IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 17-1909

STATE OF IOWA,
Plaintiff-Appellee,

v.

LORI DEE MATHES,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT FOR MONONA COUNTY,
DISTRICT COURT NO. SRCR016184,
THE HONORABLE JUDGE DUANE E. HOFFMEYER

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF IOWA, JANE DOE (IOWA LEGAL AID), AND FINES AND FEES JUSTICE CENTER

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**Application for Admission Pro Hac Vice Pending*

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STATEMENTS OF INTEREST OF AMICI CURIAE

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization made up of more than 500,000 members dedicated to the principles of liberty and equality embodied in state and federal law. The **ACLU of Iowa**, founded in 1935, is its statewide affiliate. The ACLU of Iowa has long sought to preserve the rights of those who enter the criminal justice system and to ensure that the people and communities in Iowa most affected by poverty are not subjected to court debt imposition or collection practices that unlawfully discriminate against indigent defendants or burden the right to counsel. The proper resolution of this case therefore is a matter of substantial interest to the ACLU of Iowa and its members.

Iowa Legal Aid joins this brief on behalf of their client, Jane Doe. Ms. Doe recently made an unsuccessful challenge to the condition of Iowa's dismissal-acquittal expungement statute requiring the repayment of indigent defense fee reimbursement (IDFR). *State v. Doe*, 927 N.W.2d 656 (Iowa 2019). Jane Doe, like many low-income Iowans with dismissed criminal cases, finds herself facing hundreds if not thousands of dollars in financial obligations that create significant barriers to breaking the cycle of poverty.

Fines and Fees Justice Center ("FFJC") is a national center for advocacy, information, and collaboration on effective solutions to the unjust

and harmful imposition and enforcement of fines and fees in state and local courts. FFJC's mission is to create a justice system that treats individuals fairly, ensures public safety, and is funded equitably.

STATEMENT REQUIRED BY IOWA R. APP. P. 6.906(4)(d)

Neither party nor their counsel participated in the drafting of this brief, in whole or in part. Neither party nor their counsel contributed any money to the undersigned for the preparation or submission of this brief. The drafting of this brief was performed *pro bono publico* by amici curiae.

STATEMENT OF FACTS

Despite the district court's dismissal of all criminal charges against her, the financial information available on Iowa Courts Online shows that Lori Dee Mathes was assessed $100 in filing fees, $40 in court reporter fees, and $2,847.28 in indigent defense fee reimbursement ("IDFR"), purportedly by agreement. *See State v. Mathes*, 2019 WL 1294098 (Iowa Ct. App. 2019). The routine use of such "agreements" that avoid the constitutional requirement of reasonable ability to pay determinations is a significant problem across our state. *See, e.g.,* Iowa Cnty. Attorney Assoc. Amicus Br. at 6 ("In every courtroom in this state, criminal cases are routinely disposed of by a dismissal at the defendant's cost.") While the amount of IDFR in Iowa has steadily increased over the years, the collection rate has remained dismally low:

Fiscal year	Amount of IDFR outstanding	Amount of IDFR collected	**Collection rate**
2015	$157,048,534[1]	$5,000,235[2]	3.2%
2016	$161,664,137[3]	$4,709,153[4]	2.9%
2017	$167,598,811[5]	$3,983,668[6]	2.4%
2018	$172,887,091[7]	$3,439,272[8]	1.9%

It is currently unknown how much of the total balance of IDFR is derived from cases like this one, where limitations based on ability to pay are purportedly bypassed by agreement. However, these numbers provide strong evidence that many Iowans are subject to a regime that is sadly not "carefully designed to insure that only those who actually become capable of repaying the state will ever be obliged to do so." *Fuller v. Oregon*, 417 U.S. 40 (1974).

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[1] Iowa Judicial Branch, 2015 Accounts Receivable Report
https://www.legis.iowa.gov/docs/publications/DF/711087.pdf
[2] Clerk of Court Collections, FY 2015 / 2016
https://www.legis.iowa.gov/docs/publications/DF/798152.pdf
[3] Iowa Judicial Branch, 2016 Accounts Receivable Report
https://www.legis.iowa.gov/docs/publications/DF/799090.pdf
[4] Clerk of Court Collections, FY 2015 / 2016
https://www.legis.iowa.gov/docs/publications/DF/798152.pdf
[5]Iowa Judicial Branch, 2017 Accounts Receivable Report
https://www.legis.iowa.gov/docs/publications/DF/860848.pdf
[6] Clerk of Court Collections, FY 2017 / 2018
https://www.legis.iowa.gov/docs/publications/DF/969686.pdf
[7] Iowa Judicial Branch, 2018 Accounts Receivable Report
https://www.legis.iowa.gov/docs/publications/DF/969685.pdf
[8] Clerk of Court Collections, FY 2017 / 2018
https://www.legis.iowa.gov/docs/publications/DF/969686.pdf

ARGUMENT

I. INTRODUCTION

Under the current version of the Iowa Code, there is no fact pattern under which IDFR or other costs can be lawfully assessed against a defendant in a dismissed criminal case. Moreover, any statute that would purport to allow for such costs would be an unconstitutional burden on the presumption of innocence, basic due process, and the right to counsel. Of course, should the Court find that there in fact is subject matter jurisdiction, there is no authority to enter such an order. Alternatively, an order for IDFR or other costs in a dismissed criminal case would constitute an illegal sentence.

