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IN THE SUPREME COURT OF IOWA
Supreme Court No. 19–0369

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CHANCE BERES,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POWESHIEK COUNTY
THE HONORABLE JOEL D. YATES, JUDGE

APPELLEE'S BRIEF

THOMAS J. MILLER
Attorney General of Iowa

LOUIS S. SLOVEN
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
Louie.Sloven@ag.iowa.gov

BART K. KLAVER
Poweshiek County Attorney

ATTORNEYS FOR PLAINTIFF-APPELLEE

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. Did the State breach the plea agreement in FECR010796 when it filed new charges in this case, when its promise not to file additional charges was conditioned on completion of an interview which subsequently became unnecessary?

Authorities

Lamasters v. State, 821 N.W.2d 856 (Iowa 2012)
Nichols v. City of Evansdale, 687 N.W.2d 562 (Iowa 2004)
Rhoades v. State, 880 N.W.2d 431 (Iowa 2016)
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Restatement (Second) of Contracts § 229
Restatement (Second) of Contracts § 255
Restatement (Second) of Contracts § 261
Restatement (Second) of Contracts § 383

ROUTING STATEMENT

Beres seeks retention. *See* Def's Br. at 13. But Beres only asks this Court to apply its precedent on plea bargaining. Because this case can be resolved by applying established legal principles, transfer to the Court of Appeals is appropriate. *See* Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

This is an interlocutory appeal. Chance Beres is charged with multiple counts of arson in FECR010833. He moved to dismiss; his argument was that the State already agreed not to file these charges as part of the agreement that secured his guilty plea in FECR010796. The State argued that its "no additional charges" concession had been contingent on Beres's cooperation in an investigative interview, which had become unnecessary before Beres was sentenced in FECR010796. Additionally, Beres had been notified that new charges would be filed *before* sentencing in FECR010796—but Beres still chose to proceed to sentencing, over the State's offer to acquiesce to any withdrawal of his guilty plea. The trial court denied Beres's motion to dismiss, and he applied for interlocutory review. This Court granted the application. Beres renews his claim that dismissal is required because prosecuting any new charges is a violation of the plea agreement in FECR010796.

Course of Proceedings

Beres was charged with second-degree arson in FECR010796. *See* FECR010796 Trial Information (6/5/18); App. 8. He entered a guilty plea on July 9, 2018, during a hearing that included this:

> **THE COURT**: What is the plea agreement in the case?
>
> **DEFENSE**: 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 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.

PleaTr. 8:3–9:9. As contemplated in the plea agreement, Beres was immediately released, pending sentencing. *See* PleaTr. 13:15–19.

At sentencing, Beres objected to consideration of statements that he had been involved in other arsons, and the sentencing court agreed not to consider them. *See* Sent.Tr. 2:16–4:25. Neither party mentioned to the sentencing court that Beres, under the plea deal, would have been required to cooperate truthfully with an interview with investigators—if the State had requested one, which it did not.

Beres requested a deferred judgment, and the sentencing court granted that request. *See* Sent.Tr. 5:15–14:25; FECR010796 Deferred Judgment (10/1/18); App. 21.

Before that sentencing hearing, the prosecutor sent this e-mail to Beres's attorney to ensure there were no misunderstandings:

> 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 [Poweshiek County Sheriff's Office Deputy Steve] 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 inverview would do to assist at this point.

See State's Ex. A; App. 58. Neither party mentioned this exchange to the sentencing court. Later, Beres admitted that he knew about this before sentencing, and he still chose not to withdraw his guilty plea:

> **THE STATE**: [Y]ou were aware at the sentencing hearing in your other case that you hadn't given the interview; isn't that correct?
>
> **BERES**: Yes.
>
> **THE STATE**: And you were informed by [defense counsel] Mr. Stiefel prior to the sentencing hearing that new charges would likely be filed?
>
> **BERES**: Yes.
>
> **THE STATE**: And you were informed that you had the possibility of filing a motion to withdraw your guilty plea at that time; isn't that correct?
>
> **BERES**: Yes.
>
> **THE STATE**: And you decided you didn't want to make that motion; correct?
>
> **BERES**: Correct.

