

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,)
)
 Plaintiff-Appellee,)
)
 v.) SUPREME COURT 18-1504
)
 CHAD RICHARD CHAPMAN,)
)
 Defendant-Appellant.)

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
HONORABLE SCOTT D. ROSENBERG, JUDGE

APPELLANT'S BRIEF AND ARGUMENT
AND
REQUEST FOR ORAL ARGUMENT

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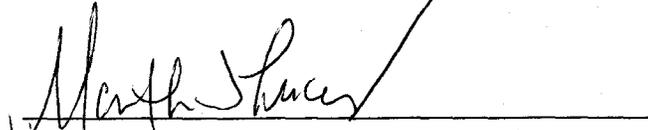
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CERTIFICATE OF SERVICE

On the 13th day of March 2019, 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 Chad Chapman, 5220 SE 8th, Des Moines, IA 50315.

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. AT SENTENCING, THE STATE DID NOT PRESENT ANY EVIDENCE TO PROVE THE OFFENSE WAS SEXUALLY MOTIVATED. DID THE DISTRICT COURT ERR IN FINDING BEYOND A REASONABLE DOUBT THAT IT WAS A SEXUALLY MOTIVATED OFFENSE?

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State v. Keene, 630 N.W.2d 579, 581 (Iowa 2001)

1A Charles Alan Wright, Federal Practice and Procedure § 174,
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State v. Sailer, 587 N.W.2d 756, 760-761 (Iowa 1998)

Iowa Code § 915.10(3) (2017)

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Iowa Code § 915.21(2) (2017)

Iowa Code § 915.21(3) (2017)

II. THE LEGISLATURE DID NOT AUTHORIZE THE IMPOSITION OF A SPECIAL SENTENCE PURSUANT TO IOWA CODE SECTION 903B.2 AND THE LAW ENFORCEMENT INITIATIVE SURCHARGE PURSUANT TO IOWA CODE SECTION 911.3 FOR A VIOLATION OF IOWA CODE CHAPTER 726. ARE THESE PORTIONS OF THE SENTENCE ILLEGAL?

Authorities

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**III. MUST THE DISTRICT COURT FIRST DETERMINE
CHAPMAN'S REASONABLE ABILITY TO PAY COURT COSTS
BEFORE ORDERING HIM TO PAY COURT COSTS?**

Authorities

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

State v. Haines, 360 N.W.2d 791, 797 (Iowa 1985)

State v. Harrison, 351 N.W.2d 526, 529 (Iowa 1984)

Bearden v. Georgia, 461 U.S. 660, 667 n.8, 103 S.Ct. 2064, 2069 n.8 (1983)

State v. Coleman, 907 N.W.2d 124, 149 (Iowa 2018)

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State v. Poland, No. 17-0189, 2018 WL 3302201, at *6 (Iowa Ct. App. July 5, 2018)

State v. Boutchee, No. 17-1217, 2018 WL 3302010, at *5 (Iowa Ct. App. July 5, 2018)

State v. Pearl, No. 13-0796, 2014 WL 1714490, at *5 (Iowa Ct. App. April 30, 2014)

State v. Hols, No. 10-1841, 2013 WL 750307, at *2 (Iowa Ct. App. Feb. 27, 2013)

State v. Wilson, Nos. 1-104, 00-0609, 2001 WL 427404, at *3 (Iowa Ct. App. April 27, 2001)

State v. Alexander, No. 16-0669, 2017 WL 510950, at *3
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Iowa Code § 602.8102(141) (2017)

Iowa Code § 625.8 (2017)

Iowa Code § 602.8102(99) (2017)

Iowa Code § 602.8102(135) (2017)

Iowa Code § 602.8106(1) (2017)

Iowa Code § 907.8 (2017)

Iowa Code § 910.4 (2017)

Iowa Code § 910.5(1)(a) (2017)

Iowa Code § 910.5(1)(d) (2017)

Iowa Ct. R. 26.2(1)

Iowa Code § 602.807(1)(a) (2017)

Iowa Code § 602.8107 (2017)

IV. A DISCREPANCY EXISTS BETWEEN THE ORAL SENTENCING PRONOUNCEMENT AND THE SUBSEQUENT WRITTEN JUDGMENT ENTRY REGARDING REIMBURSEMENT OF LEGAL ASSISTANCE FEES. SHOULD THE CASE BE REMANDED TO THE DISTRICT COURT FOR APPROPRIATE FURTHER PROCEEDINGS TO CORRECT THE WRITTEN JUDGMENT ENTRY?

Authorities

State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994)

State v. Wilson, 294 N.W.2d 824, 826 (Iowa 1980)

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State v. Suchanek, 326 N.W.2d 263, 265 (Iowa 1982)

Iowa R. Crim. P. 2.23(3)(g)

Iowa Code § 910.4 (2017)

ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because issues raised involve a substantial issue of first impression in Iowa and/or a substantial question of enunciating changing legal principles. Iowa Rs. App. P. 6.903(2)(d), 6.1101(2)(c), and 6.1101(2)(f).

First, the Iowa Supreme Court has not yet addressed Iowa Code section 692A.126. The Court of Appeals has decided cases which challenged orders requiring sex offender registration upon a judicial finding the offense was sexually motivated. State v. Mesenbrink, No. 15-0054, 2015 WL 7075826, at *5 (Iowa Ct. App. Nov. 12, 2015)(declined to allow the court to rely upon Minutes to establish beyond a reasonable doubt as required by § 692A.126 where defendant did not agree with portions relied upon); State v. Rodriguez, No. 15-1002, 2016 WL 4051696, at *1 (Iowa Ct App. July 27, 2016)(evidence, including victim's testimony, admitted at sentencing hearing supported conclusion offense was sexually

motivated); State v. Rigel, No. 16-0576, 2017 WL 936135, at *5 (Iowa Ct. App. March 8, 2017)(To find sexual motivation, the court necessarily had to rely on unproven information in the Minutes). The Court should clarify the proper procedure for a determination of sexual motivation pursuant to Iowa Code section 692A.126 (2017) when the defendant pleads guilty to the offense but denies sexual motivation. Additionally, the Court should address the proper remedy when the State fails in its burden and the district court erroneously orders sex offender registration.