A challenge to the trial court's jurisdiction is reviewed for correction of errors at law. Iowa R. App. P. 6.907; *State v. Bruegger*, 773 N.W.2d 862, 869 (Iowa 2009). However, Iowa appellate courts review challenges to the constitutionality of a statute de novo. *State v. Tripp*, 776 N.W.2d 855 (Iowa 2010).

II. THE COURT DID NOT HAVE SUBJECT MATTER JURISDICTION TO ENTER A JUDGMENT FOR COURT DEBT IN A DISMISSED CRIMINAL CASE.

"'Subject matter jurisdiction' refers to the power of a court to deal with a class of cases to which a particular case belongs." *In re Estate of Falck*, 672 N.W.2d 785 (Iowa 2003). "Subject-matter jurisdiction over a claim is

conferred either constitutionally or statutorily." *State v. Propps*, 897 N.W.2d 91 (Iowa 2017). As explained below, neither the Iowa Code nor the U.S. or Iowa Constitutions confer subject matter jurisdiction to the district court to assess IDFR or other court costs to a criminal defendant when all charges have been dismissed.

A. Iowa Code Section 815.9 Does Not Allow Taxation of IDFR to the Defendant After the Case Against Her Has Been Dismissed.

In Iowa, costs are only taxable to the extent provided by statute, and such statutes are "derogation of the common law." *Woodbury County v. Anderson*, 164 N.W.2d 129, 133 (Iowa 1969). In other words, Iowa courts do not have an inherent right to order reimbursement for costs absent explicit statutory authority. While prior versions of the Iowa Code provided for state recovery of IDFR in dismissed cases, the legislature repealed that language in 2012. S.F. 2231, 84th Gen. Assemb. (Iowa 2012).

1. The Plain Text of Section 815.9 Does Not Allow IDFR to be Assessed to the Defendant in Dismissed Cases.

As amended in 2012, Iowa Code § 815.9 provides that IDFR can be recovered by the state in only three situations—upon conviction, upon acquittal, or in a case other than a criminal case:

> 5. If the person receiving legal assistance **is convicted in a criminal case**, the total costs and fees incurred for legal

> assistance shall be ordered paid when the reports submitted pursuant to subsection 4 are received by the court, and the court shall order the payment of such amounts as restitution, to the extent to which the person is reasonably able to pay, or order the performance of community service in lieu of such payments, in accordance with chapter 910.
>
> 6. If the person receiving legal assistance **is acquitted in a criminal case or is a party in a case other than a criminal case**, the court shall order the payment of all or a portion of the total costs and fees incurred for legal assistance, to the extent the person is reasonably able to pay, after an inquiry which includes notice and reasonable opportunity to be heard.

Iowa Code § 815.9 (emphasis added).

"[W]hen the terms and meaning of a statute are plain and clear, we enforce the statute as written." *State v. Wickes*, 910 N.W.2d 554 (Iowa 2018). When the plain language is clear, the Court does "not search for meaning beyond the statute's express terms. *State v. Iowa Dist. Ct. for Johnson County,* 730 N.W.2d 677, 679 (Iowa 2007) (quotation and citation omitted). Because the plain text of the statute unambiguously does not authorize the assessment of IDFR in dismissed criminal cases, the district court had no jurisdiction to do so. *See Woodbury County*, 164 N.W.2d at 133.

2. The Legislative History of Section 815.9 Demonstrates Legislative Intent Not to Authorize IDFR to the Defendant in Dismissed Cases.

While the Court need look no further than the plain text of the statute to determine legislative intent in this case, the history of IDFR in Iowa leading

to the current form of section 815.9 further demonstrates the General Assembly did not intend for the accused in dismissed cases to be assessed costs. As detailed below, the current Code is the result of a 2012 legislative amendment that repealed prior statutory authorization of IDFR in dismissed cases. An omission under such circumstances, resulting from repeal of a prior statute, is construed as evidence of legislative intent under governing principles of statutory construction. *State v. Beach*, 630 N.W.2d 598, 600 (Iowa 2001) ("Intent may be expressed by the omission, as well as the inclusion, of statutory terms."); *Wieslander v. Iowa Dep't of Transp.*, 596 N.W.2d 516, 522 (Iowa 1999) ("The repeal of a statute typically destroys the effectiveness of the statute, and the repealed statute is deemed never to have existed."). Thus, the omission of dismissed cases from section 815.9 was intentional.