MotionTr. 7:25–8:16. Beres testified that he was willing to sit for an interview, but was never contacted about it. *See* MotionTr. 6:24–7:16.

Beres received his deferred judgment on October 1, 2018. *See* FECR010796 Deferred Judgment (10/1/18); App. 21. Subsequently, on October 30, 2018, the State filed criminal complaints that alleged Beres had committed four other instances of arson. *See* FECR010833 Criminal Complaints (10/30/18); CApp. 13. After the State filed a trial information, Beres moved to dismiss it, on the grounds that any new charges that arose from incidents occurring before his guilty plea in FECR010796 would violate the plea agreement. *See* FECR010833 Motion to Dismiss (12/29/18); App. 40.

The State resisted. *See* FECR010833 Resistance (1/9/19); App. 44. The resistance noted that, before sentencing, the prosecutor had e-mailed defense counsel *and* orally informed him that "additional charges against the defendant would likely be filed." *See id.* at 2; App. 45. It also explained that "[t]he benefit to the State of conducting the interview would have been to expedite the open investigations," but that soon became unnecessary because "the investigations into the suspicious fires had been concluded." *See id.* at 1–2; App. 44–45. These facts were known to Beres and his counsel before sentencing:

> 14. The undersigned suggested to defense counsel that the sentencing hearing not be held on October 1, 2018, and that the defendant attempt to withdraw the plea in Case No. FECR010796 if the defendant believed the situation to be inequitable. The undersigned informed defense counsel 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.
>
> 15. Defense counsel indicated to the undersigned that he would inform the defendant of the new developments and possibility of withdrawing the guilty plea.
>
> 16. After consulting with the defendant, defense counsel told the undersigned that the defendant did not want to withdraw his guilty plea and wanted to proceed to sentencing.

Id. at 2; App. 45. The State also noted the "condition precedent" of an interview never occurred, so it never had any obligation to provide the corresponding contingent benefit. *See id.* at 2–3; App. 45–46.

At the hearing on Beres's motion to dismiss in FECR010833, the court took judicial notice of the entire file in FECR010796. *See* MotionTr. 9:1–10:3. Deputy Kivi testified that, at the moment when Beres was charged with arson and lasting through Beres's guilty plea, there were open investigations into other suspicious fires in the area. *See* MotionTr. 11:7–12:17. He had wanted to interview Beres to help resolve the other investigations—but that soon became unnecessary:

> Because we — in mid-September — Well, for one thing, we received some information that was, quite frankly, very damning to Mr. Beres as a suspect in these other fires.
>
> We thought if — at that point, if we do interview him and we didn't charge him with the fires — Basically, we got new information that we thought was strong enough to — that we didn't need to interview him anymore that we didn't have earlier.
>
> Not to mention that he had quite, I don't know, a few months, I guess, or quite — quite some time to — to approach us, and we wanted to interview him before his sentencing hearing. I was contacted a couple days or a few days before, which would have left us not nearly enough time to verify whatever he would tell us, corroborate anything he would say.

MotionTr. 12:18–13:13. Poweshiek County's investigation had been put on hold to search for Mollie Tibbetts. *See* MotionTr. 14:14–15:7. Then, in mid-September, Deputy Kivi discovered strong evidence that resolved the arson investigations and pointed to Beres as the culprit, eliminating the upside for any interview. *See* MotionTr. 15:8–25.

