IN THE SUPREME COURT OF IOWA

STATE OF IOWA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	S.CT. NO. 19-0369
	)	
CHANCE BERES,	)	
	)	
Defendant-Appellant.	)	

INTERLOCUTORY APPEAL FROM THE IOWA DISTRICT COURT IN AND FOR POWESHIEK COUNTY
HONORABLE JOEL D. YATES, JUDGE (RULING ON MOTION TO DISMISS)

APPELLANT'S BRIEF AND ARGUMENT AND REQUEST FOR ORAL ARGUMENT

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FINAL

CERTIFICATE OF SERVICE

On December 24, 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: Chance Beres, 1309 Marion Ave., Malvern, IA 51551.

STATE APPELLATE DEFENDER

/s/ Vidhya K. Reddy

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Other Authorities:

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the district court erred in denying Beres's Motion to Dismiss the instant prosecution (Poweshiek Co. FECR010833) as barred by the plea agreement in the prior case (Poweshiek Co. FECR010796)?

Authorities

State v. Dudley, 856 N.W.2d 668, 675 (Iowa 2014)

State v. Hovind, 431 N.W.2d 366, 368 (Iowa 1988)

State v. Aschan, 366 N.W.2d 912, 916 (Iowa 1985)

State v. Lopez, 872 N.W.2d 159, 170 (Iowa 2015)

Santobello v. New York, 404 U.S. 257, 261 (1971)

State v. Bearse, 748 N.W.2d 211, 215 (Iowa 2008)

State v. Loye, 670 N.W.2d 141, 149 (Iowa 2003)

State v. Macke, No. 18-0839, --- N.W.2d ----, 2019 WL 4382985, at *9 (Iowa Sept. 13, 2019)

State v. Coleman, No. 12–1557, 2013 WL 3458181, at *3 (Iowa Ct. App. July 10, 2013)

Mabry v. Johnson, 467 U.S. 504, 509 (1984)

State v. Weig, 285 N.W.2d 19, 21 (Iowa 1979)

Iowa R. Crim. Pro. 2.8(2)(c)

Iowa R. Crim. Pro. 2.10(2)

U.S. Const. amend. XIV

Iowa Const. art. I § 9

State v. Cropp, No. 07–2112, 2009 WL 139528, at *2 (Iowa Ct. App. 2009)

1). The 'condition precedent' was that Beres "cooperate with" the State in an interview. As Beres never breached his promise to "cooperate with" an interview, the State was not relieved of its reciprocal promise not to charge earlier conduct.

Authorities

State v. Carrillo, 597 N.W.2d 497, 500 (Iowa 1999)

State v. Horness, 600 N.W.2d 294, 299 (Iowa 1999)

State v. Foy, 574 N.W.2d 337, 340 (Iowa 1998)

State v. Aschan, 366 N.W.2d 912, 916 (Iowa 1985)

State v. Dudley, 856 N.W.2d 668, 672 (Iowa 2014)

State v. Weig, 285 N.W.2d 19, 19–20 (Iowa 1979)

State v. Bergmann, 600 N.W.2d 311, 314–15 (Iowa 1999)

State v. Coleman, No. 12–1557, 2013 WL 3458181, at *3 (Iowa Ct. App. July 10, 2013)

State v. Bearse, 748 N.W.2d 211, 215 (Iowa 2008)

Scarborough v. State, 945 A.2d 1103, 1114 (Del. 2008)

2). Even if the 'condition precedent' was the *actual occurrence* of an interview, the State cannot impede or prevent an interview and then point to defendant's failure to submit to such interview as the basis for excusing the State's reciprocal obligation.

Authorities

Scarborough v. State, 945 A.2d 1103, 1112 (Del. 2008)

State v. Carrillo, 597 N.W.2d 497, 500 (Iowa 1999)

State v. Bearse, 748 N.W.2d 211, 215–16 (Iowa 2008)

State v. Horness, 600 N.W.2d 294, 299–300 (Iowa 1999)

State v. Lopez, 872 N.W.2d 159, 174 (Iowa 2015)

State v. Kuchenreuther, 218 N.W.2d 621, 621-24 (Iowa 1974)

State v. Lummus 449 N.W.2d 95, 96-100 (Iowa Ct. App. 1989)

Aschan v. Auger, 861 F.2d 520, 522 (8th Cir. 1988)

Mabry v. Johnson, 467 U.S. 504, 507–08 (1984)

State v. Aschan, 366 N.W.2d 912, 915 (Iowa 1985)

United States v. San Pedro, 781 F. Supp. 761, 775 (S.D. Fla. 1991)

State v. Rademacher, 433 N.W.2d 754, 757 (Iowa 1988)

State v. Williams, 637 N.W.2d 733, 745 (Wis.2002)

3). No meaningful new evidence was discovered by the State after Beres's guilty plea. But even if there had been new evidence, it would not relieve the State of its obligations under the plea agreement.

Authorities

State v. Kuchenreuther, 218 N.W.2d 621, 624 (Iowa 1974)

State v. Bergmann, 600 N.W.2d 311, 313 (Iowa 1999)

State v. Lopez, 872 N.W.2d 159, 180 (Iowa 2015)

State v. Weig, 285 N.W.2d 19, 21 (Iowa 1979)

P. Westen & D. Westin, A Constitutional Law of Remedies for Broken Plea Bargains, 66 Calif.L.Rev. 471, 509 (1978)

Scarborough v. State, 945 A.2d 1103, 1115 (Del. 2008)

4). The informal out-of-court interaction between the prosecutor and defense counsel on the morning of sentencing neither modified nor nullified the already binding plea agreement that was placed on the plea record.

Authorities

State v. Macke, No. 18-0839, --- N.W.2d ----, 2019 WL 4382985, at *9 (Iowa Sept. 13, 2019)

State v. Loye, 670 N.W.2d 141, 148-149 (Iowa 2003)

Cunningham v. Novak, 322 N.W.2d 60, 62 (Iowa 1982)

State v. Coleman, No. 12–1557, 2013 WL 3458181, at *3 (Iowa Ct. App. July 10, 2013)

State v. Weig, 285 N.W.2d 19, 20-21 (Iowa 1979)

State v. Powell, No. 17-0882, 2018 WL 3912110, at *4 (Iowa Ct. App. Aug. 15, 2018)

State v. Foy, 574 N.W.2d 337, 339–40 (Iowa 1998)

State v. Hovind, 431 N.W.2d 366, 369 (Iowa 1988)

State v. Frencher, 873 N.W.2d 281, 284 (Iowa 2015)

5). Dismissal of the instant prosecution (Poweshiek Co. FECR010833) is required.

Authorities

Iowa R. Crim. Pro. 2.8(2)(c)

Iowa R. Crim. Pro. 2.10(2)

State v. Macke, No. 18-0839, --- N.W.2d ----, 2019 WL 4382985, at *8-9 (Iowa Sept. 13, 2019)

State v. Lopez, 872 N.W.2d 159, 180 (Iowa 2015)

Santobello v. New York, 404 U.S. 257, 262 (1971)

Mabry v. Johnson, 467 U.S. 504, 509 (1984)

State v. Williams, 637 N.W.2d 733, 744 (Wis. 2002)

State v. Kuchenreuther, 218 N.W.2d 621, 623 (Iowa 1974)

State v. Lummus, 449 N.W.2d 95, 98–99 (Iowa Ct. App. 1989)

ROUTING STATEMENT

Retention by the Iowa Supreme Court would be appropriate, as this case provides opportunity for this Court to issue further clarification and guidance concerning the rights and duties of the government and criminal defendants under plea agreements. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(f).

Alternatively, this Court may appropriately elect to transfer this case to the Court of Appeals, as the State's breach of the parties' plea agreement is clear under established principles of existing law. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case: This is an interlocutory appeal by Defendant-Appellant Chance Beres, challenging the district court's denial of his motion to dismiss the instant prosecution (Poweshiek Co. FECR010833) as barred by the plea agreement in prior Poweshiek County case number FECR010796.

Both the current and prior prosecutions charged Beres with arson in connection with various suspicious fires

occurring in Poweshiek County between January 26, 2018 and May 27, 2018. Both prosecutions arose from the same arson investigation, and the first prosecution (FECR010796) charged Beres with the final May 27 fire, while the second prosecution (FECR010833) charged Beres with four earlier fires. At the time of Beres's arrest on the first prosecution, law enforcement already believed he was responsible for the earlier fires which would ultimately be the basis for the second prosecution. They had already collected various evidence concerning Beres in relation to those fires, and they used Beres's May 27 post-arrest interview to obtain Beres's alleged admissions and/or incriminating statements concerning the earlier fires in addition to the May 27 fire.

The State thereafter entered into a plea agreement with Beres in the first prosecution (FECR010796) providing, inter alia, that: Beres would plead guilty to the May 27 fire and "cooperate with" a sheriff's interview concerning that and earlier incidents; and the State would not charge Beres for any of the pre-May 27 fires. On July 9, 2018 Beres pled guilty to

the May 27 fire pursuant to the terms of the plea agreement. Thereafter, the State neither made any efforts to schedule an interview nor responded to Beres' affirmative inquiries into an interview. Then, in informal out-of-court communications on the morning of sentencing, the State advised Beres that it might wish to file additional charges at some point in the future, and invited Beres to withdraw his guilty plea so as to relieve the State of its obligations under the plea agreement. Beres declined, and informed the State that he had been and remained willing to participate in an interview at any time.

Subsequently, about a month after Beres had been sentenced on his guilty plea to the May 27 fire in FECR010796, the State instituted the instant prosecution in Poweshiek Co. FECR010796 charging Beres with four earlier fires. Beres responded by filing a motion to dismiss the second prosecution as barred by the plea agreement in the earlier prosecution, but such motion was denied by a February 4, 2019 order of the district court.

Beres obtained discretionary review and now argues on appeal, as he did below, that the instant prosecution (FECR010833) must be dismissed as barred by the plea agreement in the earlier case (FECR010796).