In the 1969 case of *Woodbury County v. Anderson*, the Iowa Supreme Court held that courts had no inherent power to tax costs absent express statutory authority, which the Court recognized was "especially true" when, as here, costs are imposed against a non-convicted party in a criminal matter. 164 N.W.2d 129, 136 (considering an acquitted defendant). Five years later, the United States Supreme Court held in *Fuller v. Oregon* that assessment of IDFR was constitutional, including as a condition of probation, but only

provided defendants were afforded protections to ensure that the repayment requirement would only attach to those who had the ability to pay without hardship. *Fuller*, 417 U.S. 40.

Pursuant to *Fuller*, the rule established in *Woodbury County* was modified in the 1977 Iowa case *State v. Rogers*, which authorized courts to assess IDFR as a condition of probation without a specific authorizing statute. *State v. Rogers*, 251 N.W.2d 239 (Iowa 1977). The *Rogers* Court held that the ability to assess IDFR was within the broad powers to set conditions of probation. *Id*.

In 1982, the Iowa Legislature first codified the state's right to recover IDFR in cases where there had been a criminal conviction. S.F. 2280, 69th Gen. Assemb. (Iowa 1982); Iowa Code § 910.2. One year later, the Legislature codified Iowa Code chapter 815, governing appointment of counsel for indigents. S.F. 495, 70th Gen. Assemb. (Iowa 1983). For the first decade of its existence, Chapter 815 only allowed for recovery of costs outside a conviction under narrow circumstances—specifically, when the person was not indigent and could actually afford counsel. Iowa Code § 815.10(2) (1983).

In 1993, the Legislature enacted Iowa Code § 815.9A, which for the first time explicitly allowed recovery of IDFR outside of a conviction in a criminal case, irrespective of any finding that the defendant was not truly

indigent. S.F. 266, 75th Gen. Assemb. (Iowa 1993); Iowa Code § 815.9A (1993). The statute specifically authorized recovery of IDFR when "the person is acquitted or the charges are dismissed." *Id*. The statute also imposed certain caps on recovery. For people between 100 and 150 percent of federal poverty guidelines, the statute directed that at least $100 would be collected, and those over 150 percent of federal poverty guidelines would have to pay at least $200. *Id*. In 1996, this statute was amended to provide that the IDFR order would constitute a judgment. H.F. 2458, 76th Gen. Assemb. (Iowa 1996). The amendment also added a third tier for recovery, providing that people over 185% of federal poverty guidelines would have to pay at least $300 in IDFR. *Id*.

In 1999, Iowa Code 815.9A was repealed, and language allowing courts to order IDFR was inserted into section 815.9. S.F. 451, 78th Gen. Assemb. (Iowa 1999). The Code provision read, in relevant part:

> 3. If a person is granted an appointed attorney, the person shall be required to reimburse the state for the total cost of legal assistance provided to the person…
>
> 4. If the case is a criminal case, all costs and fees incurred for legal assistance shall become due and payable to the clerk of the district court by the person receiving the legal assistance not later than the date of sentencing, or if the person is acquitted **or the charges are dismissed**, within thirty days of the acquittal or dismissal.

Iowa Code § 815.9 (1999) (emphasis added). In the next ten years, the only

change made to the statutory language relevant to the matter at hand was an amendment forbidding courts from issuing wage assignments to collect IDFR until after the conclusion of the case. S.F. 2301, 79th Gen. Assemb. (Iowa 2002).

In 2009, the Iowa Supreme Court decided two cases that limited practices then in effect to assess and collect IDFR. First, in *State v. Sluyter*, this court held that IDFR could not be collected via contempt proceedings. 763 N.W.2d 575, 585 (Iowa 2009). Michael Sluyter had been charged with several counts in a criminal action. *Id*. at 577. One of these counts was dismissed before trial, and Sluyter was acquitted of the remaining counts by a jury. *Id*. After trial, Sluyter was assessed IDFR and ordered to pay installments on pain of contempt. *Id*. at 577-78. On certiorari, the Iowa Supreme Court found that neither the court's inherent power of contempt, nor the statute allowing for contempt for non-payment of fines and surcharges provided the court with the power to use contempt to collect IDFR. *Id*. at 582. The Court reasoned that the district court lacked inherent authority because it was limited to civil collection methods rather than criminal contempt proceedings in such cases. *Id.* ("[B]ecause Sluyter was not convicted of the criminal charges, the cost judgment entered against him could not have been 'part of the fine to be imposed as penalty for an offense.'") The Court likewise rejected the State's

statutory argument because it found the legislative history "indicat[ed] a conscious decision by the legislature to restrict the contempt power to criminal liabilities." *Id.* at 583

