IN THE SUPREME COURT OF IOWA

STATE OF IOWA,	)	
	)	
Plaintiff–Appellee,	)	
	)	
v.	)	S.CT. NO. 19–1159
	)	
DAQUON BOLDON,	)	
	)	
Defendant–Appellant.	)	

APPEAL FROM THE IOWA DISTRICT COURT
FOR BLACK HAWK COUNTY
HONORABLE JOEL A. DALRYMPLE, JUDGE (Sentencing)

APPELLANT'S BRIEF AND ARGUMENT AND REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF SERVICE

On 5th day of March, 2020, 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 Daquon Dupree Boldon, No. 6579231, Mount Pleasant Correctional Facility, 1200 East Washington Street, Mt. Pleasant, IA 52641.

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ROUTING STATEMENT

Defendant–Appellant Daquon Boldon appeals after he pled guilty and was subsequently sentenced on July 1, 2019. Boldon requests the Iowa Supreme Court retain this case because it presents substantial constitutional questions regarding the validity of Senate File 589's amendments to Iowa Code sections 814.6(1) and 814.7. These arguments also raise substantial issues of first impression and fundamental issues of broad public importance that require ultimate determination by the Supreme Court. See Iowa Rs. App. P. 6.903(2)(d), 6.1101(2) (a), (c)–(d) (2019).

Additionally, the Court should retain this case to address the Boldon's request that the Court adopt plain-error review. Id. While the Iowa Supreme Court has historically declined to adopt a formal plain-error doctrine, this rejection has coexisted with the Court's ability to nevertheless redress plain and prejudicial unpreserved errors on direct appeal under an ineffective-assistance-of-counsel framework where the record was adequate. Compare State v. Johnson, 272 N.W.2d 480,

484 (Iowa 1978), with State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978). If Iowa Code section 814.7 now prevents appellate courts from redressing even plain and substantial errors on direct appeal under an ineffective-assistance-of-counsel rubric despite an adequate record, there is a substantial need for this Court to recognize plain-error review for clear errors that "seriously affect the fairness, integrity, or public reputation of judicial proceedings." Johnson v. United States, 520 U.S. 461, 467 (1997).

Moreover, the Court's guidance is needed on the question of what limitations exist on a sentencing court's consideration of defendant's juvenile criminal history. Recent case law has made clear that children are deemed constitutionally different for purposes of sentencing. Certain mitigating considerations of youth necessarily and universally attend juvenile criminal conduct. State v. Lyle, 854 N.W.2d 378, 389 (2014). However, Iowa appellate courts have not yet determined what limits such realities impose upon a sentencing court's consideration of the *juvenile* criminal history of an offender in adult court.

Boldon respectfully urges that juvenile criminal history does not shed its mitigated character merely because the offender is now in adult court. The vulnerabilities of youth that attended such juvenile criminal conduct continue to inhere in those juvenile adjudications. Juvenile criminal history should thus not be treated the same way or given the same weight as adult criminal history. This Court should hold that a sentencing court cannot consider an adult offender's juvenile criminal history without also explicitly recognizing the mitigating features of youth attending such juvenile adjudications.

STATEMENT OF THE CASE

Nature of the Case: Boldon appeals following his convictions, judgment, and sentence imposed following his guilty pleas to possession of a firearm by a felon, in Black Hawk County District Court Case No. FECR226296, and to interference with official acts with a firearm and carrying weapons, in Black Hawk County District Court Case No. FECR226943.

Course of Proceedings: In FECR226296, on August 10, 2018, the State charged Boldon with possession of a firearm, a class "D" felony. (FECR226296 Trial Information) (App. p. 4). Subsequently, on September 14, 2018, the State charged Boldon with interference with official acts with a firearm, a class "D" felony, in violation of Iowa Code section 719.1, and carrying weapons, an aggravated misdemeanor, in violation of Iowa Code section 724.4(1), in FECR226943. (FECR226943 Trial Information) (App. p. 10). Boldon was arraigned in open court in both cases. (FECR226296 Arraignment & Order; FECR226943 Arraignment & Order) (App. pp. 7–9, 13–15).

On March 25, 2019, Boldon entered guilty pleas to interference with official acts with a firearm and carrying weapons in FECR226943, as well as possession of a firearm by a felon in FECR226296. (FECR226943 Order Following Plea; FECR226296 Order Following Plea) (App. pp. 16–19). In exchange for Boldon's guilty pleas to the charges, the State would recommend a prison sentence on each count, but it agreed to recommend that all three charges run concurrently

to one another. (Plea Tr. p.6 L.5–p.7 L.6). The defense was free to make its own sentencing recommendations. (Plea Tr. p.6 L.5–p.7 L.6).

At the sentencing hearing, the prosecutor stated it was recommending five years in prison on each of the felony counts and two years in prison on the aggravated misdemeanor, with those sentences to run concurrently. The State also recommended the court suspend the minimum fines and make Boldon pay court costs. (Sentencing Tr. p.8 L.3–14). The prosecutor then spoke at length, advocating for a prison sentence. (Sentencing Tr. p.8 L.15–p.10 L.21). Boldon requested the court consider giving him a deferred judgment. (Sentencing Tr. p.10 L.22–p.15 L.11). After giving Boldon the right to speak, the district court sentenced him to an indeterminate term not to exceed five years on each of the class "D" felonies and an indeterminate term not to exceed two years on the aggravated misdemeanor. (Sentencing Tr. p.16 L.10–20) (Sentencing Order) (App. pp. 21–22). The court imposed the prison sentences and ordered the sentences for

felonies to run consecutive with each other but concurrent to the misdemeanor for a total of ten years in prison. (Sentencing Tr. p.16 L.19–20, p.19 L.2–4) (Sentencing Order) (App. p. 22).

It also assessed a $750 fine and criminal surcharge for each of the felony counts but then ordered them suspended; it ordered a $625 fine and criminal surcharge for the misdemeanor but also suspended it as well. (Sentencing Tr. p.16 L.10–11) (Sentencing Order) (App. p. 22). The district court found Boldon did not have the reasonable ability to pay restitution for court-appointed attorney fees or court costs. (Sentencing Tr. p.16 L.21–p.17 L.4) (Sentencing Order) (App. pp. 23–24). Lastly, the court ordered Boldon to submit a DNA sample. (Sentencing Tr. p.17 L.7–8) (Sentencing Order) (App. p. 23).

Boldon timely filed a notice of appeal in each case on July 5, 2019. (Notice) (App. p. 26).

Facts: During the guilty plea proceeding, Boldon admitted that, on August 2, 2018, in Black Hawk County, he

was travelling in a vehicle on which a Waterloo police officer conducted a traffic stop. (Plea Tr. p.12 L.9–p.13 L.3). Boldon admitted to fleeing the vehicle and running from the police officer, while carrying a .45 caliber Smith & Wesson pistol. (Plea Tr. p.13 L.4–p.15 L.10). Boldon also admitted that he had prior juvenile adjudications for conduct that would have been a felony if he was an adult when committed, which prohibited him from legally carrying a firearm. (Plea Tr. p.11 L.19–p.12 L.8).

Any additional relevant facts will be discussed below.

ARGUMENT

I. THE SENATE FILE 589 AMENDMENTS TO IOWA CODE CHAPTER 814 SHOULD NOT AFFECT THE DEFENDANT'S APPEAL.

On July 1, 2019, Senate File 589 went into effect. The legislation made several changes to the Iowa Code, including several affecting criminal appeals. In particular, Senate File 589 amended Iowa Code section 814.6(1) to only grant a right of appeal from a final judgment of sentence from "[a] conviction where the defendant has pled guilty" to a class "A"

felony or in cases "where the defendant establishes good cause." Iowa Code § 814.6(1) (2019). Additionally, it amended section 814.7, stating that ineffective-assistance-of-counsel claims "shall not be decided on direct appeal from the criminal proceedings." Iowa Code § 814.7 (2019). Boldon entered a guilty plea prior to the amendments but was sentenced on July 1, 2019.

A. The amendments of Senate File 589 should not apply to criminal defendants, like Boldon, that entered guilty pleas prior to July 1, 2019.

Senate File 589 went into effect on July 1, 2019. State v. Macke, 933 N.W.2d 225, 227 (Iowa 2019). The amendments do not contain language that they apply retroactively to guilty pleas, like Boldon's, that were accepted prior to July 1, 2019. See id. at 233. Thus, in the absence of such language, the Court should find they do not apply. See id. Moreover, Iowa Code's general savings provision also renders the amendment to Iowa Code chapter 814 inapplicable to defendants such as Boldon who have pleaded guilty before the law went into effect. It provides:

> 1. The reenactment, revision, amendment, or repeal of a statute does not affect any of the following:
>
> a. The prior operation of the statute or any prior action taken under the statute.
>
> b. Any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred under the statute.
>
> c. Any violation of the statute or penalty, forfeiture, or punishment incurred in respect to the statute, prior to the amendment or repeal.
>
> d. Any investigation, proceeding, or remedy in respect of any privilege, obligation, liability, penalty, forfeiture, or punishment; and the investigation, proceeding, or remedy may be instituted, continued, or enforced, and the penalty, forfeiture, or punishment imposed, as if the statute had not been repealed or amended.