Facts & Course of Proceedings: The minutes of testimony allege the following.

a). Pre-Charge Investigation:

From January through May 2018, there were a number of unexplained fires in Poweshiek County and nearby areas, including: (1) a January 26, 2018 fire involving a pole barn containing hay bales at 3596 Highway 146, Grinnell, IA 50112 (the basis for Count 1 of FECR010833); (2) an April 12, 2018 grass fire on private property at 392 430th Ave., Grinnell, IA 50112 (the basis for Count 4 of FECR010833); (3) an April 29, 2018 grass and shed fire at the county-owned Fox Forest Wildlife conservation area, 1159 500th Ave., Montezuma, IA (the basis for Count 3 of FECR010833); (4) an April 29 nighttime grass-fire at 1435 510th Ave., Montezuma, IA 50171 and an April 30, 2018 early morning fire involving an

abandoned two-story farmhouse at the same location (the basis for Count 2 of FECR010833); and (5) a May 27, 2018 fire at an abandoned barn just east of 1715 500th Ave., Montezuma, IA (the basis for the sole charge in FECR010796). (FECR010796 TI & Min. with Attachment; FECR010833 Complaints 1-4, TI[1], Min: Narrative, and Min: Attachment at pp.1-6, 15, 31, 45, 57, 59, 78, 80)(App. pp. 8-9, 34-36; Conf. App. 6-10, 13-31, 90, 56, 70, 82, 84, 103, 105). Twenty-year-old Chance Beres, a Montezuma firefighter and Grinnell paramedic, "had been involved in many of the suspicious fires, specifically in reporting the fires, responding to the fires, and/or being prepared to respond to the fires." (FECR010796 Min: Narrative p.1)(Conf. App. p. 6). See also (FECR010796 Complaint; Sent. Tr. p.5 L.24-p.6 L.1)(Conf. App. pp. 4-5)

[1] In the second prosecution (FECR010833) the criminal complaints identified each fire by date, structure, and address. But the trial information that followed generally referred to each fire only by the structure involved, and identically listed the date for each of the four counts as "on or about April 12, 2018". Compare (FECR010833 Complaints 1-4)(Conf. App. pp. 13-20), with (FECR010833 TI)(App. pp. 34-36).

(defendant's age); (FECR010833 Min: Attachment p.22-23)(Conf. App. pp. 47-48) (employment).

On or about February 20, 2018, investigator Lucas Ossman of the State Fire Marshall's Office and Deputy Steve Kivi of the Poweshiek County Sheriff's Office commenced an arson investigation concerning the area fires. The investigation was triggered by a phone call from the Grinnell Fire Chief expressing the belief that the January 26 fire and a February 20 fire occurring at the same farm property may both have been intentionally set. Suspicion initially focused on an unrelated male individual whose family lived in the area, but on or about March 7 that other individual was ruled out as a suspect. (FECR010833 Min: Attachment p.12)(Conf. App. p. 37).

By early April 2018, fire investigator Ossman believed the fires were being intentionally set by a firefighter. (FECR010833 Min: Attachment p.12)(Conf. App. p. 37). On or about April 30, 2018, suspicion focused specifically on Beres, who had both called in and responded with the Montezuma

fire department to the April 30 structure fire at 1433 510th Avenue. Beres had recently joined the Montezuma fire department on April 25, 2018, and had also been working as a paramedic for Midwest Ambulance Service in Grinnell since July 2017. (FECR010833 Min: Attachment pp.13, 22-23)(Conf. App. pp. 38, 47-48).

On April 29 at approximately 9:41 p.m., the Montezuma fire department had been called to a grass fire at 1433 510th Avenue in Montezuma. Beres "responded initially [to that fire] with the grass truck on his own and then returned and responded with other firefighters [in] a different truck." A few hours later at 2:46 a.m. on April 30, Beres both reported and then responded with the Montezuma fire department to the structure fire of an abandoned farmhouse at the same location. Fire personnel reported Beres had been ready to respond to the April 30 fire before the other firefighters, and that he had made "odd comments" at the scene while responding to both fires. On April 30, Deputy Kivi conducted a plain view examination of Beres's truck, and observed

accelerants and possible fire-starting materials inside. (FECR010833 Min: Attachment pp.13, 22-23)(Conf. App. pp. 38, 47-48).

Based on the foregoing, an April 30, 2018 search warrant was obtained for placement of a GPS tracker Beres's vehicle. (FECR010833 Min: Attachment pp.35-43)(Conf. App. pp. 60-68). The GPS warrant application stated a belief that Beres "has committed and is committing" arsons, including specific references to the April 29 and April 30 fires at 1433 510th Avenue. (FECR010833 Min: Attachment pp.37-39)(Conf. App. pp. 62-64). The warrant application was approved, and the GPS tracker was attached to Beres's vehicle the same day. (FECR010833 Min: Attachment p.13)(Conf. App. p. 38).

Also on April 30, 2018, Ossman and Kivi were made aware of an earlier April 12, 2018 fire which had occurred at 9:19 p.m. at 392 430th Ave. Grinnell, as well as an earlier April 29, 2018 grass fire which had occurred at 12:59 p.m. at the county-owned Fox Forest Wildlife Area of 1159 500th Ave., Montezuma, IA. These two fires (later charged as Counts 3-4

of FECR010833) had not initially been noted as suspicious when they occurred on April 12 and April 29; but given the other suspicious fires in the vicinity over the following weeks, the April 12 Grinnell grass fire as well as the April 29 Fox Forest Conservation Area fire were both reported to law enforcement on April 30 as also being suspicious. The dispatch record from the April 12 fire indicated the reporting party had seen a vehicle potentially consistent with Beres's truck. (FECR010833 Min: Attachment pp.60, 78)(Conf. App. pp. 85, 103).

Investigators contacted other area fire authorities (including those in Grinnell, Glenwood, Malvern, and in Mills County), inquiring into Beres. By May 2, 2018, investigators learned from such fire authorities that Beres had a history of "being associated with" fires, fire departments, and calls for service since the time he was approximately 17 years old. (FECR010833 Min: Narrative p.2; Min: Attachment pp.13, 50)(Conf. App. pp. 22, 38, 75).

On May 7, 2018, investigators obtained Beres's computerized card access record for the Grinnell Public Safety Building, showing the dates, times, and doors accessed by Beres at that building for the period from August 29, 2017-May 7, 2018. (FECR010833 Min: Attachment p.50)(Conf. App. p. 75).

On May 11, 2018, investigators obtained a search warrant for Beres's Verizon cell phone records (including cell tower and location information) for dates ranging from January through April 2018. (FECR010833 Min: Attachment pp.28-34)(Conf. App. pp. 53-59). The search warrant application referenced a number of fires (occurring January 26, February 5, February 20, April 12, April 29, April 30, and approximately10 grass fires between April 18 and April 30, 2018), and then stated: "Law enforcement believes Beres was involved in starting these fires, and believes that obtaining his cell phone records for these dates will show Beres was in the area of these fires near the time they would have been lit, and/or to become familiar with the area before lighting the

fires, and/or to re-visit the scene." (FECR010833 Min: Attachment pp.30-31)(Conf. App. pp. 55-56). The requested cell phone and locational records were received by investigators on May 16, 2018. (FECR010833 Min: Narrative p.2; Min: Attachment p.23)(Conf. App. pp. 22, 48).

On May 27, 2018, emergency responders were called to a barn fire just east of 1715 500th Ave., Montezuma, IA. Investigators examined the GPS tracking record for Beres's vehicle and determined Beres was at the scene prior to the fire being reported. At approximately 11 p.m. on May 27, Beres was arrested for the May 27 fire. (FECR010833 Min: Narrative p.2; Min: Attachment pp.3-4)(Conf. App. pp. 22, 28-29). On the same day, Beres submitted to an hour-and-a-half-long post-arrest interview[2] during which he was questioned and allegedly made admissions or incriminating statements concerning not only the May 27 fire but also the earlier fires,

[2] The interview commenced in the late evening of May 27 and concluded in the early morning of May 28, 2018. (FECR010833 Min: Attachment pp.15-16)(Conf. App. pp. 40-41).

namely: admitting that he started the May 27 Montezuma barn fire (the basis for FECR010796)[3]; admitting that he started the April 12 grass fire at 392 430th Avenue (later charged as Count 4 in FECR010833)[4]; stating that he'd tried but failed to set fire to the wildlife area at 1159 500th a day before the April 29 fire occurred at that same location (later charged as Count 3 in FECR010833); acknowledging that he "was at the scene of [the January 26 barn and hay bales] fire [at 3596 Hwy 146], for no apparent reason minutes before it would have started then left" and "drove back by a few minutes later", "noticed the fire", called in the fire "on the non-recorded number", and then responded to the fire with Midwest Ambulance (later charged as Count 1 in FECR010833)[5]; and admitting that he'd driven by the scene prior to the April 30 abandoned-farmhouse fire at 1435 510th Ave (later charged as Count 2 in FECR010833), and may have

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[3] See (FECR010833 Min: Attachment p.15)(Conf. App. p. 40).
[4] See (FECR010833 Complaint re: 392 430th Ave; Min: Attachment pp.4, 59)(Conf. App. pp. 13-14, 29, 84).
[5] See (FECR010833 Complaint re: 3596 Hwy 146; Min: Attachment pp.4, 16-17)(Conf. App. pp. 19-20, 29, 41-42).

started the initial grass fire at that location[6]. During that interview, law enforcement also had Beres's cell phone location information, and confronted him with that information. (FECR010833 Min: Attachment p.3)(Conf. App. p. 28).

Subsequent to Beres's May 27 arrest in the first case (FECR010796), law enforcement issued a June 1, 2018 Subpoena to Midwest Ambulance requesting Beres's time card records; such time card records were received by investigators on July 2. (FECR010833 Min: Attachment p.51)(Conf. App. p. 76). The time card records allegedly indicated Beres responded with Midwest Ambulance to several of the fires, including the January 26 and April 12 fires. (FECR010833 Min: Attachment pp.16, 61-62)(Conf. App. pp. 41, 86-87).

As discussed below, Beres's guilty plea under the plea agreement at issue was entered in the first case (FECR010796) on July 9, 2018. No new information or evidence of any significance appears to have been discovered by investigators

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[6] See (FECR010833 Complaint re: 1435 510th Ave; Min: Attachment p.3)(Conf. App.pp. 17-18, 28).

after Beres's July 9 guilty plea. On July 28, 2018, fire investigator Ossman conducted a scene investigation at 1159 500th Ave., the location of the April 29, 2018 Fox Forest Wildlife Conservation Area grass and shed fire; but nothing of significance was noted in connection with this scene investigation, only that there was fire damage to wood fence posts and that the shed contained minimal items at the time of the fire. (FECR010833 Min: Attachment p.79)(Conf. App. p. 104). The minutes for the second prosecution (FECR010833) also included reports by investigator Ossman concerning each of the charged fires, and listing "Date[s] Typed" of: September 25, 2018 (report re: Count 1 – July 26 fire), September 28, 2018 (report re: Count 2 – April 30 fire), September 26, 2018 (reports re: Count 4 – April 12 fire, and Count 3 – April 29 Fox Forest Wildlife Area fire). Each such report stated as its conclusion that Beres committed Arson in connection with each charged fire, and that "This case should be considered closed pending any new developments." But such reports merely summarized and relied on the information received

much earlier in the investigation, without referencing any new information or evidence recently obtained. (FECR010833 Min: Attachment pp.12-18, 49-54, 60-65, 78-82)(Conf. App. pp. 37-43, 74-79, 85-90, 103-107). Along the same lines, the minutes similarly included a report by Deputy Kivi dated November 6, 2018, but that too only summarized the information received much earlier in the investigation, up through the time of Beres's May 27 post-arrest interview. (FECR010833 Min: Attachment pp.58-59)(Conf. App. pp. 83-84).

b). Charge and Plea in Poweshiek Co. FECR010796 – May 27 Fire

The first prosecution (Poweshiek Co. FECR010796) concerned the May 27 Montezuma barn fire, and charged Beres with: Arson in the Second Degree (value exceeding $500), a Class C Felony in violation of Iowa Code section 712.3. The matter was commenced by Deputy Kivi's filing of a May 28, 2018 criminal complaint. (FECR010796 Complaint)(Conf. App. pp. 4-5). Beres was already in custody,

having been arrested the previous day (May 27). (FECR010833 Min: Narrative p.2)(Conf. App. p. 22). County Attorney Bart Klaver subsequently filed a June 5, 2018 trial information formally charging Beres with Arson Second Degree in connection with the May 27 fire. (FECR010796 TI)(Conf. App. pp. 8-9).