That same year, the Iowa Supreme Court also decided *State v. Dudley*, which dealt with both IDFR and other court costs. *State v. Dudley*, 766 N.W.2d 606 (Iowa 2009). Larry Dudley, an indigent person who relied upon appointed counsel, was acquitted of a criminal charge in 2005. *Id*. at 611. After his acquittal, the trial court sua sponte ordered that Dudley pay the full costs of his defense. *Id*. Overruling an initial challenge made by Dudley on constitutional grounds, the court further ordered that Dudley would pay in monthly installments and that failure to do so could result in contempt. *Id*. On review, this Court held that the lack of language limiting recovery to what Dudley had the ability to pay was a violation of his constitutional right to counsel. *Id*. In doing so, the Court compared Iowa Code section 815.9 as applied to an acquitted defendant against the protections that preserved the statute examined by the United States Supreme Court in *Fuller v. Oregon*. *Id*. at 613-14. This Court determined that the failure to accord an ability-to-pay limitation in section 815.9 did not, as required by *Fuller*, "insure that only those who actually become able to capable of repaying the state will ever be

obliged to do so." *Id*. at 614, quoting *Fuller*, 417 U.S. at 53.[9]

Finally, responding to *Dudley*, the Legislature amended Iowa Code section 815.9 to more or less its current form in 2012. S.F. 2231, 84th Gen. Assemb. (Iowa 2012). The provision "[i]f a person is granted an appointed attorney, the person shall be required to reimburse the state for the total cost of legal assistance provided to the person" was retained in the new version of the statute. Iowa Code § 815.9(3). However, in passing the current version of section 815.9, the legislature deleted the prior statute's authorization to assess IDFR in dismissed criminal cases. *Id*. To the extent that the omission of dismissals of criminal cases conflicts with the general language of Iowa Code § 815.9(3), the specific language prevails. Iowa Code § 4.7; *see Burton v. University of Iowa Hospitals and Clinics*, 566 N.W.2d 182 (Iowa 1997). This history demonstrates that the legislature's omission of dismissed cases was intentional. There is no statutory basis to assess IDFR in dismissed cases.

3. Construing Section 815.9 to Allow for the Imposition of IDFR Leads to Absurd Results.

Because the plain text of the statute does not authorize the imposition

[9] Two years later, the Iowa Supreme Court limited *Dudley* to prospective cases and those cases where it could be raised in a valid post-judgment motion. *State v. Olsen*, 794 N.W.2d 285 (Iowa 2011). *Olsen* dealt with an acquittal, not a dismissal, and did not otherwise raise any of the jurisdictional arguments raised here.

of IDFR in dismissed cases, the Court can only read such authority into the statute where its omission would lead to absurd results. *See Brakke v. Iowa Dep't of Natural Resources*, 897 N.W.2d 522, 538-39 (Iowa 2017). Further, the Court should generally only construe a statute to *narrow* its scope to avoid absurdity, not to *broaden* its scope beyond its plain meaning. *Id.* at 539. In this case, the omission of dismissed cases is not absurd; to the contrary, to broaden section 815.9 to allow for the imposition of IDFR in dismissed cases would be.

While good arguments exist to challenge the imposition of IDFR cases in acquittals, there are rational, legitimate reasons to distinguish between acquittals and dismissals in the assessment of costs. First, the costs expended for the defense of someone who is acquitted at a jury trial are generally much higher than those which are dismissed before trial. Second, and more importantly, the imposition of IDFR in a dismissed case carries additional constitutional concerns,[10] especially given the natural propensity for dismissals to be resolved by agreements that may bypass necessary constitutional protections such as ability-to-pay limitations that are available in an acquittal or conviction. In fact, allowing IDFR to be assessed in dismissals by agreement creates the perverse situation where people who are

[10] *See* section I.D. of this brief.

not guilty of a crime are likely to pay potentially far more than those convicted. Because the ability-to-pay analysis is waived, people whose charges are dismissed pay more than those who are acquitted or convicted and thus have no incentive to waive those rights. Omitting dismissed criminal cases from the IDFR requirement, as the legislature has done, obviates those constitutional concerns.

Iowa Code section 815.9 provides that a court has jurisdiction to order IDFR in acquittals,[11] criminal convictions, and cases other than criminal cases, but only has the authority to do so to the extent that the litigant has the ability to pay. In contrast, the statute provides for no situation where IDFR can be ordered in a dismissed criminal case, regardless of the litigant's ability to pay, depriving the court of subject matter jurisdiction. Given that distinction, the order entered against Mathes was void *ab initio*.

B. There is Also No Statutory Basis for Costs Other Than IDFR in a Dismissal of a Criminal Case.

In addition to IDFR, Mathes was also charged for two other items, $40 in court reporter fees and $100 in filing fees. Court reporter fees are generally taxed at a rate of $40 per day. Iowa Code § 625.8. Filing fees for criminal cases other than simple misdemeanors or traffic citations are generally $100.