The State made this argument against dismissal:

> It's the State's position there's been no violation of the plea agreement. The agreement was contingent on the Defendant giving an interview and being truthful to the satisfaction of the deputy, which never happened, and so . . . it would be unfair to the State to have these charges dismissed when the State received no benefit of the bargain.
>
> The spirit of the deal and the purpose of the deal was to aid in the investigation and to confirm or dispel the investigator's suspicions of whether Mr. Beres was responsible for the several fires that they were investigating, and so at the time Mr. Beres reached out, the investigators had concluded their investigation. There was no purpose in interviewing him at that time from their perspective because they had the information they needed to resolve those investigations.
>
> And I also want to point out that the Defendant was aware that new charges were going to be filed prior to the sentencing in his other case. That was communicated to defense counsel and to the Defendant. The Defendant had an opportunity to lodge an objection or attempt to withdraw the guilty plea in the other case, and he stood silent on that and failed to raise the issue, and that's his responsibility.

See MotionTr. 20:9–21:14; *accord* Resistance (1/9/19); App. 44. The court agreed. Its ruling pointed out that Beres and his counsel were "notified of potential new charges" before sentencing, and still "voluntarily went forward with the sentencing hearing" without any objection and without seeking withdrawal. *See* FECR010833 Ruling (2/4/19); App. 61. As such, it overruled the motion to dismiss.

Additional facts will be discussed when relevant.

ARGUMENT

I. The district court was correct to overrule Beres's motion to dismiss. By proceeding on to sentencing, Beres ratified the version of the agreement where the condition precedent had failed. That relieved the State of its obligation to provide that contingent benefit.

Preservation of Error

Beres raised his claim in a motion to dismiss, which the court considered and ruled upon. *See* FECR010833 Motion to Dismiss (12/29/18); App. 40; FECR010833 Ruling (2/4/19); App. 61. Thus, error was preserved to raise the same claim on appeal. *See Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012).

Standard of Review

This ruling is reviewed for abuse of discretion; this Court should reverse "[i]f the district court abused its limited discretion by finding the State did not repudiate the plea agreement." *State v. Dudley*, 856 N.W.2d 668, 675 (Iowa 2014) (citing *State v. Horvind*, 431 N.W.2d 366, 368 (Iowa 1988)). Beres suggests a different standard of review for the constitutional components of his challenge. *See* Def's Br. at 50. But Beres only alleges an impermissible breach of a plea agreement—his argument does not require interpreting, construing, or applying any constitutional provision, so *de novo* review is inappropriate. *See Dudley*, 856 N.W.2d at 675.

Merits

Beres argues that the State is held to "the most meticulous standards of both promise and performance." *See* Def's Br. at 51 (quoting *State v. Lopez*, 872 N.W.2d 159, 170 (Iowa 2015)). The State does not disagree. But the State has met those standards. When facts emerged that caused the State to realize that its duty to do justice required it to charge Beres with additional counts of arson, it gave Beres the opportunity to move to withdraw the plea, with its support. *See* FECR010833 Resistance (1/9/19) at 2; App. 45. That coincided with the State's realization that the condition precedent that would trigger its contingent obligation not to file additional charges would never happen—and it said so, before Beres proceeded to sentencing. *See* MotionTr. 7:25–8:16. When Beres chose to proceed onwards, he ratified the version of the agreement where that condition failed.

The best place to start is with the terms of the plea agreement. The controlling terms of the plea agreement "are those described on the record during the plea hearing." *See State v. Macke*, 933 N.W.2d 226, 236–37 (Iowa 2019) (citing *State v. Loye*, 670 N.W.2d 141, 153–54 (Iowa 2003)). When Beres entered his guilty plea, his attorney summarized the relevant portion of the agreement like this:

> . . . [I]t 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.

See PleaTr. 8:3–9:9. The "if—then" construction of this obligation creates a condition precedent and a contingent benefit: if Beres is interviewed and cooperates truthfully, then the State must not file any additional charges for incidents before Beres was arrested.