Second, Chapman requests this Court retain the case to clarify the proper procedure and scope of the “reasonable ability to pay” provision in Iowa Code section 910.2(1) (2017). Chapman specifically requests this Court clarify *when* the district court must consider a defendant’s reasonable ability to

pay criminal restitution.¹

STATEMENT OF THE CASE

Nature of the Case: Appellant Chad Chapman appeals following an Alford plea, judgment and sentence for child endangerment in violation of Iowa Code sections 726.6(1)(a) and 726.6(7) (2017).

Course of Proceeding and Disposition Below: On October 5, 2017, the State charged Chapman with two counts of sexual abuse in the second degree for acts alleged between June 15 and July 17, 2017. (TI)(App.pp. 9-10).

On July 9, 2018, the parties reached a plea agreement.

The prosecutor outlined the agreement:

The State moves to amend the trial information to the crime of child endangerment causing no injury, in violation of Iowa Code Sections 726.6(1)(a) and 726.6 (7).

¹ At the time of writing the page proof brief, similar issues are pending in State v. Headley, # 18-0594, State v. Petty, # 18-0437, State v. Covell # 18-0678, State v. Smith # 18-0184, and State v. Albright, # 17-1286.

If you allow this amended trial information to be filed, the defendant is going to withdraw his former plea of not guilty and enter a plea of guilty.

Your Honor, there is a need for a presentence report, and also the Court should be aware at the time of sentencing the parties are free to argue as to a possible sentence.

And the parties intend and are anticipated to introduce evidence about whether or not this defendant should be on the sex offender registry, whether or not this was a sexually motivated crime. So I would expect the State will introduce evidence supporting that allegation, and the defense will counter it.

(Plea Tr. p. 2L14-p. 3L10). The court granted the motion to amend the Trial Information. The amended Trial Information charged Chapman with child endangerment in violation of Iowa Code sections 726.6(1)(a) and 726.6(7). (Plea Tr. p. 5L6-10; Motion to Amend TI; Amended TI)(App. pp. 12; 13).

During the hearing, Chapman provided a factual basis for the amended charge. (Petition to Plead Guilty; Plea Tr. p. 19L1-21)(App. p. 11). Apparently, the facts he admitted were not satisfactory to the prosecution who requested a recess. (Plea Tr. p. 19L22-p. 20L1-4). After a short recess, defense counsel requested the court withdraw the former guilty plea

and statement and proceed with an Alford plea. (Plea Tr. p. 20L5-p. 21L5). The prosecutor did not object to an Alford plea but wanted to hear Chapman retract his previous statement. (Plea Tr. p. 6-12).

The district court then inquired whether Chapman wished to retract his factual basis statement made under oath. Chapman said no. The court then stated they would begin jury selection. The prosecutor indicated Chapman did not understand the court's question. Chapman again stated that he did not want to retract his statement. Then he stated that he wanted to retract it and go through the Alford plea. The court asked Chapman if he was retracting his statement made under oath and was he saying it was not true. Chapman asserted his prior statement was the truth. The court then stated jury selection would proceed. (Plea Tr. p. 21L13-p. 22L21).

After an approximately twenty minute break, the proceeding was reconvened. (Plea Tr. p. 28L22-p. 29L9).

Defense counsel informed the judge Chapman was having difficulty hearing and understanding him. Chapman was then set up in front of the court reporter to be able to read the transcript in real-time. (Plea Tr. p. 29L11-25). The court repeated the plea colloquy.² (Plea Tr. p. 30L3-p. 41L24).

The court discussed the requirements of an Alford plea with Chapman. (Plea Tr. p. 42L14-p. 44L20). Chapman acknowledged the likelihood of conviction for child endangerment if the witnesses testified consistent with the original Minutes of Testimony. (Plea Tr. p. 45L12-p. 46L2). The court accepted the plea.³ (Plea Tr. p. 46L20-p. 47L17; Plea Order)(App. pp. 15-21).

² The court did not repeat the elements of child endangerment the State would be required to prove. However, the court had previously outlined the elements. (Plea Tr. p. 16L12-p. 17L2).

³ The district court found the Alford plea was knowingly, voluntarily and intelligently made. (Plea Tr. p. 46L20-p. 47L17). The court did not orally state there was a factual basis for the Alford plea, but such finding was included in the Plea Order. (Plea Order p. 1)(App. p. 15).

The sentencing hearing was held on August 28, 2018. (Sent Tr. p. 1L1-25). The prosecutor informed the court of a victim impact statement. Additionally, the State requested the court find that the crime was sexually motivated and require Chapman to register as a sex offender. (Sent Tr. p. 3L10-15). C.B.'s mother presented a victim impact statement. (Sent Tr. p. 4L8-p. 9L8). The prosecutor requested she be placed under oath and she was sworn by the court. (Sent Tr. p. 4L6-10). See Iowa Code § 915.21(3) (2017) ("A victim shall not be placed under oath and subjected to cross-examination at the sentencing hearing."). In compliance with Iowa Code section 915.21(3), defense counsel was not provided an opportunity to question C.B.'s mother. (Sent Tr. p. 9L3-6).

After the victim impact statement, the State again requested the court make the determination the crime was sexually motivated and place Chapman on the registry for ten years. (Sent. Tr. p. 9L11-20). Defense counsel requested the court find the State had not met their burden to prove that the

crime was sexually motivated as not to require registration.

(Sent. Tr. p. 10L12-16).

The district court sentenced Chapman to be incarcerated for a period not to exceed two years and suspended the sentence. He was placed on probation for a period of two years. The court found, pursuant to Iowa Code section 692A.126, beyond a reasonable doubt it was a sexually motivated offense. Therefore, Chapman was placed on the sex offender registry. The fine was suspended. Chapman was ordered to pay a \$125 law enforcement initiative surcharge. (Sent Tr. p. 11L16-p. 12L16). The court also imposed the Iowa Code section 903B.2 ten-year special sentence. (Sent. Tr. p. 14L23-p. 15L3)

Notice of Appeal was filed on August 30, 2018.

(NOA)(App. pp. 29-30).

Facts: Chapman entered an Alford plea.⁴ The district court stated it used the Minutes to find a factual basis for the

⁴ North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160 (1970).

guilty plea. (Sent Tr. p. 12L4-8). The original Minutes alleged that Chapman was a routine caretaker of C.B. who was under the age of fourteen. C.B. alleged that Chapman committed sex acts upon her. (Minutes)(Conf. App. pp. 4-8). Chapman denied the allegations. (Plea Tr. p. 19L9-16).

