IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. DAVID J. TREPTOW, Defendant-Appellant.	)))))))))	SUPREME COURT 19-1276

APPEAL FROM THE IOWA DISTRICT COURT
FOR BUCHANAN COUNTY
HONORABLE KELLYANN LEKAR, JUDGE

APPELLANT'S BRIEF AND ARGUMENT
AND
REQUEST FOR ORAL ARGUMENT

MARTHA J. LUCEY
State Appellate Defender
mlucey@spd.state.ia.us
appellatedefender@spd.state.ia.us

STATE APPELLATE DEFENDER'S OFFICE
Fourth Floor Lucas Building
Des Moines, Iowa 50319
(515) 281-8841 / (515) 281-7281 FAX

ATTORNEY FOR DEFENDANT-APPELLANT

FINAL

CERTIFICATE OF SERVICE

On the 5th day of June, 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 David J. Treptow, # 6558592, Newton Correctional Facility, 307 S. 60th Avenue, W., PO Box 218, Newton, IA 50208.

APPELLATE DEFENDER'S OFFICE

/s/*Martha J. Lucey*
MARTHA J. LUCEY
State Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
mlucey@spd.state.ia.us
appellatedefender@spd.state.ia.us

MJL/lr/4/20
MJL/sm/6/20

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and Court Rules:

Other Authorities:

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Must Iowa Code section 814.6(1)(a)(3) (Supp. 2020), Iowa Code section 814.7 (Supp. 2020), and Iowa Code section 814.29 (Supp. 2020) be invalidated for improperly restricting the role and jurisdiction of Iowa's appellate courts?

Authorities

Iowa Const. art. V, § 4

Hills Bank & Trust Co. v. Converse, 772 N.W.2d 764, 771 (Iowa 2009)

Klouda v. Sixth Judicial Dist. Dept. of Corr. Serv., 642 N.W.2d 255, 260 (Iowa 2002)

2019 Acts, ch. 140, § 28, codified as Iowa Code § 814.6(1) (Supp. 2020)

2019 Acts, ch. 140, § 31, codified as Iowa Code § 814.7 (Supp. 2020)

2019 Acts, ch. 140, § 33, codified as Iowa Code § 814.29 (Supp. 2020)

State v. Phillips, 610 N.W.2d 840, 842 (Iowa 2000)

Planned Parenthood of the Heartland v. Reynolds ex rel. State, 915 N.W.2d 206, 212 (Iowa 2018)

Iowa Const. art. V, § 1

Franklin v. Bonner, 207 N.W. 778, 779 (Iowa 1926)

Iowa Const. art. V, § 6

In re Guardianship of Matejski, 419 N.W.2d 576, 577 (Iowa 1988)

Laird Brothers v. Dickerson, 40 Iowa 665, 670 (1875)

Schrier v. State, 573 N.W.2d 242, 244–45 (Iowa 1997)

In re Durant Comm. Sch. Dist., 106 N.W.2d 670, 676 (Iowa 1960)

Wissenberg v. Bradley, 229 N.W. 205, 209 (Iowa 1929)

McKane v. Durston, 153 U.S. 684, 687–88 (1894)

Cassandra Burke Robinson, The Right to Appeal, 91 N.C. L. Rev. 1219, 1221 (2013)

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)

In re Chambers, 152 N.W.2d 818, 820 (Iowa 1967)

Waldon v. Dist. Court of Lee Cnty., 130 N.W.2d 728, 731 (Iowa 1964)

Iowa Code § 602.4102(2) (2019)

Varnum v. Brien, 763 N.W.2d 862, 875–76 (Iowa 2009)

U.S. Const. amend. VI

U.S. Const. amend. XIV

Iowa Const. art. I, § 10

State v. Ambrose, 861 N.W.2d 550, 556 (Iowa 2015)

II. Do Iowa Code section 814.6(1)(a)(3) (Supp. 2020) and Iowa Code section 814.7 (Supp. 2020) violate equal protection?

Authorities

Iowa Const. art. V, § 4

Hills Bank & Trust Co. v. Converse, 772 N.W.2d 764, 771 (Iowa 2009)

Klouda v. Sixth Judicial Dist. Dept. of Corr. Serv., 642 N.W.2d 255, 260 (Iowa 2002)

Iowa Code § 814.6(1)(a)(3) (Supp. 2020)

Iowa Code § 814.7 (Supp. 2020)

U.S. Const. amend. XIV

Iowa Const. art. I § 6

Varnum v. Brien, 763 N.W.2d 862, 878 (Iowa 2009)

State v. Doe, 927 N.W.2d 656, 661 (Iowa 2019)

City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439–41, 105 S.Ct. 3249, 3254-3255 (1985)

Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S.Ct. 2574, 2582 (1986)

Gideon v. Wainwright, 372 U.S. 335, 344, 83 S.Ct. 792, 796 (1963)

United States v. Cronic, 466 U.S. 648, 654, 104 S.Ct. 2039, 2044 (1984)

Evitts v. Lucey, 469 U.S. 387, 395, 105 S.Ct. 830, 835 (1985)

State v. Kress, 636 N.W.2d 12, 20 (Iowa 2001)

State v. Delano, 161 N.W.2d 66, 72–73 (Iowa 1968)

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

State v. Truesdell, 679 N.W.2d 611, 616 (Iowa 2004)

III. Do Iowa Code section 814.6(1)(a)(3) (Supp. 2020) and Iowa Code section 814.7 (Supp. 2020) deny Treptow due process and the right to effective counsel on appeal?

Authorities

Iowa Const. art. V, § 4

Hills Bank & Trust Co. v. Converse, 772 N.W.2d 764, 771 (Iowa 2009)

Klouda v. Sixth Judicial Dist. Dept. of Corr. Serv., 642 N.W.2d 255, 260 (Iowa 2002)

U.S. Const. amend XIV

Iowa Const. art. I, § 9

Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S.Ct. 2574, 2582 (1986)

Evitts v. Lucey, 469 U.S. 387, 395, 105 S.Ct. 830, 835 (1985)

Iowa Code § 814.7 (Supp. 2020)

State v. Brooks, 555 N.W.2d 446, 448 (Iowa 1996)

State v. Hack, 545 N.W.2d 262, 263 (Iowa 1996)

Griffin v. Illinois, 351 U.S. 12, 18, 76 S.Ct. 585, 590 (1956)

Iowa Code § 814.6(1)(a)(3) (Supp. 2020)

Rinaldi v. Yeager, 384 U.S. 305, 310, 86 S.Ct. 1497, 1500 (1966)

Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Howe, 706 N.W.2d 360, 368 (Iowa 2005)

State v. Delano, 161 N.W.2d 66, 74 (Iowa 1968)

IV. If the amendment to section 814.6 applies to this appeal, does Treptow have good cause to appeal?

Authorities

Iowa Code § 814.6(1)(a)(3) (Supp. 2020)

Iowa Const. art. V, § 4

Hills Bank & Trust Co. v. Converse, 772 N.W.2d 764, 771 (Iowa 2009)