Iowa Code § 4.13 (2019). Before the enactment of Senate File 589, Boldon had the right to appeal his plea, judgment, and sentence on direct appeal. He was not informed that he would no longer have that right come July 1, 2019. Moreover, he was originally scheduled to be sentenced on May 30, 2019, but there were several continuances, including the last one, which was filed by the *prosecutor*, and resulting in the sentencing being held on July 1, 2019. (Mot. Continue) (App. p. 20). Boldon's rights had vested and cannot be retroactively removed by a statutory amendment; it is unfair that a series of

continuances, including that by the opposing party, can place him in a worse position. Therefore, for the reasons stated above, the Court should find that the amendments of Senate File 589 to chapter 814 have no application to this appeal.

B. Even if the amendments of Senate File 589 apply to Boldon's direct appeal, they should be invalidated for improperly restricting the role and jurisdiction of Iowa's appellate courts.

Issues of retrospective and prospective application aside, Boldon contends the changes to Section 814.7 improperly interfere with the separation of powers, with this Court's jurisdiction, and with the Court's role in addressing constitutional violations. "The separation-of-powers doctrine is violated 'if one branch of government purports to use powers that are clearly forbidden, or attempts to use powers granted by the constitution to another branch.'" Klouda v. Sixth Judicial Dist. Dept. of Corr. Serv., 642 N.W.2d 255, 260 (Iowa 2002) (quoting State v. Phillips, 610 N.W.2d 840, 842 (Iowa 2000)). The doctrine means that one branch of government may not impair another branch in "the performance of its

constitutional duties." Id. Recently, the Iowa Supreme Court examined the judicial branch's role within Iowa's "venerable system of government":

> The Iowa Constitution, like its federal counterpart, establishes three separate, yet equal, branches of government. Our constitution tasks the legislature with making laws, the executive with enforcing the laws, and the judiciary with construing and applying the laws to cases brought before the courts.
>
> Our framers believed "the judiciary is the guardian of the lives and property of every person in the State." Every citizen of Iowa depends upon the courts "for the maintenance of [her] dearest and most precious rights." The framers believed those who undervalue the role of the judiciary "lose sight of a still greater blessing, when [the legislature] den[ies] to the humblest individual the protection which the judiciary may throw as a shield around [her]."

Planned Parenthood of the Heartland v. Reynolds ex rel. State, 915 N.W.2d 206, 212 (Iowa 2018) (internal citations omitted) (alteration in original).

All judicial power in Iowa is vested in the Iowa Supreme Court and its inferior courts. Iowa Const. art. V, § 1. "Courts constitute the agency by which judicial authority is made operative. The element of sovereignty known as judicial is vested, under our system of government, in an independent

department, and the power of a court and the various subjects over which each court shall have jurisdiction are prescribed by law." Franklin v. Bonner, 207 N.W. 778, 779 (Iowa 1926). Article V, sections 4 and 6 are related to the jurisdiction of the courts. Article V, section 4 provides the jurisdiction of the Iowa Supreme Court. Iowa Const. art. V, § 4. It states:

> The supreme court shall have appellate jurisdiction only in cases in chancery, and shall constitute a court for the correction of errors at law, under such restrictions as the general assembly may, by law, prescribe; and shall have power to issue all writs and process necessary to secure justice to parties, and shall exercise a supervisory and administrative control over all inferior judicial tribunals throughout the state.

Iowa Const. art. V, § 4. Likewise, Article V, section 6 provides for the jurisdiction of the district court. It states:

> The district court shall be a court of law and equity, which shall be distinct and separate jurisdictions, and have jurisdiction in civil and criminal matters arising in their respective districts, in such manner as shall be prescribed by law.

Iowa Const. art. V, § 6.

Notably, the Iowa Constitution provides that limitations on the manner of the Court's jurisdiction can be prescribed by

the legislature. See Iowa Const. art. V § 4. But the ability of the legislature to "prescribe" the "manner" of jurisdiction should not be confused with an ability to remove jurisdiction from the Court. Subject matter jurisdiction is conferred upon Iowa's courts by the Iowa Constitution. In re Guardianship of Matejski, 419 N.W.2d 576, 577 (Iowa 1988). They have general jurisdiction over all matters brought before them and the legislature can only prescribe the manner of its exercise; the legislature cannot deprive the courts of their jurisdiction. Id. (quoting Laird Brothers v. Dickerson, 40 Iowa 665, 670 (1875)); Schrier v. State, 573 N.W.2d 242, 244–45 (Iowa 1997).

The Iowa Supreme Court has previously recognized statutory limitations placed on the right to appeal, for example. See In re Durant Comm. Sch. Dist., 106 N.W.2d 670, 676 (Iowa 1960) (citations omitted) ("We have repeatedly held the right of appeal is a creature of statute. It was unknown at common law. It is not an inherent or constitutional right and the legislature may grant or deny it at pleasure."); see also Wissenberg v. Bradley, 229 N.W. 205, 209

(Iowa 1929). The United States Supreme Court has held similarly. McKane v. Durston, 153 U.S. 684, 687–88 (1894) ("A review by an appellate court of the final judgment in a criminal case, however grave the offence of which the accused is convicted, . . . is not now a necessary element of due process of law."). However, these holdings are subject to criticism. See Cassandra Burke Robinson, The Right to Appeal, 91 N.C. L. Rev. 1219, 1221 (2013) (arguing U.S. Supreme Court has relied on "nineteenth century dicta" for the proposition that due process does not require a right of appeal and expressing concerns that states will attempt to eliminate appeals as of right "in order to save fiscal and administrative resources."); Marc M. Arkin, Rethinking the Constitutional Right to an Appeal, 39 UCLA L. Rev. 503 (1992); Jones v. Barnes, 463 U.S. 745, 756 n. 1 (1983) (Brennan, J., dissenting) (predicting that if the court were squarely faced with the issue, it would hold that due process requires a right to appeal a criminal conviction).

"Once the right to appeal has been granted, however, it must apply equally to all. It may not be extended to some and denied to others." In re Chambers, 152 N.W.2d 818, 820 (Iowa 1967) (citing Waldon v. Dist. Court of Lee Cnty., 130 N.W.2d 728, 731 (Iowa 1964)). Although Iowa Code section 602.4102 contemplates the Iowa Supreme Court handling criminal appeals, the amendment to section 814.6 would make challenges to guilty pleas unreviewable on direct appeal except for where the defendant pleaded to a class "A" felony or established "good cause", and the amendment to section 814.7 would make claims of ineffective assistance of counsel unreviewable on direct appeal. Iowa Code § 602.4102(2) (2019). This is particularly problematic for the Court's inherent jurisdiction.

The Iowa Supreme Court has both the jurisdiction and the duty to invalidate state actions that conflict with the state and federal constitutions. See Varnum v. Brien, 763 N.W.2d 862, 875–76 (Iowa 2009) (noting the courts have an obligation to protect the supremacy of the

constitution). One of the rights enumerated in both the United States and Iowa Constitutions is the assistance of counsel. U.S. Const. amends. VI, XIV; Iowa Const. art. I, § 10. Having a constitutional right to counsel means the having a right to *effective* assistance of counsel. State v. Ambrose, 861 N.W.2d 550, 556 (Iowa 2015) (citations omitted).

A statute that seeks to divest Iowa's appellate courts of their ability to decide and remedy claimed deprivations of constitutional rights improperly intrudes upon the jurisdiction and authority of the judicial branch. The Iowa Supreme Court has eloquently stated:

> No law that is contrary to the constitution may stand. "[C]ourts must, under all circumstances, protect the supremacy of the constitution as a means of protecting our republican form of government and our freedoms." Our framers vested this court with the ultimate authority, and obligation, to ensure no law passed by the legislature impermissibly invades an interest protected by the constitution.

Planned Parenthood, 915 N.W.2d at 212–13 (internal citations omitted) (alteration in original). "The obligation to resolve this

grievance and interpret the constitution lies with this court." Id.

By removing the court's consideration of ineffective-assistance-of counsel claims and challenges to guilty pleas on direct appeal, the legislature is intruding on Iowa appellate courts' independent role in interpreting the constitution and protecting Iowans' constitutional rights. This action by the legislature has violates the separation of powers and impermissibly interferes with the inherent jurisdiction of the Court. Accordingly, this Court should invalidate the statutory changes prohibiting the Court from ruling upon claims of ineffective assistance of counsel that are presented on direct appeal.

C. Senate File 589's amendments to section 814.6 and section 814.7 violate equal protection.

Boldon contends the changes Senate File 589 made to Iowa Code sections 814.6 and 814.7 deny him equal protection under the law because they deprive him of the ability to challenge his conviction on direct appeal based upon

the facts that he pled guilty and that his attorney failed to provide him with effective assistance of counsel.