ARGUMENT

I. AT SENTENCING, THE STATE DID NOT PRESENT ANY EVIDENCE TO PROVE THE OFFENSE WAS SEXUALLY MOTIVATED. THE DISTRICT COURT ERRED IN FINDING BEYOND A REASONABLE DOUBT THAT IT WAS A SEXUALLY MOTIVATED OFFENSE.

Preservation of Error.

Chapman did not waive his right to have the court determine beyond a reasonable doubt whether the offense was sexually motivated. Iowa Code § 692A.126(1)(v)(2017). (Plea Tr. p. 2L14-p. 3L10; Plea Order p. 1)(App.p. 15). Because he did not admit the allegations of sexual motivation, Chapman was not required to file a motion in arrest of judgment in order to raise this issue on appeal. Iowa R. Crim. P. 2.24(3); State

v. Rigel, No. 16-0576, 2017 WL 936135, at *3 (Iowa Ct. App. March 8, 2017).

The statutory requirement in Iowa Code section 692A.126 is more akin to a trial in which the State has the burden to prove and the factfinder find beyond a reasonable doubt the question of sexual motivation. Because in the present case, the court was required to make this determination, Chapman was not required to point out the deficiencies in the State's evidence in order to preserve error. Cf. State v. Abbas, 561 N.W.2d 72, 74 (Iowa 1997)(defendant not required to move for a judgment of acquittal when judge is the factfinder). To the extent Chapman was required to object to the lack of evidence, he did so. (Sent. Tr. p. 10L12-16, p. 15L5-17).

Standard of Review.

This Court reviews sufficiency of the evidence for errors at law. Iowa R. App. P. 6.907; State v. Keopasa euth, 645 N.W.2d 637, 639-640 (Iowa 2002). The Kansas Court of Appeals, interpreting a similar statutory provision to Iowa Code section

692A.126, utilized the legal standard governing sufficiency claims. State v. Chambers, 138 P.3d 405, 414 (Kan. Ct. App. 2006) (A court's finding of sexual motivation reviewed for substantial evidence). Likewise, this Court reviews sentencing decisions for errors at law. State v. Grandberry, 619 N.W.2d 399, 401 (Iowa 2000).

Discussion.

Chapman was convicted of child endangerment in violation of Iowa Code sections 726.6(1)(a) and 726.6(7), an aggravated misdemeanor. (Amend TI; Sentencing Order)(App. pp. 13-14; 22-27). Iowa Code section 726.6(1)(a) does not contain an unambiguous sexual component in any statutorily defined element. Iowa Code section 726.6(1)(a) (2017)(A person having custody or control over a child commits child endangerment when the person knowingly acts in a manner that creates a substantial risk to a child's physical, mental or emotional health or safety.). However, a person convicted of an indictable offense in violation of Chapter 726 may be

required to register as a sex offender if the offense was sexually motivated. Iowa Code §§ 692A.102(1)(2)(9), 692A.103(1), 692A.106, 692A.126(1)(v) (2017). Iowa Code section 692A.126 provides, in relevant part:

1. If a judge or jury makes a determination, beyond a reasonable doubt, that any of the following offenses for which a conviction has been entered on or after July 1, 2009, are sexually motivated, the person shall be required to register as provided in this chapter:

v. Any indictable offense in violation of chapter 726 if the offense was committed against a minor or otherwise involves a minor.

Iowa Code § 692A.126(1)(v) (2017). “Sexually motivated” means that one of the purposes for the commission of the crime is the purpose of sexual gratification of the perpetrator of the crime. Iowa Code § 692A.101(29) (2017); Iowa Code § 229A.2(10)(2017).

Chapman entered an Alford plea to child endangerment.

See North Carolina v. Alford, 400 U.S. 25, 37, 91 S.Ct. 160, 167 (1970) (holding “express admission of guilt ... is not a constitutional requisite to the imposition of [a] criminal

penalty”). Under an Alford plea procedure, “the defendant acknowledges the evidence strongly negates the defendant's claim of innocence and enters [a guilty] plea to avoid a harsher sentence.” State v. Knight, 701 N.W.2d 83, 85 (Iowa 2005) (quoting Comm. on Prof'l Ethics & Conduct v. Sturgeon, 487 N.W.2d 338, 340 (Iowa 1992)). Thus, Chapman made no admission of his guilt at the plea proceeding.

The plea agreement provided:

The State moves to amend the trial information to the crime of child endangerment causing no injury, in violation of Iowa Code Sections 726.6(1)(a) and 726.6 (7).

If you allow this amended trial information to be filed, the defendant is going to withdraw his former plea of not guilty and enter a plea of guilty.

Your Honor, there is a need for a presentence report, and also the Court should be aware at the time of sentencing the parties are free to argue as to a possible sentence.

And the parties intend and are anticipated to introduce evidence about whether or not this defendant should be on the sex offender registry, whether or not this was a sexually motivated crime. So I would expect the State will introduce evidence supporting that allegation, and the defense will counter it.

(Plea Tr. p. 2L14-p. 3L10; Plea Order p. 1)(App. p. 15). The district court acknowledged that “depending how it comes out in the facts” Chapman may be required to register as a sex offender. (Plea Tr. p. 4L7-12).

At the sentencing hearing, the prosecutor informed the court there was a victim impact statement. The State requested the court find that the crime was sexually motivated and require Chapman to register as a sex offender. (Sent Tr. p. 3L10-15). C.B.’s mother presented a victim impact statement. (Sent Tr. p. 4L8-p. 9L8). In compliance with Iowa Code section 915.21(3), defense counsel was not provided an opportunity to question C.B.’s mother. (Sent Tr. p. 9L3-6).

After the victim impact statement, the State again requested the court make the determination the crime was sexually motivated and that Chapman be placed on the registry for ten years. (Sent. Tr. p. 9L11-20). Defense counsel requested the court find the State had not met their burden to prove that the crime was sexually motivated as not

to require registration. (Sent. Tr. p. 10L12-16). The district court found, pursuant to Iowa Code section 692A.126, beyond a reasonable doubt it was a sexually motivated offense. The court ordered Chapman to be on the sex offender registry for ten years. (Sent Tr. p. 12L9-13).

Defense counsel argued that the Alford plea agreement was that the district court could use the Minutes only to establish a factual basis and the parties would present evidence at sentencing regarding the registry. Defense counsel asserted the court should not consider the Minutes for the determination of sexual motivation. (Sent. Tr. p. 15L5-14). The court responded that even without the Minutes, C.B.'s mother's testimony was sufficient for the finding of sexual motivation. (Sent. Tr. p. 15L15-17).

