3-14). Albright cut Hartman's ear with a knife. (Vol. 2 p. 32L15-24). The assault went on for hours. (Vol. 2 p. 33L2-p. 34L4). The assault would start again if Hartman moved toward the door. Albright stopped her from leaving by blocking the door. He would tell Hartman to go back into the house and sit down. (Vol. 2 p. 34L23-p. 35L13).

The evidence presented failed to show that any confinement in the house had any independent significance

apart from the assault. Hartman testified Albright kept her in the house and beat her. Any confinement did not *substantially* increase the harm to Hartman independent from the assault. The risk of harm was from the assault itself; not any detention in the house. Hartman was not free to leave because of the assault not any other act independent from the underlying crime of assault.

The fact that the assault occurred in the home which Albright and Hartman shared is significant. Without consideration of the totality of the circumstances of a domestic assault, even a brutal beating, incidental restrictions on movement during the course of the assault would automatically elevate such assaults into first degree kidnapping convictions resulting in a life sentence. See State v. Robinson, 859 N.W.2d at 482 (Court noted "in particular the potential of sliding downhill into situations in which a person with limited additional criminal culpability suffers dramatically increased penalty."). Any assault in a home increases the risk to an intimate partner if no one else is present. However, the fact of

an assault occurring within the home does not *substantially* increase the risk of harm without something more than what is present in the current case.

Removal from the Meservey house

The State failed to present sufficient evidence that any removal of Hartman from the Meservey house to the truck for the purpose of taking the dog to the veterinarian had any significant apart from the assault committed in the truck. On the totality of the circumstances, any removal from the home to the truck did not *substantially* increase the risk to Hartman, *significantly* reduce the risk to Albright of detection or *significantly* ease the escape of Albright.

Albright told Hartman to get into the truck. Hartman did not want to go and told Albright so. Hartman got into the truck after Albright told her she was not going to stay home. (Vol. 2 p. 36L5-p. 37L6). Albright continued to hit her in the truck. (Vol. 2 p. 37L9-12, p. 39L6-p. 40L11).

At vet clinic, Albright went inside. Hartman stayed in the truck but did not get out because she thought Albright was

probably watching her. (Vol. 2 p. 41L18-p. 42L15) Albright then drove to Casey's. He hit her again and told her not to move. (Vol. 2 p. 43L22-p. 43L1). Hartman got out of the truck and went to the Dollar General. (Vol. 2 p. 43L2-p. 44L4).

The purpose of the trip to Sheffield was to take the dog to the vet because he had been hit by a car a couple of days prior. (Vol. 2 p. 36L5-11, p. 38L10-12, p. 87L2-6, p. 117L23-p. 118L1, p. 124L7-9; Vol. 3 p. 100L24-p. 101L16). The trip from Meservey to Sheffield was fifteen miles. (Vol. 2 p. 38L18-p. 39L9; Vol. 3 p. 26L13-p. 27L20). While Hartman testified that Albright made threats to bury her in a cornfield, she did not say at any time Albright stopped the truck or took any action on those particular threats. (Vol. 2 p. 40L19-p. 41L8). They had an appointment. (Vol. 2 p. 36L5-11, p. 117L23-p. 118L1). And if one believes the prosecution, Albright liked his dogs and would want to get the dog medical attention. (Vol. 4 p. 7L13-15). Albright admitted hitting Hartman in the truck. (Vol. 3 p. 103L1-12, p. 110L1-22). Any restriction in the truck was because of the usual boundaries inherent in a moving

motor vehicle. Any confinement in the truck had no independent significance apart from the assault.

The risk to Hartman actually diminished. She went from being alone in the Meservey house to being in the city of Sheffield outside businesses where people were present. *Compare* State v. Holderness, 301 N.W.2d 733, 740 (Iowa 1981)(victim taken several miles from the city out into the countryside.). The fact that Hartman was outside businesses increased the likelihood passersby would be present. This lessened the risk to her – not *substantially* increased the risk.

The trip to Sheffield also increased the risk to Albright of detection. Hartman was within view of any passersby. She could get out of the truck at the veterinary clinic and seek help. And in fact she did leave the truck and run to an open business where people were present. (Vol. 2 p. 43L2-p. 44L4). Being within the city, the ease of Albright's escape was significantly diminished.

Remedy

The State's evidence was not sufficient to prove Albright confined Hartman or removed her to the truck for confinement as required by kidnapping in the first degree. The jury instructions for the lesser-included offenses of kidnapping in the second degree, kidnapping in the third degree and false imprisonment all required the same confinement instruction. (Ins. 24, 25, 26, 27)(App. pp. 41-44). The lesser-included charges must also be dismissed for lack of sufficient evidence. State v. Robinson, 859 N.W.2d at 482. The charge of kidnapping in the first degree must be reversed and remanded for entry of a judgment of acquittal.

Alternatively, if this Court determines the State presented sufficient evidence on only one alternative of confinement at the Meservey house or removal from the house to confinement in the truck but not both alternatives, Albright must be granted a new trial. The charge of kidnapping in the first degree was marshalled in the alternative. (Ins. 23)(App. p. 40). The jury was instructed that the verdict itself had to be unanimous, not

the theory or facts it was based upon. (Ins. 16)(App. p. 39). The verdict form only provided for a general verdict. (Verdict Form Ct II)(App. pp. 47-48). When a general verdict does not reveal the basis for a guilty verdict, reversal is required. State v. Heemstra, 721 N.W.2d 549, 558 (Iowa 2006).

B. intentionally subjected to torture

The jury was instructed regarding the definition of "torture." "Concerning element number Instruction No. 4 of Instruction No. 23- "torture" means the intentional infliction of severe physical or mental pain." (Ins. 28)(App. p. 45).

Hartman testified to the abuse she said Albright inflicted upon her. She had a broken nose. (Vol. 2 p. 37L13-17, p. 52L19-25). The assault broke her dentures. (Vol. 2 p. 37L22-p. 38L3). She had lots of swelling on her face, arms, and legs. She had blood in her eye. (Vol. 2 p. 53L1-5). The assault went on for twelve hours. (Vol. 2 p. 41L5-8).

However, Hartman provided very limited testimony about the pain she suffered. The Tazer on her wrist left two marks and hurt. (Vol. 2 p. 48L24-p. 49L22). She had pain in her

head and wrist. (Vol. 2 p. 53L15-24). The dog bite was painful. (Vol. 2 p. 30L3-12). Hartman still had physical pain on October 11th. (Vol. 2 p. 70L21-23). Hartman did not suffer a serious injury. (Vol. 1 p. 6L6-p. 7L18).