State v. Tarbox, 739 N.W.2d 850, 852 (Iowa 2007)

Iowa Code § 814.6(1)(a)(3) (Supp. 2020)

Iowa Civil Liberties Union v. Critelli, 244 N.W.2d 564, 568–69 (Iowa 1976)

State v. Tesch, 704 N.W.2d 440, 451–52 (Iowa 2005)

Iowa R. Crim. P. 2.33

Iowa R. Civ. P. 1.977

Iowa Code § 322A.2 (2017)

Iowa Code § 322A.15 (2017)

Iowa Code § 915.84(1) (2017)

State v. Winters, 690 N.W.2d 903, 907-08 (Iowa 2005)

Wilson v. Ribbens, 678 N.W.2d 417, 420-21 (Iowa 2004)

Simmons v. State Pub. Defender, 791 N.W.2d 69, 74 (Iowa 2010)

U.S. Const. amend. V

amend. XIV § 1

Iowa Const. art. I, § 6

Iowa Const. art. I, § 9

In re Chambers, 152 N.W.2d 818, 820 (Iowa 1967)

Evitts v. Lucey, 469 U.S. at 400-401, 105 S.Ct. 830, 838-839 (1985)

Billotti v. Legursky, 975 F.2d 113, 115 (4th Cir. 1992)

Gibb v. Hansen, 286 N.W.2d 180, 188 (Iowa 1979)

Farrell v. Iowa Dist. Court, 747 N.W.2d 789, 790–92 (Iowa Ct. App. 2008)

State v. Hack, 545 N.W.2d 262, 263 (Iowa 1996)

V. Do the Minutes of Testimony establish a factual basis for Treptow's Alford plea to gatherings where controlled substances used?

Authorities

Iowa R. Crim. P. 2.8(2)(d)

Iowa R. Crim. P.2.24(3)(a)

State v. Fisher, 877 N.W.2d 676, 680 (Iowa 2016)

State v. Meron, 675 N.W.2d 537, 540 (Iowa 2004)

State v. Hrbek, 336 N.W.2d 431, 435-436 (Iowa 1983)

Washington v. Scurr, 304 N.W.2d 231, 235 (Iowa 1981)

State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1973)

State v. Lucas, 323 N.W.2d 228, 232 (Iowa 1982)

Iowa Code § 814.20 (2017)

State v. Velez, 829 N.W.2d 572, 575 (Iowa 2013)

State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987)

Iowa R. App. P. 6.907

United States v. Olano, 507 U.S. 725, 732-35, 113 S.Ct. 1770, 1777-1778 (1993)

United States v. Atkinson, 297 U.S. 157, 160, 56 S.Ct. 391, 392 (1936)

Treptow's guilty plea to gatherings where controlled substances used is not supported by a factual basis.

State v. Brooks, 555 N.W.2d 446, 448 (Iowa 1996)

State v. Hanson, 234 N.W.2d 878, 879 (Iowa 1975)

Iowa Code § 124.407 (2017)

State v. Cartee, 577 N.W.2d 649, 653 (Iowa 1998)

State v. Carter, 582 N.W.2d 164, 166 (Iowa 1998)

The motion in arrest of judgment advisement did not substantially comply with Rule 2.8(2)(d).

Iowa R. Crim. P. 2.8(2)(d)

Ineffective assistance of counsel

U.S. Const. amend. VI

U.S. Const. amend. XIV

Iowa Const. art. I, section 10

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Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981)

Iowa R. Crim. P. 2.8(2)(b)

State v. Hack, 545 N.W.2d 262, 263 (Iowa 1996)

State v. Keene, 630 N.W.2d 579, 582 (Iowa 2001)

Rhoads v. State, 848 N.W.2d 22, 29 (Iowa 2014)

Plain Error Review

Iowa Code § 124.407 (2017)

SF 589, 88 G.A. § 31 (2019)

Iowa R. Crim. P. 2.8(2)(b)

Barker v. Capotosto, 875 N.W.2d 157, 168 (Iowa 2016)

Washko v. Westport Ins. Corp., No. CIV.A. 01-4026, 2002 WL 1745910, at *5 (E.D. Pa. July 24, 2002)

State v. Rutledge, 600 N.W.2d 324, 325 (Iowa 1999)

State v. McCright, 569 N.W.2d 605, 607 (Iowa 1997)

Rhoads v. State, 848 N.W.2d 22, 29 (Iowa 2014)

State v. Sahinovic, No. 15-0737, 2016 WL 1683039, at *2 (Iowa Ct. App. April 27, 2016)

Iowa Code § 814.20 (2017)

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State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994)

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Fed. Rule Crim. P. 52(b)

United States v. Olano, 507 U.S. 725, 732-35, 113 S.Ct. 1770, 1777-1778 (1993)

Johnson v. United States, 520 U.S. 461, 466-467, 117 S.Ct. 1544, 1548-1549 (1997)

Rosales-Mireles v. United States, 138 S.Ct. 1897, 1906 (2018)

United States v. Davis, No. 19-5421, 2020 WL 1325819, at *2 (U.S. March 23, 2020)

7 Criminal Procedure, § 27.5(d)(4th ed. November 2018 update)

Iowa R. Crim. P. 2.8(2)(b)

State v. Brainard, 222 N.W.2d 711, 713-714 (Iowa 1974)

McCarthy v. United States, 394 U.S. 459, 465, 89 S.Ct. 1166, 1170 (1969)

State v. Hack, 545 N.W.2d 262, 263 (Iowa 1996)

Remedy

Iowa R. Crim. P. 2.8(2)

Fed. R. Crim. P. 52(a)

United States v. Garcia, 587 F.3d 509, 520 (2nd Cir. 2009)

Iowa Code § 814.29 (Supp. 2020)

State v. Finney, 834 N.W.2d 46, 60 (Iowa 2013)

Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Howe, 706 N.W.2d 360, 371(Iowa 2005)

State v. Schmidt, 909 N.W.2d 778, 789 (Iowa 2018)

State v. Schminkey, 597 N.W.2d 785, 792 (Iowa 1999)

Ryan v. Iowa State Penitentiary, 218 N.W.2d 616, 620 (Iowa 1974)

ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because it presents substantial constitutional questions regarding the validity of 2019 Acts, chapter 140, sections 28, 31, and 33, now codified in Iowa Code sections 814.6(1)(a)(3), 814.7, and 814.29 (Supp. 2020). These arguments also raise substantial issues of first impression and fundamental issues of broad public importance that require ultimate determination by the Supreme Court. Additionally, Treptow asks this Court to set a "good cause" standard permitting a direct appeal of a guilty plea under Iowa Code section 814.6(1) (Supp. 2020). Iowa Rs. App. P. 6.903(2)(d), 6.1101(2) (a), (c)-(d).

Lastly, the Court should retain this case to address the Treptow'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, 117 S.Ct. 1544, 1549 (1997).