The State presented no evidence to prove beyond a reasonable doubt Chapman committed a sexually motivated offense. There was not an evidentiary hearing. The district court's finding is not supported by substantial evidence.

Minutes of Testimony

The Minutes of Testimony filed in a criminal case are prepared by the prosecuting attorney. The Minutes contain the name and occupation of each witness and a full and fair statement of the witness' expected testimony. Iowa R. Crim. P. 2.5(3). The Trial Information is approved by the court if the judge finds the evidence contained in the Information and the Minutes, if unexplained, would warrant a conviction by the trial jury. Iowa R. Crim. P. 2.5(4). The majority of the information contained within the Minutes is hearsay. Iowa R. Evid. 5.801.

The Iowa Supreme Court has not yet addressed Iowa Code section 692A.126 and the proper procedure for a determination of sexual motivation pursuant to Iowa Code section 692A.126 (2017) when the defendant pleads guilty to the offense but denies sexual motivation. The Court of Appeals has stated that it will not permit the district court to rely upon the Minutes to establish proof beyond a reasonable

doubt where a defendant denies a portion of the Minutes relied upon by the court. State v. Mesenbrink, No 15-0054, 2015 WL 7075826, *5 (Iowa Ct. App. Nov. 12, 2015); State v. Rigel, No. 16-0570, 2017 WL 936135, at * 5 (Iowa Ct. App. March 8, 2017). The Court of Appeals in Mesenbrink and Rigel concluded that because a plea court's reliance on the Minutes to support a factual basis was not proof beyond a reasonable doubt, that a finding of sexual motivation was not supported by proof beyond a reasonable doubt. State v. Mesenbrink, 2015 WL 7075826, at *5; State v. Rigel, 2017 WL 936135, at *5. The Court of Appeals' decision holding the unadmitted and unproven Minutes cannot be used to prove beyond a reasonable doubt the sexual motivation of an offense is persuasive and the Supreme Court should adopt the same.

The use of Minutes is limited in the district court. State v. Dist. Ct. for Jones Cty., 888 N.W.2d 655, 666 (Iowa 2016) ("Some evidence" standard in SOTP determinations can be satisfied by victim's statement in Minutes if reliable and

credible). Minutes of Testimony are not evidence at trial. State v. De Bont, 273 N.W. 873, 874 (Iowa 1937)(“These minutes are simply ex parte statements of certain witnesses, and hearsay as against the appellant.”); In re Detention of Stenzel, 827 N.W.2d 690, 710 (Iowa 2013)(Minutes and Trial Information are a statement of what the prosecution expected (at one point) to prove; whether the Court consider these from the standpoint that they are not truly “facts or data,” or from the standpoint that the danger of unfair prejudice substantially outweighs their probative value, the Court questioned the basic fairness of the State’s using materials that it generated exclusively to prosecute Stenzel criminally as a factual ground for committing him as an SVP at the conclusion of his sentence.). District courts are not permitted to consider “additional, unproven, and unprosecuted charges” during sentencing, unless “the facts before the court show defendant committed those offenses or they are admitted by him.” State v. Messer, 306 N.W.2d 731, 733 (Iowa 1981).

In certain circumstances, the information in the Minutes can be relied upon in district court. Courts may use the Minutes to find a factual basis for a guilty plea. State v. Finney, 834 N.W.2d 46, 57 (Iowa 2013) (In ineffective-assistance-of-counsel claim for allowing defendant to plead guilty and relying on the “entire record,” including information in Minutes); State v. Rodriguez, 804 N.W.2d 844, 850 (Iowa 2011)(In an Alford plea, court cannot rely upon defendant’s in-court admissions to establish facts; court looks to the rest of the record including the Minutes to see whether sufficient facts were available to justify the court in accepting plea). District courts may also rely on the charging documents of unprosecuted offenses in determining conditions of release. State v. Fenton, 170 N.W.2d 678, 679 (Iowa 1969) (setting bail based on criminal history and the Trial Information charging rape).

Chapman entered an Alford plea. He did not admit the elements, sexual motivation or agree the Minutes were

accurate. (Petition to Plead Guilty; Plea Tr. p. 19L1-p. 22L19, p. 42L14-p. 47L5; Plea Order p. 1)(App. p. 15). While Chapman permitted the court to rely upon the Minutes, it was solely for the purpose of the Alford plea. (Sent. Tr. p. 15L5-14). Before a court may accept a guilty plea, it must find that there is a factual basis for the plea. Iowa R. Crim. P. 2.8(2)(b) (“The court...shall not accept a plea of guilty without first determining that the plea...has a factual basis.”). In an Alford plea, because the defendant is denying his guilt, a factual basis must be established independent of his statements. Farley v. Glanton, 280 N.W.2d 411, 416 (Iowa 1979). The factual basis is a substitute for the admission of guilt. Id. (citing Harlow v. Murray, 443 F.Supp. 1327, 1330 n.8 (W.D.Va. 1978)). An adequate factual basis is the means of resolving “the conflict between the waiver of trial and the claim of innocence.” Farley v. Glanton, 280 N.W.2d at 416 (citing North Carolina v. Alford, 400 U.S. at 38 n.10, 91 S.Ct. at 168 n.10).

A factual basis is not proof beyond a reasonable doubt. State v. Finney, 834 N.W.2d 46, 50 (Iowa 2013). In making a finding that there is a factual basis “the trial court is not required to extract a confession from the defendant. Instead, it must only be satisfied that the facts support the crime, ‘not necessarily that the defendant is guilty.’” State v. Keene, 630 N.W.2d 579, 581 (Iowa 2001)(quoting 1A Charles Alan Wright, Federal Practice and Procedure § 174, at 199 (1999)).

Chapman did not admit the Minutes, but acquiesced to their use for an Alford plea to the offense – i.e., to finding a factual basis to the offense.

The Minutes cannot be accepted as accurate for purposes of finding the offense was sexually motivated. Cf. State v. Gonzalez, 582 N.W.2d 515, 517 (Iowa 1998)(“The sentencing court should only consider those facts contained in the minutes that are admitted to or otherwise established as true.”). Consideration of the Minutes, especially in an Alford plea, is not proof beyond a reasonable doubt as required by

section 692A.126. Because the district court relied upon information that it should not have considered and were not established beyond a reasonable doubt, there was not proof beyond a reasonable doubt that the offense was sexually motivated.