Both the federal and state constitutions provide for equal protection of citizens under the law. U.S. Const. amend. XIV; Iowa Const. art. I § 6. "Like the Federal Equal Protection Clause found in the Fourteenth Amendment to the United States Constitution, Iowa's constitutional promise of equal protection is essentially a direction that all persons similarly situated should be treated alike." Varnum, 763 N.W.2d at 878 (citations omitted) (internal quotation marks omitted); see also State v. Doe, 927 N.W.2d 656, 661 (Iowa 2019) (citation omitted).

There are three classes of review for an equal protection claim based upon the underlying classification or right involved. See City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439–41 (1985) (discussing different levels of scrutiny under federal equal protection analysis). The Court evaluates classifications based on race, alienage, or national origin and classifications impacting fundamental rights using strict

scrutiny. Varnum, 763 N.W.2d at 879 (citation omitted). Such classifications are "presumptively invalid and must be narrowly tailored to serve a compelling governmental interest." Id. It applies intermediate or heightened scrutiny to "quasi-suspect" groups. Id. "To survive intermediate scrutiny, the law must not only further an important governmental interest and be substantially related to that interest, but the justification for the classification must be genuine and must not depend on broad generalizations." Id. (citation omitted). The Court evaluates all other classifications using rational basis review, in which a complainant has the "heavy burden of showing the statute is unconstitutional and must negate every reasonable basis upon which a classification may be sustained." Id.

The first step in analyzing an equal protection claim is to determine if the legislation is treating similarly situated persons differently. Doe, 927 N.W.2d at 662. "[T]o truly ensure equality before the law, the equal protection guarantee requires that laws treat all those who are similarly situated

with respect to the purposes of the law alike." Varnum 763 N.W.2d at 883. With respect to the changes made by Senate File 589, Boldon is in two groups.

First, he is within a group of criminal defendants who have been convicted following a guilty plea made in the district court. Within this group, the amendment to section 814.6 has singled out those wrongly sentenced defendants. Whereas defendants who went to trial can obtain relief on direct appeal, a defendant who pled guilty may not get relief on direct appeal unless he has established "good cause"—whatever that may be. Even within this group, the legislature has also made the distinction between those that pleaded guilty to a class "A" felony and those that pleaded guilty to any other classification of crime. The legislature has treated Boldon and defendants like him differently based upon his decision to forgo certain constitutional rights and plead guilty. Second, there is a group of criminal defendants who have been convicted and sentenced based upon errors as shown by the record made in the district court. Within this group, the amendment to

section 814.7 has singled out those defendants who were provided ineffective assistance of counsel for disparate treatment. Whereas a properly represented defendant can obtain relief on direct appeal, an improperly represented defendant may not get relief on direct appeal and must instead pursue postconviction relief while, in many cases, being required to serve his sentence.[1] The legislature has treated Boldon and defendants like him differently based upon his assertion of an underlying violation of the right to effective assistance of counsel.

Boldon further contends that his claim of disparate treatment involves the deprivations of fundamental rights. The right to counsel is a fundamental right. Kimmelman v. Morrison, 477 U.S. 365, 374 (1986) (citing Gideon v. Wainwright, 372 U.S. 335, 344 (1963)). The right to counsel "assures the fairness, and thus the legitimacy, of our

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1. Although there is an option to post an appeal bond and stay a criminal sentence in most cases, there is no such option for bond in postconviction relief proceedings. See State v. Macke, 933 N.W.2d 226, 233 (Iowa 2019) (citations omitted).

adversary process." Id. Because the right to counsel is so vital to the accused, courts have long recognized that the right to counsel means the right to effective counsel. United States v. Cronic, 466 U.S. 648, 654 (1984) (citation omitted); Evitts v. Lucey, 469 U.S. 387, 395 (1985). Moreover, by pleading guilty, a defendant waives several constitutional rights, but only by doing so knowingly and voluntarily. State v. Kress, 636 N.W.2d 12, 20 (Iowa 2001); State v. Delano, 161 N.W.2d 66, 72–73 (Iowa 1968). Furthermore, in sentencing, a criminal defendant has a fundamental right in having his case dealt with fairly and justly. See id. at 74. By depriving Boldon of his right to direct review his sentence following a guilty plea and a right to review of a claim based upon an assertion of ineffective assistance of counsel, the legislature has deprived him of fundamental rights. Accordingly, the Court should review his claim on appeal under strict scrutiny. Varnum, 763 N.W.2d 862, 879 (Iowa 2009); City of Cleburne, 473 U.S. at 440.

Regardless of whether this Court considers Boldon's claims under strict scrutiny or rational scrutiny, it should find the statutory changes are unconstitutional. Video from the legislature's discussions regarding the bill indicates the amendments were designed to reduce "waste" caused by "frivolous appeals" in the criminal justice system. Senate Video 2019-03-28 at 1:49:10–1:49:20, statements of Senator Dawson, available at https://www.legis.iowa.gov/dashboard?view=video&chamber=S&clip=s20190328125735925&dt=2019-03-28&offset=3054&bill=SF%20589&status=i.

To the extent the statutory changes prevent appellate courts from ruling upon appeals from guilty pleas and claims of ineffective assistance of counsel for which the appellate record is adequate, the law is neither narrowly tailored nor rationally related to its legislative purpose. Such claims can be decided on direct appeal because they require no additional record. State v. Truesdell, 679 N.W.2d 611, 616 (Iowa 2004). "Preserving ineffective assistance of counsel claims that can be resolved on direct appeal wastes time and resources." Id.

Moreover, the same will be true for appeals of guilty pleas. Without knowing the process of how good cause will be determined, it is hard to state for certain, but the appeal of a guilty plea will inevitably require appellate review. Likely, the appellate court will still need to review the record and briefing to determine if "good cause" exists. This process will also be a waste of time and resources for the court. Therefore, the amendments of Senate File 589 to Iowa Code chapter 814 are not only not narrowly tailored or rationally related to the government's professed purpose, but directly contravene it. For these reasons, the Court should find the amendments to section 814.6 and section 814.7 denies Boldon equal protection under the law and should not be applied to his appeal.

D. The amendments to section 814.6 and section 814.7 deny Boldon due process and the right to effective counsel on appeal.

Both the Iowa Constitution and the United States Constitution ensure criminal defendants are accorded due process of law. U.S. Const. amend XIV; Iowa Const. art. I, § 9.

As discussed above, the right to counsel is a fundamental right. Kimmelman, 477 U.S. at 374 (citation omitted). It is so fundamental to due process that it has been made obligatory on the states. Evitts, 469 U.S. at 394. This guarantee of effective counsel extends to the first appeal as of right. Id. at 396.

"A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." Id. An appellate attorney does not have to submit every argument urged by an appellant, but "the attorney must be available to assist in preparing and submitting a brief to the appellate court . . . and must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim." Id. at 394 (citations omitted).

Boldon contends the changes to section 814.7 violate his right to counsel on appeal and, therefore his right to due process, by interfering with appellate counsel's ability to effectively represent him. The amendment purports to

prohibit an appellate court from deciding his underlying claim of ineffective assistance of counsel on direct appeal even though the record is clearly sufficient that it could be decided on direct appeal. Cf. State v. Lopez, 872 N.W.2d 159, 169–70 (Iowa 2015); Wiborg v. United States, 163 U.S. 632, 658 (1896). Where a state provides an appeal as of right but refuses to allow a defendant a fair opportunity to obtain an adjudication on the merits of his appeal, the "right" to appeal does not comport with due process. See Evitts, 469 U.S. at 405 (citation omitted); Griffin v. Illinois, 351 U.S. 12, 17–18 (1956).

> A system of appeal as of right is established precisely to assure that only those who are validly convicted have their freedom drastically curtailed. A State may not extinguish this right because another right of the appellant-the right to effective assistance of counsel-has been violated.

Evitts, 469 U.S. at 399–400.

Moreover, the changes to section 814.6 and section 814.7 may essentially extinguish Boldon's ability to challenge the breach of the plea agreement by the prosecutor or any other

ineffective-assistance-of-counsel claims that a defendant could raise in a guilty plea proceeding. Appellate review has become an integral part of the Iowa trial system for adjudicating the guilty or innocence of a defendant. See Griffin, 351 U.S. at 18 (citations omitted); see also Rinaldi v. Yeager, 384 U.S. 305, 310 (1966) (finding once a right of appeal is established "these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts"). Because of the lengthy process, it is quite possible that a defendant would never be able to challenge sentencing errors or breaches of the plea agreement in a postconviction relief proceeding because by the time he gets a hearing, his sentence would have already discharged, rending the claims moot and giving a defendant no relief for improper conduct at the sentencing hearing. This not only violates due process, it manifests inherent unfairness and injustice, offends the public sense of fair play, and it also undermines confidence in the criminal justice system as a whole. See Delano, 161 N.W.2d at 74. Accordingly, the Court should find Senate File 589's amendments deny Boldon due

process; accordingly, it should not apply the amendments to his appeal.