STATEMENT OF THE CASE

Nature of the Case: Appellant David Treptow appeals following his guilty plea, judgment and sentence, to the charges of possession of a controlled substance (marijuana) with the intent to deliver in violation of Iowa Code section 124.401(a)(d) (2017), failure to affix a drug tax stamp in

violation of Iowa Code section 453B.12 (2017), and gatherings where controlled substance (marijuana) unlawfully used – enhanced as a second offender in violation of Iowa Code sections 124.407 and 124.411 (2017).

Course of Proceeding and Disposition Below: On May 1, 2019, the State charged Treptow with six offenses alleged to have occurred on December 27, 2018. The Trial Information charged Treptow with Count I: possession with intent to deliver marijuana within 1000 feet of a school and/or public park and enhanced as a second offender and habitual offender in violation of Iowa Code sections 124.401(1)(d), 124.401A, 124.411, 902.8, and 902.9(1)(c); Count II: failure to affix a tax stamp as a habitual offender in violation of Iowa Code sections 453B.12, 902.8, and 902.9(1)(c); Count III: possession of methamphetamine – third offense within 1000 feet of a school and/or public park and enhanced as a habitual offender in violation of Iowa Code sections 124.401(5), 124.401B, 902.8, and 902.9(1)(c); Count IV: possession of Diazepam – third

offense within 1000 feet of a school and/or public park and enhanced as a habitual offender in violation of Iowa Code section 124.401(5), 124.401B, 902.8, and 902.9(1)(c); Count V: gathering where controlled substance (methamphetamine) unlawfully used enhanced as a second offender and habitual offender in violation of Iowa Code sections 124.407, 124.411, 902.8, and 902.9(1)(c); and Count VI: gathering where controlled substances (marijuana) unlawfully used enhanced as a second offender in violation of Iowa Code sections 124.407 and 124.411. (TI)(App. pp. 4-10).

Treptow and the prosecution reached a plea agreement which provided he enter guilty pleas to possession of a controlled substance (marijuana) with the intent to deliver (Ct I, no enhancements), failure to affix a drug tax stamp in violation of Iowa Code (Ct. II, no enhancements), and gatherings where controlled substance (marijuana) unlawfully used – enhanced as a second offender. Treptow agreed to be sentenced to be incarcerated on each count (5 years Ct I &

II)(2 years Ct VI) to be served consecutively for a total of twelve (12) years. The terms of incarceration would also be consecutive to a previous sentence in which Treptow was facing a parole revocation. Treptow would receive the statutory minimum fine which would be suspended for Counts I and II, but not suspended in Count VI. Treptow would be responsible for application surcharges (Ct I & IV DARE + LEI) (Ct. II LEI). (Tr. p. 8L22-p. 9L23). Counts III-V and a companion simple misdemeanor were to be dismissed at Treptow's cost. On July 16, 2019, pursuant to the plea agreement, Treptow entered Alford[1] guilty pleas. (Tr. p. 3L14-18; Judgment p. 1)(App. p. 11).

Treptow requested immediate sentencing. He was sentenced in accordance with the plea agreement. (Tr. p. 27L10-p. 28L10; Judgment)(App. pp. 11-15). Notice of Appeal was filed on July 25, 2019. (NOA)(App. p. 16).

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[1] North Carolina v. Alford, 400 U.S. 25, 37, 91 S.Ct. 160, 167 (1970)

Facts: On December 27, 2018, 911 dispatch received a call regarding a domestic disturbance at 111 5th Avenue Northeast in Independence. Buchanan County Deputies Schwinghammer and Leech responded to assist Independence Police Sergeant Johnson. The deputies arrived prior to Johnson. They heard yelling from inside. Schwinghammer knocked on the door; Treptow answered and allowed the deputies into the residence. The smell of marijuana was immediately apparent.

Schwinghammer inquired into the situation. Julie Moore said she wanted Treptow out because he had not paid his part of the rent. The argument was not physical.

Schwinghammer noticed what he believed to be marijuana in an ashtray on the coffee table. Treptow said it was catnip. Schwinghammer picked up the ashtray and smelled the substance which had a faint smell of marijuana. Johnson arrived and commented about the smell of marijuana

in the house. He pointed to the ashtray. The ashtray and contents were seized for testing.

Moore explained that she wanted Treptow to pay his share of the rent. She stated that she kept to herself and did not know what was going on because she mostly stayed in her room. Moore said she did not know anything about the drugs in the house. Schwinghammer asked Moore for consent to "look around." Moore said they could. Schwinghammer immediately located a digital scale under the coffee table along with a large ziplock bag labeled "Leroy" which had a strong odor of marijuana and some substance consistent with marijuana inside. He also found green material consistent with marijuana in the couch cushions.

Schwinghammer requested Deputy Ward and his K9 partner Koda respond to the house. Ward inspected the residence to ensure it was safe for Koda to check the house. Treptow and Moore along with the cats sat in Moore's room

when Koda entered the house. Ward was shown where Treptow's bedroom was and where Moore's bedroom was.

Koda alerted on the top of a dresser in Treptow's bedroom but nothing was found. Koda alerted on a small purse/wallet on the coffee table. Schwinghammer located narcotics in the purse/wallet.

During Koda's search, Moore requested to use the bathroom. Schwinghammer took everything out of Moore's walker. Schwinghammer took the items into the living room and looked through them. He found prescription medication, a baggie with suspected marijuana, and a baggie with a powder substance which Moore identified as crack, crank or meth. Moore disclaimed ownership of the items. When questioned about the prescription medicine, Moore stated it was her mother's medicine and she had not yet disposed of it. Moore claimed that Treptow must have put the other items in there.

Schwinghammer checked the jackets on or near the couch. A blue North Face jacket smelled strongly of marijuana. When he "maneuver[ed]" the jacket, two small baggies fell out of it. Treptow said he had no idea what it was. Ward moved a maroon jacket which smelled like marijuana. Moore said the maroon coat belonged to Treptow.

Leech photographed the evidence and searched the living room. He located a suspected crack pipe and a broken meth pipe.

While Schwinghammer was collecting evidence, Moore requested to speak to an officer. Johnson spoke with her in the kitchen. "Moore advised [] that David Treptow moved back in with her in April 2018. Moore stated that she thought Treptow was smoking marijuana in the house. Moore stated that she does let Treptow smoke marijuana in the house. Moore also stated [] that on December 26, 2018 she and her girlfriend smoked meth in her bedroom while Treptow was sitting in the living room."

Ward and Koda walked around the car park outside. Koda pulled Ward to the side of the house where he alerted on a backpack. Schwinghammer picked up the backpack and got an immediate strong smell of marijuana. Schwinghammer opened the backpack. It contained two large bags of suspected marijuana. He placed the backpack in his vehicle.

Deputy Leech moved to a location where he could watch the house. The deputies and Johnson left the residence. Approximately thirteen minutes after law enforcement left the residence, Treptow walked out the front door, walked to the driver's side of his vehicle, walked around the front of the vehicle to the passenger side, and then threw something into the garbage can near the house. He then went back into the house.