Victim Impact statement

The legislative purpose of Chapter 915 is for the fair and compassionate treatment of victims of crime, to reaffirm the criminal justice system's fundamental responsibility to victims, to ensure the equitable and fair treatment of victims, and to assist victims in overcoming emotional and economic hardships resulting from criminal acts. State v. Sailer, 587 N.W.2d 756, 760-761 (Iowa 1998). Allowing a victim to testify fully and completely, without regard for whether particular elements of offenses were proved or admitted would serve the objective of "fair and compassionate treatment" of victims and would also likely aid victims "in overcoming emotional and economic hardships resulting from criminal acts." Id. at 761.

C.B.'s mother is a "victim" for purposes of presenting a victim impact statement. Iowa Code § 915.10(3) (2017) ("Victim" also includes the immediate family members of a victim who was under eighteen years of age at the time of the offense.). She was entitled to present a statement at the sentencing hearing. Iowa Code § 915.21(1)(b) (2017). A victim is not limited in what she may include in the impact statement. Iowa Code § 915.21(2)(2017); State v. Sailer, 587 N.W.2d at 761. However, the district court is "trusted with the discretion and responsibility to avoid consideration of any unproven offenses which may arise in the content of the victim impact statement." State v. Sailer, 587 N.W.2d at 761.

The presentation of victim impact statement is not evidence to prove sexual motivation of an offense for purposes of Iowa Code section 692A.126. The purpose of the Chapter, to provide victim rights, is at odds with an evidentiary hearing which is to provide a defendant due process. Ordinarily, the victim is not placed under oath and is not subject to

cross-examination. Iowa Code § 915.21(3)(2017). C.B.'s mother was placed under oath. (Sent. Tr. p. 4L6-10).

However, she was not subjected to cross-examination by defense counsel. (Sent. Tr. p. 9L3-6). C.B.'s mother's testimony was not subjected to any adversarial testing. The victim impact statement cannot constitute evidence beyond a reasonable doubt the offense was sexually motivated.

Assuming arguendo the victim impact statement was a proper consideration of the question of sexual motivation, it was insufficient to support the district court's finding. The majority of this information did not support the conclusion the child endangerment offense was sexually motivated. C.B.'s mother testified she took C.B. to the hospital. (Sent. Tr. p. 5L8-11). She informed the court of the impact of the offense on C.B. (Sent. Tr. p. 5L12-p. 6L14). She stated how she knew Chapman and how she personally had been impacted. (Sent. Tr. p. 6L15-p. 7L14). She told the judge her recommendation for sentencing. (Sent. Tr. p. 7L15-p. 9L2).

C.B.'s mother made a reference to physical contact by Chapman. She alleged "at the least he touched my child." She stated that she could tell the court "vivid thing that he had done to her". (Sent. Tr. p. 7L22-p. 8L6). The allegation Chapman "touched" C.B. is too vague to support a finding the offense was sexually motivate. A "touch" does not exclusively suggest sexual contact. A "touch" and "vivid things" without more does not support a finding beyond a reasonable doubt the offense was sexually motivate.

Because the district court relied upon the victim impact statement that it should not have considered and was not established beyond a reasonable doubt, there was not proof beyond a reasonable doubt that the offense was sexually motivated.

Remedy

The Court of Appeals in Mesenbrink and Rigel held that the district court's finding that the offense was sexually motivated must be vacated and the matter remanded for

further proceedings where the State could present additional evidence to prove sexual motivation. State v. Mesenbrink, 2015 WL 7075826, at *5; State v. Rigel, 2017 WL 936135, at *5 Chapman submits that because the determination is a finding of fact equivalent to a verdict, the matter should be treated similarly to lack of sufficient evidence in a trial.

Therefore, this Court should find that the evidence was insufficient, the finding that the child endangerment offense was sexually motivation reversed, and the case remanded for order vacating the requirement Chapman register as a sex offender.

II. THE LEGISLATURE DID NOT AUTHORIZE THE IMPOSITION OF A SPECIAL SENTENCE PURSUANT TO IOWA CODE SECTION 903B.2 AND THE LAW ENFORCEMENT INITIATIVE SURCHARGE PURSUANT TO IOWA CODE SECTION 911.3 FOR A VIOLATION OF IOWA CODE CHAPTER 726. THESE PORTIONS OF THE SENTENCE ARE ILLEGAL.

Preservation of Error.

The general rule of error preservation is not applicable to void, illegal or procedurally defective sentences. State v.

Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994). The court may correct an illegal sentence at any time. Iowa R. Crim. P. 2.24(5).

Standard of Review.

When the sentence imposed is beyond the court's authority, review is for errors at law. State v. Morris, 416 N.W.2d 688, 689 (Iowa 1987).

Discussion.

Chapman was convicted of child endangerment in violation of Iowa Code sections 726.1(1)(a) and 726.6(7)(2017). (Sentencing Order p. 1)(App. p. 22). Chapman was convicted of an aggravated misdemeanor. Iowa Code § 726.6(7)(2017). Iowa Code section 903.1(2) provides the penalty:

When a person is convicted of an aggravated misdemeanor, and a specific penalty is not provided for, the maximum penalty shall be imprisonment not to exceed two years. There shall be a fine of at least six hundred twenty-five dollars but not to exceed six thousand two hundred fifty dollars. When a judgment of conviction of an aggravated misdemeanor is entered against any person and the court imposes a sentence of confinement for a period of more than one year the term shall be an indeterminate term.

Iowa Code § 903.1(2)(2017). Iowa Code section 726.6 does not provide a specific penalty.

To be illegal under Iowa Rule of Criminal Procedure 2.24(5)(a), a sentence must be one that is not authorized by statute. Iowa R. Crim. P. 2.24(5)(a); Tindell v. State, 629 N.W.2d 357, 359 (Iowa 2001).

The exclusion of illegal sentences from the principles of error preservation is limited to those cases in which a trial court has stepped outside the codified bounds of allowable sentencing. In other words, the sentence is illegal because it is beyond the power of the court to impose.

Id. (quoting State v. Ceasar, 585 N.W.2d 192, 195 (Iowa 1998) (citations omitted)). “The legislature possesses the inherent power to prescribe punishment for crime, and the sentencing authority of the courts is subject to that power. A sentence not permitted by statute is void.” State v. Ohnmacht, 342 N.W.2d 838, 842 (Iowa 1983) (citations omitted).