E. If the amendment to section 814.6 does apply to this appeal, Boldon has good cause.

As discussed above, the amendment to section 814.6(1) provides that a defendant who has pled guilty may only appeal when he "establishes good cause." Iowa Code § 814.6(1)(a)(3) (2019). "Good cause" is not defined in the statute, and the statute does not prescribe the procedure to be used by a defendant to establish good cause. Id. Thus, the determination of both is left to the discretion of the court. See Iowa Civil Liberties Union v. Critelli, 244 N.W.2d 564, 568–69 (Iowa 1976) (Iowa courts maintain an "inherent common-law power . . . to adopt rules for the management of cases on their dockets in the absence of statute.").

This Court should interpret "good cause" broadly and implement an adequate procedure to avoid due process and equal protection violations. Because "good cause" is not defined or limited in the statute, the Court will give the term

its common meaning. State v. Tesch, 704 N.W.2d 440, 451–52 (Iowa 2005) (citation omitted). "Good cause" is commonly defined as "[a] legally sufficient reason." Cause, Black's Law Dictionary (11th ed. 2019). It is a broad and flexible term, found throughout Iowa law where its definition is situational and varies depending on the context in which it is being applied. See, e.g., Iowa R. Crim. P. 2.33 (2017) (providing violations of speedy indictment and speedy trial warrant dismissal unless "good cause to the contrary is shown."); Iowa R. Civ. P. 1.977 (2017) (stating the court may set aside default upon showing of "good cause"); Iowa Code §§ 322A.2 & .15 (2017) (providing motor vehicle franchise may not be terminated unless "good cause" is shown and identifying factors to evaluate in that determination); Iowa Code § 915.84(1) (2017) (allowing for waiver of time limitation to file for crime victim compensation if "good cause" is shown); State v. Winters, 690 N.W.2d 903, 907–08 (Iowa 2005) (discussing that grounds for "good cause" to grant trial continuance is narrower in a criminal case where speedy trial rights are at

stake than in a civil case); Wilson v. Ribbens, 678 N.W.2d 417, 420–21 (Iowa 2004) (discussing factors to be considered when determining if "good cause" has been shown to excuse failure of service pursuant to rule 1.302).

The Court usually interprets statutes in a way that avoids constitutional problems. Simmons v. State Pub. Defender, 791 N.W.2d 69, 74 (Iowa 2010). The legislature's assignment of discretion to the Court to define "good cause" and to implement the procedure utilized to establish such cause helps in ensuring both can be accomplished in a manner consistent with constitutional dictates. An interpretation effectively prohibiting the right of appeal for defendants who plead guilty would raise concerns about due process and equal protection under both the Iowa and the federal constitutions, as discussed above. See U.S. Const. amend. V; amend. XIV § 1; Iowa Const. art. I, §§ 6, 9.

Assuming the legislature can grant or deny the right to appeal at its pleasure, as discussed above, equal protection guarantees dictate that once the right to appeal is granted, it

may not be extended to some and denied to others." In re Chambers, 152 N.W.2d at 820 (citation omitted). Thus, the Court should widely interpret "good cause" as to extend the right of direct appeal to apply to criminal defendants who have pled guilty that have some colorable claim on appeal.

In addition, the procedure by which the appeal is considered must also comport with due process. See Evitts, 469 U.S. at 400–01 ("The right to appeal would be unique among state actions if it could be withdrawn without consideration of applicable due process norms. . . . In short, when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause."): Billotti v. Legursky, 975 F.2d 113, 115 (4th Cir. 1992) (finding West Virginia's discretionary right of appeal did not violate due process because procedure for seeking appeal included right to court-appointed counsel, preparation of transcripts, opportunity to present oral argument, and submission of

written petition to the appellate court including statement of facts, procedure, assignments of error, and legal authority). Thus, the application of good cause to appeals from guilty pleas must also comport with due process guarantees. Therefore, defendants should be able to have appellate counsel, the preparation of transcripts, and an opportunity for appellate counsel to review the record and present legal and factual argument to the Court to review when determining if good cause exists to sustain the appeal.

In this case, the Court should find that good cause clearly exists. At the time that Boldon entered his guilty pleas he was not advised that his right to appeal was limited. Nor was he given the opportunity to withdraw or affirm his guilty pleas once it was clear that Senate File 589 was passed. In fact, the district court at sentencing first told Boldon that he did have the right to appeal. (Sentencing Tr. p.19 L.25–p.20 L.5). However, then the district court stated: "That's debatable as the law changed today that based upon a plea of guilty you don't have the ability to just file an appeal. Be that as it may .

. . if you do have that right to appeal, . . . you would have to do so within 30 days . . . .” (Sentencing Tr. 20 L.6–14). Thus, the record shows that Boldon was not clearly advised of how the amendments may change his ability to appeal. Thus, in this situation, where a defendant has not been advised that his appeal rights are limited, the Court should recognize that “good cause” exists to pursue an appeal. Cf. State v. Weitzel, 905 N.W.2d 397, 402 (Iowa 2017) (citation omitted) (“[W]hen the court does not fully advise the defendant of his or her right to file a motion in arrest of judgment, the defendant may file a direct appeal challenging his or her guilty plea.”); see also Utah R. Crim. P. 11(e)(8) (2019) (stating court may not accept a guilty plea until it has found, among other things, the defendant has been advised that his right to appeal is limited). Recognizing good cause in such a situation ensures the defendant’s guilty plea is voluntary and complies with due process.

Additionally, the Court should find that good cause always exists in the context where the defendant is not trying

to undo the guilty plea, but rather only raising sentencing challenges. The spirit of the changes to Iowa Code section 814.6(1) appear to be aimed at defendants challenging and getting their guilty pleas undone over what the legislature deemed technical violations. Importantly, the challenges raised by Boldon in this appeal if successful would not result in a reversal and undoing of his guilty pleas; it would simply result in a new sentencing hearing where the prosecutor would be required to commend the recommended sentence and where the district court would sentence the defendant fairly and appropriately. If Boldon had gone to trial and had the same sentencing hearing, the Court could review his claim the district court used improper considerations in fashioning his sentence. This Court should interpret section 814.6(1) as still allowing appeals of sentencing errors or violations of constitutional rights.

Moreover, it is not clear that claims in the sentencing process would be able to be addressed in any other forum. Specifically, they may not cognizable in postconviction

proceedings. See Iowa Code § 822.2(1) (2017). Moreover, as discussed above, because of the lengthy time delay it takes to file, present, and get a ruling on a postconviction relief proceeding, many sentences will be discharged before the defendant is afforded a correction of the process. Moreover, in many cases, the defendant will have to await the correction while incarcerated. It is inherently unfair that if a prosecutor blatantly breaches a plea agreement that the defendant will have to wait in prison to try to remedy the situation—and potentially never be able to get relief if the sentence is short or the postconviction relief proceeding is too long. The same is true for other sentencing errors, like an abuse of discretion or the consideration of improper sentencing factors.

Furthermore, to satisfy a "good cause" standard, the defendant should not have to show that he would definitively win on the merits of the claim he seeks to raise in the appeal. Instead, the court's consideration of whether good cause has been established should include whether the defendant has a colorable or non-frivolous claim. In other discretionary review

situations, a petitioner does not have a burden to show he will ultimately prevail on the merits of the claim to get review granted. See Gibb v. Hansen, 286 N.W.2d 180, 188 (Iowa 1979) (considering claims raised in petition for writ of certiorari and ultimately ruling against petitioner and annulling writ); Farrell v. Iowa Dist. Court, 747 N.W.2d 789, 790–92 (Iowa Ct. App. 2008) (noting the Supreme Court granted the writ of certiorari but ruling against the petitioner on one issue and for him on others).

In this case, as discussed below, the prosecutor breached the plea agreement at sentencing by recommending the imposition of court costs, which was not a term of the agreement, and by failing to actually commend concurrent sentences to the district court. Trial counsel was ineffective for failing to object to the breach, and it was plain error. Moreover, the district court wrongfully considered Boldon's history of juvenile adjudications when sentencing him. The record supports Boldon's claims, and Boldon has established good cause for his appeal.

II. THE COURT SHOULD REMAND FOR A NEW SENTENCING HEARING BECAUSE THE STATE BREACHED THE PLEA AGREEMENT.

A. Preservation of Error: The traditional rules of preservation of error do not apply to claims of ineffective assistance of counsel or to plain error. See Puckett v. United States, 556 U.S. 129 (2009); State v. Ondayog, 722 N.W.2d 778, 784 (Iowa 2006) (citing State v. Lucas, 323 N.W.2d 228, 232 (Iowa 1982)).

B. Standard of Review: Because they involve a constitutional right, the Court reviews claims of ineffective assistance of counsel de novo. State v. Clay, 824 N.W.2d 488, 494 (Iowa 2012) (citing State v. Brubaker, 805 N.W.2d 164, 171 (Iowa 2011)).