The parties entered into plea negotiations with County Attorney Klaver representing the State, and defense counsel Peter Stiefel representing Beres. (FECR010796 5/29/18 Order Appointing; 5/29/18 Appearance; 6/5/18 TI)(App. 6-9). According to County Attorney Klaver, "[d]uring plea negotiations…, investigations were ongoing into the source of several suspicious fires that had broken out in Poweshiek County", and "[i]nvestigators suspected… the defendant was responsible for many of the suspicious fires". Investigators wished "to interview the defendant about the various other suspicious fires to confirm or dispel their suspicions". "The benefit to the State of conducting the interview would have been to expedite the open investigations, if not wholly resolve

the matters." (FECR010833 1/9/19 State Resist. MTD ¶¶4-6, 8)(App. p. 44).

On June 29, 2018, the court was notified that the parties had reached a plea agreement. (FECR010796 6/29/18 Def. Mot. to Set Plea Hearing; 6/29/18 Order Setting Plea Hearing)(App. pp. 13-15). A guilty plea hearing was held before Judge Shawn R. Showers on July 9, 2018. As required under Iowa Rules of Criminal Procedure 2.8 and 2.10, the parties' plea agreement was stated on the record during the guilty plea hearing and was confirmed by defense counsel, defendant, and the prosecutor as follows:

> THE COURT: What is the plea agreement in the case?
>
> MR. STIEFEL: The plea agreement to my understanding, Your Honor, is in exchange for Mr. Beres' guilty plea today, at the sentencing hearing, both parties will have the option of arguing for whatever sentence they think is appropriate.
>
> And at least on Mr. Beres' behalf, that would include the ability to argue for a deferred judgment.
>
> It's a further provision of the plea agreement that if Mr. Beres successful [sic] enters his guilty plea today, that the State and the defendant would both request that he be released from jail under the

pretrial supervision of the 8th Judicial District Department of Correctional Services.

And it is the further provision of the plea agreement that Mr. Beres agrees to cooperate with an interview with the Poweshiek County Sheriff's Office regarding the incident and other potential incidents that led to his current criminal charges, and that if Mr. Beres cooperates with the interview and is truthful to the satisfaction of the sheriff's department in the interview, that the State will file no further charges against Mr. Beres for any alleged incidents that may have occurred prior to his date of incarceration in this case.

THE COURT: Mr. Beres, is that your understanding of the plea agreement?

MR. BERES: Yes, Your Honor.

THE COURT: Mr. Klaver, is that your understanding of the plea agreement?

MR. KLAVER: It is, Your Honor.

THE COURT: And, Mr. Beres, you understand that the sentencing judge, whoever that may be, will ultimately decide what your sentence is?

MR. BERES: Yes, Your Honor.

THE COURT: Have any threats or promises, other than the plea agreement, been made to get you to plead guilty?

MR. BERES: No, Your Honor.

(FECR010796 Plea Tr. p.1 L.1-25, p.8 L.3-p.9 L.17) (emphasis added). On that same date, Beres entered and the court accepted a plea of guilty to Arson Second Degree for the May 27 fire, pursuant to the terms of the plea agreement. (FECR010796 Plea Tr. p.1 L.1-25, p.12 L.14-22-p.13 L.1; 7/9/18 Order re: Plea)(App. pp. 16-18). On the joint request of the parties under the plea agreement, the court ordered Beres released on Department of Corrections Supervision pending sentencing. (FECR010796 Plea Tr. p.15-19; 7/9/18 Order for Release)(App. pp. 19-20). The plea court scheduled sentencing for October 1, 2018 at 10:30 a.m. (FECR010796 Plea Tr. p.12 L.24-p.13 L.1; 7/9/18 Order re: Plea)(App. pp. 16-18).

Pursuant to the plea agreement, Beres thereafter remained at all times willing to cooperate in an interview. But no representative of the State ever contacted Beres or his attorney to arrange an interview following the July 9 plea hearing. (FECR010833 Def. MTD p.2; MTD Tr. p.6 L.10-p.7 L.16, p. 14 L.6-13)(App. p. 41). Having not heard anything

from the State, defense counsel called and left voicemails for Poweshiek County Sheriff's Deputy Steve Kivi on September 24 and September 28, 2018, inquiring into such interview scheduling. Defense counsel's calls were never returned by Deputy Kivi nor any other representative of the State. (FECR010833 Def. MTD p.2; MTD Tr. p.16 L.5-16)(App. p. 41).

After receiving defense counsel's voicemails, Deputy Kivi informed the County Attorney "that the investigations into the suspicious fires had been concluded and that an interview of the defendant would not serve any purpose." (FECR010833 State Resist. MTD ¶11)(App. p. 45). See also (MTD Tr. p.16 L.17-25). Sentencing had been scheduled for Monday October 1 at 10:30 a.m. (FECR010796 7/9/18 Order Re: Guilty Plea)(App. pp. 16-18). At 8:53 a.m. on the morning of October 1, about an hour-and-a-half prior to the sentencing hearing, the County Attorney sent an email to defense counsel stating:

> Peter,
>
> I wanted to let you know in advance of the hearing that Chance Beres is likely going to be getting additional charges. I spoke with the [sic] Kivi Friday

> and then we are scheduled to meet Tuesday along with the fire marshal (Kivi is off today). I didn't want to spring this on you because it is late in the process, however, the entire purpose of the "plea bargain" if it can even be called that, was to aid in the investigation. It would appear that the investigation is concluded and so there is nothing Mr. Beres [sic] interview would do to assist at this point.
>
> Bart K. Klaver
> Poweshiek County Attorney
> […]

(FECR010833 State's Exhibit 1)(App. p. 58). See also (FECR010833 State Resist. MTD ¶12)(App. p. 45).

Thereafter, during informal discussions outside of the court's presence prior to the 10:30 a.m. sentencing hearing, the county attorney "informed defense counsel orally that additional charges against the defendant would likely be filed" or that "he was considering filing additional charges." (FECR010833 State Resist. MTD ¶13; 3/6/19 Applic. Interloc. Appeal ¶4)(App. pp. 45, 68-69). No additional charges had yet been filed, and it appeared the State had not yet reached a final decision on whether additional charges would be sought for the earlier fires (as the County Attorney stated only that

unspecified additional charges were "likely", and that he needed to discuss the matter further with investigators subsequent to sentencing). However, the county attorney nevertheless "suggested to defense counsel that the sentencing hearing not be held on October 1, 2018, and that the defendant attempt to withdraw the plea… if the defendant believed the situation to be inequitable", stating that "despite any missed deadlines or limitations on withdrawing the plea, the State would take the position that the defendant should be allowed to withdraw the plea." (FECR010833 State Resist. MTD ¶14)(App. p. 45). "Defense counsel indicated to the [county attorney] that he would inform the defendant of the new developments and possibility of withdrawing the guilty plea." (FECR010833 State Resist. MTD ¶15)(App. p. 45). "After consulting with the defendant, defense counsel told the [county attorney] that the defendant did not want to withdraw his guilty plea and wanted to proceed to sentencing." (FECR010833 State Resist. MTD ¶16)(App. p. 45). See also (MTD Tr. p.8 L.3-16). During this discussion defendant,

through defense counsel, also stated to the County Attorney "that he was willing, and had been since his guilty plea hearing, to participate in an interview and would submit to one at any time." (FECR010833 MTD p.2)(App. p. 41).

The matter proceeded to sentencing that morning as scheduled, and Judge Lucy Gamon presided over the sentencing hearing. Neither party raised any issue to the sentencing court concerning either a breach or a modification of the plea agreement terms from those stated on the record of the earlier plea hearing. A PSI report had been completed and was available to the court and the parties at sentencing. The PSI report included allegations (recited by County Attorney Klaver to the presentence investigator) of Beres's involvement in other alleged fires. (FECR010796 PSI p.2)(Conf. App. p. 12). Defense counsel objected to any consideration of such unrelated fires by the sentencing court, the county attorney agreed they should not be considered, and the court agreed not to consider the other allegations, treating them as deleted from the PSI report. (FECR010796 Sent. Tr. p.2 L.16-p.5

L.22). The sentencing court then inquired into the parties' recommendations for Beres's sentence. Beres and his attorney argued for a deferred judgment (Sent. Tr. p.5 L.15-p.8 L.11, p.10 L.3-p.11 L.8), while the State argued for imposition of a 10-year prison sentence (Sent. Tr. p.8 L.11-p.10 L.2). The sentencing court ultimately entered a deferred judgment and placed Beres on five years probation, contrary to the State's request for incarceration. (Sent. Tr. p.11 L.13-p.15 L.2).

c). Subsequent Charges in Poweshiek Co. FECR010833 – for earlier fires

About a month after Beres was sentenced on his plea to the May 27 fire in FECR010796, the State commenced a second prosecution (FECR010833) charging Beres with earlier fires, namely: the January 26, 2018 fire involving a pole barn containing hay bales at 3596 Highway 146, Grinnell, IA 50112 (Count 1); the April 30, 2018 fire at an abandoned two-story farmhouse at 1435 510th Ave., Montezuma, IA 50171 (Count 2); the April 29, 2018 grass and shed fire at the county-owned Fox Forest Wildlife conservation area, 1159 500th Ave.,

Montezuma, IA (Count 3); and the April 12, 2018 grass fire on private property at 392 430th Ave., Grinnell, IA 50112 (Count 4). (FECR010833 Complaints 1-4; TI; Min: Narrative; Min: Attachment at pp.1-6, 15, 31, 45, 57, 59, 78, 80)(Conf. App. pp. 13-31, 40, 56, 70, 82, 84, 103, 105).[7]

As with the prior case, the prosecution was commenced by criminal complaints submitted by Poweshiek County Sheriff's Deputy Steve Kivi. (FECR010833 Complaints 1-4)(Conf. App. pp. 13-20). Beres was arrested on the complaints the following day, on October 31, 2018. (FECR010833 Min: Attachment p.4; Def. MTD p.2)(Conf. App. p. 29; App. p. 41). All four complaints alleged Beres made admissions or incriminating statements concerning the fires charged herein (FECR010833) at the time of his earlier May 27, 2018 interview following arrest in FECR010796. The

[7] The FECR010833 criminal complaints identified each fire by date, structure, and address. The subsequent Trial Information instead generally referred to each fire only by the structure involved, and identically listed the date for each of the four counts as "on or about April 12, 2018". Compare (FECR010833 Criminal Complaints 1-4) with (FECR010833 TI)(Conf. App. pp. 13-20; App. pp. 34-36).

complaints also referenced cell phone location information, which had been received by investigators May 16, 2018, and had been used by them in the May 27 interview. (FECR010833 Complaints 1-4; Min: Narrative pp.2-3; Min: Attachment pp.23 & 33-34)(Conf. App. pp. 13-20, 22-23, 48, 58-59).