[11] *But see* section I.C. of this brief, addressing *Nelson v. Colorado*, 137 S.Ct. 1249 (2017).

Iowa Code § 602.8106(1)(a). However, for criminal actions prosecuted under state law, these filing fees and other associated court costs are waived. *Id*. Unlike IDFR, there has never been even historical statutory language that would allow for these types of costs to be assessed against a prevailing defendant in a dismissal or an acquittal.

Tracking the common law rule, the Code provides that "costs shall be recovered by the successful against the losing party." Iowa Code § 625.1. In *Woodbury County*, this Court found that this general precept also applied in the context of criminal cases. *Woodbury County v. Anderson*, 164 N.W.2d at 135. *Dudley* also addressed court reporter fees, noting that the clear statutory language allowing these costs to be taxed in a conviction had no analog for cases where no conviction was entered. *State v. Dudley*, 766 N.W.2d at 624.

Costs like court reporter fees and filing fees cannot be collected absent a clear grant of statutory authority. Like IDFR, there is no clear statutory authority to impose either of these fees against a prevailing defendant under any circumstances. The court's inclusion of these fees in this case was in excess of its subject matter jurisdiction, rendering this order void ab initio. The district court and court of appeals rulings must therefore be reversed.

C. Charging Court Debt of Any Kind in a Dismissed Case is a Violation of the Presumption of Innocence Under *Nelson v. Colorado.*

To the extent that a statute would purport to give subject matter jurisdiction to a court to enter judgments for costs against exonerated defendants, such a statute is constitutionally void. The Court avoids construing statutes in a manner which would render them unconstitutional whenever possible. *See, e.g., In re Guardianship of Kennedy*, 845 N.W.2d 707 (Iowa 2014) (declining to construe statute governing the power of a guardian to involuntarily sterilize an intellectually disabled adult without judicial review, because doing so would raise serious due process concerns.) Because interpreting the statute to authorize imposition of costs against exonerated persons would likewise raise serious constitutional concerns under *Nelson v. Colorado*, this Court should construe it to avoid those infirmities, or else find the statute unenforceable as unconstitutional.

The United States Supreme Court recently addressed the imposition of monetary obligations against exonerated defendants in *Nelson v. Colorado*. 137 S.Ct. 1249 (2017). *Nelson* examined Colorado's Exoneration Act, which addressed issues related to the aftermath of convictions that were later reversed. *Id*. at 1254-55. In addition to providing procedure and criteria for obtaining recovery for wrongful incarceration, the Colorado Act provided that

a defendant who was later exonerated upon appeal had to prove their innocence by clear and convincing evidence in a separate civil action in order to obtain a refund of any court debt they had paid as a result of their earlier conviction. *Id*.

Upon a challenge by Shannon Nelson, the Colorado Supreme Court upheld the statutory procedure. *Id*. at 1254. In doing so, the court reversed the decision of the state's intermediate appellate court, which had ruled that "[c]osts, fees, and restitution… 'must be tied to a valid conviction.'" *People v. Nelson*, 369 P.3d 625, 627-628 (Colo. Ct. App. 2013). The Colorado Supreme Court held that, notwithstanding the lack of a valid conviction, the process laid out in the Exoneration Act "provide[d] sufficient process for defendants to seek refunds of costs, fees, and restitution that they paid in connection with their conviction." *People v. Nelson*, 362 P.3d 1070, 1078 (Colo. 2016).

The United States Supreme Court reversed the Colorado Supreme Court, 7-1. Writing for a six-justice majority, Justice Ginsberg explained that Colorado's scheme "offends the Fourteenth Amendment's guarantee of due process." *Id*. at 1252. Per the holding in *Nelson*, a state "may not presume a person, adjudged guilty of no crime, nonetheless guilty enough for monetary exactions." *Id*. at 1256.

Applying the balancing test of *Matthews v. Eldridge* to the process for obtaining a refund under the Exoneration Act, the Court found that the test weighed decidedly in favor of Nelson. *Id*. at 1255-57; *see Matthews v. Eldridge*, 424 U.S. 319, 335 (1976). On the first prong of the test, the nature of the private interest of the individual, the Court found an "obvious interest in regaining the money paid to [the State]." *Id*. at 1255. In doing so, the Court stated that the presumption of innocence was "[a]xiomatic and elementary," and "lies at the foundation of our criminal law." *Id*.