A plea agreement "may be regarded as a contract where both sides ordinarily obtain a benefit" *See Rhoades v. State*, 880 N.W.2d 431, 449 (Iowa 2016); *accord State v. Powell*, No. 17–0882, 2018 WL 3912110, at *3 (Iowa Ct. App. Aug. 15, 2018). Basic contract law on non-occurrence of conditions can be summarized in three principles:

> (1) Performance of a duty subject to a condition cannot become due unless the condition occurs or its non-occurrence is excused.
>
> (2) Unless it has been excused, the non-occurrence of a condition discharges the duty when the condition can no longer occur.
>
> (3) Non-occurrence of a condition is not a breach by a party unless he is under a duty that the condition occur.

Restatement (Second) of Contracts § 225.

Here, the condition was truthful cooperation in an interview about the suspicious fires. The Poweshiek County Sheriff's Office never interviewed Beres, so truthful cooperation never happened. That does not mean that Beres breached the agreement, but it *does* signify non-occurrence of a condition, which discharged the duty that the State might otherwise have: the duty to file no additional charges.

Beres suggests that the State had a duty to offer an interview or ensure that an interview occurred. *See* Def's Br. at 57–61. But nothing in the plea agreement makes that interview part of the State's promise to perform—especially because it specifically puts that interview on the Poweshiek County Sheriff's Office, not the county attorney's office. *See* PleaTr. 8:3–9:9. If Beres were correct that the State did have a duty to schedule an interview with him, he would probably be right that failure to create an opportunity for Beres to cooperate would have excused the non-occurrence of that condition, and the State would still be obligated to perform its contingent duty and provide that contingent benefit. *See* Restatement (Second) of Contracts § 255 ("Where a party's repudiation contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused."). However, the agreement does not obligate the State to schedule or coordinate that interview.

The best way to conceptualize this provision is that it gave both parties a set of obligations that triggered in the event of an interview. If an interview occurred and Beres did not provide truthful assistance, he would have breached the agreement. If an interview occurred and Beres *did* cooperate, then the State would be obligated to perform its contractual duty and refrain from filing additional charges. But in the absence of an interview, none of those particular obligations attached. The State has not received the additional benefit that it contemplated from truthful cooperation in an open and ongoing investigation, and Beres is not entitled to reciprocal benefits for performance not given.

Beres seems to argue that he had no other expected benefit from the plea agreement, other than an expectation that he could fulfill that condition and avoid new charges. *See* Def's Br. at 57 n.9. "To the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange." *See* Restatement (Second) of Contracts § 229. The State submits that Beres did not experience disproportionate forfeiture, and that cooperation with an ongoing and open investigation *was* a material part of the conditional agreement not to file new charges.

Beres pled guilty to request a deferred judgment, which would have been harder to obtain if the sentencing court had a full trial record before it during sentencing. And it would have been *much* harder to obtain a deferred judgment if the sentencing court had been given a PSI report containing his truthful statements about his involvement in starting other fires in Poweshiek County—which is why Beres was sure to strike *other* statements about his involvement from the PSI. *See* Sent.Tr. 2:16–4:25. Beres has already benefitted from the fact that the Poweshiek County Sheriff's Office did not conduct an interview, depriving the State of its chance to use his statements at sentencing and seek a sentence that would be commensurate with his culpability. He cannot simultaneously demand performance that he would have been entitled to demand if he *had* been interviewed. *See Dudley*, 856 N.W.2d at 675 ("The State has no obligation to make available the anticipated benefits of a plea agreement when the defendant fails to perform his or her end of the bargain."). This demonstrates a benefit that goes far beyond immediate release from pretrial detention and beyond minimization of court costs and attorney fees. There is no way for Beres to establish that disproportionate forfeiture will result if this Court does not excuse non-occurrence of the interview condition.