A trial information followed on November 9, 2018, formally charging Beres on the earlier fires with: three counts of Arson in the Second Degree (value exceeding $500), Class C felonies in violation of Iowa Code section 712.3 (2017); and one count of Arson in the Third Degree (value not exceeding $500), an Aggravated Misdemeanor in violation of Iowa Code section 712.4 (2017). As with the prior case, Poweshiek County Attorney Bart Klaver filed the trial information and represented the State throughout the prosecution. (FECR010833 11/9/18 TI)(App. pp. 34-36). Defense counsel Peter Stiefel again represented Beres throughout the case. (FECR010833 11/2/18 Appearance for D)(App. p. 28).

On November 2, 2018, defense counsel requested preparation of the guilty plea and sentencing transcripts in the prior case (FECR010796), noting that "defendant claims that the state's filing of the charges in the present case violate the plea agreement… in… FECR010796." (11/2/18 Def. Mot. for Prep. of Transcripts ¶1)(App. p. 29). See also (11/2/18 Mot. for Bond Reduction ¶4)(App. p. 29). The transcripts were subsequently authorized and prepared. (11/5/18 Order for Transcripts)(App. pp. 32-33).

On December 29, 2018, Beres filed a Motion to Dismiss the instant prosecution, arguing that the State's filing of charges herein for alleged conduct preceding May 27, 2018 violated the plea agreement in FECR010796. The motion argued that the State had not requested and then ultimately declined Defendant's request to sit for an interview, that the State then breached the plea agreement by filing the charges in the present case, and that the proper remedy for the State's breach was to require specific performance of the plea

agreement by dismissing with prejudice the charges in the present case (FECR010833). (Def. MTD (App. pp. 40-43).

The State filed a January 9, 2018 resistance to the Motion to Dismiss. The State's resistance made no suggestion that any interview had been requested by the State and rejected by Beres, nor a suggestion that Beres had failed to cooperate in any efforts of the State to schedule such interview. To the contrary, the State acknowledged that defense counsel, upon not hearing anything from any representative of the State, had affirmatively reached out to Deputy Kivi twice during the week prior to sentencing to inquire into the matter of the interview. Nevertheless, the State argued the defense motion to dismiss should be denied because:

> The State did not breach any plea agreement, specifically the agreement to refrain from filing any new charges against the defendant was contingent upon the defendant providing an interview to the investigators' satisfaction. The condition precedent of [sic] never occurred, and therefore, the State was not bound under the agreement to refrain from filing new charges.

(State's Resist. to MTD ¶20a)(App. pp. 45-46).

On February 3, 2019, defense counsel filed a brief in support of Beres's motion to dismiss. (2/3/19 Def.'s Brief)(App. pp. 49-56). The defense brief emphasized: that prosecutors are bound to meticulous standards of compliance with both the terms and spirit of plea agreements, including the responsibility to properly carry out all obligations or promises in good faith and under norms of fair play; that the State cannot unilaterally withdraw from or modify the terms of a plea agreement after a defendant has detrimentally relied upon it by entering his guilty plea; that the State's failure to abide by the terms of the plea agreement violates due process under both the State and Federal constitutions; and that when the State's failure to abide by the plea agreement is based on an allegation that Defendant did not fulfill his portion of the agreement, the burden is on the State to prove Defendant failed to live up to his end of the bargain. The Defense brief also emphasized that the State could not justify the filing of charges herein on the argument that Defendant has not

provided an interview because: (1) the plea agreement neither provided a deadline by which such interview was required to be held, nor required defendant to be the one to initiate contact with the State to arrange the interview; (2) the plea agreement itself informed the State that Defendant was willing to provide an interview but the State never arranged an interview and, to the contrary, when Defendant attempted to contact the State to arrange an interview the State did not respond and ultimately refused Defendant's interview request; (3) and the State's institution of additional charges, after failing to accommodate an interview and thwarting Defendant's own efforts to set up an interview with the apparent purpose of relieving itself of its promise not to file additional charges, violated both the terms and the spirit of the agreement. As to remedy, the defense brief argued that (a) the instant case must be dismissed with prejudice or, alternatively, that (b) the instant case should be dismissed without prejudice to allow the State to accommodate the

defendant's request for an interview pursuant to the plea agreement. (2/3/19 Def. Brief)(App. pp. 49-56).

The State then filed a February 4, 2019 memorandum of law in support of its resistance to the motion to dismiss. Such memorandum argued that "The performance of a plea bargain agreement must be mutual" and "When a defendant fails to uphold his end of the bargain, the State has no obligation to provide the defendant the anticipated benefits of that bargain." (2/4/19 Memo of Law ¶¶1-2)(App. p. 57) (quoting State v. Hovind, 431 N.W.2d 366, 368 (Iowa 1988)). The State's memorandum of law also cited Aschan v. Auger, 861 F.2d 520 (8th Cir. 1988), stating the Eighth Circuit there "found that… where prosecutor agreed to allow defendant to plead to a misdemeanor on the condition that the defendant complete a treatment program", the "defendant 'did not have a plea bargain; he merely had an executory agreement which would have ripened into the bargained-for misdemeanor plea if he had substantially fulfilled his obligations under the

agreement'" by completing treatment. (2/4/19 Memo of Law ¶3)(App. p. 57) (quoting Auger, 861 F.2d at 522).

A hearing on the motion to dismiss was held on February 4, 2019, before the Honorable Joel D. Yates. (1/14/19 Order Setting Hearing)(App. pp. 47-48). Beres testified stating he never refused to cooperate with an interview, was never contacted by any State representative regarding an interview, never did anything to hinder the State in conducting an interview, and was still willing even at the time of the motion to dismiss hearing to provide an interview. (MTD Tr. p.6 L.10-p.7 L.16). Deputy Kivi testified on behalf of the State, acknowledging that he'd never attempted to contact Beres following the July 9 plea hearing, and that the Deputy also never responded to the voice messages left by Beres's counsel on September 24 and September 28, 2018. (MTD Tr. p.16 L.5-16). Instead, Deputy Kivi testified "we decided to forego the interview" with Beres because: (1) from approximately July 20 through mid-September 2018, the Sheriff's Office was tied up with an unrelated investigation; and (2) Deputy Kivi then

received, in mid-September 2018, some unspecified but "damning" evidence against Beres which made an interview with him unnecessary. (MTD Tr. p.12 L.11-p.13 L.6, p.14 L.14-p.15 L.25, p.16 L.17-25). Neither Deputy Kivi nor the County Attorney specified what this purportedly meaningful new evidence was. Deputy Kivi's testimony, however, suggested he ultimately had second thoughts on the desirability of the plea deal already reached, coming to the conclusion: "if we do interview [Beres] and we didn't charge him with the fires" then "I guess, my thought was what's the point." (MTD Tr. p.13 L.2-3, p.15 L.13-19). In addition to the testimony of Beres and Deputy Kivi, the court took judicial notice of the court file in FECR010796, the guilty plea and sentencing transcripts from FECR010796 were admitted into evidence as Defense Exhibits 1 and 2, and a copy of the County Attorney's October 1 8:53 a.m. email to defense counsel was admitted into evidence as State's Exhibit A. (MTD Tr. p.9 L.1-p.10 L.3, p.18 L.5-23). The district court took the

matter under advisement, stating that a written ruling would follow. (MTD Tr. p.21 L.15-19).

Later that same day, the district court issued a written ruling denying Defendant's Motion to Dismiss. The court's ruling stated, in pertinent part, as follows:

> On February 4, 2019, this case came before the Court for hearing on the Defendant's Motion to Dismiss and the State's Resistance thereto. The State was represented by Poweshiek County Attorney Bart Klaver. The Defendant was personally present with his attorney, Peter Stiefel.
>
> On or about July 9, 2018, this Defendant tendered a plea of guilty in companion case number FECR010796. On that date, sentencing was set for October 1, 2018. The State and Defendant discussed the possibility of the Defendant being interviewed prior to sentencing about his involvement in other potential crimes. The interview never happened.
>
> The State says they obtained additional, new information linking this Defendant to additional crimes, therefore negating the need for the interview. The Defendant claims he reached out to the State regarding the interview, but acknowledges that it was close to the sentencing date. Regardless, the Defendant and Defendant's counsel were notified of potential new charges prior to the sentencing date.

> Despite the awareness of additional charges, the Defendant voluntarily went foward [sic] with the sentencing hearing. The Defendant did not seek a continuance or withdrawal of his plea of guilty, nor did the Defendant lodge any type of objection.
>
> For all of the reasons set forth in the State's Resistance, the Court finds the Defendant's Motion to Dismiss should be and is hereby **DENIED**. Costs for said hearing are assessed to the Defendant.

(2/4/19 Ruling Denying MTD)(App. pp. 61-63).

On March 6, 2019, Beres filed an application for interlocutory appeal to the Supreme Court, challenging the district court's denial of his motion to dismiss. (3/6/19 Applic. Interloc. Appeal)(App. pp. 67-75). Counsel argued the district court's ruling was improper and erroneous.

First, defense counsel noted that the State's promise not to file charges for earlier conduct if defendant cooperated with an interview was not merely "discussed" by the parties as suggested in the court's ruling – rather it was an explicit term of the plea agreement placed on the plea record, and binding the State. (3/6/19 Applic. Interloc. Appeal ¶8a)(App. pp. 70-71).