Section 903B.2 special sentence

The district court imposed a ten year special sentence pursuant to Iowa Code section 903B.2 (2017). (Sent. Tr. p.

14L23-p. 15L3; Sentencing Order p. 3)(App. p. 24). Iowa Code section 903B.2 provides, in relevant part:

A person convicted of a misdemeanor or a class “D” felony offense under **chapter 709, section 726.2, or section 728.12** shall also be sentenced, in addition to any other punishment provided by law, to a special sentence committing the person into the custody of the director of the Iowa department of corrections for a period of ten years, with eligibility for parole as provided in chapter 906.

Iowa Code § 903B.2 (2017)(emphasis added). Iowa Code section 903B.2 authorizes the special sentence only for the specifically enumerated criminal violations, and section 726.6 is not included in the listed offenses. The Iowa Code does not authorize the imposition of the section 903B.2 special sentence for convictions of child endangerment in violation of Iowa Code section 726.6. Because this is not authorized by statute, it is not legal. Tindell v. State, 629 N.W.2d 357, 359 (Iowa 2001). This portion of Chapman’s sentence must be vacated.

Section 911.3 Law enforcement surcharge

The district court orally imposed a \$125 law enforcement initiative surcharge pursuant to Iowa Code section 911.3.

(Sent. Tr. p. 12L14-16). Iowa Code section 911.3 (2017)

provides in relevant part:

1. In addition to any other surcharge, the court or clerk of the district court shall assess a law enforcement initiative surcharge of one hundred twenty-five dollars if an adjudication of guilt or a deferred judgment has been entered for a criminal violation under any of the following:

- a. Chapter 124, 155A, 453B, 713, 714, 715A, or 716.
- b. Section 719.7, 719.8, 725.1, 725.2, or 725.3.

Iowa Code § 911.3(1)(2017). Iowa Code section 911.3

authorizes this surcharge only for the specifically enumerated criminal violations, and section 726.6 is not included in the listed offenses. Iowa Code § 911.3(2017); State v. Rodriguez, 804 N.W.2d 844, 854 (Iowa 2011). The sentence is not authorized by statute and is, therefore, illegal. Tindell v. State, 629 N.W.2d 357, 359 (Iowa 2001). This portion of the sentence is illegal and must be vacated.

The sentencing order does not specifically list the law enforcement initiative surcharge, but does include general language that any and all restitution including surcharges is

due immediately. (Sentencing Order p. 5)(App. p. 26).

Arguably, there may be a discrepancy between the oral pronouncement of the sentence and the written judgment order. The oral sentence pronounced by the court is not the judgment of the court; the record in the judgment docket is proof that a judgment is entered and is the enforceable judgment. State v. Suchanek, 326 N.W.2d 263, 265 (Iowa 1982). In cases where the oral imposition of sentence is not the same as the written judgment entry, the question is whether the discrepancy is a result of a clerical error or a result of judicial intent. State v. Hess, 533 N.W.2d 525, 527 (Iowa 1995). However, the question of error or judicial intent is not necessarily important because the imposition of the surcharge is not authorized by law. Because the case must be remanded for a new sentencing order deleting the section 903B.2 special sentence, the district court should clarify the section 911.3 surcharge is not applicable and shall not be imposed. State v. Rodriguez, 804 N.W.2d at 854.

III. THE DISTRICT COURT ORDERED CHAPMAN TO PAY COURT COSTS WITHOUT FIRST DETERMINING HIS REASONABLE ABILITY TO PAY SUCH COSTS.

Preservation of Error.

Criminal restitution is a part of the sentence. Iowa Code § 910.2(1) (2017); State v. Alspach, 554 N.W.2d 882, 883 (Iowa 1996). The general rule of error preservation is not applicable to void, illegal or procedurally defective sentences. State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994).

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 a constitutional claim 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 debt 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.

Chapman was found to be indigent and was granted court-appointed counsel. (Initial Appearance Order)(App. pp. 4-6). In the sentencing order , the district court ordered Chapman to pay restitution for court costs. (Sentencing Order p. 5)(App. p. 26). These costs were order as restitution and have been assessed. (Combined General Docket, Financial Summary p. 1)(App. p. 31). The court did not orally order restitution for court-appointed attorney fees due to Chapman's indigence. (Sent. Tr. p. 15L21-p. 16L15).⁵

In all criminal cases where judgment is entered, the sentencing court shall order restitution be made. Restitution includes court costs. Iowa Code § 910.2 (2017). Criminal restitution is a criminal sanction that is part of the sentence. Iowa Code § 910.2(1) (2017); 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

⁵ The Sentencing Order conflicts with the oral pronouncement. (Sentencing Order p. 5)(App. p. 26). See Division IV.

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).

The legislature specifically provided that the imposition of restitution for court costs is subject to a determination of the defendant’s reasonable ability to pay. Iowa Code section 910.2(1) (2017) 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) (2017)(emphasis added).

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."). "A cost judgment may not be constitutionally imposed on a defendant unless a determination is first made that the defendant is or will be reasonably able to pay the judgment." State v. Dudley, 766 N.W.2d at 614-615.

Published Supreme Court case law is conflicting regarding *when* the district court must consider a defendant's

reasonable ability to pay court debt. Many of the cases involve repayment of court-appointed attorney fees. However, the analysis applicable to attorney fees is equally applicable to the restitution for court costs.

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 Supreme 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 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 defendant challenged that the district court improperly ordered restitution for the amount of court costs and defendant's court-appointed lawyer fees without first making a determination of the defendant's ability to pay.

State v. Swartz, 601 N.W.2d 348, 354 (Iowa 1999). The Court concluded:

that he may not advance that claim in this court on the present record for two reasons. First, it does not appear that the plan of restitution contemplated by Iowa Code section 910.3 was complete at the time the notice of appeal was filed. Second, Iowa Code section 910.7 permits an offender who is dissatisfied with the amount of restitution required by the plan to petition the district court for a modification. Until that remedy has been exhausted we have no basis for reviewing the issue that defendant raises.

State v. Swartz, 601 N.W.2d at 354.