The second prong, risk of erroneous deprivation, was in the majority's view "unacceptable". *Id.* at 1257. In part, this was because the Act conditioned recovery on a showing of innocence by clear and convincing evidence, was cost prohibitive for smaller amounts, and simply not available for misdemeanors. *Id*. at 1256. The Court went a step further, and stated that "to get their money back, defendants should not be saddled with *any* proof burden… [i]nstead, they are entitled to be presumed innocent." *Id*. Finally, the Court found that the third prong of the *Matthews* test, government interest, also weighed decidedly in favor of Nelson, finding that Colorado "has no interest in withholding from Nelson… money to which the State currently has zero claim of right." *Id*. at 1257.

In his concurrence, Justice Alito disagreed with the majority's

application of *Matthews*. *Id*. at 1258 (Alito, J., concurring). As he saw it, the case involved "state procedural rules which… are part of the criminal process[,]" thus requiring the application of the less stringent due process requirements of *Medina*, instead of *Matthews*. *Id.* Under *Medina*, a state rule of criminal procedure "violates the Due Process clause of the Fourteenth Amendment only if it offends a fundamental and deeply rooted principle of justice." *Id*., *citing Medina v. California*, 505 U.S. 437 (Iowa 1992). However, even under this lower standard, Justice Alito found that the Colorado statute did not pass constitutional muster. *Nelson v. Colorado*, 137 S.Ct. at 1258 (Alito, J., concurring).

Even Justice Thomas, the sole dissenting vote in *Nelson*, did not propose that Colorado had any right to exact monetary sanctions from an exonerated defendant. His dissent was solely focused on the idea that such defendants effectively no longer had an ownership interest in funds already collected, which limited the right recovery of those funds and thus did not necessitate a higher level of due process than that afforded by the Exoneration Act. *Id*. at 1263 (Thomas, J., dissenting).

As a whole, the decision in *Nelson*—majority, concurrence, and dissent alike—is built upon the axiomatic and elementary principle that is at the heart of Mathes' challenge here. This presumption applies to criminal defendants in

dismissed cases. *See, e.g., id.* at 1256 ("[T]he presumption of innocence "lies at the foundation of our criminal law."), *citing Coffin v. United States*, 156 U.S. 432, 453 (1895); s*ee also State v. Lindsey*, 302 N.W.2d 98, 103 (Iowa 1981) (on the necessity of the instruction of the presumption of innocence); *see also* Iowa Code § 701.3 ("Every person is presumed innocent until proven guilty."). The presumption of innocence prohibits the assessment of monetary sanctions against a non-convicted defendant in a criminal case. Any statute that would purport to do so would be invalid on due process grounds.

D. Section 815.9 As Applied in the Present Case is Also Void for Vagueness.

The United States Supreme Court has also found statutes assessing costs to exonerated defendants to be void for vagueness on due process grounds. In *Giaccio v. State of Pa.*, after being duly acquitted of a criminal charge by a jury, Jay Giaccio was nevertheless "sentenced" to pay costs of his prosecution. 382 U.S. 399, 400 (1966). This sentence was in accordance with a statute that allowed a jury to determine, post-acquittal, whether the defendant or the state should pay the costs of prosecution. *Id*. at 400-401. The language of the statute imposed no criteria to guide the jury, and required the defendant to be imprisoned until the costs were paid. *Id*. at 405. Prior to *Giaccio*, Pennsylvania appellate courts had filled the statutory void by suggesting that a jury instruction stating that imposing costs on an acquitted

defendant was appropriate on a finding of "misconduct of some kind as to which he should be required to pay some penalty short of conviction." *Id*. at 404.

Upon review, the U.S. Supreme Court unanimously reversed. *Id*. Writing for a seven justice majority, Justice Black rejected the state appellate court's determination that the statute was "'not a penal statute[…] but rather as compensation to a litigant for expenses[,]'" since "there is no doubt that [the statute] provides the State with a procedure for depriving an acquitted defendant of his liberty and his property[.]" *Id*. at 402. The Court then found both the statute and the suggested jury instructions to be impermissibly vague, as "[i]t would be difficult if not impossible for a person to prepare a defense against such general abstract charges as 'misconduct,' or 'reprehensible conduct.'" *Id*.

In a concurring opinion, Justice Stewart opined that to "punish a defendant after finding him not guilty… violates the most rudimentary concept of due process of law." *Id.* at 405 (J. Stewart, concurring). Along similar lines, Justice Fortas' concurrence stated succinctly that "the Due Process Clause of the Fourteenth Amendment does not permit a State to impose a penalty or costs upon a defendant whom the jury has found not guilty of any offense with which he has been charged." *Id.* (J. Fortas, concurring).

Each of these concurrences are echoed in the majority, concurrence, and dissent in *Nelson*.