Second, defense counsel argued the district court's emphasis on Defendant having been "notified of potential new charges prior to the sentencing date"[8] but proceeding with sentencing rather than "seek[ing] a continuance or withdrawal of his guilty plea" or "lodg[ing] any type of objection" was also erroneous. Counsel noted that once a guilty plea has been entered by a defendant, the plea agreement becomes binding and the State cannot unilaterally withdraw from it (even by informing defendant of the possibility that it may desire to act in violation of the agreement in the future). Further, counsel also noted that Beres had neither any basis nor any obligation to object on grounds of a breach of the plea agreement by the State at the time of sentencing because, at that time, there had not actually been any breach by the State as it had not

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[8] Note that this finding by the district court was factually incorrect. Defendant and defense counsel were notified of potential new charges on the date of sentencing – while the notification occurred an hour-and-a-half prior to the sentencing *hearing*, it did not occur prior to the sentencing *date*. See (FECR010796 7/9/18 Order Re: Guilty Plea; Sent. Tr. p.1 L.1-25; FECR010833 State's Exhibit 1; 1/9/19 State Resist. MTD ¶¶12-13; Applic. Interloc. Appeal ¶4)(App. pp. 16-18, 58, 45, 68-69).

filed additional charges for alleged incidents preceding May 27, 2018. (3/6/19 Applic. Interloc. Appeal¶¶8b-c)(App. pp. 71-73).

The State filed a March 20, 2019 resistance, stating that interlocutory appeal should be granted only in exceptional situations, and that the instant matter should instead await direct appeal from a conviction if one is ultimately obtained by the State. (3/20/19 State's Resist.)(App. pp 76-78).

On March 21, 2019, the Supreme Court issued an order granting Defendant's application for interlocutory appeal, and staying further district court proceedings. (3/21/19 S.Ct. Order)(App. pp. 79-80). The Appellate Defender Office was appointed to represent Defendant on appeal. (3/25/19 Order Appointing)(App. pp. 65-66).

Any other facts or proceedings relevant to the issue on appeal will be discussed below.

ARGUMENT

The district court erred in denying Defendant's Motion to Dismiss the instant prosecution (Poweshiek Co. FECR010833) as barred by the plea agreement in the prior case (Poweshiek Co. FECR010796).

A. Preservation of Error: Error was preserved by Beres's Motion to Dismiss, and the district court's denial thereof. (FECR010833 12/29/18 MTD; 2/3/19 Def.'s Brief in Support; 2/4/19 Ruling Denying MTD)(App. pp. 40-46, 61-63). Interlocutory appeal was sought and granted on this issue. (3/6/19 Applic. Interloc. Appeal; 3/21/19 S.Ct. Order)(App. pp. 67-75, 79-80).

B. Standard of Review: "When faced with a motion to dismiss as a sanction for the State's alleged repudiation of a plea agreement, the district court has the same limited discretion it has 'when ruling on a motion to dismiss for failure to provide a speedy trial under Iowa Rule of Criminal Procedure [2.33(2)].'" State v. Dudley, 856 N.W.2d 668, 675 (Iowa 2014) (quoting State v. Hovind, 431 N.W.2d 366, 368 (Iowa 1988)). "If the district court abused its limited discretion

by finding the State did not repudiate the plea agreement, [our appellate courts] will reverse its finding." Id. "When the district court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable, an abuse of discretion occurs." Id. "When a ground or reason is based on an erroneous application of the law or not supported by substantial evidence, it is untenable." Id.

The issue herein is raised not only under the Rules of Criminal Procedure, but also under an assertion of constitutional due process rights. (12/29/18 MTD; 2/3/19 Def.'s Brief)(App. pp. 40-43, 49-56). Review of the constitutional challenge is de novo. State v. Aschan, 366 N.W.2d 912, 916 (Iowa 1985).

C. Discussion: The integrity of the plea-bargaining process "presuppose[s] fairness" both "in securing agreement between an accused and a prosecutor" and in the performance of such agreement. State v. Lopez, 872 N.W.2d 159, 170 (Iowa 2015) (quoting Santobello v. New York, 404 U.S. 257, 261 (1971)). Prosecutors are thus held "to the most meticulous

standards of both promise and performance", and "violations of either the terms or the spirit of the agreement" require relief. Id. at 171 (quoting State v. Bearse, 748 N.W.2d 211, 215 (Iowa 2008)).

A "prosecutor's obligation to scrupulously comply with the letter and spirit of plea agreements" means that even technical compliance will not suffice if the prosecutor otherwise "undercut[s] the plea agreement". Lopez, 872 N.W.2d at 173. Prosecutors are obligated to act in good faith and abide by principles of fair dealing with regard to the agreement. Bearse, 748 N.W.2d at 215.

Iowa Rules of Criminal Procedure 2.8(2)(c) and 2.10(2) "require that any plea agreement be disclosed 'in open court *at the time the plea is offered*.'" State v. Loye, 670 N.W.2d 141, 149 (Iowa 2003) (emphasis in original). This requirement is necessary to allow the plea court to ensure the guilty plea comports with the due process requirement of being knowing and voluntary. See State v. Macke, No. 18-0839, --- N.W.2d ---, 2019 WL 4382985, at *9 (Iowa Sept. 13, 2019); State v.

Coleman, No. 12–1557, 2013 WL 3458181, at *3 (Iowa Ct. App. July 10, 2013); Mabry v. Johnson, 467 U.S. 504, 509 (1984). Thus, the terms disclosed in open court at the time the plea is offered are the only enforceable terms of the agreement. Macke, 2019 WL 4382985 at *9; Coleman, 2013 WL 3458181, at *3. If the terms recited on the plea record do not accurately capture the State's understanding of the agreement, it is incumbent on the State to correct the record at the plea proceeding. Macke, 2019 WL 4382985 at *9. Nor will terms disclosed at the plea proceeding be deemed to have been subsequently modified off the record. Id. ("The record of the proceedings in open court controls our analysis, not any off-the-record side deals."); Id. ("We are unwilling to assume the plea agreement was later modified or waived off the record."). Rather, "[t]o be enforceable against the defendant, a change in the terms of the plea agreement must be made in open court with a colloquy to confirm the defendant's guilty plea is knowing and voluntary." Id.

A plea agreement reached between the parties becomes binding on the State once the defendant pleads guilty or otherwise detrimentally relies on the agreement. Thus, the "State may withdraw from a plea bargain at any time prior to, but not after, actual entry of the guilty plea by defendant…" State v. Weig, 285 N.W.2d 19, 21 (Iowa 1979); See also State v. Dudley, 856 N.W.2d 668, 675 (Iowa 2014). Once the plea agreement has become binding, the State's failure to abide by the terms of the agreement violates not only the rules of criminal procedure, but also due process under both the State and Federal constitutions. Iowa Rs. Crim. Pro. 2.8(2)(c), 2.10(2); Macke, 2019 WL 4382985 at *8; U.S. Const. amend. XIV; Iowa Const. art. I § 9; Lopez, 872 N.W.2d at 180. If the State thereafter claims the defendant's failure to fulfill his or her own promise under the plea agreement relieved the State of its reciprocal obligation, the burden lies with the State to "show the defendant failed to live up to his or her end of the bargain." State v. Cropp, No. 07–2112, 2009 WL 139528, at *2 (Iowa Ct. App. 2009).

In the present case, there was a binding plea agreement, under which Defendant entered a guilty plea in FECR010796. Pursuant to that agreement, the State was prohibited from charging Beres for earlier alleged conduct, and Defendant had a reciprocal obligation to "cooperate" with an interview. Following Defendant's entry of his guilty plea, the State elected not to hold an interview and ultimately refused Defendant's affirmative request to schedule such interview. At no time, however, did Defendant violate his obligation to "cooperate" with an interview, and he remained willing and available to cooperate in an interview both before and after sentencing in FECR010796. Absent any showing that Beres had breached his obligation to "cooperate", the State remained bound to its reciprocal obligation not to charge Beres for earlier conduct.

Nor could the State avoid its obligations by the simple expedients of (a) informally advising Beres prior to sentencing of the possibility that the State may wish to breach the agreement (by filing additional charges) in the future, and (b) inviting Beres to withdraw his guilty plea (thereby relieving the

State of its obligations under the plea agreement). At the time of sentencing in FECR010796, the State had not yet breached the plea agreement, as no charges on earlier conduct had been filed. Indeed, the State at that time expressed the prospect of future charges as only a possibility rather than a certainty, and the State did not make explicit that the "additional charges" being contemplated were for pre-May 27 (rather than for post-May 27) conduct. Beres thus had no obligation or basis to object to a breach of the plea agreement at the time of sentencing – rather, the State's breach did not occur until approximately a month later when the State instituted the prosecution in FECR010833 charging pre-May 27 conduct. Beres did not, during the informal morning-of-sentencing discussion with the County Attorney, agree to release the State from its promise not to charge earlier conduct; nor did the State place any possible or perceived modification of the plea agreement on the record before the sentencing court.

Under these circumstances, the State's filing of the additional charges in FECR010833 violated the binding plea

agreement in FECR010796. The prosecution in FECR010833 must thus now be dismissed.

1). The 'condition precedent' was that Beres "cooperate with" the State in an interview. As Beres never breached his promise to "cooperate with" an interview, the State was not relieved of its reciprocal promise not to charge earlier conduct.

The State argued below that the "condition precedent" to its promise not to file additional charges was the actual occurrence of an interview. The State thus reasoned that, because no interview actually occurred (though this was at the election of the State), the State was not bound to its reciprocal promise not to charge earlier conduct. (State's Resist. MTD ¶20a)(App. pp. 45-46).

Defendant disagrees. The condition precedent under the plea agreement was that Defendant "cooperate" in an interview, not that such an interview actually be held. See (FECR010796 Plea Tr. p.8 L.3-p.9 L.17) ("… that Mr. Beres agrees to *cooperate with* an interview with the Poweshiek County Sheriff's Office…, and that if Mr. Beres *cooperates with*

the interview and is truthful to the satisfaction of the sheriff's department in the interview.…") (emphasis added).

The decision of whether any interview would actually be held or allowed lay within the exclusive control of the State – not the Defendant. The State's proposed interpretation (that the "condition precedent" was the *actual occurrence* of an interview) would thus leave it entirely up to the whim of the State whether Defendant would ever be permitted to submit to an interview and, thereby, whether he could ever receive the benefit of the State's promise not to file additional charges.[9] See State v. Carrillo, 597 N.W.2d 497, 500 (Iowa 1999) ("We find specious the State's suggestion that it only agreed not to resist Carrillo's right to request a suspended sentence, a promise which would have no value."); State v. Horness, 600

[9] Note that such term provided the bulk of the plea agreement and was the primary source of any benefit to Beres, who pled guilty to the offense as charged with no other charging or sentencing concession having been made by the State. Absent this term, the only benefit to Beres would be the State's joining in the defense request for Beres's release from jail on pretrial supervision for the three-month period between the plea and sentencing. (FECR010796 Plea Tr. p.8 L.3-p.9 L.17).

