

**IN THE
SUPREME COURT OF IOWA**

STATE OF IOWA
Plaintiff-Appellee,

And Concerning

JANE DOE,
Defendant-Appellant.

*APPEAL FROM THE IOWA DISTRICT COURT FOR
DES MOINES COUNTY
HONORABLE EMILY DEAN, DISTRICT ASSOCIATE JUDGE*

**FINAL BRIEF OF *AMICUS CURIAE*:
AMERICAN CIVIL LIBERTIES UNION OF IOWA
IN SUPPORT OF DEFENDANT-APPELLANT**

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INTEREST OF AMICUS 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 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.

ARGUMENT

I. INTRODUCTION

Iowa Code § 907.9(4)(b) denies expungement unless applicants first pay all restitution, which includes the costs imposed for court-appointed attorney fees for indigent defendants. *Id.* (“However, the court’s record shall not be expunged until the person has paid the restitution, civil penalties, court costs, fees, or other financial obligations ordered by the court or assessed by the clerk of the district court in the case that includes the deferred judgment.”) This provision treats those who are eligible for expungement who owe a civil debt to the government for the cost of court-appointed attorney fees, and who are indigent, more harshly than those who owe a private creditor for the cost of privately-retained counsel. As a result, for the reasons put forth by Appellant, that provision violates equal protection under the Iowa Constitution and United States Constitution. (Appellant Proof Br. *passim*); Iowa Const. art. I, §§ 1, 6; U.S. Const. amend. XIV. In addition, it burdens the right to counsel as protected by the federal constitution and the Iowa Constitution. U.S. Const. amend. VI; Iowa Const. art. I, § 10.

However, this Court may save Iowa Code § 907.9(4)(b) by requiring a determination of reasonable ability to pay prior to the denial of expungement on the basis of nonpayment.

Finally, there is no waiver of the right to expungement upon successful discharge from a deferred judgment without entry of conviction, because expungement is an inexorable feature of the deferred judgment *criminal* sentencing scheme—normally entered automatically upon the successful discharge from a deferred judgment without entry of conviction—entirely separate from and outside of the mechanisms for enforcement of *civil* judgments available to private and government creditors alike. Thus, any agreement to pay court-appointed attorney’s fees as part of a guilty plea, which could constitute waiver of the ability to challenge the collection of those fees by the government from a defendant on the basis of indigence, does not likewise constitute waiver of the right to an expungement for nonpayment of the fees absent a reasonable-ability-to-pay determination.

II. IOWA CODE § 907.9 VIOLATES THE RIGHT TO COUNSEL GUARANTEED BY THE IOWA CONSTITUTION AND UNITED STATES CONSTITUTION.

The requirement in Iowa Code § 907.9(4)(b) that an applicant pay all restitution owed for their appointed counsel before expungement may be granted burdens indigent defendants’ right to counsel under the Iowa

Constitution and the United States Constitution, because it is not conditioned on a reasonable ability to pay determination. Iowa Const. art. I, § 10; U.S. Const. amend. VI.

This Court has previously determined that a statutory framework that imposes the cost of appointed counsel on an indigent defendant without regard to the defendant's ability to pay infringes the right to counsel. *State v. Dudley*, 766 N.W.2d 606,614 (“We conclude chapter 815.9, as applied to acquitted defendants, infringes on their federal and state right to counsel.”). The Court reasoned that absent a reasonable ability to pay determination, the statute would unconstitutionally burden the right to counsel by disincentivizing accepting appointment of counsel by indigent defendants. *Id.* at 614 (“an acquitted defendant will be charged with the full expense of his legal assistance without regard to whether he will ever have the funds or means to pay . . . We conclude chapter 815.9, as applied to acquitted defendants, infringes on their federal and state right to counsel.”)