The Supreme Court decided Jackson the same day as

Swartz. State v. Jackson, 601 N.W.2d 354 (Iowa 1999). The Court followed its holding in Swartz. The Court again held that a “plan of restitution contemplated by Iowa Code section 910.3” must be completed before the district court is required to give consideration to the defendant’s ability to pay. And a person who is dissatisfied with the amount of restitution required by the plan must petition pursuant to Iowa Code section 910.7 for a modification. “Unless that remedy has been exhausted, we have no basis for reviewing the issue in this court.” State v. Jackson, 601 N.W.2d 354, 357 (Iowa 1999).

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 38, 45 (Iowa 2001). The Court stated:

The amount of restitution is part of the sentencing order and is therefore directly appealable, as are all orders incorporated in the sentence. Janz, 358 N.W.2d at 549. The ability to pay is an issue apart from the amount of restitution and is therefore not an “order[] incorporated in the sentence” and is therefore not directly appealable as such.

The facts in this case differ from those in *Janz* in only one respect. Here, unlike in *Janz*, the amount of restitution had not been determined at the time notice of appeal was filed.

Likewise, the facts in this case differ from those in *Swartz* and *Jackson* in only one respect. Here, Jose challenges the amount of restitution, whereas in *Swartz* and *Jackson* the defendants only challenged the district court's failure to determine their *ability to pay*. The defendants in *Swartz* and *Jackson* were therefore challenging the "restitution plan of payment," rather than the actual "plan of restitution." Iowa Code § 910.7. At issue here is the plan of restitution, rather than the plan of payment.

State v. Jose, 636 N.W.2d at 45. The Swartz opinion does not use the phrase "plan of payment." Additionally, Swartz and Jackson both refer to Iowa Code section 910.3 plan of restitution. State v. Swartz, 601 N.W.2d at 354; State v. Jackson, 601 N.W.2d at 357. Iowa Code section 910.3 requires the district court to determine the "amount of restitution" and such "court orders shall be known as the plan of restitution." Iowa Code § 910.3 (2017).

The Court of Appeals' opinions regarding the "reasonable ability to pay determination" generally follow Swartz and Jackson that the "reasonable ability to pay determination" is

not “ripe” for appeal unless the plan of restitution and the restitution plan of payment are final. See e.g. State v. Kurtz, 878 N.W.2d 469, 471-72 (Iowa Ct. App. 2016)(“We conclude Kurtz is able to appeal the restitution order, including the court’s failure to consider his ability to pay, because the plan of restitution and the restitution plan of payment were part of the sentencing order from which Kurtz had a right of appeal.”); State v. Johnson, 887 N.W.2d 178, 184 (Iowa Ct. App. 2016) (“We conclude [Johnson] is able to appeal the restitution order, including the court’s failure to consider his ability to pay, because the plan of restitution and the restitution plan of payment were part of the sentencing order from which [Johnson] had a right of appeal.”); State v. Tanner, No. 14-1963, 2016 WL 4384468, at *5 (Iowa Ct. App. Aug 17, 2016)(“It was proper for Tanner to raise the issue on direct appeal because, when the plan of restitution and restitution plan of payment are part of a sentencing order, a defendant has the right to direct appeal.”); State v. Poland, No. 17-0189,

2018 WL 3302201, at *6 (Iowa Ct. App. July 5, 2018)(“The facts here are similar to the facts of *State v. Johnson*”); State v. Boutchee, No. 17-1217, 2018 WL 3302010, at *5 (Iowa Ct. App. July 5, 2018)(The checked boxes requiring repayment of court costs was not a “final restitution order” under Swartz and Jackson.); State v. Pearl, No. 13-0796, 2014 WL 1714490, at *5 (Iowa Ct. App. April 30, 2014)(“Because the plan of restitution was not complete in the case by the time the notice of appeal was filed, we are unable to consider this issue at this time.”); State v. Hols, No. 10-1841, 2013 WL 750307, at *2 (Iowa Ct. App. Feb. 27, 2013)(Judgment entry did not set an amount of attorney fees; defendant may seek relief pursuant to section 910.7); State v. Wilson, Nos. 1-104, 00-0609, 2001 WL 427404, at *3 (Iowa Ct. App. April 27, 2001)(“We cannot address this issue at this time because no plan of restitution was completed at the time Wilson filed his notice of appeal and the record before us on appeal contains no court order dictating a plan for payment of restitution.”). The Court of

Appeals summed up the rule in Alexander:

Our rule regarding the ability to appeal a restitution order can be summarized as follows: A restitution order is not appealable until it is complete; the restitution order is complete when it incorporates both the total amounts of the plan of restitution and the plan of payment. A defendant must also petition the court for a modification before they challenge the amount of restitution. If the above requirements are met, our Constitution requires the court to make a finding of the defendant's reasonable ability to pay.

State v. Alexander, No. 16-0669, 2017 WL 510950, at *3 (Iowa Ct. App. Feb. 8, 2017).

In addition to being contrary to the Supreme Court's pronouncement in the Harrison and Haines line of cases, Swartz and Jackson line of cases fail to adequately take into consideration the legislature provided the practical process of assessing court debt. The clerk of court is tasked with the duty of implementing the criminal judgment order. Iowa Code § 602.8102(141) (2017) ("Carry out duties relating to the entry of judgment as provided in rule of criminal procedure 2.23, Iowa court rules."). The clerk of court must collect the court reporter fees. Iowa Code §§ 625.8 and 602.8102(99) (2017).

The clerk is also to carry out duties related to probations and restitutions. Iowa Code § 602.8102(135) (2017) (“Carry out duties relating to deferred judgments, probations, and restitution as provided in sections 907.4 and 907.8, and chapter 910.”). The clerk of court also is to collect filing fees in criminal cases where judgment is rendered. Iowa Code § 602.8106(1) (2017). As a practical matter, once the district court orders a defendant to pay court costs, the clerk of court assesses the amount authorized by Code. The district court does not enter a further order containing a specific amount.

The clerk is required to send the restitution plan to the Department of Correctional Services if the defendant is placed on probation. Iowa Code §§ 907.8 and 910.4 (2017). The court is required to send the restitution plan to the Department of Correction if the defendant is incarcerated. Iowa Code § 910.5(1)(a) (2017). The clerk of court carries out this duty for the court. Iowa Code § 602.8102(135), (141) (2017). The restitution plan is complete after sentencing

when the clerk assesses the fines, fees, surcharges and other restitution as order by the judgment order. In general, nothing more will filed unless the defendant is sentenced to custody of the Department of Corrections. The Department of Corrections is required to “prepare a restitution plan of payment or modify any existing plan of payment.” Iowa Code § 910.5(1)(d) (2017).