The federal plain error standard for an error not raised in the trial court requires: "(1) 'error,' (2) that is 'plain', and (3) that 'affect[s] substantial rights.'" Johnson v. United States, 520 U.S. 461, 466–67 (1997) (quoting United States v. Olano, 507 U.S. 725, 732 (1993)) (alternation in original). If these first three requirements are met, the appellate court may

exercise its discretion to correct the error, if the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." Id. at 467.

C. Discussion: Both the U.S. Supreme Court and the Iowa Supreme Court have emphasized that the process of plea bargaining and the judicial enforcement of plea agreements are an "essential component of the administration of justice." See State v. Lopez, 872 N.W.2d 159, 170 (Iowa 2015) (quoting Santobello v. New York, 404 U.S. 257, 260–61 (1971)). The improper use of plea agreements "threatens the liberty" of criminal defendants and "the honor of the government." State v. Bearse, 748 N.W.2d 211, 215 (Iowa 2008) (citations omitted) (internal quotation marks omitted). Moreover, it undermines "public confidence in the fair administration of justice . . . [and] adversely impact[s] the integrity of the prosecutorial office and the entire judicial system." Id. "'[W]hen 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 [for the plea], such promise must be

fulfilled.'" Lopez, 872 N.W.2d at 170 (quoting Santobello, 404 U.S. at 262).

"[P]rosecutors are required to scrupulously honor the letter and spirit of plea agreements to maintain the integrity of the plea-bargaining process." Id. at 161. "[V]iolations of either the terms or the spirit of the agreement require reversal of the conviction or vacation of the sentence." Bearse, 748 N.W.2d at 215 (citations omitted) (internal quotation marks omitted). The Court holds "prosecutors and courts to the most meticulous standards of both promise and performance." State v. Horness, 600 N.W.2d 294, 298 (Iowa 1999) (citation omitted). Accordingly, our time-honored fair play norms and accepted professional standards" require strict compliance with the plea agreement. Bearse, 748 N.W.2d at 215.

Furthermore, the prosecutor's promise to make a sentencing recommendation involves more than "simply inform[ing] the court of the promise the State as made to the defendant with respect to sentencing." Id. (citing Horness, 600 N.W.2d at 299) (alternation in original).

> The State must actually fulfill the promise. Where the State has promised to "recommend" a particular sentence, we have looked to the common definition of the word "recommend" and required the prosecutor to present the recommended sentence[ ] with his or her approval, to commend the sentence[ ] to the court, and to otherwise indicate to the court that the recommended sentence[ ][is] supported by the State and worthy of the court's acceptance.

Id. at 216 (citations omitted) (alternation in original).

Therefore, the prosecutor must present the promise and recommendation with approval and commend the recommended sentence to the court. Id. at 215–17.

In this case, the prosecutor did not strictly comply with the plea agreement, nor did he actually fulfill the promise by commending concurrent sentences to the district court. At sentencing, when asked by the district court for the State's recommendation, the prosecutor stated:

> In counts one of both case numbers FECR226296 and FECR226943, the State's recommending a $750 suspended fine plus surcharge and court costs and five years in prison.
>
> On count two of FECR226943, the carrying weapons, the State's recommending a $625 suspended fine plus surcharge and court costs and two years in prison. The State is recommending that the counts run concurrently with each other.

The State is recommending a prison sentence on several factors. First of all, the facts and circumstances of this case. On August 2nd, 2018, the defendant, when stopped in a motor vehicle a little after midnight, had a .45 caliber Smith & Wesson while he was riding around, one round chambered with 11 more in the magazine, fled on foot causing a danger to himself and police officers. Another individual in the car, Mr. Dunn, also had a loaded firearm and fled from that vehicle as well.

We would note that the defendant, while on pretrial supervision, has not maintained employment. The attempt, latest attempt at working at Taco Bell appears to come right on the heels of sentencing. His other references to employment at Crystal Distribution, the timing of his not taking the UA appears to be consistent with the timing of his other failed UA attempts with pretrial supervision. Also the Crystal Distribution -- or excuse me, with Bertch. And then the Crystal Distribution job would appear also to be another attempt right on the heels of sentencing.

We would also note the defendant's continued drug use. The presentence investigation and the pretrial supervision reports indicate the defendant had multiple positive UAs, I believe nine positive UAs during the course of his pretrial supervision. Also, his failure to attend everything except for one substance abuse meeting before being unsuccessfully discharged and then misleading the officer about that even though he has claimed to once again start substance abuse treatment at this point.

The defendant also has a horrible record in juvenile court as far as adjudications. . . .

[The district court then interrupted to inform the prosecutor he had read the presentence

> investigation report "so there was no need . . . to outline all of the arrest record . . . ."]
>
> Biggest concern the State has regarding the presentence investigation history is the number of crimes that involve firearms. There's multiple adjudications for firearms-related offenses and for violent offenses. The burglary first and the second, possession of firearm as a felon. The possession of firearm as a felon involves actually firing of a .357 Smith & Wesson.
>
> The fact is that there is a long litany of different weapons violations, different dates, different firearms, that show that the defendant is a danger to the community. So based on those factors, based on the defendant's history, the defendant's pretrial supervision issues, the facts of this case, the State is recommending a prison sentence in this matter.

(Sentencing Tr. p.17 L.14–16).

First, the prosecutor recommended that Boldon pay the court costs of the actions. The plea agreement did not contemplate the repayment of court costs. Iowa Rule of Criminal Procedure 2.10(2) requires the parties to disclose the plea "agreement in open court at the time the plea is offered." Iowa R. Crim. P. 2.10(2) (2017). Similarly, Iowa Rule of Criminal Procedure 2.8(2)(c) requires the terms of the plea agreement to be disclosed on the record when the defendant

enters a guilty plea. Iowa R. Crim. P. 2.8(2)(c) (2017). The parties did recite a plea agreement on the record. (Plea Tr. p.6 L.2–p.7 L.10). That agreement did not indicate Boldon would pay the court costs. Because the plea agreement stated by the parties on the record at the guilty plea hearing did not include a provision that Boldon pay court costs, it was not part of the plea agreement. See State v. Loye, 670 N.W.2d 141, 149 (Iowa 2003) (internal citation omitted) ("We assume the prosecutor was aware of [Rule 2.8(2)(c)'s requirement that the plea agreement be disclosed in open court in the plea proceeding] and, had Loye's guilty plea been the product of a plea bargain that any such agreement would have been made a part of the record. *Its absence from the record leads us to conclude no plea agreement existed.*" (emphasis added)). The prosecutor recommended a term that was not contemplated by the plea agreement, thereby failing to strictly comply with its terms at sentencing; as such, he breached the plea agreement with his recommendation that Boldon pay the court costs. See Bearse, 748 N.W.2d at 215 (citations omitted).

Secondly, a mere a formal recitation of the plea agreement, without any advocacy concerning the appropriateness of the sentence for the resolution of the case, is insufficient to fulfill the State's promise made as a term of the plea agreement. The Court "holds prosecutors and courts to the most meticulous standards of both promise and performance." Id. In State v. Horness, the Court approvingly cited a case that held "*a prosecutor's 'formal recitation of a possible sentence' does not satisfy the obligation to 'make a recommendation' of a particular sentence; the recommendation must be 'expressed with some degree of advocacy'*". Horness, 600 N.W.2d at 299 (citing United States v. Brown, 500 F.2d 375, 377 (4th Cir. 1974)) (emphasis added). In this case, the prosecutor did not actually commended the recommended sentence to the sentencing court, thereby indicating it was worthy of the court's acceptance. See id.; Lopez, 872 N.W.2d at 170 (quoting Santobello, 404 U.S. at 262). Other than one brief mention that the State was recommending concurrent sentences, the prosecutor never again spoke about that

particular recommendation, though he explained at length the reasoning behind why the State requested incarceration. More is required to "scrupulously honor the letter and spirit of plea agreements" and "maintain the integrity of the plea-bargaining process." Id. at 161. Because the prosecutor failed to actually commend the recommended sentence—specifically, concurrent sentences—at the sentencing hearing for the court's consideration, he breached the plea agreement. See Bearse, 748 N.W.2d at 216 (citations omitted) ("[O]ur previous jurisprudence requir[es] the prosecutor to do more than merely inform the court of the promise made by the State.").

1. Ineffective assistance of counsel

Both the U.S. Constitution and Iowa Constitution guarantee the right to effective assistance of counsel to criminal defendants. U.S. Const. amends. VI, XIV; Iowa Const. art. I, § 10; see also State v. Ambrose, 861 N.W.2d 550, 555 (Iowa 2015). To prevail on an ineffective-assistance-of-counsel claim, a defendant must show (1) counsel failed to perform an essential duty and (2) the defense was prejudiced

as a result. State v. Brothern, 832 N.W.2d 187, 192 (Iowa 2013) (citation omitted). The defendant must establish both elements by a preponderance of the evidence. Id. (citation omitted).