N.W.2d 294, 299 (Iowa 1999) (State's promise to make sentencing recommendation would be "of little value to the defendant" if it left State free to suggest more severe alternatives). Defendant's obligation under the agreement was to "cooperate" with an interview – not an obligation to himself ensure such interview take place (something it was not in his power to do). The State's reciprocal obligation was to abstain from filing any additional charges, absent Beres' violation of his obligation to "cooperate."

Beres' obligation to "cooperate with" an interview was satisfied here: (1) the terms of the plea agreement itself informed the State Beres was willing to submit to an interview; (2) when no State actor subsequently contacted Beres as to scheduling, defense counsel affirmatively reached out to Deputy Kivi on September 24 and 28 (prior to sentencing in FECR010796) inquiring into the interview; and (3) at even subsequent to the date of sentencing in FECR010796, Beres continued to remain willing to submit to an interview. At no time did Beres decline an interview, fail to return calls from

the State, or otherwise refuse, avoid, or evade any State efforts to contact him or schedule an interview. He never failed to "cooperate" because he never failed to do something the State requested of him concerning an interview or interview scheduling. Compare State v. Foy, 574 N.W.2d 337, 340 (Iowa 1998) (defendant initially complied with plea agreement promise to "cooperate" in that "he did all those things we asked him to do"; however, his cooperation eventually ceased beginning in September when "we couldn't get a hold of him and couldn't get… information from him"); State v. Aschan, 366 N.W.2d 912, 916 (Iowa 1985) (Defendant violated pretrial diversion agreement requiring him "to cooperate in good faith with" mental health treatment, where he "misrepresented to staff personnel what activities he was performing" and "misstated to some of his counselors what others had said to him during the course of the treatment.").

The State acknowledged it made no efforts to contact Beres or initiate scheduling of an interview. However, the State suggested Beres breached his obligations under the

agreement by not contacting the State to inquire into scheduling until the week prior to sentencing, which the State argued came too late to comply. Specifically, the State claimed (a) this did not leave enough time for the State to interview Defendant and fact-check his answers prior to sentencing; and (b) by that time the State's investigation had progressed to a point that the State no longer desired or needed to interview defendant. (MTD Tr. p.12 L.1-p.13 L.23, p.14 L.6-p.17 L.22); (State Resist. MTD ¶¶10-11)(App. p. 45).

But the plea agreement neither (a) required Beres (rather than the State) to be the one to initiate scheduling, nor (b) set a timeframe by which either scheduling or the interview itself must accomplished (e.g., prior to sentencing, prior to a particular date, prior to the State's completion of a particular investigative step, or prior to the State's discovery of unanticipated or new information). See (FECR010796 Plea Tr. p.8 L.3-p.9 L.17) (reciting plea agreement herein). Compare (FECR010796 7/9/18 Order for Release)(App. pp. 19-20) (requiring "*Defendant shall report* to supervision *within 24*

hours of release.") (emphasis added); State v. Dudley, 856 N.W.2d 668, 672 (Iowa 2014) ("county attorney… notified Dudley the [plea] offer [to dismiss charges if Dudley passed a polygraph test] would expire once the parties took B.O.'s deposition", and then subsequently "contacted Dudley to inform him he would be making a trip to Minnesota to interview B.O." *after which all plea offers would be off the table*); State v. Weig, 285 N.W.2d 19, 19–20 (Iowa 1979) (agreement recited on plea record provided State would recommend probation *unless PSI disclosed a prior felony conviction State was unaware of*).

"…[A]bsent a breach of the express terms of the bargain by the accused", the State is not relieved of its obligations under the plea agreement. Weig, 285 N.W.2d at 21. If the State wished to place the burden on Defendant to initiate contact and/or to do so by a certain point in time, it was incumbent on the State (a) to incorporate such requirements into the explicit terms of the plea agreement, or (b) to at least

inform Defendant of such expectations in time for Defendant to be able to comply and cooperate.

Having done neither, the State cannot now point to Defendant's failure to initiate contact, nor his failure to do so by a particular date, as breaches of the plea agreement. See e.g., State v. Bergmann, 600 N.W.2d 311, 314–15 (Iowa 1999) ("Although the prosecutor claimed at the sentencing hearing that the defendant's arrest on another criminal charge after pleading guilty released the State from its obligation, the State's obligations under the cooperation agreement were not contingent on the absence of any intervening arrests for criminal offenses.") (emphasis removed); State v. Coleman, No. 12–1557, 2013 WL 3458181, at *3 (Iowa Ct. App. July 10, 2013) ("[t]he terms disclosed in open court at the time the plea" was offered "did not mention any contingency between Coleman's post-plea behavior and the sentencing recommendation.").

The terms of the plea agreement as recited on the plea record herein required Beres to "cooperate with" an interview,

and to be "truthful" in any statements given during such an interview. (FECR010796 Plea Tr. p.8 L.18-p.9 L.17) ("Mr. Beres agrees to cooperate with an interview" and "if Mr. Beres cooperates with the interview and is truthful to the satisfaction of the sheriff's department in the interview," State will not charge earlier conduct). Thus, to establish Beres' failure to discharge his obligations under the agreement, the State would have to show either (a) that Beres failed to "cooperate with" an interview (as by failing to appear at a scheduled interview, or by evading the State's efforts to schedule such interview), or that (b) such interview was had but Beres' statements therein were not "truthful" to the (good faith)[10] satisfaction of the sheriff's department. Neither was shown here. Accordingly, Beres did not breach his obligations under

[10] See State v. Bearse, 748 N.W.2d 211, 215 (Iowa 2008) (State must act in good faith as to plea agreement); Scarborough v. State, 945 A.2d 1103, 1114 (Del. 2008) (Where the "plea agreement provided the State with the ability to decide Scarborough's performance", the "State must exercise "honest judgment" and give "fair consideration" to determine whether Scarborough's 'work' was sufficient. If we find that the State acted in bad faith or failed to give Scarborough's offer fair consideration, his performance is excused.").

the plea agreement, and the State was not thereby relieved of its own reciprocal obligation to abstain from charging earlier conduct.

2). Even if the 'condition precedent' was the *actual occurrence* of an interview, the State cannot impede or prevent an interview and then point to defendant's failure to submit to such interview as the basis for excusing the State's reciprocal obligation.

Even if the State's obligation to refrain from charging earlier incidents is deemed to be contingent on the *actual occurrence* of an interview[11], this requirement must be read together with the implicit obligation of the State to act in good faith by itself cooperating in, and not impeding, such an interview. See e.g., Scarborough v. State, 945 A.2d 1103, 1112 (Del. 2008) ("… Scarborough had a legitimate expectation that the State would 'refrain from arbitrary or unreasonable conduct which has the effect of preventing [Scarborough] from receiving the fruits of the bargain.'").

Prosecutors are required to abide by standards of good faith and fair dealing, in accordance with the spirit as well as

[11] See (State's Resist. to MTD ¶20a)(App. pp. 45-46).

the terms of the agreement. As such, our courts will not permit prosecutors to evade plea agreements by engaging in gamesmanship or hypertechnical interpretations of the agreement's terms, contrary to standards of good faith. See e.g., State v. Carrillo, 597 N.W.2d 497, 500 (Iowa 1999) (concluding plea agreement required State "to remain silent at sentencing, and leave unchallenged Carrillo's request for suspended sentences"; finding "specious the State's suggestion that it only agreed not to resist Carrillo's right to request a suspended sentence, a promise which would have no value."); State v. Bearse, 748 N.W.2d 211, 215–16 (Iowa 2008) (prosecutor's "promise to make a sentencing recommendation" requires "more than 'simply inform[ing] the court of the promise the State has made" – the recommended sentence must actually be presented with the prosecutor's approval); State v. Horness, 600 N.W.2d 294, 299–300 (Iowa 1999) (State's promise to make a sentencing recommendation "carr[ies] with it the implicit obligation to refrain from suggesting more severe sentencing alternatives.").

Nor can the State do indirectly what it could not do directly. See e.g., State v. Lopez, 872 N.W.2d 159, 174 (Iowa 2015) (Though "[t]he prosecutor has no right or duty to prevent victim-impact statements", the prosecutor "cannot evade the State's obligation to honor its plea agreement [to recommend a particular sentence] by *soliciting* a GAL's victim-impact statement urging a harsher sentence") (emphasis added); Id. at 178 & 181 (Despite prosecutor's technical "recitation of the agreed sentencing recommendation", a breach nevertheless occurred because the "prosecutor effectively undermined the… recommendation by using… photos in a manner suggesting a more onerous sentence was warranted").

In accordance with these principles our Courts have recognized that, once the plea agreement has become binding in that the defendant detrimentally relied upon it (as by entering his guilty plea), the State cannot impede the defendant's fulfillment of his remaining obligations under the agreement and then cite such non-fulfillment as a basis for

relieving the State of its own obligations. See State v. Kuchenreuther, 218 N.W.2d 621, 621-24 (Iowa 1974); State v. Lummus 449 N.W.2d 95, 96-100 (Iowa Ct. App. 1989).

In Kuchenreuther, an agreement was reached prior to the State's filing of any charges. Under the agreement: the Defendant promised to provide information, to pay restitution for property taken, *and* to plead guilty to Disturbing the Peace; and in exchange the State promised not to prosecute any charge higher than Disturbing the Peace nor to charge any earlier conduct. Kuchenreuther, 218 N.W.2d at 623. Defendant thereafter "effected restitution…, and cooperated with the county attorney as agreed", "*but [he] was never afforded opportunity to [fulfill his remaining obligation to] plead on a disturbing the peace charge*" because the State instead charged a higher felony offense of "larceny in the nighttime." Id. (emphasis added). Our Supreme Court vacated Defendant's larceny conviction and ordered dismissal of the prosecution, holding that the State's filing of that higher charge violated the plea bargaining agreement – this was so

despite the fact that (owing to the State's conduct) Defendant had never actually fulfilled his final obligation under the plea agreement by pleading guilty to Disturbing the Peace. Id. at 623-24.

In Lummus, the defendant's promise under the plea agreement was to provide information to the State *and* to testify against codefendants. Defendant provided information to the State, but the State then accepted guilty pleas from the codefendants such that no trial was had at which Defendant would testify as promised. It was held that the State was bound by the plea agreement requiring dismissal of the charge, despite the fact that Defendant did not actually testify. Lummus, 449 N.W.2d at 96-97, 99-100.

Kuchenreuther and Lummus both stand for the proposition that, if a defendant has only *partially* fulfilled his obligations under the plea agreement, but the nonfulfillment of his remaining obligation is *attributable to the State*, the defendant will not be deemed to have breached the agreement and the State will still be bound to its reciprocal obligations

under the agreement. The same principle controls in the instant case.