In *Woodbury County*, this Court held that "[i]t would be constitutionally permissible for the legislature to include a provision that expenditures made under this section be taxed as part of the costs against a defendant convicted either as a result of jury trial or plea of guilty." *Woodbury County*, 164 N.W.2d at 123-124. "On the other hand, the permissibility of taxing such expenditures as a part of the costs against a defendant acquitted is somewhat doubtful in view of [*Giaccio*]." *Id*. This observation holds even more true today, in light of subsequent holdings in *Fuller* and *Dudley*. In the absence of ability to pay requirements, or really any standards whatsoever, the system for imposing IDFR and costs on defendants in dismissed cases is completely arbitrary – like the statute struck down in *Giaccio*.

E. Allowing Assessment of IDFR Without a Later Right to Modify is a Violation of Right to Counsel and Equal Protection under *Fuller v. Oregon*.

Fuller v. Oregon held that IDFR collection statutes do not run afoul of violating the right to counsel only where the "statute is carefully designed to insure that only those who actually become capable of repaying the state will ever be obliged to do so." *Fuller* at 53. As set forth below, the Oregon statute

Fuller upheld had several features that the State's interpretation of Iowa Code § 815.9 lacks. This is especially true as to cases where all counts have been dismissed or a defendant has been acquitted of all counts. To the extent that this Court determines that there is statutory authority to allow for Mathes to be assessed IDFR, that statute would be invalid as an impermissible burden on the right to counsel.

There are several differences between the statute upheld in *Fuller* and Iowa's IDFR statutes. First, in *Fuller*, the IDFR statute only applied to convicted defendants. *Id*. The statute provided for an ability-to-pay assessment at imposition, a facial requirement of Iowa Code § 815.9 that the State argues can be bypassed here. *Id*. Second, the statute upheld in *Fuller* provided that a defendant could modify the IDFR debt at any time, based on changes in circumstances. *Id*. 45-46.

The ability to later modify IDFR is constitutionally necessary for at least two reasons. First, the circumstances of a defendant can change over time—hopefully for the better, but frequently for the worse. Second, in the absence of objective standards for what constitutes the reasonable ability to pay, the reality in Iowa is that these assessments are often based on guesswork about what someone's future earning capacity might be. Without the ability to correct course when initial assumptions prove incorrect, or when the

underlying premises about earning capacity change, Iowa's recoupment scheme does not pass constitutional muster. *Dudley*, 766 N.W.2d at 614, citing *Fuller*, 417 U.S. at 53.

Iowa Code § 910.7 provides a very limited right to later modify an IDFR balance only to those who are both convicted and remain under the supervision of the state. "At any time **during the period of probation, parole, or incarceration**, the offender or the office or individual who prepared the offender's restitution plan may petition the court on any matter related to the plan of restitution or restitution plan of payment[.]" Iowa Code § 910.7(1) (emphasis added). The statute provides that a court has complete discretion whether to schedule a hearing, or not, without setting a standard that would require ability to pay to be reassessed upon a showing of changed circumstances. *Id*.; *see also State v. Blank*, 570 N.W.2d 924 (Iowa 1997) (affirming dismissal of a post-judgment challenge to a restitution order (including IDFR) by an indigent defendant who claimed he was unable to pay). This relief, such as it is, is not available at all to someone who is assessed IDFR and is never under the supervision of the state, is assessed IDFR in a non-criminal case, is acquitted, or—like Mathes—has all charges dismissed.

In 1985, the version of Iowa Code § 815.9 then in effect survived constitutional challenge because it was deemed to have all of the features that

preserved the constitutionality of the statute in *Fuller*. *State v. Haines*, 360 N.W.2d 791 (Iowa 1985). However, *Haines* was decided under a previous statutory regime that only assessed IDFR to convicted people. *Id*. Moreover, the defendant in *Haines* was under the supervision of the state, and thus at the time of his appeal could take advantage of the limited relief provided by section 910.7. *Id*. As applied to Haines, the former section 815.9 was arguably constitutional. As applied to Mathes, the current section 815.9 is not.

While the validity of Mathes' purported "waiver" of her initial ability-to-pay determination remains in question, it is also irrelevant in light of *Fuller*, because the right to an ability-to-pay assessment is ongoing and not simply limited to the moment that it is first made. Given that the Code provides no mechanism for Mathes to exercise that ongoing right, to the extent that the statute is found to confer jurisdiction, the statute itself an invalid burden on the right to counsel.

III. THE COURT DID NOT HAVE AUTHORITY TO ENTER A JUDGMENT FOR COURT DEBT IN A DISMISSED CRIMINAL CASE.

Even if the trial court did have subject matter jurisdiction to enter the order against Mathes, the court was nevertheless without statutory and constitutional authority to do so for the same reasons stated above. Further, Mathes properly challenged the entry of this judgment and did not consent to

it, or waive her rights.