An address book was found inside the backpack. The handwriting was compared to Treptow's known handwriting. Marc Roth determined the writing in the address book matched Treptow's known writing.

The seized items were taken to the DCI lab. The DCI lab processed the substances. The DCI concluded there was approximately: (1) 0.17 grams of methamphetamine; (2) 885.33 grams of marijuana; and (3) 81.62 grams of marijuana concentrate. (Minutes)(Conf. App. pp. 4-46).

ARGUMENT

I. Iowa Code section 814.6(1)(a)(3) (Supp. 2020), Iowa Code section 814.7 (Supp. 2020), and Iowa Code section 814.29 (Supp. 2020) must be invalidated for improperly restricting the role and jurisdiction of Iowa's appellate courts.

Preservation of Error.

Challenges to the amendments to Iowa Code sections 814.6 and 814.7 and the enactment of Iowa Code section 814.29 are of a nature which cannot be preserved in district court. The district court cannot determine this Court jurisdiction. Iowa Const. art. V, § 4. The filing of a timely notice of appeal confers subject matter jurisdiction for this Court to hear the issues presented. Cf. Hills Bank & Trust Co. v. Converse, 772 N.W.2d 764, 771 (Iowa 2009)("A failure to file

a timely notice of appeal leaves us without subject matter jurisdiction to hear the appeal."). Therefore, Treptow preserved error on this issue by timely filing a notice of appeal.

Standard of Review.

Constitutional issues are reviewed de novo. Klouda v. Sixth Judicial Dist. Dept. of Corr. Serv., 642 N.W.2d 255, 260 (Iowa 2002).

Discussion.

During the 2019 legislative session, the Iowa legislature enacted statutes which prohibit the appellate courts from applying long-standing standards of appellate procedure. Relevant to this appeal, the legislature 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." 2019 Acts, ch. 140, § 28, codified as Iowa Code § 814.6(1)(a)(3) (Supp. 2020). Additionally, the legislature amended section 814.7, stating

that ineffective-assistance-of-counsel claims "shall not be decided on direct appeal from the criminal proceedings." 2019 Acts, ch. 140, § 31, codified as Iowa Code § 814.7 (Supp. 2020). The legislature also enacted a new section which provides "[i]f a defendant challenges a guilty plea based on an alleged defect in the plea proceedings, the plea shall not be vacated unless the defendant demonstrates that the defendant more likely than not would not have pled guilty if the defect had not occurred." 2019 Acts, ch. 140, § 33, codified as Iowa Code § 814.29 (Supp. 2020).

The changes to Chapter 814 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. (emphasis in original). 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. 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)(same). 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, 103 S.Ct. 3308, 3315 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. Furthermore, the enactment of

Iowa Code section 814.29 essentially makes a defect in a guilty plea 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 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, restricting appeals from guilty pleas and restricting the remedy for a defective guilty plea.

II. Iowa Code section 814.6(1)(a)(3) (Supp. 2020) and Iowa Code section 814.7 (Supp. 2020) violate equal protection.

Preservation of Error.

The right of appeal following the amendments to Iowa Code sections 814.6 and 814.7 are of a nature which cannot be preserved in district court. The district court cannot determine this Court jurisdiction. Iowa Const. art. V, § 4. The filing of a timely notice of appeal confers subject matter jurisdiction for this Court to hear the issues presented. Cf. Hills Bank & Trust Co. v. Converse, 772 N.W.2d 764, 771 (Iowa 2009)("A failure to file a timely notice of appeal leaves us without subject matter jurisdiction to hear the appeal."). Therefore, Treptow preserved error on this issue by timely filing a notice of appeal.

Standard of Review.

Constitutional issues are reviewed de novo. Klouda v. Sixth Judicial Dist. Dept. of Corr. Serv., 642 N.W.2d 255, 260 (Iowa 2002).

Discussion.

Iowa Code section 814.6(1)(a)(3) (Supp. 2020) and Iowa Code section 814.7 (Supp. 2020) deny Treptow equal protection under the law because the statutes 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 v. Brien, 763

N.W.2d 862, 878 (Iowa 2009) (citations omitted)(internal quotation marks omitted). See also State v. Doe, 927 N.W.2d 656, 661 (Iowa 2019) (other citation omitted)("[O]n a basic level, both constitutions establish the general rule that similarly situated citizens should be treated alike.").

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, 105 S.Ct. 3249, 3254-3255 (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 v. Brien, 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. State v. 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 v. Brien, 763 N.W.2d at 883. With respect to the changes made by Senate File 589, Treptow 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 who have entered a guilty plea. 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 Treptow 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. The legislature has treated Treptow and defendants like him differently based upon his assertion of an underlying violation of the right to effective assistance of counsel.

Treptow 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, 106 S.Ct. 2574, 2582 (1986) (citing Gideon v. Wainwright, 372 U.S. 335, 344, 83 S.Ct. 792, 796 (1963)). The right to counsel "assures the fairness, and thus the legitimacy, of our 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, 104 S.Ct. 2039, 2044 (1984); Evitts v. Lucey, 469 U.S. 387,

395, 105 S.Ct. 830, 835 (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). By depriving Treptow of his right to direct review of his 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 v. Brien, 763 N.W.2d at 879; City of Cleburne, 473 U.S. at 440, 105 S.Ct. at 3254.

Regardless of whether this Court considers Treptow'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 narrowly tailored or rationally related to the government's professed purpose, but directly contravene it. For these reasons, the Court should find Iowa Code section 814.6(1)(a)(3) (Supp. 2020) and Iowa Code section 814.7 (Supp. 2020) deny Treptow equal protection under the law and should not be applied to his appeal.

III. Iowa Code section 814.6(1)(a)(3) (Supp. 2020) and Iowa Code section 814.7 (Supp. 2020) deny Treptow due process and the right to effective counsel on appeal.

Preservation of Error.

The right of appeal following the amendments to Iowa Code sections 814.6 and 814.7 are of a nature which cannot be preserved in district court. The district court cannot determine this Court jurisdiction. Iowa Const. art. V, § 4. The filing of a timely notice of appeal confers subject matter jurisdiction for this Court to hear the issues presented. Cf. Hills Bank & Trust Co. v. Converse, 772 N.W.2d 764, 771

(Iowa 2009)("A failure to file a timely notice of appeal leaves us without subject matter jurisdiction to hear the appeal."). Therefore, Treptow preserved error on this issue by timely filing a notice of appeal.

Standard of Review.

Constitutional issues are reviewed de novo. Klouda v. Sixth Judicial Dist. Dept. of Corr. Serv., 642 N.W.2d 255, 260 (Iowa 2002).

Discussion.

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 v. Morrison, 477 U.S. at 374, 106 S.Ct. at 2582 (citation omitted). It is so fundamental to due process that it has been made obligatory on the states. Evitts v. Lucey, 469 U.S. at 394, 105 S.Ct. at 835. This guarantee of effective counsel extends to the first appeal as of right. Id. at

396, 105 S.Ct. at 836.