Hartman was not concerned about her physical injuries or pain. The 911 dispatcher asked Hartman "has he physically hurt you today?" She said, "Yes, but it's not that ... that I am worried about ... I just want to get someplace safe." (Ex. 2 L68-70)(Ex. App. p. 4). The dispatcher asked, "Are you hurt at all, Kim?" "Um" "Do you need an ambulance?" Hartman responded, "No. I just need a safe place to go for now." (Ex. 2 L120-126)(Ex. App. p. 5). Upon release from the hospital, Hartman was told to take Tylenol for pain. (Vol. 2 p. 180L6-7).

The photographs of Hartman show the extent of her physical injuries. (Ex. 3-14)(Ex. App. pp. 7-18). While Hartman exhibited several injuries which surely caused some level of discomfort, without more specific evidence, a factfinder cannot make a reasonable inference her physical pain rose to the level of "severe" pain.

Hartman additionally provided very limited information about any mental pain she suffered. Albright called her names. (Vol. 2 p. 26L15-22, p. 31L3-5). He made threats to bury her up to her neck in the cornfield and let a combine take her head off and nobody would find her. (Vol. 2 p. 40L19-p. 41L4). Hartman said she believed him because he was "that mad." (Vol. 2 p. 41L1-4). Based on Hartman's testimony this was the only threat in which he would facilitate her death. She did not testify that he threatened to kill her during the assault in the house.

The evidence in the present case does not rise to the level of torture. This Court has previously found torture under the several circumstances. In Cross, in upholding the conviction the defendant intentionally subjected the victim to torture, the Court stated:

> Defendant ripped off the victim's clothes and hit her several times, one blow producing a large wound on her head. He bit her breasts, chained her hands, and carried her in the car trunk for miles, nude and unconscious, in the cold of late October. During the twelve-hour ordeal defendant constantly threatened to kill the victim and to inflict oral and anal sexual abuses. He exposed himself to her, fondled her breasts, and penetrated her

vagina with his finger. Defendant admitted that when the victim tried to escape, "I must have landed an awful good backhand ... (for) her lips were all puffed up ... just mangled."

State v. Cross, 308 N.W.2d 25, 27 (Iowa 1981).

The Court of Appeals in Kirchner found sufficient evidence of torture. The Court outlined the evidence:

Gary had previously subjected Melanie to threats and physical abuse. He repeatedly threatened to kill Melanie while brandishing the tire iron or hitting the tire iron against the wall. Gary also hit Melanie in the face causing a black eye, pushed her down the basement steps causing a hip injury, and broke a ceramic doll and threatened to cut Melanie's face with pieces of glass. Gary then tied Melanie's hands and feet and left her in the hayloft for forty-five minutes in cold weather for which she was not adequately dressed, during which time he continued to threaten her with the tire iron. Melanie testified that throughout the ordeal she was terrified and thought Gary would kill her. Therefore, we conclude there is substantial evidence to support a finding Gary tortured Melanie by intentionally subjecting her to severe physical or mental pain.

State v. Kirchner, 600 N.W.2d 330, 334 (Iowa Ct. App. 1999).

Lastly, in White, this Court found sufficient evidence of torture based solely on severe mental pain. White had broken into Nelson's home while she was gone. He made a two and a half hour long videotape repeatedly threatening to kill Nelson. White surprised Nelson when she got out of the shower after

returning home. He pointed a shotgun at her. Nelson "was so consumed with fear that White was going to shoot her, Nelson walked backwards up the stairs." Nelson believed she was going to die. White ordered Nelson to sit on the bed or he would shoot her knee." White then made Nelson sit in in front of the video recorder which was on. State v. White, 668 N.W.2d 850, 857 (Iowa 2003).

> At all times, White kept the shotgun pointed at her. He interrogated her. He accused her of sexual infidelity. He demanded she tell the truth about having intimate relationships with other men. Nelson answered his questions. She was hysterical; she was trembling uncontrollably, crying and sobbing, wailing and screaming, and begging for her life. Nelson said, "I don't want you to kill me," and White responded, "Then answer my questions." Nelson pleaded to him not to kill her because their children needed her. White responded, "They'll be alright." When Nelson asked White why he was doing this to her he said, "I'll be in jail as soon as I leave if I don't shut you up.... You can't keep your mouth shut."

Id. White then made Nelson go downstairs. He still had the gun pointed at her. "White forced Nelson, at gunpoint, into the living room." He forced Nelson to watch the entire videotape White had previously recorded.

> The tape was replete with explicit statements of White's intent to kill Nelson, his accusations against her, and vulgar

name-calling. White stayed with Nelson as she viewed the entire two and a half hour video. As Nelson watched the tapes and heard the homicidal ideations of her husband, White repeatedly cocked and uncocked the shotgun. She heard White say on the tape he was going to torture her. She heard White say he was going to shoot her when she returned home. Nelson believed White was going to hurt her.

Id. After the tape was finished he acted like he was going to let her go. However, White came after her and blocked the door so Nelson could not leave. "He reloaded the shotgun and ordered Nelson back into the living room." Nelson attempted to boost his ego by saying everything was her fault and she deserved the bad treatment. State v. White, 668 N.W.2d at 857-858.

The evidence of the present case does not support a finding of "torture."

Remedy

The State failed to present sufficient evidence that Albright intentionally subjected Hartman to severe physical or mental pain. The charge of kidnapping in the first degree must be reversed and remanded for entry of a judgment of acquittal.

The jury was instructed on several lesser-included offenses. Upon a judgment of acquittal for first degree

kidnapping, the court may not enter conviction for kidnapping in the second degree. Kidnapping in the second degree (dangerous weapon) is not a lesser-included offense. This challenge is addressed in Division II. If this Court finds sufficient evidence of confinement and/or removal, upon remand the district court must enter judgment on the lesser-included offense of kidnapping in the third degree.

Alternatively, if this Court determines the State presented sufficient evidence on only one alternative definition of torture but not both alternatives, Albright must be granted a new trial. "Torture" was defined in the alternative. (Ins. 28)(App. p. 45). The jury was instructed that the verdict itself had to be unanimous, not the theory or facts it was based upon. (Ins. 16)(App. p. 39). The verdict form only provided for a general verdict. (Verdict Form Ct II)(App. pp. 47-48). When a general verdict does not reveal the basis for a guilty verdict, reversal is required. State v. Heemstra, 721 N.W.2d at 558.

Ineffective Assistance of Counsel

If error was not preserved, counsel provided ineffective assistance. A criminal defendant is entitled to effective assistance of counsel. U.S. Const. amend VI; Iowa Const. art. I, §10; Strickland, 466 U.S. at 686, 104 S.Ct. at 2063. The test for determining whether a defendant received effective assistance of counsel is "whether under the entire record and totality of the circumstances counsel's performance was within the range of normal competency." Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). In order to establish ineffective assistance of counsel, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. at 2068. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

If error was not preserved by the motion for judgment of acquittal, counsel breached an essential duty. The State failed to present sufficient evidence of first degree kidnapping.