Moreover, occurrence of the interview was a material part of the agreed exchange on those contingent performance obligations, so it cannot simply be "excused" without judicially reshaping the deal. *See generally Nichols v. City of Evansdale*, 687 N.W.2d 562, 571–72 (Iowa 2004) (quoting 66 AM.JUR.2D *Reformation of Instruments* § 1 (2001)) ("Courts are not at liberty, under the guise of reformation, to rewrite the parties' agreement and foist upon the parties a contract they never made."); *accord* Restatement (Second) of Contracts § 229. This is not an unconditional agreement not to file charges. Nor is it an agreement not to file charges with an option for the State to prosecute Beres if he lies during an interview—that could have been achieved by requiring the State to refrain from filing additional charges (without any condition precedent) and by retaining terms that required Beres to cooperate truthfully in any interview (because any breach of that obligation would release the State from all of its future obligations). *See generally State v. Aschan*, 366 N.W.2d 912, 916–17 (Iowa 1985). Instead, this plea agreement included a condition, expressly stated—because the State did not want to refrain from prosecuting Beres for additional acts of arson unless the Poweshiek County Sheriff's Office needed his help to solve these cases. And as it turned out, it did not.

Beres argues "[n]o meaningful new evidence was discovered by the State after [his] guilty plea," and discovering new evidence "would not relieve the State of its obligations under the plea agreement." *See* Def's Br. at 73–79. Neither is entirely true. If it were really possible to construe this agreement to create an unconditional obligation on the part of the State to coordinate an interview, that might suggest that it would be a "basic assumption" of the plea agreement that the State did not believe it could figure out what happened without his help—and unexpectedly strong evidence that fully resolves the investigation would have made it "impracticable" to conduct an interview. *See* Restatement (Second) of Contracts § 261. But the better view is that the State wanted a *conditional* future charging obligation, precisely because it foresaw the possibility that investigators would uncover evidence that definitively proved Beres started the other fires, which would make it unnecessary to interview him (and would also make it unfair to allow him to escape prosecution). So while Beres is correct that discovering additional evidence could not "relieve" the State of obligations under the plea agreement, it was fair for that to influence the Poweshiek County Sheriff's Office in deciding that it had become unnecessary to interview Beres—which caused the condition to fail.

As for the new evidence, the minutes of evidence show that the State and the investigators sought electronic data that could establish where Beres was, in the moments immediately preceding the fires. Analyzing that data took "many weeks," but it was eventually fruitful:

> Cellphone and google map information was obtained and reviewed over many weeks. This information does place Chance Beres in the area of the fire that occurred at 1159 500th Ave. prior to the fire being reported and not in the day before that he stated.

See Minutes Attachment (11/9/18) at 79; CApp. 104. And even though a variety of other information that was discussed in the attachment to the minutes for FECR010833 could have been known before the date on which Beres pled guilty, investigators had not yet assembled the entire story. While Beres is correct that the information described in the minutes for FECR010833 describes a series of acts and events that occurred before Beres pled guilty, it is assembled into a narrative that goes beyond the understanding that the State had reached when it filed minutes for FECR010796. *Compare* FECR010833 Minutes & Attachment (11/9/18); CApp. 21 (82 pages of attachments), *with* FECR010796 Minutes & Attachment (6/5/18); CApp. 6 (2 pages). That was the point of the condition: investigators would have wanted to interview Beres if there had still been at least one suspicious fire

that they did not have a conclusive explanation for—but if they could resolve *every* investigation without the need to grant Beres immunity for his other acts of arson, that would be the optimal resolution. And at the moment when Beres pled guilty, the State did not know whether investigators would be able to extract that critical proof from the data generated by Beres's cell phone. This new evidence mattered. Indeed, the State's awareness of the possibility that it might develop evidence that would make it unnecessary to interview Beres was the impetus to refuse to make any charging concessions that were *not* contingent on that condition precedent. The condition was material to the exchange of those additional reciprocal obligations, and it would be improper to hold the State to its additional contingent duty to perform after the condition has failed. *See* Restatement (Second) of Contracts § 229.