"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, 105 S.Ct. at 835 (citations omitted).

Iowa Code section 814.7 (Supp. 2020) violates Treptow's right to counsel on appeal and, therefore his right to due process, by interfering with appellate counsel's ability to effectively represent him. Iowa Code section 814.7 (Supp. 2020) 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. See State v. Brooks, 555 N.W.2d 446, 448 (Iowa 1996)(Where a factual basis for a charge does not exist, and trial counsel allows the defendant to plead guilty anyway, counsel has failed to perform an essential duty; State v. Hack, 545 N.W.2d 262, 263 (Iowa 1996)(same). 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 v. Lucey, 469 U.S. at 405, 105 S.Ct. at 841 (citation omitted); Griffin v. Illinois, 351 U.S. 12, 17–18, 76 S.Ct 585, 590 (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 v. Lucey, 469 U.S. at 399-400, 105 S.Ct. at 838.

Moreover, Iowa Code sections 814.6(1)(a)(3) (Supp. 2020) and Iowa Code section 814.7 (Supp. 2020) may essentially extinguish Treptow's ability to challenge the lack of a factual

basis for his guilty plea 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. Cf. Griffin v. Illinois, 351 U.S. 12, 18, 76 S.Ct. 585, 590 (1956) ("Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant."). See also Rinaldi v. Yeager, 384 U.S. 305, 310, 86 S.Ct. 1497, 1500 (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 may not challenge guilty plea errors in a postconviction relief proceeding because by the time he gets a hearing, his sentence may already be discharged thereby giving the trial court little incentive to comply with Iowa Rule of Criminal Procedure 2.8(2)(b). Cf. Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Howe, 706

N.W.2d 360, 368 (Iowa 2005)(magistrate understood at the time she accepted the guilty pleas to cowl-lamp violations that there was no factual basis for them.). 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 State v. Delano, 161 N.W.2d 66, 74 (Iowa 1968). Accordingly, the Court should find Iowa Code sections 814.6(1)(a)(3) (Supp. 2020) and Iowa Code section 814.7 (Supp. 2020) deny Treptow due process; accordingly, it should not apply the amendments to his appeal.

IV. If the amendment to section 814.6 does apply to this appeal, Treptow has good cause.

Preservation of Error.

The right of appeal following the amendments to Iowa Code sections 814.6 is of a nature which cannot be preserved in district court. See Iowa Code § 814.6(1)(a)(3) (Supp. 2020) (This subparagraph does not apply in a case where the defendant establishes good cause). The district court cannot

determine this Court jurisdiction. Iowa Const. art. V, § 4. The filing of a timely notice of appeal confers subject matter jurisdiction for this Court to hear the issues presented. Cf. Hills Bank & Trust Co. v. Converse, 772 N.W.2d 764, 771 (Iowa 2009)("A failure to file a timely notice of appeal leaves us without subject matter jurisdiction to hear the appeal."). Therefore, Treptow preserved error on this issue by timely filing a notice of appeal.

Standard of Review.

Questions of statutory interpretation are reviewed for correction of errors at law. State v. Tarbox, 739 N.W.2d 850, 852 (Iowa 2007).

Discussion.

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) (Supp. 2020). "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). "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 (providing violations of speedy indictment and speedy trial warrant dismissal unless "good cause to the

contrary is shown."); Iowa R. Civ. P. 1.977 (stating the court may set aside default upon showing of "good cause"); Iowa Code §§ 322A.2 & 322A.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 818, 820 (Iowa 1967)(other 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 v. Lucey, 469 U.S. at 400-401, 105 S.Ct. 830, 838-839 (1985) ("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). 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.

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, the Court should find that good cause clearly exists. Treptow was charged with gatherings where controlled substances unlawfully used. (TI, Ct VI)(App. pp. 8-9). The Minutes of Testimony do not show that Treptow's conduct meets the elements of the offense. (Minutes)(Conf. App. pp. 4-46). Treptow's guilty plea lacks a factual basis. Plea bargains should not be fictions, and that convictions as entered provide a reliable public record and accounting of conduct. State v. Hack, 545 N.W.2d 262, 263 (Iowa 1996). Iowa law does not permit a plea to stand unless the facts fit the crime. Id.

David Treptow has established good cause for his appeal.

V. The Minutes of Testimony do not establish a factual basis for Treptow's Alford plea to gatherings where controlled substances used.

Preservation of Error.

Treptow did not file a motion in arrest of judgment. Iowa Rs. Crim. P. 2.8(2)(d), 2.24(3)(a). "Generally, "[a] defendant's failure to challenge the adequacy of a guilty plea proceeding by motion in arrest of judgment shall preclude the defendant's right to assert such challenge on appeal."" State v. Fisher, 877 N.W.2d 676, 680 (Iowa 2016)(quoting Iowa R. Crim. P. 2.24(3)(a)). But defendants who were not advised during the plea proceedings that challenges to the plea must be made in a motion in arrest of judgment and that the failure to challenge the plea by filing the motion within the time provided prior to sentencing precludes a right to assert the challenge on appeal are not barred from challenging a defect on appeal. State v. Meron, 675 N.W.2d 537, 540 (Iowa 2004).

If the Court finds the motion in arrest of judgment advisement substantially complied with Rule of Criminal

Procedure 2.8(2)(d), the failure of counsel to preserve error may constitute a denial of effective assistance of counsel. State v. Hrbek, 336 N.W.2d 431, 435-436 (Iowa 1983); Washington v. Scurr, 304 N.W.2d 231, 235 (Iowa 1981). Review of an appellate issue is, therefore, not precluded when failure to preserve error results from a due process denial of effective representation. State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1973). A claim of ineffective assistance of counsel is an exception to the general rule of error preservation. State v. Lucas, 323 N.W.2d 228, 232 (Iowa 1982).

Additionally, a guilty plea which lacks a factual basis is plain error. This Court may correct plain error. Iowa Code § 814.20 (2017)("The appellate court, after an examination of the entire record, may dispose of the case by affirmation, reversal or modification of the district court judgment.").

Standard of Review.

Challenges to guilty pleas are reviewed for correction of errors at law. State v. Velez, 829 N.W.2d 572, 575 (Iowa 2013).

A claim of ineffective assistance of counsel is accorded de novo review. State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987).

A guilty plea lacking a factual basis constitutes an error at law. Review is for corrections of legal error. Iowa R. App. P. 6.907. The plain error standard of review requires a showing that there was "(1) error, (2) that is plain, and (3) that affects substantial rights." United States v. Olano, 507 U.S. 725, 732-35, 113 S.Ct. 1770, 1777-1778 (1993). Even after such a showing, the federal courts only correct the error where it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." Id. at 736, 113 S.Ct. 1779 (quoting United States v. Atkinson, 297 U.S. 157, 160, 56 S.Ct. 391, 392 (1936)). The discretion to correct error should be

employed "'in those circumstances in which a miscarriage of justice would otherwise result.'" United States v. Olano, 507 U.S. at 736, 113 S.Ct. at 1779 (other citation omitted). The term "miscarriage of justice" includes that the defendant is innocent. Id.