Albright was prejudiced by counsel's failure to make a specific motion for judgment of acquittal. Had counsel made the specific motion, the district court would have been informed of the State's failure of proof and granted the motion. Additionally, a specific motion would have preserved error for appellate review. Albright received ineffective assistance of counsel and this Court should grant relief.

II. THE DISTRICT COURT ERRED IN SUBMITTING KIDNAPPING IN THE SECOND DEGREE (DANGEROUS WEAPON) AS A LESSER-INCLUDED OFFENSE OF KIDNAPPING IN THE FIRST DEGREE (TORTURE).

Preservation of Error.

Defense counsel objected to the submission of the jury instruction for kidnapping in the second degree as a lesser-included offense of kidnapping in the first degree. (Vol. 4 p. 7L10-p. 10L12). See State v. Jeffries, 430 N.W.2d 728, 737 (Iowa 1988)(timely objection to jury instructions in criminal proceedings is necessary to preserve alleged error for appellate review.)

Standard of Review.

The Court reviews challenges to jury instructions for correction of errors at law. State v. Spates, 779 N.W.2d 770, 775 (Iowa 2010). See also Alcala v. Marriott Intern., Inc., 880 N.W.2d 699, 707 (Iowa 2016)(clarified that absent a discretionary component the Court reviews refusals to give a requested jury instruction for correction of errors at law.). The Court's review is to determine whether the challenged instruction accurately states the law. State v. Predka, 555 N.W.2d 202, 204 (Iowa 1996). Error in giving a particular instruction does not warrant reversal unless the error was prejudicial to the party. State v. Douglas, 485 N.W.2d 619, 623 (Iowa 1992).

Discussion.

Iowa Rule of Criminal Procedure 2.22(3) allows the jury to find the defendant guilty of "any offense the commission of which is necessarily included in that with which the defendant is charged." Iowa R. Crim. P. 2.22(3). To determine whether one crime is a lesser-included offense of another, Iowa applies

the "impossibility test" and looks to the elements of the offenses in question. State v. McNitt, 451 N.W.2d 824, 825 (Iowa 1990). The impossibility test provides one offense is a lesser-included offense of the greater when the greater offense cannot be committed without also committing the lesser. State v. Ondayog, 722 N.W.2d 778, 783 (Iowa 2006); State v. Coffin, 504 N.W.2d 893, 894 (Iowa 1993). This test is "[t]he paramount consideration in determining submissibility of lesser-included offenses." State v. Turecek, 456 N.W.2d 219, 223 (Iowa 1990).

The usual method to ascertain whether it is possible to commit the greater offense without committing the lesser is to strictly compare the elements of the two crimes— called the "strict statutory-elements approach." State v. Jeffries, 430 N.W.2d at 730–731. "Under this approach, if the elements of the proffered lesser included offense are found in the putative greater offense (and the greater offense contains at least one additional element), then it will be legally impossible to commit the greater offense without simultaneously committing the lesser offense." State v. Miller, 841 N.W.2d 583, 588 (Iowa

2014). "If the lesser offense contains an element not required for the greater offense, the lesser cannot be included in the greater." State v. Jeffries, 430 N.W.2d 740.

The Court clarified the Jeffries rule and "cautioned against applying the elements approach overly restrictively and to the exclusion of the broader impossibility inquiry." State v. Miller, 841 N.W.2d at 588 (citing State v. McNitt, 451 N.W.2d at 824–25). In Turecek, the Court emphasized that "[t]he comparison of the elements of the greater and lesser crimes, sometimes referred to as the 'elements test,' is only resorted to as an aid in applying the impossibility test and is fully subsumed therein." State v. Turecek, 456 N.W.2d at 223.

Iowa has rejected a factual impossibility test which turns on the specific facts of the case in favor of a more general analysis based on the relationship between the two crimes. State v. Stewart, 858 N.W.2d 17, 21 (Iowa 2015). The State argued that under the facts as charged in the present case, torture "would encompass beatings, and torture could encompass beatings or assault, assaultive acts as it does here

with a dangerous weapon." (Vol. 4 p. 9L4-10). The district court agreed with this erroneous application of the law. "I think in this particular case, because the allegation for kidnapping first involves the torture alternative and given some of the facts that have been placed into evidence regarding the use of or presence of dangerous weapons during the events that the State believes support the torture element, I think that the kidnapping second, involving use of a dangerous weapon, should be included here as a lesser included offense." (Vol. 4 p. 9L22-p. 10L12). The district court improperly considered the rejected factual impossibility test.

In considering impossibility, the determination of legal possibility should be guided not only by analysis of the statute, but also by examining the marshalling instructions given by the district court. State v. Stewart, 858 N.W.2d at 22; State v. Miller, 841 N.W.2d at 590. The jury was instructed that for Albright to be found guilty of kidnapping in the first degree, the State had to prove: (1) On or about October 7, 2016, in Franklin County, Iowa, Defendant confined Kim Hartman or removed her

from one place to another; (2) Defendant did so with the specific intent to inflict serious injury upon Kim Hartman; (3) Defendant knew he did not have the consent or authority of Kim Hartman to do so; and (4) As a part of the confinement or removal Kim Hartman was intentionally subjected to torture. (Ins. 23)(App. p. 40). "Torture" means "intentional infliction of severe physical or mental pain." (Ins. 28)(App. p. 45).

The jury was next instructed the State had to prove the following elements of kidnapping in the second degree: (1) On or about October 7, 2016, in Franklin County, Iowa, Defendant confined Kim Hartman or removed her from one place to another; (2) Defendant did so with the specific intent to inflict serious injury upon Kim Hartman; (3) Defendant knew he did not have the consent or authority of Kim Hartman to do so; and (4) Defendant was armed with a dangerous weapon at the time he confined Kim Hartman or removed her from one place to another. (Ins. 24)(App. p. 41).

The first three elements are the same. However, being subjected to "torture" does not necessarily require "being armed

with a dangerous weapon." "[I]t is not legally impossible to commit the greater crime actually charged without also committing the lesser crime as charged." State v. Stewart, 858 N.W.2d at 22. Kidnapping in the second degree (dangerous weapon) is not a lesser-included offense of kidnapping in the first degree (torture). The district court erred in submitting the offense to the jury.