If Senate File 589's amendment does not apply, the defendant may raise an ineffective-assistance-of-counsel claim on direct appeal if he "has reasonable grounds to believe that the record is adequate to address the claim on direct appeal." Id. § 814.7(2) (2017). Therefore, although ordinarily preserved for postconviction relief, the Court may consider the merits of such a claim on direct appeal if the record is adequate. See State v. Liddell, 672 N.W.2d 805, 809 (Iowa 2003). Where "the record reflects the terms of the plea agreement, the State's conduct that is alleged to have breached the plea agreement, and defense counsel's [lack] of response to the alleged breach," the record is adequate to resolve the issue on direct review. State v. Fannon, 799 N.W.2d 515, 520 (Iowa 2011) (citations omitted).

Defense counsel has a duty to object to the breach of a plea agreement. See id. at 523.

> When the State breached the plea agreement, the defendant's trial counsel clearly had a duty to object; only by objecting could counsel ensure that the defendant received the benefit of the agreement. Moreover, no possible advantage could flow to the defendant from counsel's failure to point out the State's noncompliance. Defense counsel's failure in this regard simply cannot be attributed to improvident trial strategy or misguided tactics.

Horness, 600 N.W.2d at 300 (citations omitted). Because defense counsel failed object to the State's breach of the plea agreement, he failed to perform an essential duty. Id.

The Court does not speculate on what sentence the trial court would have pronounced if trial counsel had objected to the State's breach of the plea agreement. Lopez, 872 N.W.2d at 170. Rather, the Court presumes prejudice in situations where "defense counsel fails to object to the state's breach of a plea agreement at the sentencing hearing." Id. As such, the Court should find Boldon is entitled to a new sentencing hearing where the State must "grant specific performance of

the plea agreement with resentencing by a different judge." See id. at 171 (citation omitted).

2. Plain error

Alternatively, Boldon requests the Court adopt plain error review and find that the prosecutor's breach of the plea agreement was plain error.

> In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings.

United States v. Atkinson, 297 U.S. 157, 160 (1936). Federal courts have recognized plain error rule since 1896. Jon M. Woodruff, Note, Plain Error by Another Name: Are Ineffective Assistance of Counsel Claims a Suitable Alternative to Plain Error Review in Iowa?, 102 Iowa L. Rev. 1811, 1815 (May 2017) (citing Wiborg, 163 U.S. at 658–59). In Wiborg v. United States, the United States Supreme Court was confronted with a claim of insufficient evidence that had not been raised in the trial court. Wiborg, 163 U.S. 632, 658 (1896). The Court

ruled on the merits of the claim and articulated the foundation for the plain error rule, holding that "although this question was not properly raised, yet if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it." Id.

The federal plain error rule was later codified in the Federal Rules of Criminal Procedure Rule 52(b). It states: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52 (2019). Although the language of the rule does not describe either what constitutes "plain error" or "substantial rights", the advisory committee note makes it clear the rule is a codification of existing law, and it cites Wiborg. Fed. R. Crim. P. 52 advisory committee's note.

The United States Supreme Court created a multipart standard for plain error in United States v. Olano. Olano, 507 U.S. at 732–34. First, there must be an error, such as a deviation from a legal rule, which has not been affirmatively waived. Id. at 732–33. Second, the error must be plain, which

means it must be clear or obvious. Id. at 734. Third, the error must affect substantial rights, meaning the defendant has the burden of proving the error was prejudicial. Id. The majority of jurisdictions recognize the authority of an appellate court to reverse on unpreserved errors on the basis of plain error. Wayne R. LaFave et al., 7 Criminal Procedure, § 27.5(d) (4th ed. Nov. 2018); see also generally Tory A. Weigand, Raise or Lose: Appellate Discretion and Principled Decision-Making, 17 Suffolk J. Trial & App. Advoc. 179, 199–241 (2012) (discussing how various jurisdictions apply the plain error rule); State v. Macke, No. 18–0839, 2019 WL 1300432, at *5 (Iowa Ct. App. Mar. 20, 2019), overruled by 933 N.W.2d 226 (Iowa 2019) ("Iowa is one of only two states that have not adopted the plain-error doctrine. . . .").

The Iowa Supreme Court has repeatedly declined to recognize plain error review. See State v. Rutledge, 600 N.W.2d 324, 325 (Iowa 1999) (citation omitted); State v. McCright, 569 N.W.2d 605, 607 (Iowa 1997) (citation omitted).

The Court has justified requiring error preservation in the trial court as follows:

> On closer reflection we think simple justice demands rigid adherence to the rule. The rule does not proceed, as cynics would have it, from some vague fear of blindsiding a trial judge, but rather from the very real fear of blindsiding the trial process. Long experience has taught us that the bulk of mistakes made at trial can and will be corrected whenever the trial court is alerted to them. The public should not be required to fund a system that would allow trial counsel to, as lawyers often phrase it, "bet on the outcome."

Rutledge, 600 N.W.2d at 326. However, at the same time, it has been recognized that Iowa's appellate courts have generally substituted the ineffective-assistance-of-counsel analysis for plain error:

> Although we have not said so as a court, I think the reality is that our court has an expansive view of ineffective assistance of counsel. In some respects, we are using ineffective assistance as a substitute for a plain error rule, which we do not have in Iowa. One of those areas is guilty pleas, where we vacate a plea whenever the record does not contain a factual basis for each element of the crime, seemingly without regard to counsel's actual competence. . . .

Rhoades v. State, 848 N.W.2d 22, 33–34 (Iowa 2014) (Mansfield, J., concurring specially) (internal citations

omitted). Other jurists have also noted it may be beneficial to adopt plain error review in Iowa. See, e.g., State v. Sahinovic, No. 15–0737, 2016 WL 1683039, at *2 (Iowa Ct. App. Apr. 27, 2016) (McDonald, J., concurring) (unpublished table decision) ("I write separately to note there may be merit in adopting a plain error rule rather than continuing to stretch the doctrinal limits of the right to counsel to address unpreserved error."); Macke, 2019 WL 1300432, at *5 (Doyle, J.) (same); State v. Hall, No. 11–1524, 2012 WL 4900426, at *2 n.1 (Iowa Ct. App. Oct. 17, 2012) (Tabor, J.) (unpublished table decision) ("[S]alutary reasons may exist for recognizing a "plain error" rule . . . .").

Thus, while our Iowa Supreme Court has historically declined to adopt a plain error doctrine, the appellate courts have routinely addressed unpreserved plain and prejudicial error on direct appeal under the ineffective-assistance-of-counsel framework, so long as the existing record is adequate to do so. See State v. Johnson, 272 N.W.2d 480, 484 (Iowa 1978) (declining to adopt a plain error rule, *accord* State v.

Rinehart, 283 N.W.2d 319, 324 (Iowa 1979)); State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978) (noting ineffective-assistance-of-counsel claims should not be addressed on direct appeal if the record is not adequate to do so, but acknowledging "[t]here are cases when incompetency [of counsel] is so glaring that we are justified in saying so upon an examination of the record" on direct appeal). To the extent that the amendments of Senate File 589 to Iowa Code section 814.7 prevent Iowa appellate courts from redressing even plain and substantial (though unpreserved) errors on direct appeal under an ineffective-assistance-of-counsel rubric despite an adequate record, such change provides a significant basis and need for the Iowa Supreme Court to alter its prior course and now recognize the necessity of plain-error review for certain clear but unpreserved errors that "seriously affect the fairness, integrity, or public reputation of judicial proceedings." Johnson, 520 U.S. at 467.

Moreover, there is also a basis for plain error review in Iowa law. Iowa Code section 814.20 gives the appellate courts

broad authority to affirm, modify, or reverse a judgment, order a new trial, or reduce a defendant's punishment. Iowa Code § 814.20 (2017). It was this provision the Iowa Supreme Court relied upon when it corrected an illegal sentence without the benefit of a motion in the district court. See State v. Young, 292 N.W.2d 432, 435 (Iowa 1980).

> If a sentence is illegal for example, a court mistakenly imposes a ten-year term when the statute authorizes a five-year maximum the practice in this state has been for the district court to correct the illegality when it comes to that court's attention, or for this court to do so or to direct the district court to do so when it comes to this court's attention. Thus rule 23(5)(a) really adds nothing new; it reflects what Iowa courts have been doing. Nothing in rule 23(5)(a) expressly requires a motion thereunder prior to appeal, section 814.20 of the Code authorizes us to dispose of an appeal by affirmation, reversal, "or modification" of the judgment, and we prefer to remain with the prior practice. We thus reject the State's contention that rule 23(5)(a) must be initially applied.