By contrast, a reasonable ability to pay hearing may save otherwise constitutional laws that disincentivize accepting appointment of counsel. For example, in *State v. Haines* and *Fuller v. Oregon*, the Courts determined that the statutes authorizing a court to order an indigent defendant to repay the cost of his legal defense did not violate the right to counsel

only because the statutes contained safeguards against imposing restitution against an indigent defendant who was not reasonably able to pay—either at the time of their defense or at some later point. 360 N.W.2d 791, 794 (Iowa 1985); 417 U.S. 40, 53 (1974). In *Haines*, the Court reasoned both that “[i]t is this ‘reasonably able to pay’ standard which allows section 910.2 to withstand constitutional attack” and that protection for future indigence existed under Iowa Code § 910.7, which provided an opportunity for relief if “a probationer later becomes unable to meet the plan of restitution.” *Haines*, 360 N.W.2d at 797, 794. Likewise, in *Fuller*, the Court found that “[t]he Oregon statute is carefully designed to insure that only those who actually become capable of repaying the State will ever be obligated to do so. Those who remain indigent or for whom repayment would work ‘manifest hardship’ are forever exempt from any obligation to pay.” *Fuller*, 417 U.S. at 53.

A requirement that the cost of an appointed attorney be paid in full before expungement may be granted is a clear disincentive to accept counsel in the first place, because criminal defendants view the repayment of attorney’s fees as a bar on expungement if they lack the ability to pay them. The benefits of deferred judgments flow from the expungement upon successful completion. The incentives to criminal defendants to seek deferred judgments and expungement in lieu of

conviction cannot be overstated. An expungement minimizes the collateral consequences of a person's involvement in the criminal justice system. These collateral consequences act as barriers to those who have had even a minor brush with the criminal justice system, and offer a second chance. Discrimination against those with a criminal history record "exists in the areas of civil rights, employment, housing, public assistance, occupational licenses, and in every stage throughout the life of a criminal case." Anna Kessler, *Excavating Expungement Law: A Comprehensive Approach*, 87 Temp. L. Rev. 403, 411-12 (2015).

Expungement can have a dramatic effect on an applicant's job prospects and income. One cost-benefit analysis of criminal record expungement conducted in Santa Clara County, California found average annual income increases of more than \$6,000 following record expungement. Meyli Chapin et al., *A Cost-Benefit Analysis of Criminal Record Expungement in Santa Clara County* 6 (March 2014). As this Court recognized in *State v. Young*, the collateral consequences even of misdemeanor convictions can be severe. 863 N.W.2d 249, 253-4 (Iowa 2015) ("Conviction of misdemeanors, as discussed below, may impose a significant moral stigma and can substantially affect employment opportunities.") Beyond consequences to employment opportunities, convictions can disqualify a person from student aid, public housing, lead to driver's license

suspension, and more. *Id.* at 254 (citing ABA Standards for Criminal Justice: Collateral Sanctions and Discretionary Disqualification of Convicted Persons 19–2.1, at 21 (3d ed.2004)). Collateral consequences for felonies are even more severe and profound. For example, in Iowa, felony convictions lead to lifetime loss of voting rights, whereas the successful discharge of a deferred judgment for a felony does not disqualify an Iowan as an elector. *See* Iowa Governor’s Office, *Voting Rights Restoration*, <https://governor.iowa.gov/services/voting-rights-restoration> (“An individual who was given a deferred judgment for a felony and has successfully discharged probation has not lost the right to vote.”).

Iowa law contains precious few opportunities for the expungement of the record of a criminal case. Expungements are only available to adult defendants where there is an acquittal or dismissal of a public offense, where there is a deferred judgment, or where the conviction is for certain enumerated offenses such as consumption or intoxication in public places. *See* Iowa Code § 901C.1; Iowa Code § 907.9(4)(b); Iowa Code § 123.46(6). A deferred judgment may be an adult defendant’s only realistic opportunity to have the record of their criminal case expunged. Thus, there is a very real incentive for indigent defendants to avoid any and all potential future impediments to that

expungement. This would include the possibility that an expungement may be denied due to their future inability to pay for their appointed counsel in full.

However, unlike the statutes at issue in *Haines* and *Fuller*, Iowa Code § 907.9(4)(b) contains no contemporaneous ‘ability to pay’ requirement. Applicants cannot modify their plan of restitution or restitution plan of payment once they have successfully completed probation. Iowa Code 910.7(2) (“the court, at any time prior to the expiration of the offender’s sentence . . . may modify the plan of restitution or the restitution plan of payment, or both, and may extend the period of time for the completion of restitution.”). If their ability to pay changes only after their period of probation ends, there is no remedy available to modify their plan of restitution or restitution plan of payment.