Albright acknowledges that if this Court finds there was sufficient evidence of "torture" he cannot demonstrate prejudice in the submission of the kidnapping in the second degree instruction. "The general rule applies that when a defendant is convicted of a greater offense he cannot complain of the fact the jury was permitted to consider his guilt of a lesser offense." State v. Douglas, 485 N.W.2d 619, 623 (Iowa 1992). However, if as argued in Division I, this Court determines the State's evidence was insufficient to prove Hartman was intentionally subjected to torture, Albright was prejudiced by the inclusion of the second degree kidnapping instruction. In that case, Albright would be found guilty of a crime for which he was not

charged. A formal accusation is essential for every trial of a crime. State v. Adcock, 426 N.W.2d 639, 640 (Iowa Ct. App. 1988). If a defendant is not formally charged with an offense, or if the offense of which he is found guilty is neither charged nor an included offense, then he is found guilty of an offense without a formal charge and his conviction is a nullity. State v. Adcock, 426 N.W.2d 639, 640 (Iowa Ct. App. 1988). If this Court determines the State's evidence was insufficient to prove the torture element, the highest offense Albright could be convicted of is kidnapping in the third degree.[1] See Instruction 25 (App. p. 42).

III. TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT TO AND INTRODUCING EVIDENCE OF ALBRIGHT'S OTHER CRIMES, WRONGS OR OTHER ACTS.

Preservation of Error.

The Iowa Supreme Court allows an exception to the general rule of error preservation in ineffective assistance of

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1 Also assuming the Court determines there was sufficient evidence of confinement and/or removal contested in Division I.

counsel claims. State v. Lucas, 323 N.W.2d 228, 232 (Iowa 1982). The failure of counsel to preserve error may constitute a denial of effective assistance of counsel. State v. Hrbek, 336 N.W.2d 431, 435-436 (Iowa 1983); Washington v. Scurr, 304 N.W.2d 231, 235 (Iowa 1981).

Standard of Review.

Ineffective assistance of counsel claims involve the violation of a constitutional right. The totality of the circumstances relating to counsel's conduct is reviewed de novo. State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987).

Discussion.

The Sixth and Fourteenth Amendments of the United States Constitution and article I section 10 of the Iowa Constitution set forth that a defendant is entitled to the assistance of counsel. The United States Supreme Court held a defendant is entitled to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063 (1984). The test for determining whether a defendant received effective assistance of counsel is "whether under the

entire record and totality of the circumstances counsel's performance was within the range of normal competency." Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981).

When specific errors are relied upon to show the ineffective assistance of counsel, the defendant must demonstrate (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom. Id. In order to establish ineffective assistance of counsel, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceedings would have been different. Strickland v. Washington, 466 U.S. at 694, 104 S.Ct. at 2068. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

To prove the attorney failed to perform an essential duty, the defendant must show the attorney's performance fell outside the normal range of competency. Snethen v. State, 308 N.W.2d at 14. The Court starts with the presumption the attorney performed in a competent manner. State v. Maxwell, 743 N.W.2d 185, 196 (Iowa 2008). The Court then measures

the attorney's performance against the standard of a reasonably competent practitioner. Id. at 195.

"More than mere improvident trial strategy, miscalculated tactics, mistake, carelessness or inexperience" must be shown. State v. Cromer, 765 N.W.2d 1, 8 (Iowa 2009) (citations omitted). "If there is no possibility that trial counsel's failure to act can be attributed to reasonable trial strategy, then we can conclude the defendant has established that counsel failed to perform an essential duty." State v. Graves, 668 N.W.2d 860, 870 (Iowa 2003). The present record is adequate to resolve the claims on direct appeal. State v. Buck, 510 N.W.2d 850, 853 (Iowa 1994).

Prior bad acts evidence

"In general, relevant evidence is admissible and irrelevant evidence is not admissible." State v. Taylor, 689 N.W.2d 116, 123 (Iowa 2004)(citing Iowa R. Evid. 5.402). "Evidence is relevant if: a. It has any tendency to make a fact more or less probable than it would be without the evidence; and b. The fact is of consequence in determining the action." Iowa R. Evid.

5.401. Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Iowa R. Evid. 5.403.

Iowa Rule of Evidence 5.404(b) establishes a specific rule governing the admissibility of a person's other crimes, wrongs or acts. Rule 5.404(b) provides:

> (1) *Prohibited use.* Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
>
> (2) *Permitted uses.* This evidence may be admissible for another purpose such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

Iowa R. Evid. 5.404(b). Iowa Rule 5.404(b) is a rule of exclusion. State v. Sullivan, 679 N.W.2d 19, 24 (Iowa 2004).

Ordinarily, the prosecutor must articulate a noncharacter theory of relevance. Id. at 28. The court then would determine whether the other-bad-acts evidence is relevant and material to a legitimate issue in the case, other than a general propensity to commit wrongful acts. State v. Cox, 781 N.W.2d 757, 761 (Iowa 2010). If the court determines the evidence is

relevant to a legitimate issue in dispute, the court must determine whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice to the defendant. Id. The evidence must be excluded *if the evidence's probative value is substantially* outweighed by its unfair prejudice. State v. Nelson, 791 N.W.2d 414, 425 (Iowa 2010). Unfair prejudice arises when the evidence would cause the jury to base its decision on something other than the proven facts and applicable law, such as sympathy for one party or a desire to punish a party. State v. Rodriquez, 636 N.W.2d 234, 240 (Iowa 2001). In determining whether unfair prejudice generated by evidence of a defendant's other misconduct substantially outweighs the probative value of the evidence, the court should consider the need for the evidence in light of the issues and the other evidence available to the prosecution, whether there is clear proof the defendant committed the prior bad acts, the strength or weakness of the evidence on the relevant issue, and the

degree to which the fact finder will be prompted to decide the case on an improper basis. Id.

A. Trial counsel provided ineffective assistance by failing to object to and introducing evidence of prior abuse of Hartman.

Hartman testified that Albright had been controlling and abusive in the past. (Vol. 2 p. 50L4-p.52L14, p. 112L11-15, p. 113L11-21, p. 115L5-22, p. 128L12-p. 129L17, p. 132L9-20, p. 133L3-12). Hartman testified that she quit her job at Subway because Albright accused her of cheating when she went to work. (Vol. 2 p. 22L11-18). The prosecutor asked Hartman if Albright had a "common theme" of believing she was cheating. Hartman agreed. (Vol. 2 p. 23L24-p. 24L11). Hartman testified she had to use Albright's phone to call her children and "then she had to be where he could hear [her]." (Vol. 2 p. 24L25-p. 25L5). Hartman stated Albright had called her names before October 4th. (Vol. 2 p. 31L3-7).

Albright had used weapons on Hartman in the past. He had knives and swords that he used or threatened to use to hurt Hartman. (Vol. 2 p. 50L4-10). Hartman said Albright

cut her knee with a sword. He said he was going to cut her leg off so she couldn't leave. Hartman showed the jury the scar on her knee. (Vol. 2 p. 128L12-p. 129L17). Hartman told people she cut her knee on the lawn mower so they wouldn't know Albright caused it. (Vol. 2 p. 132L9-20). Hartman did not get medical treatment for the knee injury because it would just raise more questions and she thought she loved Albright. (Vol. 2 p. 133L3-12).