The restitution plan of payment is final at the time of sentencing. Generally, the court requires payment of fines, surcharges, attorney fees and other restitution be paid the day of sentencing. Iowa Ct. R. 26.2(1)(“A person shall be instructed to pay the court debt with the office of the clerk of court on the date of imposition of the court debt.”); Iowa Code § 602.807(1)(a)(“ “Court debt” means all fines, penalties, court costs, fees, forfeited bail, surcharges under chapter 911, victim restitution, court-appointed attorney fees or expenses of a public defender ordered pursuant to section 815.9, or fees charged pursuant to section 356.7 or 904.108.”). In the

present case, the district court ordered Chapman to “immediately pay any and all restitution, civil penalties, fines surcharges, and court costs.” (Sentencing Order p. 5)(App. p. 26). The restitution plan of payment was established at the time of sentencing.

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 prior to imposing the costs? Chapman 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 restitution request and order. 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 might be chilled because the debt could last a life-time⁶ 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 Chapman's reasonable ability to pay court costs prior to imposing the cost as part of criminal restitution. Cf. State v. Jenkins, 788 N.W.2d at 646 (denying defendant an opportunity to challenge the amounts of

⁶ Court debt is not written off until 65 years after the date of imposition. Iowa Code § 602.8107(6) (2017).

the restitution order before the district court implicates his right to due process.). The “reasonable ability to pay” determination is the sentencing court’s duty. The district court failed to consider Chapman’s reasonable ability to pay prior to the order entering judgment for court costs. 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 Chapman’s reasonable ability to pay court costs. The district court should also consider the amount of interest or fees, if any, which have been added to the original restitution amount and reduce this amount accordingly. See Iowa Code § 602.8107 (2017) (Collection of court debt).

IV. A DISCREPANCY EXISTS BETWEEN THE ORAL SENTENCING PRONOUNCEMENT AND THE SUBSEQUENT WRITTEN JUDGMENT ENTRY REGARDING REIMBURSEMENT OF LEGAL ASSISTANCE FEES. THE CASE SHOULD BE REMANDED TO THE DISTRICT COURT FOR APPROPRIATE FURTHER PROCEEDINGS TO CORRECT THE WRITTEN JUDGMENT ENTRY.

Preservation of Error.

The general rule requiring error preservation is not ordinarily applicable to void, illegal or procedurally defective sentences. State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994). A defendant is not required to raise an alleged sentencing defect in the trial court in order to preserve a right of appeal on that ground. State v. Wilson, 294 N.W.2d 824, 826 (Iowa 1980).

Standard of Review.

When a party asserts that there is an inconsistency between an oral pronouncement of sentence and the written judgment entry, this Court reviews for correction of errors at law. State v. Hess, 533 N.W.2d 525, 527 (Iowa 1995).

Discussion.

A court follows a two-step process in sentencing a

criminal defendant. First, the court orally pronounces the sentence on the record in the presence of the defendant. Iowa R. Crim. P. 2.23(3)(d). Second, the court files a written judgment entry. Iowa R. Crim. P. 2.23(3)(d); Iowa Code § 901.6 (2017). The oral sentence pronounced by the court is not the judgment of the court; the record in the judgment docket is proof that a judgment is entered and is the enforceable judgment. State v. Suchanek, 326 N.W.2d 263, 265 (Iowa 1982).

The court orally and in the presence of the defendant waived repayment of attorney fees. (Sent. Tr. p. 15L23-p. 16L15). In the written judgment entry, the court stated the fees were not suspended. (Sentencing Order p. 5)(App. p. 26).

The record shows a discrepancy between the oral pronouncement of the sentence and the written judgment entry.

In cases where the oral imposition of sentence is not the same as the written judgment entry, the question is whether

the discrepancy is a result of a clerical error or a result of judicial intent. An error is clerical in nature if it is not the product of judicial reasoning and determination. State v. Hess, 533 N.W.2d at 527. When a judgment entry incorrectly differs from the oral version of the judgment only as a result of clerical error, the trial court has the inherent power to correct the judgment entry so that it will reflect the actual pronouncement of the court. State v. Hess, 533 N.W.2d at 527. The district court may correct a clerical error in a judgment entry through issuance of a nunc pro tunc order. Iowa R. Crim. P. 2.23(3)(g); State v. Suchanek, 326 N.W.2d at 265-66.

When judicial intent is unclear, the Court will remand for an evidentiary hearing for a determination of the proper method of correcting the defective written sentence. State v. Suchanek, 326 N.W.2d at 266. But when the record unambiguously reflects that a clerical error has occurred, the Court will direct the district court to enter a nunc pro tunc

order to correct the judgment entry. State v. Hess, 533

N.W.2d at 527. The Court in Hess stated:

We look to the record to “harmonize the intent of the court with the written judgment.” A rule of nearly universal application is that “where there is a discrepancy between the oral pronouncement of sentence and the written judgment and commitment, the oral pronouncement of sentence controls.”

State v. Hess, 533 N.W.2d at 528.

The record of the sentencing proceeding unambiguously reveals the court intended to waive repayment of attorney fees because of Chapman’s inability to pay. (Sent. Tr. p. 15L23-p. 16L15). The court’s oral pronouncement waiving the fees controls. The case should be remanded for entry of a nunc pro tunc order correcting the written judgment. A copy of the nunc pro tunc order should be certified to the Iowa Department of Correctional Services. Iowa Code § 910.4 (2017)(Condition of probation - payment plan).

CONCLUSION

Chad Chapman respectfully requests this Court reverse the district court’s finding of sexual motivation and remand to

the district court for an order vacating the requirement for sex offender registration. Additionally, Chapman respectfully requests this Court reverse the portions of his sentence imposing the law enforcement initiative surcharge pursuant to Iowa Code section 911.3, the special sentencing pursuant to Iowa Code section 903B.2, and attorney fees and remand to the district court for an order vacating the requirements. Lastly, Chapman respectfully requests this Court remand this case to the district court for a determination of Chapman's reasonable ability to pay court costs.

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 \$ 5.90, and that amount has been paid in full by the Office of the Appellate Defender.

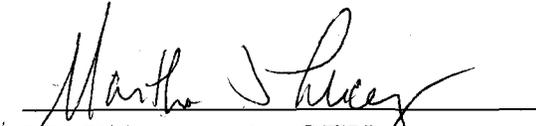
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