Beres argues that the State caused the non-occurrence of an interview, and that the State cannot "perform an 'end run' around the plea agreement, to avoid its own obligations." *See* Def's Br. at 64–73. But that decision was made by the Poweshiek County Sheriff's Office, which was put in charge of that condition in the agreement, as stated. *See* PleaTr. 8:3–9:9. Deputy Kivi made the decision that no interview with Beres was needed—not the prosecutor. *See* MotionTr. 15:8–16:25.

Beres cites *Kuchenreuther* and *Lummus* for the principle 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." *See* Def's Br. at 66–69 (citing *State v. Kuchenreuther*, 218 N.W.2d 621, 621–24 (Iowa 1974), and *State v. Lummus*, 449 N.W.2d 95, 97 (Iowa Ct. App. 1989)). But the State never argued that Beres breached the plea agreement or that the State was released from all of its obligations under the agreement. Instead, this is the non-occurrence of a condition that obviated a pair of contingent reciprocal obligations that would have attached, if that condition *did* occur. And this is not a situation where the prosecutor decided to take action that would foreclose the condition, in bad faith. The decision not to interview Beres came from Deputy Kivi and the Poweshiek County Sheriff's Office, after they uncovered new evidence that wiped away any reason for that office to conduct the interview. *See* MotionTr. 14:14–15:25. This condition would occur (or not occur) at the discretion of another office, separate from the office that wields prosecutorial discretion and that entered into this plea agreement.

Even in the absence of the notification before sentencing, there is nothing inherently unfair about conditioning additional obligations on the need for an interview, and then relieving both parties of their additional reciprocal duties after non-occurrence of that condition. Any potential for unfairness is further alleviated by the fact that the prosecutor made sure that Beres and his attorney were aware of the non-occurrence of that condition, and the likely effects, *before* Beres was sentenced. *See* State's Ex. A; App. 58; MotionTr. 7:25–8:16. Certainly, it is true that the plea bargain is formed and finalized when the defendant enters a guilty plea, pursuant to the agreement's terms. *See, e.g.*, *State v. Edwards*, 279 N.W.2d 9, 11 (Iowa 1979) ("The State may withdraw from a plea bargain at any time prior to, but not after, actual entry of a guilty plea by a defendant or other action by a defendant constituting detrimental reliance upon the arrangement."). If this were construed as a unilateral attempt by the State to modify the agreement, it would fail. But that is not what happened. Rather, the State explained its view that the condition had not occurred and additional reciprocal obligations were not triggered—which meant that Beres could expect additional charges. And after explaining that, it offered *Beres* the option of rescinding his plea—and Beres refused.

See State's Ex. A; App. 58; MotionTr. 7:25–8:16; MotionTr. 21:1–13. There are no clearer "circumstances indicat[ing] that he has assumed the risk" of non-occurrence of the condition: Beres chose to reject the option to rescind his prior acceptance and withdraw his guilty plea, with full awareness that the relevant condition would never occur and that the State did not intend to provide that contingent performance. *See* Restatement (Second) of Contracts § 227(1). Even uncharitable explanations for failure of this condition would only render the deal "voidable," such that Beres would have been justified "in putting an end to the contract." *See* Restatement (Second) of Contracts § 7, cmt. b. At best, Beres would have acquired the power to avoid performance—but instead, he chose "ratification of the contract to extinguish the power of avoidance." *See* Restatement (Second) of Contracts § 7.

> The propriety of calling a transaction a voidable contract rests primarily on the traditional view that the transaction is valid and has its usual legal consequences until the power of avoidance is exercised. Where each party has a power of avoidance, there is no legal duty of performance; but the term voidable contract is appropriate if ratification by one of the parties would terminate his power of avoidance and make the contract enforceable against him. *See* § 85. Moreover, action may be necessary in order to prevent the contract from producing the ordinary legal consequences of a contract; often such action in order to be effectual must be taken promptly.