Albright accused Hartman of going to her uncle's funeral to cheat on him. Albright was going to allow Hartman to drive his truck to the funeral, but then he did not let her use the truck. She did not call anyone for a ride to the funeral because Albright had the phone. (Vol. 2 p. 50L11-p. 51L16).

Prior to October 7th, Albright would tie a noose and tell Hartman to hang herself so that she was not a bother to anyone else. (Vol. 2 p. 51L24-p. 52L14). Defense counsel did not object to any of this evidence.

Because defense counsel did not object to the inadmissible other acts evidence, he introduced similar evidence. Hartman

was abused when they lived in Garner. (Vol. 2 p. 112L7-15). A few months before October 7th, she had bruising. (Vol. 2 p. 113L11-21). Albright kept Hartman from her family because she couldn't call or see them. (Vol. 2 p. 115L5-p. 116L12, p. 120L7-13). The dog had attacked Hartman before when she and Albright were fighting. (Vol. 2 p. 125L17-p. 126L2).

In Taylor, this Court determined prior incidents of domestic abuse were relevant to the defendant's intent which was at issue. State v. Taylor, 689 N.W.2d 116, 124-125 (Iowa 2004). The Court reasoned there was "a logical connection between a defendant's intent at the time of the crime, when the crime involves a person to whom he has an emotional attachment, and how the defendant has reacted to disappointment or anger directed at that person in the past, including acts of violence, rage, and physical control." Id. at 125. "In other words, the defendant's prior conduct directed to the victim of a crime, whether loving or violent, reveals the emotional relationship between the defendant and the victim and is highly probative of the defendant's probable motivation

and intent in subsequent situations." Id. Taylor's holding only determined the other acts evidence was relevant to show intent.

The Supreme Court again addressed prior acts of domestic violence in State v. Richards, 879 N.W.2d 140 (Iowa 2016). Richards asserted he acted in self-defense. Id. at 142. The Court concluded a self-defense claim does not categorically remove the defendant's intent from dispute, the other acts evidence was relevant to a legitimate disputed issue. Id. at 152.

The emphasis on the question whether the other acts evidence is relevant to a "legitimate issue" is significant. State v. Sullivan, 679 N.W.2d at 25. "That emphasis is significant because "the jury is less likely to concentrate on propensity if there is a bona fide dispute on mens rea." " State v. Richards, 879 N.W.2d at 147 (quoting State v. Henderson, 696 N.W.2d 5, 16 (Iowa 2005) (Lavorato, C.J., concurring specially)). But if there is no real dispute regarding intent, "the only relevancy of such evidence is to show the defendant's criminal disposition or

propensity to commit the very crime for which the defendant is on trial." Id.

The other acts evidence unrelated to the incident on October 7th was not relevant for any legitimate purpose.[2] Albright's intent was not a disputed issue at trial. Albright admitted he hit Hartman. He only disputed that he had hit her at the house and confined or removed her to constitute the kidnapping charge. (Vol. 3 p. 58L14-20, p. 74L18-p. 75L1, p. 100L18-20, p. 101L8-22, p. 103L1-12, p. 104L16-p. 105L10, p. 106L9-p. 107L1, p. 110L5-22, p. 123L11-21, p. 124L12-p. 125L7). During closing argument, defense counsel conceded

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2 The evidence of the admitted assault two weeks prior to October 7th is arguably admissible under the inextricably intertwined doctrine. (Vol. 2 p. 31L8-25, p. 114L15-p. 115L4; Vol. 3 p. 89L2-p. 90L5, p. 90L16-24, p. 116L10-p. 117L2, p. 119L4-13). See State v. Nelson, 791 N.W.2d 414, 419-20 (Iowa 2010)(The inextricably intertwined doctrine bypasses Rule 5.404(b) because Rule 5.404(b) is only applicable to evidence of other crimes, wrongs, or acts, which is considered to be extrinsic evidence. "The inextricably intertwined doctrine holds other crimes, wrongs, or acts evidence that is inextricably intertwined with the crime charged is not extrinsic evidence but, rather, intrinsic evidence that is inseparable from the crime charged.").

that Albright "beat her up pretty bad. And he knows he committed willful injury. And we think he's guilty of willful injury." (Vol. 4 p. 28L25-p. 29L7).

Albright's defense was he did not confine Hartman at the house in Meservey or remove her to the truck where she was confined. Albright also denied abusing Hartman in the house but admitted he hit her several times in the truck causing injuries. Unlike prior cases where this Court has found prior acts of domestic violence relevant to show intent, Albright did not claim the charged incident was accidental. See State v. Taylor, 689 N.W.2d at 124-125 (defendant argued he accidentally broke van window); State v. Newell, 710 N.W.2d 6, 22 (Iowa 2006)(several of defendant's versions of what happened portrayed the victim's death as accidental.). Nor did Albright claim that he did not intend to cause an injury. See State v. Rodriquez, 636 N.W.2d at 242 (Defendant said he did not intend to cause a serious injury). Albright's intent to inflict serious injury was not in dispute.

If the Court determines the evidence was relevant to a legitimate issue in dispute, the Court must determine whether the probative value of the other acts evidence was substantially outweighed by the danger of unfair prejudice to the defendant. State v. Richards, 879 N.W.2d at 152. The evidence must be excluded if the evidence's probative value is substantially outweighed by its unfair prejudice. State v. Nelson, 791 N.W.2d at 425.

This Court has stated that the "victim's" testimony alone satisfies the clear proof requirement. State v. Richards, 879 N.W.2d at 152. Yet, the allegations of prior abuse other than two weeks prior to October 7th were disputed. Defense counsel spent considerable time trying to challenge Hartman's claims. (Vol. 2 p. 112L7-15, p. 113L11-21, p. 115L5-p. 116L12, p. 120L7-13, p. 125L17-p. 126L2; Vol. 3 p. 50L16-p. 51L4, p. 52L6-14, p. 55L6-9, p. 66L18-p. 67L9, p. 70L15-p. 71L15, p. 86L15-p. 87L8).

If the evidence was relevant to the issue of Albright's intent to cause serious injury, the probative value was fairly weak.

While Hartman testified Albright was suspicious and jealous, she did not claim the prior abuse was perpetrated when she expressed a desire to leave or end the relationship. *Compare* State v. Rodriquez, 636 N.W.2d at 242-43 (The fact that the defendant had cruelly assaulted victim in the past when she tried to leave him makes it more probable that his mere presence in the bedroom was intended—and perceived—to be a threat of harm calculated to prevent her from leaving.).