Id. (internal citations omitted). The Iowa Supreme Court has previously adopted exceptions to the usual error preservation rules, and it should do so again to recognize the plain-error doctrine. See State v. Lucas, 323 N.W.2d 228, 232 (Iowa

1982) (citation omitted) (allowing an exception to the general rule of error preservation for claims of ineffective assistance); State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994) (citations omitted) (noting void, illegal or procedurally defective sentences may be challenged for the first time on appeal). In addition, Article V, section 4 of the Iowa Constitution vests in the Iowa Supreme Court inherent supervisory authority over lower courts, which permits the Court to implement necessary procedures protect the rights of criminal defendants. Iowa Const. art V, § 4; State v. Dahl, 874 N.W.2d 348 (Iowa 2016).

In this particular case, there is no basis for differentiating between plain error and ineffective assistance of counsel. Boldon claims that his attorney failed to object to the prosecutor's breach of the plea agreement and the district court's failure to require the State's specific performance of the agreement. It is the sort of claim that, if established, would warrant a reversal for ineffective assistance. See Lopez, 872 N.W.2d at 170–71. Here, as discussed above, the prosecutor recommended a term not contemplated by the plea agreement

and did not actually recommend concurrent sentences to the sentencing court as required by the plea agreement; he clearly deviated from the legal rule, which is obvious from a review of the record. Nor did the district court require the prosecutor to make the recommendation, despite being on notice of the existence of a plea agreement.

Moreover, it is also clear the error affected substantial rights and was prejudicial. The Iowa Supreme Court has stated that the "defendant is entitled to relief when the prosecutor reneges on a promise that induced the guilty plea" even where defense counsel does not object to the breach. See Lopez, 872 N.W.2d at 161, 171 (citing Santobello, 404 U.S. at 260). Accordingly, Iowa Courts have refused to engage in speculation and presumed prejudice in cases where the State breaches the plea agreement. See Lopez, 872 N.W.3d at 170 ("We decline to play mind reader to speculate on what the sentencing court would have done differently [without the prosecutor's breach of the plea agreement]. . . . [P]rejudice is

presumed where defense counsel fails to object to the state's breach of a plea agreement at the sentencing hearing.").

Nor was the error in this case harmless beyond a reasonable doubt. See State v. Miller, 223 P.3d 157, 165, 172 (Haw. 2010) (noting the appellate court will correct the plain error unless it is harmless beyond a reasonable doubt). Rather, it was clear that the district court latched onto the State's argument about why incarceration was appropriate and used it to justify the imposition of consecutive sentences; the judge specifically noted the prosecutor's statements regarding Boldon's history in juvenile court. (Sentencing Tr. p.8 L.3–p.10 L.21, p.17 L.9–p.19 L.24). Nor did the district court acknowledge that it was going against the State's recommendation for concurrent sentences when it imposed the felonies consecutive to one another. Had the prosecutor actually commended concurrent sentences, there is a reasonable likelihood the trial court would have followed that recommendation, given that the trial court clearly credited the prosecutor's statements and the reasoning behind why the

State believed concurrent sentences were appropriate would have been explained.

The appellate courts are fully capable of ruling upon the claim directly. It is simply a question of whether the record established in the district court supports the claim the prosecutor breached the plea agreement. It is an answer that the appellate courts can provide to defendants without spending needless expense and resources litigating the issue in a separate postconviction proceeding. Moreover, it is not clear that a defendant would be able to get relief on this claim in a postconviction relief hearing. "[P]ostconviction proceedings often take much longer while defendants remain incarcerated without a right to release on bond." State v. Macke, 933 N.W.2d 226, 233 (Iowa 2019) (citations omitted). Because of the lengthy process, it is quite possible that a defendant (especially those serving shorter sentences) would never be able to challenge sentencing errors or breaches of the plea agreement in a postconviction relief proceeding because by the time he or she gets a hearing, his or her sentence would

have already discharged, rending the claims moot and giving a defendant no relief for improper conduct at the sentencing hearing. This not only violates the principles of fairness, but also undermines confidence in the criminal justice system. Therefore, for the reasons stated above, this Court should grant a new sentencing hearing in front of a different judge under plain-error review.

III. THE DISTRICT COURT ERRED BY CONSIDERING AND RELYING ON IMPROPER FACTORS WHEN RENDERING THE DEFENDANT'S SENTENCE.

A. Preservation of Error: The Court may review a defendant's argument that the district court considered improper factors and abused its discretion during his sentencing on direct appeal, even in the absence of an objection in the district court. See State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994) (citations omitted); State v. Young, 292 N.W.2d 432, 434–35 (Iowa 1980) (reviewing an improper factor claim despite no objection was made at the sentencing hearing). Thus, these arguments are not subject to the usual concept of waiver or the requirement of error

preservation. State v. Woody, 613 N.W.2d 215, 217 (Iowa 2000) (citing State v. Ohnmacht, 342 N.W.2d 838, 842–43 (Iowa 1983)); see also State v. Cooley, 587 N.W.2d 752, 754 (Iowa 1998) ("It strikes us as exceedingly unfair to urge that a defendant, on the threshold of being sentenced, must question the court's exercise of discretion or forever waive the right to assign the error on appeal.").

B. Standard of Review: Review of a sentence imposed in a criminal case is for correction of errors at law. Iowa R. App. P. 6.907 (2017); see also State v. Formaro, 638 N.W.2d 720, 724 (Iowa 2002). "A sentence will not be upset on appellate review unless the defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure such as the trial court's consideration of impermissible factors." State v. Witham, 583 N.W.2d 677, 678 (Iowa 1998) (citing State v. Wright, 340 N.W.2d 590, 592 (Iowa 1983)).

C. Discussion: In this case, the plea agreement was open in that the State would recommend incarceration but agreed to recommend concurrent sentences, and Boldon could

request any sentence available; at sentencing, Boldon requested a deferred judgment. (Plea Tr. p.6 L.2–p.7 L.10; Sentencing Tr. p.14 L.22–24). After hearing the parties' recommendations, the district court stated it would be imposing the prison sentences. (Sentencing Tr. p.16 L.15–20). The district court later stated:

> The real issue here is whether or not, frankly, in my opinion, these sentences should be run concurrently or consecutively to one another. As [the prosecutor] was going through, and as the PSI adequately addresses, your history stems as far back as age 14 where you were adjudicated delinquent for drugs, and shortly after that you were adjudicated delinquent for handling a nine-millimeter handgun where you were charged with carrying weapons. With that adjudication and your supervision, to say that it was -- you handled or dealt with that supervision poorly is an understatement. But nonetheless, at age 15 then, despite the efforts to try and deter you and have you walk the straight and narrow, you actually went up and committed more even egregious crimes of burglary in the first degree.
>
> You and other individuals broke into a house with firearms. In fact shot the homeowner's dog. You were placed on juvenile supervision again and again. As the PSI outlines, your supervision or your behavior on supervision was poor to say the least. In fact, you ran from the youth shelter while on supervision for such an egregious crime. While 15 you got charged with trafficking in stolen firearms. At age 16 you were arrested and at age 16, given our

> current laws and your prior history of adjudications for felony offenses, you got charged with carrying weapons and possession of a firearm as a felon, which originated in adult court. *Without casting dispersions to our judge at that time, they thought it would be wise that you get waived back to juvenile court despite the legislature's directives that you get treated like an adult for having committed adult-like crimes with that type of history.* While back in the juvenile system you violated your probation eight different ways from Sunday, multiple violations, and again placement in the detention facilities. These multiple crimes, multiple firearms offenses, multiple violent offenses, a prison sentence is appropriate. And for the purposes of the record, and to be abundantly clear, a consecutive sentence is appropriate. And so I will be running the two felonies consecutively to one another. And for the purposes of the record and for this I have to state the consecutive nature, the reasons for doing so. I have just outlined them in great detail. . . . [T]o be clear, I do believe this sentence is appropriate for those reasons. Namely, the nature of this offense, the circumstances of this offense, *your relatively young age in comparison to this extensive criminal history with firearms*, and given the amount of efforts put forth thus far regarding *your chances of -- for reform, in my opinion, are nearly nil*.

(Sentencing Tr. p.17 L.9–19 L.24). Thus, the district court thus relied heavily on Boldon's juvenile history in imposing prison and consecutive sentences on the felony charges. This Court should find the district court abused its discretion in

the manner in which it considered Boldon's juvenile criminal history.

The district court is authorized to determine and impose the sentence it determines in its discretion that is best suited to rehabilitate a defendant and protect society. Iowa Code § 901.5 (2017). When choosing a sentence, the court must consider all pertinent matters, including the nature of the offense, the attending circumstances, defendant's age, character, and propensities, and chances for reform. Formaro, 638 N.W.2d at 725. Additionally, Iowa Code section 232.55 provides that a juvenile adjudication may be admissible "in a sentencing proceeding after conviction of the person for an offense other than a simple or serious misdemeanor." Iowa Code § 232.55 (2017). However, the statute does not specify the *manner* in which such adjudications are to be considered by the sentencing court. Boldon respectfully urges that Iowa's juvenile sentencing case law imposes limits on the manner in which juvenile adjudications may be considered in adult sentencing decisions. Specifically, our juvenile sentencing

case law recognizes that juvenile criminal conduct must be understood in context with the realities of how juveniles are different from adults. Accordingly, this Court should now hold that it is an improper sentencing consideration for a sentencing court to consider juvenile criminal history of an adult offender without also considering the mitigating features of youth universally attending such juvenile adjudications. See State v. Null, 836 N.W.2d 41, 67 (Iowa 2013) ("As a result, it can be argued that the diminished culpability of juveniles must always be a factor considered in criminal sentencing."); State v. Lyle, 854 N.W.2d 378, 395 (Iowa 2014) (quoting Miller v. Alabama, 567 U.S. 460, 480 (2012)) (Fundamentally, our courts require the sentencing judge "to take into account how children are different . . . .").