Discussion.

Treptow's guilty plea to gatherings where controlled substances used is not supported by a factual basis.

In determining whether a factual basis exists for defendant's guilty plea, this Court considers the entire record before the district court including the Minutes of Testimony and any statements made by the defendant during the plea colloquy. State v. Brooks, 555 N.W.2d 446, 448 (Iowa 1996). The factual basis may also be established by reference to prosecutor's statements and by examination of the presentence investigation report. State v. Hanson, 234 N.W.2d 878, 879 (Iowa 1975).

Treptow was charged with gatherings where controlled substances unlawfully used. (TI, Ct VI)(App. pp. 8-9). The

State charged the offense generally. The elements of the offense are: (1) on or about the 27th day of December 2018, Treptow sponsored, promoted, or aided, or assisted in the sponsoring or promoting (2) a meeting, gathering, or assemblage (3) with the knowledge or intent that a controlled substance be there distributed, used or possessed. Iowa Code § 124.407 (2017). "Promote" means to move forward or further an enterprise. State v. Cartee, 577 N.W.2d 649, 653 (Iowa 1998). "Sponsor" means to assume responsibility for." Id. "Meeting" is defined as "a gathering for business, social, or other purposes." State v. Carter, 582 N.W.2d 164, 166 (Iowa 1998). "Gathering" means "a coming together of people in a group." Id. The legislature intended to encompass small groups of people as well as large groups of people when it used the language "meeting, gathering, or assemblage." Id.

The Minutes of Testimony do not show that Treptow's conduct meets any of the elements. The Minutes demonstrate Treptow possessed marijuana. (Minutes)(Conf. App. pp. 4-46).

However, the Minutes do not show that Treptow sponsored or promoted a gathering. The Minutes show that Treptow and Moore lived in the same residence. They had separate bedrooms. (Ward report p. 1)(Conf. App. p. 18). The Minutes do not show that Treptow and Moore used marijuana together in the residence. Moore told officers that she allowed Treptow to smoke marijuana in the house. (Johnson report)(Conf. App. pp. 9-11). Moore did not say she used marijuana with him. Or that Treptow has visitors who used marijuana with him. Moore stated that she used methamphetamine with a friend in her bedroom and Treptow was in the living room. (Johnson report)(Conf. App. pp. 9-11).

Based on the quantity of marijuana, the Minutes demonstrate a reasonable inference of an intent to deliver the marijuana. (Minutes)(Conf. App. pp. 4-46). However, the Minutes do not show that Treptow sponsored or promoted a gathering where he would distribute that marijuana. The Minutes reference an address book found with the large bags

of marijuana. (Schwinghammer narrative report p. 3)(Conf. App. p. 17). But the Minutes do not provide any information as to what was written in the address book. Therefore, there is no information that Treptow met with another person with the intent to distribute marijuana.

Treptow's guilty plea lacks a factual basis.

The motion in arrest of judgment advisement did not substantially comply with Rule 2.8(2)(d).

Iowa Rule of Criminal Procedure 2.8(2)(d) states:

> The court shall inform the defendant that any challenges to a plea of guilty based on alleged defects in the plea proceedings must be raised in a motion in arrest of judgment and that failure to so raise such challenges shall preclude the right to assert them on appeal.

Iowa R. Crim. P. 2.8(2)(d). The district court failed to adequately inform Treptow regarding his duty to file a motion in arrest of judgment to challenge the defects in the guilty plea. The district court informed him:

> You also have a right to file a document which is known as a motion in arrest of judgment, or you may have the right to file that, depending upon the status of this case, and that would depend upon your communication with counsel as to a

determination of your right to file a motion in arrest of judgment.

(Tr. p. 24L12-17). The court failed to tell Treptow *why* he would file a motion in arrest of judgment. The court did not inform him that the purpose was to challenge the defects or errors in the guilty plea. Merely that he *may* have a right "depending on the status of this case" and based on "communication with counsel." This is not substantial compliance with the rule.

The fact that the district court informed Treptow of the time limitations for the motion, does not show substantial compliance with Rules 2.8(2)(d) and 2.24(3)(a). Telling a criminal defendant, the timeframe for filing a motion without explain the purpose of the motion in arrest of judgment is meaningless. The court informed Treptow that proceeding to immediate sentencing would result in no opportunity to file the motion in arrest of judgment and he would forever give up his right to challenge the validity of the guilty plea. (Tr. p. 24L21-25). But the district court did not inform him what

would constitute an invalid plea – defects or errors in the guilty plea proceeding. The court did not substantially comply with Rules 2.8(2)(d) and 2.24(3)(a). Treptow is not precluded from challenging his guilty plea on direct appeal.

Treptow's guilty plea lacks a factual basis and must be vacated.

Ineffective assistance of counsel

The Sixth and Fourteenth Amendments of the United States Constitution and article I section 10 of the Iowa Constitution set forth that a defendant is entitled to the assistance of counsel. U.S. Const. amend. VI; U.S. Const. amend. XIV; Iowa Const. art. I, section 10. The United States Supreme Court held a defendant is entitled to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063 (1984).

The test for determining whether a defendant received effective assistance of counsel is "whether under the entire record and totality of the circumstances counsel's performance

was within the range of normal competency." Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). When specific errors are relied upon to show the ineffective assistance of counsel, the defendant must demonstrate (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom. Id. In order to establish ineffective assistance of counsel, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceedings would have been different. Strickland v. Washington, 466 U.S. at 694, 104 S.Ct. at 2068. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

The district court may not accept a guilty plea without first determining that the plea has a factual basis. Iowa R. Crim. P. 2.8(2)(b). The record does not establish a factual basis for the offense of gatherings where controlled substances used in violation of Iowa Code section 124.407 (2017). If the motion in arrest of judgment advisement was sufficient, error

was forfeited. Iowa R. Crim. P. 2.24(3)(a). The failure to so preserve error deprived defendant of effective assistance. Where a factual basis for a charge does not exist, and trial counsel allows the defendant to plead guilty anyway, counsel has failed to perform an essential duty. State v. Brooks, 555 N.W.2d 446, 448 (Iowa 1996); State v. Hack, 545 N.W.2d 262, 263 (Iowa 1996).

The record does not show the facts support the charge of gatherings where controlled substances used. State v. Keene, 630 N.W.2d 579, 582 (Iowa 2001)("it must only be satisfied that the facts support the crime, "not necessarily that the defendant is guilty.").

At the time of the guilty plea, the record must disclose facts to satisfy all elements of the offense. Rhoads v. State, 848 N.W.2d 22, 29 (Iowa 2014). The record does not establish a factual basis for Treptow's guilty plea to gatherings where controlled substances used in violation of Iowa Code section 124.407 (2017). Trial counsel breached an essential duty by

allowing Treptow to plead guilty to the charge without a factual basis.