The Court has "readily acknowledge juries would probably not like someone whom they conclude has repeatedly assaulted a significant other and therefore might develop a desire to punish." State v. Richards, 879 N.W.2d at 152 (citing State v. Liggins, 524 N.W.2d 181, 188–89 (Iowa 1994)). Albright had a jury trial "which means the fact finder is more susceptible to deciding the case on an improper basis." See State v. Taylor, 689 N.W.2d at 130 ("Clearly the likelihood of an improper use of the evidence is reduced by the fact that the present case was tried to the court."); State v. Casady, 491 N.W.2d 782, 786 (Iowa

1992) (concluding prejudicial effect from other acts evidence "is reduced in the context of a bench trial").

The scope of the prior acts evidence was not limited. The prosecution questioned Hartman about the prior abuse occasionally mixing the evidence of prior abuse with the October 7th incident. (Vol. 2 p. 31L3-p. 32L2, p. 52L4-14) Hartman provided more details of some of the prior abuse than she did of the events of October 7th. (Vol. 2 p. 50L2-p. 52L11, p. 128L12-p. 129L17, p. 132L9-p. 133L12). Evidence that Albright was controlling and tried to keep Hartman from her family bears no relevance on any legitimate issue other than his general propensity to abuse her. And the trial court did not instruct the jury on the proper use of the other acts evidence. See Iowa Criminal Jury Instruction 200.34 (similar crimes). The jury was free to consider the other acts evidence for the improper purpose – if the jury believed he committed other acts of abuse he more than likely committed the charged offenses.

The evidence of prior abuse unrelated to the incident on October 7th was not admissible. Trial counsel breached a duty

by failing to object and introducing similar inadmissible evidence. The failure to object cannot be shown to be a reasonable trial strategy.

Albright was prejudiced by the introduction of the evidence of prior abuse unrelated to the October 7th incident. Hartman said Albright confined her and removed her to continue the confinement. Albright while admitting he assaulted Hartman in the truck denied he confined or removed her. The jury had to resolve the disputed evidence to reach the verdict in the kidnapping count. The prior acts evidence without any limitations as to scope, purpose or relevance was unfairly prejudicial. The other acts evidence tipped the scales toward conviction. In totality, this Court must hold that the other acts evidence influenced the outcome to the extent that the confidence in the verdict without the evidence is undermined. Albright's attorney rendered ineffective assistance, and therefore, he must be granted a new trial.

B. Trial counsel provided ineffective assistance by failing to object to and introducing evidence of Albright's prior domestic abuse conviction and prison sentence.

Rule 5.404(b) evidence

The prosecution introduced evidence that Albright had been to prison. Exhibit 35 referenced Albright's "state number." (Ex. 35)(Ex. App. pp. 19-25). Hartman was questioned if she understood what the "state number" meant. Hartman responded that if Albright were to go to prison – it is his inmate number. (Vol. 2 p. 58L17-p. 59L5). Defense counsel failed to move to redact Exhibit 35. Defense counsel failed to object to the evidence of an inmate number. Counsel breached an essential duty.

The only arguable relevance of the prison inmate number is in reference to Hartman's opinion that Albright knew he was "in trouble." (Vol. 2 p. 59L4-5). See R. Evid. 5.404(b) (proof of knowledge). If Hartman's opinion regarding Albright's state of mind was correct and/or relevant, the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. Iowa R. Evid. 5.403. Evidence is unfairly

prejudicial if the evidence "appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or triggers other mainsprings of human action [that] may cause a jury to base its decision on something other than the established propositions in the case." State v. Rodriquez, 636 N.W.2d at 240.

Evidence that Albright had been to prison before because he had an inmate number was unfairly prejudicial. The evidence of Albright's previous prison sentence is the type of evidence which would persuade the jury to decide his guilt not on the facts of the case. The jury may have a tendency to want to punish Albright for his past deeds and may determine if he went to prison before he must be guilty of this offense too. *Rule 5.609 evidence*

During direct examination, defense counsel questioned Albright regarding his prior prison sentence:

Q I want you to think back to some earlier years because I think Ms. [Prosecutor] has a right to ask you this. Have you ever gone to prison?

A Yes, sir. I have.

Q How many times?

A Once.

Q And did you go to prison for domestic assault?

A Yes, it was.

Q Was it an enhanced penalty? In other words, you had more than one domestic assault?

A Yes, sir.

Q Where'd you go to prison?

A Clarinda, Iowa.

Q And how much time did you spend there?

A Approximately two, two and a half years.

(Vol. 3 p. 105L13-p. 106L2). Albright's prior prison sentence and conviction for domestic assault were not admissible to impeach him. Trial counsel breached an essential duty by introducing this evidence.

Iowa Rule of Evidence 5.609 provides, in pertinent part: The following apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) For a crime that in the convicting jurisdiction was punishable by death or by imprisonment for more than one year, the evidence:
***
(B) Must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant.

Iowa R. Evid. 5.609(1)(B). By his own testimony, Albright's prior domestic assault conviction meets the first requirement- the offense was punishable by imprisonment for more than one year. However, the evidence's probative value as to his truthfulness did not outweigh its prejudicial effect.

The Court approved of the process for weighing the probative value and the prejudicial effect.

In determining whether the probative value of evidence of a prior conviction outweighs its prejudicial effect, the trial court should consider such factors as: (1) the nature of the conviction; (2) the conviction's bearing on veracity; (3) the age of the conviction; and (4) its tendency to improperly influence the jury.

State v. Aiotis, 569 N.W.2d 813, 816 (Iowa 1997), overruled on other grounds State v. Harrington, 800 N.W.2d 46, 51 (Iowa 2011). With respect to evidence of similar crimes, the federal court stated:

Where multiple convictions of various kinds can be shown, strong reasons arise for excluding those which are for the same crime, because of the inevitable pressure on lay jurors to believe that "if he did it before he probably did so this time." As a general guide, those convictions which are for the same crime should be admitted sparingly; one solution might well be that discretion be exercised to limit the impeachment by way of a similar crime to a single conviction and then only when the circumstances indicate strong reasons for disclosure, and where the conviction directly relates to veracity.

Gordon v. United States, 383 F.2d 936, 940 (D.C.Cir.1967).

The nature of the conviction and prison sentence has no bearing on Albright's veracity. The record is unclear as to the age of the conviction. It would be presumably before Hartman and Albright's relationship began. The nature of the prior offense is very similar to the offense for which Albright was being tried. This fact alone could very likely have a substantial effect on a jury and could reasonably be expected to misuse the evidence as substantive proof of guilt. See State v. Daly, 623 N.W.2d 799, 803 (Iowa 2001)(convictions were for exactly the same crimes for which Daly was currently on trial). The evidence of Albright's conviction and prison sentence for very similar crimes as the present charges was so likely to have

influenced the jury improperly the evidence would have been inadmissible had counsel sought its exclusion instead of introducing it himself.