Because Iowa Code § 907.9(4)(b)’s requirement to pay all court appointed attorney fees prior to entry of an expungement contains no reasonable ability to pay determination, it deprives indigent defendants of right to counsel by disincentivizing appointment of counsel as in *Dudley*. Absent an opportunity to demonstrate no reasonable ability to pay, Iowa Code § 907.9(4)(b)’s requirement of payment of court appointed attorney’s fees acts as a clear disincentive to accepting

appointed counsel, and effectively deprives indigent defendants who may seek a deferred judgment of their right to counsel. Therefore, it should be struck on the basis of burdening right to counsel, in addition to violating equal protection.

III. READING IOWA CODE § 907.9(4)(B) TO REQUIRE A DETERMINATION OF ABILITY TO PAY PRIOR TO THE DENIAL OF EXPUNGEMENT MAY SAVE IT FROM CONSTITUTIONAL INFIRMITY.

The easiest way to ameliorate Iowa Code § 907.9's constitutional deficiencies is to find that the portion of section 907.9(4)(b) which requires that all restitution for appointed attorney's fees be paid before expungement is granted both unconstitutionally burdens the right to vote, and is prohibited by the 14th Amendment's guarantee of equal protection under the law, as sought by Appellant. (Appellant Proof Br. at 34.) Alternatively, the Court may construe Iowa Code § 907.9(4)(b) to require a reasonable ability to pay determination in order to save the statute.

As a matter of constitutional avoidance, the Court ordinarily construes statutes, if fairly possible, so as to avoid doubt as to their constitutionality. *In Re Kennedy*, 845 N.W.2d 707, 714 (Iowa 2014) (construing statute allowing guardian to sterilize ward to require prior court approval); *Simmons v. State Public Defender*, 791 N.W. 2d 69, 74

(Iowa 2010) (statutory caps on public defender fee recoupments required construction that permitted rebuttal of fee caps by a showing of reasonableness and necessity); *Jacobs v. Miller*, 111 N.W.2d 673, 676 (1961) (statute establishing the number of years after which certain land was deemed abandoned was construed as being of prospective effect only to avoid doubt cast on its constitutionality).

This rule of construction allows the Court to read into a statute procedural safeguards that save it from constitutional deficiency. *Thompson v. Joint Drainage Dist. No. 3-11*, 143 N.W.2d 326, 330 (1966) (statute allowing for increased property taxes was construed to instead require hearing and notice, although those protections were absent from the express language of the statute, with the Court further holding that “failure to provide hearing and give notice *as required by statute* voids the entire assessment.”) (*emphasis added*); see *Chicago B. & Q. R. Co. v. Iowa State Tax Comm.*, 142 N.W.2d 407, 410 (1966) (“The duty devolves on the court to ascertain the true meaning . . . where an adherence to the strict letter would lead to injustice, absurdity or contradictory provisions.”) (internal citation omitted.) As a corollary to the general rule that courts may decide cases on statutory grounds to avoid constitutional infirmities, courts may also inform their interpretation of a statute by the constitutional problems the court seeks to avoid. *Simmons*, 791 N.W. 2d

at 74 (“Even though we prefer to decide cases on statutory rather than constitutional grounds, in this case we must have a firm understanding of the constitutional icebergs that must be avoided in order to guide us in our statutory interpretation.”); *Thompson*, 143 N.W.2d at 330.

To save it from constitutional infirmity, Iowa Code §907.9(4)(b) may therefore be read to include a back-end safeguard requiring a reasonable ability to pay determination prior to disqualification for expungement based on nonpayment of attorney’s fees. Doing so preserves the purpose of the statute and is consistent with legislative intent that the attorney’s fees be paid when a defendant is able to pay them, but conforms with the requirements of equal protection and right to counsel clause. Construing the statute to require a reasonable ability to pay determination allows for expungement for those applicants who cannot pay as a result of indigence to receive the same treatment under Iowa Code § 907.9 as applicants who remain indebted to a private creditor. At the same time, any applicant who willfully refuses to pay restitution owed for appointed counsel remains unable to reap the benefit of expungement, consistent with the plain text of the statute. Likewise, indigent defendants considering whether to accept appointed counsel would be assured that future indigence would not bar the

expungement of a deferred judgment, remedying the statute's burden on right to counsel.