Brooks and Hack both emphasized that a plea lacking a factual basis will not stand even under the rigorous review standard applicable to ineffective assistance claims. State v. Brooks, 555 N.W.2d at 448; State v. Hack, 545 N.W.2d at 263. This result reflects, in part, the public policy that plea bargains not be fictions, and that convictions as entered provide a reliable public record and accounting of conduct. Hack, 545 N.W.2d at 263. Iowa law does not permit a plea to stand unless the facts fit the crime. Id.

Plain error review

During the 2019 legislative session, the Iowa legislature enacted a statute which prohibits the appellate courts from deciding an ineffective-assistance-of-counsel claim on direct appeal in a criminal proceeding. SF 589, 88 G.A. § 31 (2019) codified in Iowa Code § 814.7 (Supp. 2020). However, this

case demonstrates the legitimate need for challenging unpreserved errors on direct review.

The district court has the duty to guarantee a guilty plea is voluntary and has a factual basis. Iowa R. Crim. P. 2.8(2)(b). Yet, Iowa appellate courts continue to place the blame for a detective guilty plea on defense counsel when the ultimate duty and authority exclusively rests with the court.[2] This Court should reconsider its longstanding rejection of the plain error doctrine. See e.g. State v. Rutledge, 600 N.W.2d 324, 325 (Iowa 1999)("We do not subscribe to the plain error rule in Iowa, have been persistent and resolute in rejecting it, and are not at all inclined to yield on the point."); State v. McCright, 569 N.W.2d 605, 607 (Iowa 1997)("In short, we do

[2] Allegations or findings of ineffective assistance of counsel may adversely affect an attorney's malpractice insurance. Barker v. Capotosto, 875 N.W.2d 157, 168 (Iowa 2016)(the legislature has established immunity for appointed counsel unless a postconviction court determines that the client's "conviction resulted from ineffective assistance of counsel."); Washko v. Westport Ins. Corp., No. CIV.A. 01-4026, 2002 WL 1745910, at *5 (E.D. Pa. July 24, 2002)(Plaintiff had knowledge of or should have reasonably foreseen claim of ineffective assistance prior to the date of policy coverage.).

not recognize a "plain error" rule which allows appellate review of constitutional challenges not preserved at the district court level in a proper and timely manner."); Rhoads v. State, 848 N.W.2d 22, 33 (Iowa 2014)(Mansfield, J. concurring)("In some respects, we are using ineffective assistance as a substitute for a plain error rule, which we do not have in Iowa."); State v. Sahinovic, No. 15-0737, 2016 WL 1683039, at *2 (Iowa Ct. App. April 27, 2016)(McDonald, J., concurring)("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."). This Court should adopt the plain error doctrine for prompt and effective review of a guilty plea which lacks a factual basis to support the conviction.

While this Court may choose to establish the parameters of a plain error doctrine either through a court rule or case law, existing law permits the application of the rule. The legislature authorized:

> The appellate court, after an examination of the entire record, may dispose of the case by affirmation, reversal or modification of the district court judgment. The appellate court may also order a new trial, or reduce the punishment, but shall not increase it.

Iowa Code § 814.20 (2017). This Court has previously adopted exceptions to the usual error preservation rules. State v. Lucas, 323 N.W.2d 228, 232 (Iowa 1982)(ineffective assistance); State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994)(void, illegal or procedurally defective sentences). The Court should do so again and recognize the plain error doctrine.

Most jurisdictions recognize the authority of an appellate court to reverse based on plain error for unpreserved errors. Wayne R. LaFave, Jerold H. Israel, Nancy J. King, & Orin S. Kerr, 7 Criminal Procedure, § 27.5(d) (4th ed. November 2018 update). The Federal Rules of Criminal Procedure governs the application of plain error in the federal courts. Fed. Rule Crim. P. 52(b)(A plain error that affects substantial rights may be considered even though it was not brought to the court's

attention.). In United States v. Olano, the United States Supreme Court established conditions that must be met before a court may consider exercising its discretion to correct the error. United States v. Olano, 507 U.S. 725, 731, 113 S.Ct. 1770, 1776 (1993). Under the Olano test,

> before an appellate court can correct an error not raised at trial, there must be (1) "error," (2) that is "plain," and (3) that "affect[s] substantial rights." If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings."

Johnson v. United States, 520 U.S. 461, 466-467, 117 S.Ct. 1544, 1548-1549 (1997)(other citations omitted).

First, there must "indeed be an "error."" "Deviation from a legal rule is "error" unless the rule has been waived." United States v. Olano, 507 U.S. at 732-733, 113 S.Ct. at 1777. Second, the error must be "plain." ""Plain" is synonymous with "clear" or, equivalently, "obvious."" Id. at 734, 113 S.Ct. at 1777. Third, the plain error must "affec[t] substantial rights." "This is the same language employed in Rule 52(a),

and in most cases it means that the error must have been prejudicial: It must have affected the outcome of the district court proceedings." United States v. Olano, 507 U.S. at 732-733, 113 S.Ct. at 1777. The defendant has the burden to prove the error is prejudicial. Id. The fourth prong focuses "on principles of fairness, integrity, and public reputation." The Supreme Court recognized a broad category of errors that warrant correction on plain-error review. See Rosales-Mireles v. United States, 138 S.Ct. 1897, 1906 (2018)("By focusing instead on principles of fairness, integrity, and public reputation, the Court recognized a broader category of errors that warrant correction on plain-error review"); United States v. Davis, No. 19-5421, 2020 WL 1325819, at *2 (U.S. March 23, 2020)("Our cases likewise do not purport to shield any category of errors from plain-error review.").

LaFave summarized the plain error application in the states.

Most states will review "plain error" as well. Plain error review may be authorized by court rule, as in the federal courts, or as

a common law exception to the general raise-or-waive rule discussed in the prior subsection, based upon the appellate court's inherent authority to prevent a "miscarriage of justice." Although a growing number of states follow the federal formula, many states have developed their own standards. In some jurisdictions, the plain error doctrine is restricted to a limited class of errors. Thus, one state limits review to unpreserved errors that are discoverable "by a mere inspection of the pleadings and proceedings … without inspection of the evidence." Another includes only gross omissions from instructions in capital cases, errors by the trial judge to which defense counsel has no opportunity to object, and errors so serious as to warrant mistrial. Several apply it only to the most flagrant "fundamental errors." Others leave considerable discretion to the reviewing court. A few states shift the burden to the prosecution to prove lack of prejudice rather than requiring the defendant to prove that the error may have affected the outcome, or for specific errors require the state to carry the same burden on appeal that it would had the defendant made a timely objection.

7 Criminal Procedure, § 27.5(d)(4th ed. November 2018 update) (footnotes omitted).

The Iowa Supreme Court may adopt a rule or standard which is different than the Federal Rules of Criminal Procedure or other jurisdictions. Even with the adoption of plain error review, there will still be a legitimate need for ineffective assistance claims in postconviction relief. However, the present case can be decided by the plain-error test

adopted by the United States Supreme Court and applying Iowa law and the Iowa Rules of Criminal Procedure.