Prejudice

Albright was prejudiced by the evidence he had been previously to prison for domestic assault which was enhanced by another domestic assault conviction. The evidence of previous domestic assault against a victim other than Hartman would lure the jury to use the evidence for an improper purpose – if Albright assaulted his significant other twice before and went to prison, he was guilty of these offenses too. The jury was not provided with a limiting instruction explaining the proper consideration of the evidence. See Iowa Criminal Jury Instruction 200.34 (similar crimes); Iowa Criminal Jury Instruction 200.36 (Impeachment - Public Offense). Albright must be granted a new trial.

C. Cumulative effect of errors.

Even where a trial attorney's errors may not individually amount to ineffective assistance of counsel, the cumulative

effect of multiple errors may make out a Sixth Amendment violation. State v. Clay, 824 N.W.2d 488, 500-502 (Iowa 2012); Wycoff v. State, 382 N.W.2d 462, 473 (Iowa 1986). In the present case, the cumulative effect of counsel's errors, as enumerated above, undermines confidence in the outcome and establishes a reasonable probability that, but for counsel's breach of duty, the outcome of trial would have been different.

If this Court finds that the evidence of Albright's prior convictions, prison sentence, and other acts of abuse against Hartman were not individually prejudicial, the resulting prejudice from the combination of the inadmissible evidence is significant. The jury was provided with information that Albright committed domestic abuse two prior times presumably against a person other than Hartman, he was incarcerated for two and one half years for domestic abuse, then he began dating Hartman who he abused throughout the relationship culminating in instant allegations of the beating and kidnapping of Hartman. The jury was presented with information that suggested Albright was a serial batterer

without any instruction regarding a proper purpose of such evidence. The prejudice to Albright for counsel's failures increased with each piece of evidence which allowed the jury to consider Albright's propensity for violence against his intimate partners. Albright was provided ineffective assistance and must be granted a new trial.

IV. THE DISTRICT COURT ERRED IN ORDERING ALBRIGHT TO REIMBURSE THE STATE FOR THE COST OF HIS LEGAL ASSISTANCE WITHOUT FIRST CONSIDERING HIS REASONABLE ABILITY TO PAY SUCH RESTITUTION.

Preservation of Error.

An improper award of criminal restitution is an illegal sentence. See State v. Janz, 358 N.W.2d 547, 548-49 (Iowa 1984)(Noting that the practice in Iowa for many years had been to allow either the district court or the appellate court to correct an illegal sentence.); State v. Jose, 636 N.W.2d 38, 44 (Iowa 2001)("[The court noted that where the time for appeal has expired, a defendant must petition the district court under Iowa Rule of Criminal Procedure [2.24(5)(a)] to correct an illegal sentence.]"). A challenge to an illegal sentence includes a

claim that that the sentence itself is unconstitutional. State v. Bruegger, 773 N.W.2d 862, 871 (Iowa 2009). An illegal sentence may be corrected at any time. Iowa R. Crim. P. 2.24(5)(a).

Standard of Review.

This Court reviews restitution orders for correction of errors at law. When reviewing a restitution order, the appellate court determines whether the district court has properly applied the law. State v. Jenkins, 788 N.W.2d 640, 642 (Iowa 2010); State v. Klawonn, 688 N.W.2d 271, 274 (Iowa 2004). The Court's review of constitutional claims is de novo. State v. Dudley, 766 N.W.2d 606, 612 (Iowa 2009).

Discussion.

The Iowa appellate courts have addressed criminal restitution for court costs and attorney fees in many cases, some of which are confusing and conflict with other published case law. This Court should clarify the process and procedure for imposition of criminal restitution including the constitutional guarantees associated with such an order.

Albright was found to be indigent and was granted court-appointed counsel. (10/20/16 Order re Counsel; 10/21/16 Order; 10/21/16 Appearance; Financial Affidavit)(App. pp. 6-12). On November 1, 2016, privately retained counsel entered an appearance. (11/1/16 Appearance)(App. p. 15). Albright's attorney sought and obtained orders paying for an investigator and depositions at state expense. (11/3/16 Application; 11/21/16 Order; Application for Depos; 1/27/17 Order; 3/17/17 Application; 3/17/17 Order; 4/7/17 Application; 4/7/17 Order)(App. pp. 16-30).

At sentencing, the district court ordered Albright to pay *restitution for court costs*. The district court did not discuss reimbursement to the state for the cost of his legal assistance. (Sent. Tr. p. 14L12-21). The judgment entry states, in relevant part:

Payment of Financial Obligations. Pursuant to Iowa Code section 910.2, Defendant is found to have the reasonable ability to pay the obligations set forth herein, including but not limited to any crime victim assistance reimbursement, restitution to public agencies, and court costs including correctional fees,

court-appointed attorney fees, contribution to a local anticrime organization, or restitution to the medical assistance program. * * *

(Judgment p. 2)(App. p. 53).

When a person is granted an appointed attorney, he shall be required to reimburse the state for the total cost of legal assistance provided to the person. Iowa Code §815.9(3) (2015). "Legal assistance" includes not only the expense of the public defender or an appointed attorney, but also transcripts, witness fees, expenses, and any other goods or services required by law to be provided to an indigent person entitled to an appointed attorney. Iowa Code §815.9(3) (2015).

In all criminal cases where judgment is entered, the sentencing court shall order restitution be made. Restitution includes court-appointed attorney fees. Iowa Code §§910.2 and 815.9(4)(2015). Criminal restitution is a criminal sanction that is part of the sentence. Iowa Code §910.2(1) (2015); 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. Cf. State v. Dudley, 766 N.W.2d at 620 ("the legislature has injected this matter, which would ordinarily be civil, in a criminal action and provided for counsel throughout the criminal prosecution, ending with judgment on behalf of the State."). The court is authorized to order criminal restitution pursuant to the restitution statutes. State v. Bonstetter, 637 N.W.2d 161, 166 (Iowa 2001).

Albright was ultimately represented by privately retained counsel. However, Albright received the services of an investigator at state expense. He also was permitted to take depositions at state expense. (11/21/16 Order; 1/27/17 Order; 3/17/17 Order; 4/7/17 Order)(App. pp. 8-9, 21-22, 25-26, 29-30). These costs were order as restitution and have been assessed. (Judgment p. 2; Combined General Docket p. 16 & Financial Summary p. 1)(App. pp. 53, 57-58).

The legislature specifically provided that the imposition of restitution for cost of legal assistance is subject to a determination of the defendant's reasonable ability to pay. Iowa Code section 910.2(1) (2015) provides in relevant part:

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, to the clerk of court for fines, penalties, surcharges, and, **to the extent that the offender is reasonably able to pay**, for crime victim assistance reimbursement, restitution to public agencies pursuant to section 321J.2, subsection 13, paragraph "b", court costs including correctional fees approved pursuant to section 356.7, court-appointed attorney fees ordered pursuant to section 815.9, including the expense of a public defender, when applicable, contribution to a local anticrime organization, or restitution to the medical assistance program pursuant to chapter 249A.