Restatement (Second) of Contracts § 7, cmt. e; *accord* Restatement (Second) of Contracts § 85, cmt. a (explaining basic principle that "exercise of the power of avoidance discharges the contractual duty and terminates the power of ratification; conversely, exercise of the power of ratification terminates the power of avoidance"). The best that Beres could accomplish through his advocacy would be to show that, before sentencing, the State had expressed partial repudiation of its contractual obligations by telegraphing an intent to treat that set of reciprocal obligations as contingent on a condition that had failed. But even if that were true, then Beres ratified that view of the contract by turning down the offer to restore him to the same position he was in *before* accepting the plea agreement. The State offered to support an otherwise untimely motion to withdraw the plea, after it became clear to both parties that the condition precedent had failed—and when Beres declined to exercise that power of avoidance, he ratified the version of the plea bargain *without* those contingent obligations. Exercise of the power of avoidance requires *complete* avoidance:

> A party who has the power of avoidance must ordinarily avoid the entire contract, including any part that has already been performed. He cannot disaffirm part of the contract that is particularly disadvantageous to himself while affirming a more advantageous part, and an attempt to do so is ineffective as a disaffirmance.

Restatement (Second) of Contracts § 383, cmt. a. That means that, even if Beres could show a repudiation on the part of the State that would amount to grounds for treating the plea agreement as voidable, Beres deliberately chose not to exercise that power of avoidance—and his decision to keep the guilty plea in place and proceed to sentencing was a deliberate ratification that terminated any power of avoidance.

Now, Beres attempts to keep the deferred judgment, ignore the failure of the condition, and hold the State to its contingent obligation to perform. If the occurrence of an interview were not a condition, the plea agreement would not be structured to create one—and indeed, it would have effect that Beres describes *without* conditional language. Beres cannot overcome the effect of non-occurrence of that condition, which relieves both parties of their contingent reciprocal obligations. And even if he could, proceeding onward to sentencing would amount to ratification of the State's expressed view of its existing obligations and a disavowal of any power of complete avoidance that Beres had. Beres accepted non-occurrence of the condition by making his choice to proceed to sentencing, knowing that new charges were coming. *See* MotionTr. 7:25–8:16. There are no grounds to excuse non-occurrence of the condition now, and the court was right to refuse to do so.

Beres is right that the State must scrupulously abide by the text and the spirit of each plea agreement that it forms with a defendant. *See Lopez*, 872 N.W.2d at 180 ("Fairness and due process require the State to honor its promises."). That is precisely why the prosecutor took that additional step of ensuring that Beres understood that the condition had failed, that no interview would be occurring, and that the failure of that condition made it likely that the State would file additional charges. *See* State's Ex. A; App. 58; MotionTr. 7:25–8:16. The prosecutor wanted to ensure that there was no misunderstanding about the effect of the failure of that condition, going forward—and if Beres had harbored misconceptions about that effect of the plea deal, the prosecutor wanted Beres to have the chance to withdraw from it. *See* MotionTr. 20:9–21:14. Beres cannot establish that he was misled by any sort of dirty dealing—the plea agreement was upfront about the fact that this was a condition, the prosecutor made sure Beres was informed that the condition had already failed before sentencing, and Beres could rescind his acceptance if the failure of that condition had made the deal unacceptable to him. This Court should reject the claim that Beres may rewrite this deal, after acceptance and ratification, to obtain contingent benefits in spite of non-occurrence of the condition.

CONCLUSION

The State respectfully requests that this Court reject Beres's challenge and affirm the ruling that overruled his motion to dismiss.

REQUEST FOR NONORAL SUBMISSION

This case should be set for nonoral submission. In the event argument is scheduled, the State asks to be heard.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

LOUIS S. SLOVEN
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
louie.sloven@ag.iowa.gov

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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LOUIS S. SLOVEN
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
louie.sloven@ag.iowa.gov