The primary difference between judgments entered in excess of jurisdiction versus those entered in excess of authority is that the former are void *ab initio*, while the latter are merely voidable. *See In re Estate of Falck*, 672 N.W.2d 785 . Accordingly, "[w]here subject matter jurisdiction exists, an impediment to a court's authority can be obviated by consent, waiver, or estoppel." *State v. Mandocino*, 509 N.W.2d 481 (Iowa 1993) (holding that the general grant of jurisdiction to hear probation matters conferred by Iowa Code Chapter 907 provided the court subject matter jurisdiction to rule on a motion to extend probation). Moreover, "where subject matter jurisdiction exists, an impediment to the court's *authority* is not conclusively fatal to the validity of an order." *In re Marriage of Seyler*, 559 N.W.2d 7, 10 n.3 (Iowa 1997).

More fundamentally, not every protection in the criminal process is subject to waiver by agreement. In some cases:

> …gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms.

State v. Baldon, 829 N.W.2d 785, 801 (Iowa 2013). The potential consequences of a criminal conviction create a decided imbalance in bargaining power that should create a strong presumption against a finding of

meaningful consent. Additionally, as pointed out in the Amicus brief of the Iowa Appellate Defender, many of the formalities normally accompanying the plea-bargaining process are not apparent in the record here. Appellate Defender Amicus Br. at 24.

Iowa generally applies principles of contract law when analyzing agreements made in the context of criminal procedure. *State v. Ceretti*, 871 N.W.2d 88 (Iowa 2015).”[C] ontracts made in contravention of a statute are void, and Iowa courts will not enforce such contracts.” *Bank of America v. Kline*, 782 N.W.2d 453 (Iowa 2010). Because an agreement to pay costs without any statutory basis or ability to pay determination has the purpose of violating the law, it is an unenforceable contract.

This Court has recognized in dicta that parties can agree to how costs in the case as a whole may be equitably apportioned in the context of a plea bargain. *See State v. Petrie*, 478 N.W.2d 620, 622 (Iowa 1991); *State v. McMurry*, 925 N.W.2d 592 (2019). This necessarily may include assessment of costs associated with dismissed counts. *Id*. However, such cases involve *apportionment* of costs where there has been a conviction on at least some counts in the criminal case. Unlike in the present case, there is a statutory basis for charging these costs arising from the conviction. *See* Iowa Code § 815.9(5); Iowa Code § 910.2. This case is therefore distinguishable from both

Petrie and *McMurry*.

Because there was no enforceable agreement to pay costs or waive an ability-to-pay determination in this case, the district court lacked authority to impose those costs on that basis.

IV. IN THE ALTERNATIVE, THE ASSESMENT OF COSTS AGAINST A DEFENDANT IN A DISMISSED CRIMINAL CASE IS AN ILLEGAL SENTENCE.

Although an award of IDFR in a dismissed case is necessarily not a "sentence," as the defendant has not been found criminally culpable, the effect of these large cash assessments on indigents is punitive nevertheless. People who owe IDFR can have their wages garnished, and are denied the ability to expunge otherwise eligible cases from their record. *See, e.g. State v. Doe*, 927 N.W.2d 656 (Iowa 2019). "[J]udges may only impose punishment authorized by the legislature within constitutional constraints." *State v. Louisell*, 865 N.W.2d 590, 597 (Iowa 2015). It is a "well-established principle that sentences imposed without statutory authorization are illegal and void." *Id*. An illegal sentence may be challenged at any time. Iowa R. Crim. P. 2.24(5); *see also State v. Tindell*, 629 N.W.2d 357, 359 (Iowa 2001) (same).

Illegal sentences are "not subject to the usual concepts of waiver, whether from a failure to seek review or other omissions of error preservation." *State v. Onmacht*, 342 N.W.2d 838, 842-843 (Iowa 1983).

Parties cannot agree to an illegal sentence:

> Surely it should not lie within the authority of bargaining counsel and a willing judge to thus reshape the parameters of allowable punishment. If Howell were to prevail upon either of these contentions we would be left the anomalous situation in which parties could make their own law whenever a judge could be persuaded to allow it.

State v. Howell, 290 N.W.2d 355 (Iowa 1980).

If a court may order IDFR in a criminal case where all counts have been dismissed because the parties agree, despite having no statutory authority to do so, could the court also impose a fine if the parties present it as an agreement? Victim restitution? A term of incarceration? Precedent is clear that these absurd results would be illegal sentences, handed down in excess of the court's jurisdiction, and thus void and challengeable at any time.

CONCLUSION

For the reasons set out in this brief, the judgment against Mathes is void, either as entered by a court without subject matter jurisdiction, entered without authority with an improper finding of an agreement, or an illegal sentence. Under any of these theories, the decisions of the district court and court of appeals must be reversed.

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CERTIFICATE OF SERVICE

I, Alexander Vincent Kornya, hereby certify that the Amicus Brief was electronically filed on the 10th day of January, 2020, and was electronically served upon the Appellee's counsel via electronic mail / EDMS.

/s/ Alexander Vincent Kornya

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