Iowa Code §910.2(1) (2015)(emphasis added). See also Iowa Court R. 26.2(10)(a) ("the court shall order the payment of the total costs and fees for legal assistance as restitution to the extent the person is reasonably able to pay").

A defendant's reasonable ability to pay is a constitutional prerequisite for a criminal restitution order provided by Iowa Code chapter 910. State v. Haines, 360 N.W.2d 791, 797 (Iowa 1985); State v. Harrison, 351 N.W.2d 526, 529 (Iowa 1984). Cf. Bearden v. Georgia, 461 U.S. 660, 667 n.8, 103 S.Ct. 2064, 2069 n.8 (1983)("The more appropriate question is whether consideration of a defendant's financial background in setting

or resetting sentence is so arbitrary or unfair as to be a denial of due process."). Iowa's recoupment statute does not infringe on a defendant's right to counsel because of the "reasonable ability to pay" determination. State v. Haines, 360 N.W.2d at 793; State v. Dudley, 766 N.W.2d at 614-615. "A cost judgment may not be constitutionally imposed on a defendant unless a determination is first made that the defendant is or will be reasonably able to pay the judgment." Id. at 615.

Published Supreme Court case law is conflicting. Recently, this Court addressed a sentencing order which stated the court would assess the entirety of defendant's appellate attorney fees against him unless he filed a request for a hearing regarding his reasonable ability to pay them within thirty days of the issuance of Procedendo following his appeal. State v. Coleman, 907 N.W.2d 124, 149 (Iowa 2018). The Court stated "when the district court assesses any future attorney fees on Coleman's case, it must follow the law and determine the defendant's reasonable ability to pay the attorney fees without requiring him to affirmatively request a hearing on his ability to

pay." Id. Coleman appears to follow the Harrison and Haines line of reasoning. Harrison provided that the "reasonable ability to pay" provision is an "express condition on the determination of the amount of restitution for court costs and attorney fees." "The sentencing court would never get to the point of exercising this authority if it were mandated to order full restitution for court costs and attorney fees without regard to the offender's ability to pay." State v. Harrison, 351 N.W.2d at 529. Therefore, this discretion must be exercised at the sentencing hearing. Id. The Harrison holding was followed in Haines. State v. Haines, 360 N.W.2d at 797 (Court failed to exercise discretion to determine whether Haines was reasonably able to pay all or part of attorney fees).

But in Blank, the Court focused on not on the entire amount of restitution due, but on Blank's ability to pay the current installment. State v. Blank, 570 N.W.2d 924, 927 (Iowa 1997). The Blank Court cited Van Hoff, but did not include the entire holding from the case. Id. The Court in Van Hoff held:

We do not believe Van Hoff's "reasonable" ability to pay the restitution is necessarily determined by his ability to pay it in full during the period of his incarceration, as held by the court of appeals, although that might be one of the factors to be considered. A determination of reasonableness, especially in a case of long-term incarceration, is more appropriately based on the inmate's ability to pay the current installments than his ability to ultimately pay the total amount due. Van Hoff does not claim that he is paying child support, alimony, or any similar expenses. His living expenses, obviously, are paid by the state. He does not claim that he is unable to pay twenty percent of his prison wages toward the restitution order.

State v. Van Hoff, 415 N.W.2d 647, 649 (Iowa 1987).

In Swartz, the Supreme Court held that until Swartz exhausted the remedy provided in Iowa Code section 910.7 the Court had no basis for reviewing his "reasonable ability to pay" court costs and attorney fees. State v. Swartz, 601 N.W.2d 348, 354 (Iowa 1999). See also State v. Jackson, 601 N.W.2d 354, 357 (Iowa 1999)(same). The Court in Jose concluded that Swartz had not challenged the total amount of criminal restitution (restitution plan), but the restitution plan of payment. State v. Jose, 636 N.W.2d at 45. The Swartz opinion does not use the phrase "plan of payment."

The law regarding the defendant's reasonable ability to pay is conflicting and confusing. This Court should take this opportunity to clarify the law to aid the bench and bar. Must the sentencing court determine a defendant's reasonable ability to pay criminal restitution for court cost and attorney fees at the time the order is entered? Albright respectfully submits the Harrison and Haines Courts were correct in its holding that in order to pass constitutional muster the reasonable ability to pay determination must be made at the time of sentencing, or upon supplemental request and order, when the amount of criminal restitution is determined. If this determination was not made, the defendant can challenge it on direct appeal and overrule this portion of Swartz and Jackson. Additionally, the district court has the obligation to determine the total amount of criminal restitution the defendant has the reasonability to pay, not the current installment as held in Blank. If the installment amount is the determinative factor, a defendant's right to counsel will be chilled because the debt could last a life-time and the reasonable ability to pay will be meaningless. To the

extent Blank and Van Hoff hold otherwise, they should be overruled.

The district court must determine Albright's reasonable ability to pay the cost of his legal assistance prior to imposing the cost as part of criminal restitution. State v. Jenkins, 788 N.W.2d at 646 (denying defendant an opportunity to challenge the amounts of the restitution order before the district court implicates his right to due process.). See also Iowa Court R. 26.2(10)(c)("After the judicial officer makes a rule 26.2(10)(a) or (b) determination, the judicial officer shall set forth in the sentencing order the amount the person is required to pay for legal assistance."). The "reasonable ability to pay" determination is the sentencing court's duty. The district court failed to consider Albright's reasonable ability to pay the cost of his legal assistance prior to the order entering judgment for reimbursement of the court-appointed attorney fees which *includes the costs of his legal assistance.* See State v. Coleman, 907 N.W.2d 124, 149 (Iowa 2018)(court must determine the defendant's reasonable ability to pay the attorney

fees without requiring him to affirmatively request a hearing on his ability to pay.").

The case must be remanded for a determination of Albright's reasonable ability to pay the cost of his legal assistance and court costs. The district court should also consider the amount of interest, if any, which has been added to the original restitution amount and reduce this amount accordingly.

CONCLUSION

Charles Albright respectfully requests this Court reverse his conviction for first degree kidnapping and remand to the district court for an appropriate order either dismissing the charge or entry of a judgment on a proper lesser-included offense. Alternatively, Albright respectfully requests this Court reverse his conviction for first degree kidnapping and remand for a new trial. Lastly, Albright respectfully requests this Court vacate the order for restitution for the cost of his legal assistance and remand for an appropriate order after

consideration of his reasonable ability to pay this portion of criminal restitution.

REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $ 7.46, and that amount has been paid in full by the Office of the Appellate Defender.

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

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