The defendant in Kuchenreuther had performed the portion of the plea agreement providing for his cooperation, but was prevented (by the State's conduct) from performing the remaining portion of the agreement providing for his entry of a guilty plea to the lesser offense. See Kuchenreuther, 218 N.W.2d at 623. In the present case, Beres performed the portion of the plea agreement providing for his entry of a guilty plea, but was prevented (by the State's conduct) from fulfilling the remaining obligation to be interviewed. Here, as in Kuchenreuther, the technical nonfulfillment of Beres' remaining obligation (the interview) was caused by the State and, thus did not relieve the State of its own reciprocal obligation to abstain from filing additional charges.

The State below cited Aschan v. Auger, 861 F.2d 520, 522 (8th Cir. 1988) for the principle that the terms were a mere executory agreement which the defendant could have ripened into a plea agreement by performing his obligation under the

agreement – which, In Aschan, was successful completion of a treatment program. See (FECR010833 State's Memo of Law ¶3)(App. p. 57). But Aschan is distinguishable. First, in Aschan there had not yet been any detrimental reliance on the plea agreement as (unlike in the present case), the Defendant there had not entered any guilty plea thereunder – it is this fact that led the Aschan Court to conclude no binding plea agreement yet existed such that the State could permissibly withdraw the agreement following Defendant's termination from the treatment program. See Mabry v. Johnson, 467 U.S. 504, 507–08 (1984) ("A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest. It is the ensuing guilty plea that implicates the Constitution."); State v. Aschan, 366 N.W.2d 912, 915 (Iowa 1985) ("Here, as in Mabry, the plea agreement which defendant seeks to enforce was never presented to nor accepted by the trial court."); Aschan, 861

F.2d at 522 (citing Mabry, and concluding "appellant did not have a plea bargain; he merely had an executory agreement which would have ripened into the… plea if he had substantially fulfilled his obligations….").

Aschan is also distinguishable for a second reason. In Aschan, the power to satisfy the condition of completing treatment (and therefore the responsibility for failing to satisfy it) lay with the Defendant and not the State. See State v. Lummus, 449 N.W.2d 95, 99 (Iowa Ct. App. 1989) (the conclusion in Aschan "is consistent with the fact that it was the *defendant's* failure to comply with the program requirements that led to termination of the program.") (emphasis added). Crucially, unlike in the present case, the State in Achan did not (directly or indirectly) impede the defendant's ability to satisfy the condition. Aschan, 366 N.W.2d at 916 (noting State's termination of defendant's participation in pretrial diversion program was not arbitrary; rather it was properly based on defendant's failure to comply with program requirements). The result is necessarily different

where the defendant has partially performed (as by Beres' entry of a guilty plea here), and his nonfulfillment of his remaining promises under the agreement resulted only from the fact that the *State* prevented or impeded his ability to do so (as by the State's failure and ultimate refusal to hold an interview here). See Kuchenreuther, 218 N.W.2d at 621-24; Lummus 449 N.W.2d at 96-97 & 99-100 (Iowa Ct. App. 1989). See also Scarborough v. State, 945 A.2d 1103, 1115 (Del. 2008) (State's "refusal to accept [Defendant's] offer to 'work' [meaning cooperate]… excused [Defendant] from performance"; State will be required to specifically perform promise to withhold charging habitual offender status.); United States v. San Pedro, 781 F. Supp. 761, 775 (S.D. Fla. 1991) (unclean hands barred government from being able to rescind plea agreement; even assuming defendant breached the agreement, the government induced and caused that breach); Compare State v. Rademacher, 433 N.W.2d 754, 757 (Iowa 1988) (double jeopardy bar will attach and prohibit retrial after grant of defense motion for mistrial "if the Court finds it was the

intention of the prosecution to deliberately force a mistrial situation with the aim of aborting the pending prosecution.").

Defendant here did what was in his power to accomplish the interview but the State impeded such efforts by never scheduling and ultimately refusing an interview. The State is not permitted to thusly perform an "end run" around the plea agreement, to avoid its own obligations thereunder. Lopez, 872 N.W.2d at 178. It cannot thus do indirectly what it could not have done directly. Id. at 181 n.8 (citing State v. Williams, 637 N.W.2d 733, 745 (Wis.2002)).

3). No meaningful new evidence was discovered by the State after Beres' guilty plea. But even if there had been new evidence, it would not relieve the State of its obligations under the plea agreement.

The State suggested that it discovered meaningful new evidence in September 2018 (subsequent to the July 9 plea under the plea agreement) which made an interview of Beres unnecessary. (MTD Tr. p.12 L.21-p.13 L.6, p.15 L.8-25, p.16 L.17-25). Neither County Attorney Klaver nor Deputy Kivi ever

specified what this purported new evidence might be, and the minutes do not establish any such new evidence.

At the time of Beres' May 27 arrest in the first case (FECR010796), investigators already believed Beres responsible for each of the earlier fires which would ultimately be charged in the second case (FECR010833). See e.g., (FECR010833 Min: Attachment, p.30-31)(Conf. App. pp. 55-56). Investigators had also already collected various evidence concerning Beres in relation to those earlier fires, including his computerized card access record for the Grinnell Public Safety Building, his Verizon cell phone records (including cell tower and location information), assorted witness statements, and Beres' own alleged post-arrest admissions or incriminating statements concerning each of the earlier fires. (FECR010833 Complaints 1-4; Min: Attachment, p.13, 22-23, 30-31, 50, 60, 78)(Conf. App. pp. 13-20, 38, 47-48, 55-56, 75, 85, 103). Subsequent to the May 27 arrest, but still prior to Beres' July 9 guilty plea under the plea agreement in FECR010796, law enforcement also received Beres' time card

records for Midwest Ambulance. (FECR010833 Min: Attachment p.51)(Conf. App. p. 76). No new information or evidence of any significance appears to have then been discovered by investigators after Beres' July 9 guilty plea. While investigator Ossman conducted a July 28, 2018 scene investigation of the Fox Forest Wildlife Area fire, nothing of significance was discovered in connection therewith. (FECR010833 Min: Attachment p.79)(Conf. App. p. 104). And while the minutes contain investigator Ossman's reports concerning each fire charged in FECR010833 labeled with "Date[s] Typed" of between September 25 and September 28,[12] such reports merely summarized and relied on the information received much earlier in the investigation, without referencing any new information or evidence recently obtained. (FECR010833 Min: Attachment pp.12-18, 49-54, 60-65, 78-82)(Conf. App. pp. 37-43, 74-79, 85-90, 104-107).

[12] All such "Date[s] Typed" were subsequent to the September 24 voicemail left by Beres' trial attorney inquiring into interview scheduling.

Ultimately, no meaningful new evidence was discovered by the State after Beres' plea; rather, it appeared the State had simply changed its mind on whether the plea bargain struck was desirable. See (MTD Tr. p.15 L.16-19) ("anytime you can interview somebody, that's great, but I think with – with what we had discussed, if we were to interview him and not use it, then, you know, what's – I guess, my thought was what's the point."); Compare State v. Kuchenreuther, 218 N.W.2d 621, 624 (Iowa 1974) ("Apparently the county attorney entered into the instantly involved plea bargain and attendant agreement in all good faith but for some reason changed his mind while en route to the court house."); State v. Bergmann, 600 N.W.2d 311, 313 (Iowa 1999) (prosecutor explained "I didn't think the agreement was a good idea just because of her prior criminal history, and if I had been in charge, I would not have entered into that agreement."); State v. Lopez, 872 N.W.2d 159, 180 (Iowa 2015) ("If the prosecutor believes incarceration is appropriate, the State should not enter into a plea agreement to recommend probation.").

Even if new facts or information *had* subsequently been discovered, however, the State would still not be relieved from its obligations under the plea agreement. As discussed above in subsection 1, the plea agreement did not contain any contingency allowing the State to be excused from its obligations if it discovered new or unexpected evidence. A mere change of circumstances or the discovery of new facts do not entitle the State to unilaterally withdraw from or modify the plea agreement, where such contingency was not made an "express term[]" of the plea agreement. State v. Weig, 285 N.W.2d 19, 21 (Iowa 1979).

In Weig, the plea bargain recited on the guilty plea record stated probation would be recommended by the State "*unless* there is a felony conviction which the State is not aware of, a prior felony conviction" disclosed by the presentence investigation. However, no similar condition was stated that probation would not be recommended if defendant picked up new charges subsequent to his guilty plea. Defendant subsequently picked up new charges between the plea and

sentencing. At sentencing the State noted the PSI recommended incarceration because of defendant's "recent involvements with the law", and "[t]he assistant county attorney stated the State wished 'to back away from our earlier indication that we would recommend probation" as "we were not aware of these other facts" at the time the plea agreement was recited at the plea hearing. The Supreme Court concluded such new information or changed circumstances between the plea and sentencing hearings did not relieve the State of its obligation under the plea agreement. The Supreme Court noted the requirement that defendant not pick up new charges "was a condition the State might have imposed upon its obligation to make the bargained-for recommendation, but it did not do so." Weig, 285 N.W.2d at 22. As the State had not made this an "express term[]" of the plea agreement, it could not rely on this changed circumstance to avoid its obligations under the guilty plea. Id. at 21.

> (I)f a prosecutor makes a promise based on a mistaken perception of the circumstances, and the defendant pleads guilty, the prosecutor cannot avoid his obligation

> simply by showing that the promise was made in "good faith." Rather, as part of the obligation to assist the defendant in making a meaningful decision, the prosecutor has a constitutional obligation . . . to anticipate future contingencies before making such solemn representations.

Id. at 22 (Iowa 1979) (quoting P. Westen & D. Westin, A Constitutional Law of Remedies for Broken Plea Bargains, 66 Calif.L.Rev. 471, 509 (1978)) (footnotes omitted). See also Scarborough v. State, 945 A.2d 1103, 1115 (Del. 2008) ("…the State knew or should have known, before it made the plea agreement, that the police to whom they would refer the 'work' would find Scarborough's names to have little or no value" and, therefore, "that 'working' Scarborough's suggested names would not satisfy the State's measure of satisfactory performance. Because the State never intended to pursue Scarborough's names, the State was required to tell Scarborough and his counsel that *before* he agreed to plead guilty.") (emphasis in original).

4). The informal out-of-court interaction between the prosecutor and defense counsel on the morning of sentencing neither modified nor nullified the already binding plea agreement that was placed on the plea record.