The addition of a determination of ability to pay restitution owed for appointed counsel need not be greatly onerous to the district court that receives a motion for expungement of a deferred judgment. It would not be necessary to review the original imposition of restitution in the case. The court need only require submission of financial information to determine an applicant's current ability to pay prior to denying expungement. Those determinations are already required before an initial imposition of attorney's fees. *State v. Albright*, ___ N.W.2d ___, Iowa Sup. Ct. No. 17-1286, at *30 (Iowa Mar. 22, 2018). District courts are similarly required to grant a hearing for offenders who petition the court for the modification of restitution during probation, parole, or incarceration if facially warranted. Iowa Code § 910.7. Further, the determination of an applicant's ability to pay would only be required when an applicant has fulfilled all requirements for expungement other than the payment of restitution owed for appointed counsel.

IV. A DEFENDANT'S AGREEMENT TO PAY ATTORNEY'S FEES CANNOT ACT AS A BAR TO EXPUNGEMENT.

An agreement to pay court costs, attorney's fees, and other amounts as part of a plea agreement may effectively waive a defendant's

right to challenge the validity and enforceability of a civil judgment for those amounts. Expungement, by contrast, is a statutory entitlement provided to defendants who successfully discharge a deferred judgment entirely separate from the validity or enforceability of any civil judgments related to the case. Therefore, any agreement to pay costs, fees, or other amounts that become a civil judgment cannot form a bar to expungement.

Appellant's guilty plea in this case waived a number of "trial rights," the right to a record of sentencing, and to be present at sentencing; it also included Appellant's agreement to pay any court ordered attorney's fees. The order to pay restitution, including court ordered attorney's fees, amounts to a civil judgment. *State v. Hagen*, 840 N.W.2d 140, 153 (Iowa 2013) ("restitution is a judgment and is enforceable 'in the same manner as a civil judgment'") (citing Iowa Code § 910.7A(2)).

All creditors, private actors and the State alike, enforce a civil judgment for the payment of money against a judgment debtor through execution, which is the normal method of enforcement. *LaRue v. Burns*, 268 N.W.2d 639, 641 (Iowa 1978) ("a judgment for costs is to be enforced by execution.") (citing Iowa Code § 626.1); *State v. Slyter*, 763 N.W.2d 575, 584 (Iowa 2009) (holding use of contempt to enforce civil

cost judgment was not authorized by statute). Chapters 626 and 630 set forth the various procedures for, and auxiliary to, execution on a judgment, as well as the duties of a judgment debtor. *See* Iowa Code chs. 626, 630. Importantly, and in accord with *Strange* and its progeny, these mechanisms are the same for civil judgment resulting from a restitution order as they are for private debt, including debt owed by clients to privately retained counsel.

Denying the expungement of a debtor's deferred judgment is not one of the mechanisms available by creditors to enforce civil money orders. To the contrary, expungement is a mechanism that removes public access to certain court records related to a criminal case. It is purely a product of criminal law, found only in Title XVI – Criminal Law and Procedure, and in Iowa Code §123.46(6), which specifically relates to the expungement of simple misdemeanors associated with the public intoxication or consumption of alcohol. *Id.* It is available in criminal cases where there has been an acquittal or dismissal, where the defendant received a deferred judgment, or where a conviction was for certain enumerated offenses, such as public consumption or intoxication. Iowa Code § 901C.1; Iowa Code § 907.9(4)(b); Iowa Code § 123.46(6).

For a deferred judgment, expungement requires that certain court records will become confidential, exempt from public access under Iowa Code § 22.7. Iowa Code § 907.9(4)(b). This expungement of the criminal record has been part of the deferred judgment sentencing scheme since its inception in 1973, long before the current restriction that expungement only be granted after full payment of various forms of restitution. 1973 Iowa Acts ch. 295 § 6; 2004 Iowa Acts ch. 1175 § 205.

Because an agreement to pay restitution, including attorney's fees, is only a waiver of a reasonable-ability-to-pay based challenge to the imposition of those costs which enables the state to collect the civil judgment order, and expungement is not within the scheme of civil judgment collection remedies, it does not waive the right to expungement under the statute.

V. CONCLUSION

Because Iowa's deferred judgment expungement law violates equal protection and the right to counsel under the U.S. and Iowa Constitutions, this Court should reverse the ruling of the district court and grant Appellant's request for expungement. Additionally and alternatively, this Court may read Iowa Code § 907.9 to require a determination of the applicant's reasonable ability to pay relevant

remaining financial obligations before expungement may be denied pursuant to subsection (4)(b).

Respectfully submitted,

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