For purposes of sentencing, criminal conduct committed by children is "constitutionally different" than criminal conduct committed by adults. See id. "[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to

psychological damage." Id. at 392 (quoting Eddings v. Oklahoma, 455 U.S. 104, 115–17 (1982)) (alternation in original). Juveniles have "distinctive . . . mental traits and environmental vulnerabilities." Id. (quoting Miller, 567 U.S. at 473). These include a "lack of maturity, underdeveloped sense of responsibility, vulnerability to peer [and family] pressure [or influence], and the less fixed nature of the juvenile's character." Null, 836 N.W.2d at 74 (citations omitted). These "differentiating characteristics of youth are universal." Lyle, 854 N.W.2d at 389 (citation omitted) (internal quotation marks omitted). As a result, a juvenile offender's "culpability is necessarily and categorically reduced as a matter of law." Id. at 386. In addition, juvenile criminal conduct is "less likely to be evidence of 'irretrievably depraved character.'" State v. Seats, 865 N.W.2d 545, 556 (Iowa 2015) (citations omitted).

The foregoing vulnerabilities of youth necessarily inhere in juvenile adjudications. Moreover, the impact of such vulnerabilities on juvenile criminal history is only exacerbated by the fact that juvenile delinquency proceedings tend to be

more informal, carry fewer procedural protections, and have a very different purpose—best interests of the child—as compared with adult criminal proceedings. See In re A.K., 825 N.W.2d 46, 51 (Iowa 2013) (citation omitted) ("The objective of the [delinquency] proceedings is the best interests of the child."). There is both less incentive and less opportunity for children to vigilantly defend against juvenile adjudications and, as a result, juvenile adjudications are less worthy of reliance than adult criminal convictions. See id.; State v. Bruegger, 773 N.W.2d 862, 871, n.1 (Iowa 2009). Indeed, "a substantial body of literature . . . questions, on due process grounds, whether juvenile court adjudications may be considered the same as criminal convictions" in light of:

> (1) the different purposes of a juvenile adjudication and the juvenile justice system as a whole, (2) the prevalence of pleas in the juvenile system, (3) the lack of a jury trial in most juvenile proceedings, (4) the difficulty of juveniles to meaningfully participate in a process they do not fully understand and do not control, and (5) the lack of incentives to thoroughly litigate in juvenile proceedings.

Bruegger, 773 N.W.2d at 871, n.1 (citations omitted). Any consideration of juvenile adjudications in the very different context of adult criminal sentencing must thus be undertaken only with great caution.

As such, this Court should hold that, under the due process clause, if a sentencing court considers juvenile adjudications, it also must consider the following universally mitigating aspects of the juvenile criminal conduct:

> (1) the "chronological age" of the youth and the features of youth, including "immaturity, impetuosity, and failure to appreciate risks and consequences"; (2) the "family and home environment" that surrounded the youth; (3) "the circumstances of the . . . offense, including the extent of [the youth's] participation in the conduct and the way familial and peer pressures may have affected [the youth]"; (4) the "incompetencies associated with youth—for example, [the youth's] inability to deal with police officers or prosecutors (including on a plea agreement) or [the youth's] incapacity to assist [the youth's] own attorneys"; and (5) "the possibility of rehabilitation."

Lyle, 854 N.W.2d at 403 n.8 (quoting Miller, 567 U.S. at 477–78). The Court should find that due process requires the explicit consideration these factors if the sentencing court

considers prior juvenile adjudications or other juvenile criminal history. See Bruegger, 773 N.W.2d at 871, n.1 (citations omitted); see also U.S. Const. amends. VI, XIV; Iowa Const. art. I, § 9. Alternatively, and at a minimum, this Court should hold that due process requires the sentencing court must explicitly recognize the mitigating features of youth that universally accompany juvenile criminal conduct, including immaturity, vulnerability to peer pressure, impetuousness, and poor risk assessment, and render the culpability accompanying such conduct "necessarily and categorically reduced as a matter of law" if the sentencing court considers juvenile criminal history in a making a sentencing decision. See Lyle, 854 N.W.2d at 386, 389; State v. Pearson, 836 N.W.2d 88, 97 (Iowa 2013); Null, 836 N.W.2d at 74.

In the present case, the district court largely relied on Boldon's juvenile criminal history in rejecting Boldon's request for a deferred judgment, imposing incarceration, and imposing consecutive sentences, resulting in a sentence double in length than the State's recommendation. The district court's

consideration of Boldon's juvenile criminal history without also explicitly considering the universally mitigating features of youth accompanying the juvenile adjudications violates due process, and it amounts to an improper sentencing consideration.

Even if the district court does not have to consider a defendant's juvenile court history differently than an adult criminal history, the sentencing court still improperly considered Boldon's juvenile criminal history when fashioning his sentence. In his reasoning, the court expressed disapproval that a different judge thought it appropriate to waive Boldon back into juvenile court in an earlier proceeding in a different case. (Sentencing Tr. 18 L.8–19). That Boldon had been previously waived back into juvenile court at a prior time nothing to do with pertinent matters, such as the nature of the offense, the attending circumstances of the offense, Boldon's age, character, or propensity and chances for rehabilitation; thus, it was an impermissible factor for the sentencing court to consider. See Cooley, 587 N.W.2d at 755;

State v. Matlock, No. 04–0405, 2005 WL 1958370, at *2 (Iowa Ct. App. Aug. 17, 2005) (unpublished table decision) (vacating the sentence when the sentencing court improperly considered a fact that was not relevant to the question of the proper sentence).

In addition, rather than considering the mitigating factor that Boldon was seventeen when he committed the offense, the district court also considered Boldon's young age as an aggravating factor when sentencing him. Considering a circumstance that should be mitigating as aggravating is clearly unreasonable; therefore, it is an abuse of discretion for the sentencing court to do so. See State v. Buck, 275 N.W.2d 194, 195 (Iowa 1979). Indeed, Iowa courts have found it is reversible error to consider a factor an aggravating circumstance rather than a mitigating circumstance. See, e.g., State v. Hajtic, No. 15–0404, 2015 WL 6508691, at *3–4 (Iowa Ct. App. Oct. 28, 2015) (unpublished table decision) (citing Pearson, 836 N.W.2d at 97).

Lastly, the district court clearly ignored the all the case law regarding juveniles and the science that the Supreme Court cited and relied upon when finding "juveniles are different" when it determined that Boldon's chances for reform were "nearly nil". (Sentencing Tr. p.19 L.23–24). Because it is completely contrary to the law and science supporting juvenile case law, the district court's reliance on this factor was improper and "was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." Buck, 275 N.W.2d at 195. As such, it is an abuse of discretion. See id.

In order to establish reversible error, the defendant must show that the court was not just "merely aware" of the improper sentencing factor, but that the sentencing court "relied" on it in rendering its sentence. State v. Ashley, 462 N.W.2d 279, 282 (Iowa 1990) (citations omitted). Where such a showing is made, however, the reviewing court "cannot speculate about the weight a sentencing court assigned to an improper consideration and the defendant's sentences must be vacated and the case remanded for resentencing." State v.

Gonzalez, 582 N.W.2d 515, 517 (Iowa 1998) (citations omitted). This is so even if the impermissible factor was "merely a secondary consideration." State v. Lovell, 857 N.W.2d 241, 243 (Iowa 2014) (internal quotation marks omitted) (citation omitted). "The important focus is whether an improper sentencing factor crept into the proceedings; not the result it may have produced of the manner it may have motivated the court." Thomas, 520 N.W.2d at 313 (citation omitted). Additionally, "[i]n order to protect the integrity of our judicial system from the appearance of impropriety," resentencing must be "before a different judge." Lovell, 857 N.W.2d at 243.

It is clear from the sentencing court's remarks that it was not "merely aware" of the impermissible factors but actually considered and relied on them. See Ashley, 462 N.W.2d at 282. Thus, the improper considerations "crept into the proceedings". See Thomas, 520 N.W.2d at 313. As such, Boldon is entitled to a new sentencing hearing in front of a different judge. See Lovell, 857 N.W.2d at 243.

CONCLUSION

For the reasons outlined above, Defendant–Appellant Daquon Boldon requests the Court vacate his sentences and remand for a new sentencing hearing in front of a different judge.

REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $5.14, 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)(g)(1) because:

> [X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 13,236 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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