Iowa Rule of Criminal Procedure 2.8(2)(b) prohibits the district court from accepting a guilty plea "without first determining the plea is made voluntarily and intelligently and has a factual basis." Iowa R. Crim. P. 2.8(2)(b). In Brainard, this Court explained the purposes of the standards for accepting a guilty plea.

> These guidelines have two purposes. One is to assure that the defendant's plea of guilty is 'a voluntary and intelligent act done with actual knowledge of the existence and meaning of the constitutional rights involved and with full understanding of the nature of the charge made against him and the direct consequences of the plea.' The other is to 'help reduce the great waste of judicial resources required to process the frivolous attacks on guilty plea convictions that are encouraged, and are more difficult to dispose of, when the original record is inadequate.'

State v. Brainard, 222 N.W.2d 711, 713-714 (Iowa 1974)(other citations omitted). See also McCarthy v. United States, 394 U.S. 459, 465, 89 S.Ct. 1166, 1170 (1969)("although the procedure embodied in [Federal] Rule 11 has not been held to be constitutionally mandated, it is designed to assist the

district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary.").

As established above, the Minutes do not establish that Treptow's conduct falls within the elements of gatherings where controlled substances used. Treptow's guilty plea lacks a factual basis and was error. The error is clear and obvious.

The plain error affects Treptow's substantial rights. At the time of the guilty plea, the record must disclose facts to satisfy all elements of the offense. Rhoads v. State, 848 N.W.2d 22, 29 (Iowa 2014). The record does not establish a factual basis for sponsoring or promoting a gathering with the intent that a controlled substance be there distributed, used or possessed. A conviction and imprisonment as a result of a guilty plea which lacks a factual basis is a miscarriage of justice. Permitting such a plea and judgment to stand "would erode the integrity of all pleas and the public's confidence in

our criminal justice system." State v. Hack, 545 N.W.2d at 263.

Remedy

Iowa Rule of Criminal Procedure 2.8(2) does not contain a harmless error provision. Iowa R. Crim. P. 2.8(2). *Compare* Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."). In the federal courts, in the context of a Federal Rule of Criminal Procedure 11 error, the "affected the outcome of the district court proceedings" standard requires "a reasonable probability that, but for the error, [the defendant] would not have entered the plea." United States v. Garcia, 587 F.3d 509, 520 (2nd Cir. 2009). The legislature enacted Iowa Code section 814.29 which provides:

> If a defendant challenges a guilty plea based on an alleged defect in the plea proceedings, the plea shall not be vacated unless the defendant demonstrates that the defendant more likely than not would not have pled guilty if the defect had not occurred. The burden applies whether the challenge is made through a motion in arrest of judgment or on appeal. Any provision in the Iowa rules of criminal procedure that are inconsistent with this section shall have no legal effect.

Iowa Code § 814.29 (Supp. 2020).

Historically, Iowa has not applied this approach when analyzing errors resulting from a lack of factual basis. Cf. State v. Finney, 834 N.W.2d 46, 60 (Iowa 2013) (minor omissions in the plea colloquy that did not affect substantial rights would not undermine the finality of criminal convictions"). Instead, the Iowa Supreme Court has treated guilty pleas which lack a factual basis as reversible error in the in the context of the stringent standard for ineffective-assistance-of-counsel claims. See State v. Brooks, 555 N.W.2d at 448 ("if a factual basis does not exist, then counsel was ineffective"); State v. Hack, 545 N.W.2d at 263 ("This plea was not supported by the record made and, accordingly, violates the letter and spirit of Iowa Rule of Criminal Procedure 8(2)(b)". The Court has done this in recognition of the public policy that plea bargains should not be fictions, and that convictions as entered provide a reliable public record and accounting of conduct. State v. Hack, 545 N.W.2d at 263.

Existing Iowa law does not permit a plea to stand unless the facts fit the crime. Id.

This Court should not deviate from established case law that a guilty plea which lacks a factual basis may not stand upon direct review. It is unethical for a prosecutor to knowingly charge an offense which lacks probable cause. Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Howe, 706 N.W.2d 360, 371(Iowa 2005)("Filing charges that are blatantly bogus—even when defendants are willing to plead guilty to them—does not promote confidence in the integrity of the judicial process."). It likewise must be unethical to allow a guilty plea lacking a factual basis to stand. "What kind of system of justice do we have if we permit actually innocent people to remain in prison?" State v. Schmidt, 909 N.W.2d 778, 789 (Iowa 2018). "Pleading guilty does not automatically mean the defendant is *actually* guilty." State v. Schmidt, 909 N.W.2d 778, 788 (Iowa 2018) (emphasis in original). This Court stated:

> We again emphasize the prosecutor's promise of a shorter sentence is more attractive than going to trial and possibly losing. Defendants, even those who are actually innocent and especially those who are indigent, have more to lose by going to trial than by pleading guilty.

Id. at 789.

A guilty plea cannot be valid unless the defendant understood the law he was charged with violating. Cf. McCarthy v. United States, 394 U.S. at 467, 89 S.Ct. at 1171 ("The judge must determine "that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty." Requiring this examination of the relation between the law and the acts the defendant admits having committed is designed to "protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.""). The outcome of the proceeding would be different because the district court shall not accept a guilty plea which

lacks a factual basis. Iowa R. Crim. P. 2.8(2)(b). This Court should find that in the context of a factual basis defect in a guilty plea the defendant has automatically demonstrated that he "more likely than not would not have pled guilty if the defect had not occurred."

Where a guilty plea has no factual basis in the record, two possible remedies exist. Where the record establishes that the defendant was charged with the wrong crime, the Court has reversed the judgment of conviction and sentence and remanded for dismissal of the charge. State v. Schminkey, 597 N.W.2d 785, 792 (Iowa 1999). Where, however, it is possible that a factual basis could be shown, it is more appropriate merely to vacate the sentence and remand for further proceedings to give the State an opportunity to establish a factual basis. Ryan v. Iowa State Penitentiary, 218 N.W.2d 616, 620 (Iowa 1974).

The present case may fall within the second category. There might be additional facts and circumstances that do not

appear in the Minutes that would support a factual basis for the offense of gatherings where controlled substances used in violation of Iowa Code section 124.407 (2017). State v. Schminkey, 597 N.W.2d 785, 792 (Iowa 1999). If a factual basis for a voluntary plea cannot be established, the guilty plea must be vacated. This Court must vacate the sentence for the offense of gatherings where controlled substances used and remand for further proceedings.

CONCLUSION

David Treptow respectfully requests this Court vacate his guilty plea and sentence for gatherings where controlled substances used in violation of Iowa Code section 124.407 (2017) and remand to the district court for further proceedings.

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 $6.34, 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 11,189 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Martha J. Lucey Dated: *6/5/20*

MARTHA J. LUCEY
State Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
mlucey@spd.state.ia.us
appellatedefender@spd.state.ia.us