On the morning of sentencing (and outside the presence of the sentencing court), the prosecutor informally advised Beres' attorney "that additional charges against the defendant would likely be filed" and that "he was considering filing additional charges." See (FECR010833 State's Exhibit 1; 1/9/19 State's Resist. to MTD, ¶¶12-13; 3/6/19 Def. Applic. Interloc. Appeal ¶4)(App. pp. 58, 45, 68-69). No additional charges had yet been filed, and it appeared the State had not yet even reached a final decision on whether additional charges would be sought for earlier conduct (as the County Attorney stated only that unspecified additional charges were "likely", and that he needed to discuss the matter further with investigators subsequent to sentencing). However, the county attorney nevertheless suggested that Beres withdraw his guilty plea, thereby freeing the State of its obligations under the plea agreement. (FECR010833 1/9/19 State Resist. MTD

¶14)(App. p. 45). Beres declined to withdraw his plea, and informed the County Attorney "that he was willing, and had been since his guilty plea hearing, to participate in an interview and would submit to one at any time." (FECR010833 MTD p.2)(App. p. 41); See also (State Resist. MTD ¶16; MTD Tr. p.8 L.3-16)(App. p. 45).

The district court, in denying Beres's motion to dismiss, appears to have attached significance to this out-of-court pre-sentencing interaction. See (2/4/19 Ruling Denying MTD p.1)(App. p. 61) (stating defendant had been "notified of potential new charges prior to the sentencing."[13] but failed to seek "withdrawal of his guilty plea" or "lodge any type of objection" at sentencing). This was erroneous, as this

[13] The district court's order mistakenly stated that Beres was informed of potential new charges prior "to the sentencing *date*." (2/4/19 Ruling Denying MTD p.1)(App. p. 61) (emphasis added). In actuality, the County Attorney's email and oral statements had both been conveyed *on the morning of* sentencing, within an hour-and-a-half period before the sentencing hearing. (FECR010796 Sent. Tr. p.1 L.1-25; FECR010833 MTD p.2; State's Resist. to MTD ¶12-16; State's Exhibit 1)(App. pp. 41, 45, 58).

morning-of-sentencing interaction neither modified nor nullified the already-binding plea agreement.

The plea agreement properly disclosed in open court at the time of Beres' guilty plea fully and conclusively established the enforceable terms of the parties' agreement. See State v. Macke, No. 18-0839, --- N.W.2d ----, 2019 WL 4382985, at *9 (Iowa Sept. 13, 2019) ("The controlling terms… are those described on the record during the plea hearing rather than the conflicting terms of the [plea court's] written order" which "was never reviewed with Macke in open court."); State v. Loye, 670 N.W.2d 141, 148-149 (Iowa 2003) (declining States' request for remand to prove up defendant's alleged agreement not to appeal; lack of recitation of agreement on plea record conclusively established absence of any enforceable agreement). Such agreement, which had already become binding upon the court's acceptance of Beres' guilty plea, required the State to abstain from filing future charges absent Beres' failure to cooperate with an interview. The significance of Beres' declining the State's morning-of-sentencing invitation

to withdraw his guilty plea and invalidate the plea agreement, was that Defendant wished to stand by his plea and to have the State abide by the terms of the (already binding) agreement – not to release the State from its promise not to charge earlier conduct.

Nor could the plea agreement as stated on the plea record be subsequently "modified or waived off the record" via an informal "side deal[]". Macke, 2019 WL 4382985 at *9. Any "change in the terms of the plea agreement must be made in open court with a colloquy to confirm the defendant's guilty plea is knowing and voluntary." Id. This must be done *at the plea proceeding*. Loye, 670 N.W.2d at 149. But even if a modification could occur *subsequent* to the plea proceeding, it would still at minimum have to be placed on the record and ratified by the district court (which is responsible for verifying the underlying plea was still knowing and voluntary). Macke, 2019 WL 4382985 at *9. Thus, if the State believed the terms of the plea agreement as stated on the plea record were subsequently modified by agreement of the parties, then the

burden would lay with *the State* to raise the matter at sentencing and to ensure such modified terms (as well as both parties' agreement thereto) were placed on the record and accepted by the district court. Id. Having failed to do so, the State cannot now argue that the informal out-of-court interaction between the parties on the morning of sentencing effected a modification or nullification of the terms of the plea agreement. See e.g., Cunningham v. Novak, 322 N.W.2d 60, 62 (Iowa 1982) ("Iowa R. Crim. P. 19(3) provides the parameters for a grant of immunity[, which requires judicial involvement]. If a prosecutor or police officer and defense counsel could by conversation among themselves effect a grant of immunity the rule's requirement of participation by a judge would be rendered meaningless. This would amount to amending the rule by practice, and cannot be allowed."); State v. Coleman, No. 12–1557, 2013 WL 3458181, at *3 (Iowa Ct. App. July 10, 2013) ("At the sentencing hearing, rather than objecting, Coleman's counsel said: 'I understand the State's recommendation.' That statement could indicate a mutual

understanding that Coleman's 'good behavior' was an additional condition of the plea agreement. But defense counsel's comment was not specific enough to stand as Coleman's stipulation that an essential term was omitted from the recitation of the agreement at the plea hearing."); State v. Weig, 285 N.W.2d 19, 20-21 (Iowa 1979) (Where defendant pled guilty in exchange for prosecutor's promise to recommend probation, plea court's warning that it was not bound by the parties' agreement neither nullified the bargain nor furnished a ground for the State's subsequent failure to make the promised recommendation; Rejecting trial court's reasoning, in refusing to remedy State's breach, "that defendant was aware the court was not bound by any bargain" but nevertheless elected to proceed with his plea of guilty.).

Alternatively, if the State's position was not that the agreement had been modified after the plea, but rather that Beres had *breached* the agreement prior to sentencing (thereby relieving the State of its reciprocal obligation not to charge earlier conduct), it was again incumbent upon *the State* to

raise the matter at sentencing and obtain judicial determinations of Beres' breach and of the State's ability to charge earlier conduct. See State v. Powell, No. 17-0882, 2018 WL 3912110, at *4 (Iowa Ct. App. Aug. 15, 2018) ("The State has the burden of proving the defendant failed to perform in accordance with the plea agreement, and we look to the record made at the time of sentencing to determine whether the State has carried this burden."); State v. Foy, 574 N.W.2d 337, 339–40 (Iowa 1998) ("Whether the State has carried its burden [of providing defendant's breach of the plea agreement] is determined by examining the record made at the time of sentencing."; here "[a]t the sentencing hearing, the State offered testimony of investigator Knief" in support of the claim that defendant violated the agreement); State v. Hovind, 431 N.W.2d 366, 369 (Iowa 1988) ("It is evident from a review of the record that the trial court had ample basis and evidence to conclude defendant did not honor his obligations under the plea bargain agreement and that the State was free to pursue a full prosecution against defendant for the … offense.").

In contrast, Beres had no obligation to raise the matter at sentencing, as the State had not at that point breached the agreement. See State v. Frencher, 873 N.W.2d 281, 284 (Iowa 2015) (absent prosecutor's breach of plea agreement, defense counsel had no duty to object). The State's breach of the agreement was the act of filing charges on earlier conduct – and that breach did not occur until nearly a month after sentencing. Nor had the State even definitively informed Beres that it intended to breach the agreement in the future by bringing additional charges for earlier conduct. The County Attorney did not state that future charges were certain, only that they were "likely" or being considered. See (FECR010833 1/9/19 State Resist. MTD, ¶¶12-13; State's Exhibit 1; 3/6/19 Def. Applic. Interloc. Appeal ¶4)(App. pp. 45, 58, 68-69). Indeed, it did not appear the State had yet reached a final decision on whether it desired to file additional charges, as the prosecutor, Deputy Kivi, and the fire marshal were to meet on this matter the day after sentencing. Nor did the prosecutor state that any of the unspecified "additional" charges being

contemplated were for *pre-May 27* (rather than post-May 27) conduct. (FECR010833 State's Exhibit 1)(App. p.58). Because there was no breach by the State at the time of the sentencing hearing, Beres had neither any duty nor any basis to object at the time of sentencing.

The State's mere after-the-fact disclaimer, given on the morning of sentencing, stating that it may try to breach the agreement at some time in the future by filing additional charges had no effect on the terms of the already-binding agreement – those that were stated on the plea record, and under which Defendant had already entered his plea of guilty. The State's subsequent filing of charges for earlier conduct (FECR010833) thus violated the plea agreement in FECR010796.

5). Dismissal of the instant prosecution (Poweshiek Co. FECR010833) is required.

The State's breach of a plea agreement violates both the rules of criminal procedure and also constitutional requirements of due process. See Iowa Rs. Crim. Pro. 2.8(2)(c)

& 2.10(2); State v. Macke, No. 18-0839, --- N.W.2d ----, 2019 WL 4382985, at *8-9 (Iowa Sept. 13, 2019) (finding record "sufficient under the rules governing guilty pleas" to conclude State breached plea agreement); State v. Lopez, 872 N.W.2d 159, 180 (Iowa 2015) ("Fairness and due process require the State to honor its promises."); Santobello v. New York, 404 U.S. 257, 262 (1971) ("when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration", due process requires "such promise must be fulfilled"); Mabry v. Johnson, 467 U.S. 504, 509 (1984) (same); State v. Williams, 637 N.W.2d 733, 744 (Wis. 2002) ("once an accused agrees to plead guilty in reliance upon a prosecutor's promise to perform a future act, the accused's due process rights demand fulfillment of the bargain."); State v. Kuchenreuther, 218 N.W.2d 621, 623 (Iowa 1974) (declining to address due process challenge as not raised in trial court, but nevertheless granting relief for State's violation of plea agreement).

The proper remedy for the State's breach of its promise to abstain from additional charges, is dismissal of the improperly filed additional charges. Kuchenreuther, 218 N.W.2d at 623 (vacating larceny conviction, where State's filing of that charge violated the plea bargaining agreement); State v. Lummus, 449 N.W.2d 95, 98–99 (Iowa Ct. App. 1989) (affirming district court's dismissal of theft prosecution which was instituted in violation of plea agreement).

The instant prosecution (Poweshiek Co. FECR010833) charging defendant with pre-May 27, 2018 conduct was filed in violation of the plea agreement reached in prior Poweshiek County case number FECR010796. Defendant's motion to dismiss the instant prosecution (FECR010833) should thus have been granted. As requested by Defendant below, dismissal should be with prejudice. See Kuchenreuther, 218 N.W.2d at 623 (given State's breach of plea agreement in filing felony charge, "the prosecution and conviction of this defendant on a felony charge, if allowed to stand, would unduly undermine our system of justice."). Alternatively and

at minimum, dismissal should be granted without prejudice to allow the State to accommodate, in good faith, defendant's "cooperation with" a State's interview pursuant to the plea agreement. (FECR010833 MTD; Def.'s Brief p.7)(App. p. 55).

CONCLUSION

Defendant-Appellant Beres respectfully requests that this Court vacate the district court's February 4, 2019 order denying his motion to dismiss, and remand this matter to the district court with directions to dismiss the prosecution in Poweshiek Co. FECR010833.

REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument if argument would assist the Court.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $ 5.09 , and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

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

> [X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 13,947 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(f)(1).

/s/ Vidhya K. Reddy Dated: *12/24/19*

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