IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff–Appellee, v. KORKI RICOH WILBOURN, Defendant–Appellant.	))))))))	S.CT. NO. 20–0257

APPEAL FROM THE IOWA DISTRICT COURT
FOR MARSHALL COUNTY
HONORABLE JOHN J. HANEY, JUDGE (Sentencing)

APPELLANT'S BRIEF AND ARGUMENT
AND
REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF SERVICE

On the 21st day of August, 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 Korki Ricoh Wilbourn, No. 6319040, Fort Dodge Correctional Facility, 1550 "L" Street, Fort Dodge, IA 50501.

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

State v. Macke, 933 N.W.2d 225, 227–28 (Iowa 2019)

1. Iowa Code section 814.6 only removes the right of direct appeal of the underlying guilty plea itself; a defendant, like Wilbourn, who entered a guilty plea, still has a right to direct appeal of his sentence.

Iowa Code § 814.6 (2019)

Iowa Code § 814.6 (2017)

State v. Nall, 894 N.W.2d 514, 518 (Iowa 2017)

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State v. Lindell, 828 N.W.2d 1, 5 (Iowa 2013)

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State v. Boyer, 940 N.W.2d 429, 430–31 (Iowa 2020)

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Iowa Code § 814.7 (2019)

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2. If the amendment to section 814.6 applies, it should be invalidated for improperly restricting the role and jurisdiction of Iowa's appellate courts.

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

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)

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Iowa Const. art. V, § 1

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

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State v. Iowa Dist. Court for Black Hawk Cnty., 616 N.W.2d 575, 578 (Iowa 2000)

4. If the amendment to section 814.6 applies, it violates equal protection.

U.S. Const. amend. XIV

Iowa Const. art. I, § 6

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

City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439–41 (1985)

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

Griffin v. Illinois, 351 U.S. 12, 17 (1956)

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

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State v. Lyle, 854 N.W.3d 378, 387 (Iowa 2014)

Racing Ass'n of Cent. Iowa v. Fitzgerald, 675 N.W.2d 1, 6–7 (Iowa 2004)

State v. Bruegger, 773 N.W.2d 862, 883 (Iowa 2009)

Behm v. City of Cedar Rapids, 922 N.W.2d 524, 546 (Iowa

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Trujillo v. City of Albuquerque, 965 P.2d 305, 314 (N.M. 1998)

Alaska Pacific Assur. Co. v. Brown, 687 P.2d 264, 269–70 (Alaska 1984)

5. If the amendment to section 814.6 applies, it denies Wilbourn due process.

U.S. Const. amend XIV

Iowa Const. art. I, § 9

Schmidt v. State, 909 N.W.2d 778, 793 (Iowa 2018)

State v. Ingram, 914 N.W.2d 794, 799 (Iowa 2018)

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Rosanna Cavallaro, Better Off Dead: Abatement, Innocence, and the Evolving Right of Appeal, 72 U. Colo. L. Rev. 943, 986 (2002)

Harlon Leigh Dalton, Taking the Right to Appeal (More or Less) Seriously, 95 Yale L.J. 62, 62 (1985)

ABA Comm. on Standards of Judicial Administration: Standards Relating to Appellate Courts § 3.10, at 12 (1977)

State v. Wilson, 234 N.W.2d 140, 140–41 (Iowa 1975)

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

6. If the amendment to section 814.6 applies, Wilbourn has established "good cause" to appeal.

Iowa Code § 814.6(1)(a)(3) (2019)

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

Simmons v. Pub. Defender, 791 N.W.3d 69, 88 (Iowa 2010)

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

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Iowa R. Crim. P. 2.33 (2019)

Iowa R. Civ. P. 1.977 (2019)

Iowa Code § 322A.2 (2019)

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

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U.S. Const. amend. V

U.S. Const. 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. 387, 400–01 (Iowa 1985)

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

Douglas v. People, 372 U.S. 353, 356 (1963)

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

State ex rel. Allee v. Gocha, 555 N.W.2d 683, 685 (Iowa 1996)

State v. Iowa Dist. Court for Black Hawk Cnty., 616 N.W.2d 575, 578 (Iowa 2000)

Iowa Code § 822.2(1) (2019)

Rhoades v. State, 880 N.W.2d 431, 436 n.10 (Iowa 2016)

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)

7. If the Court determines that Wilbourn cannot directly appeal for any reason, it should treat his notice of appeal and this brief as an application for discretionary review and/or petition for writ of certiorari and consider his challenges to his sentences.

State v. Propps, 897 N.W.2d 91, 97 (Iowa 2017)

Iowa Code § 814.6(2)(c) (2019)

Iowa Code § 814.6(2)(e) (2019)

Iowa R. App. P. 6.106 (2019)

Iowa R. App. P. 6.107 (2019)

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II. THE DEFENDANT IS ENTITLED TO A NEW SENTENCING HEARING.

Authorities

State v. Thacker, 862 N.W.2d 402, 405 (Iowa 2015)

State v. Lathrop, 781 N.W.2d 288, 292–93 (Iowa 2010)

State v. Cooley, 587 N.W.2d 752, 754 (Iowa 1998)

Iowa R. App. P. 6.907 (2019)

State v. Formaro, 638 N.W.2d 720, 724 (Iowa 2002)

State v. Buck, 275 N.W.2d 194, 195 (Iowa 1979)

Iowa Code § 901.5 (2019)

State v. Thompson, 494 N.W.2d 239, 240 (Iowa 1992)

State v. Thomas, 547 N.W.2d 223, 225 (Iowa 1996)

Iowa Code § 124.401(1)(b) (2019)

Iowa Code § 124.413 (2019)

Iowa Code § 902.9(1)(b) (2019)

State v. Ayers, 590 N.W.2d 25, 28 (Iowa 1999)

State v. Washington, 356 N.W.2d 192, 197 (Iowa 1984)

State v. Johnson, 445 N.W.2d 337, 343 (Iowa 1989), overruled on other grounds by State v. Hill, 878 N.W.2d 269, 274–75 (Iowa 2016)

Iowa Code § 123.413(3) (2019)

Iowa Code § 901.11(1) (2019)

State v. Benes, No. 16–1214, 2017 WL 104966, at *1 (Iowa Ct. App. Jan. 11, 2017) (unpublished table decision)

State v. Cory, No. 18–0328, 2019 WL 6894254, at *2 (Iowa Ct. App. Dec. 18, 2019) (unpublished table decision)

State v. Johnson, 744 N.W.2d 646, 648 (Iowa 2008)

III. THE DISTRICT COURT ERRED IN ORDERING THE DEFENDANT TO PAY A $5,000 FINE FOR FAILURE TO AFFIX A DRUG TAX STAMP IN THE JUDGMENT ENTRY WHEN IT ORDERED A FINE OF $750 AT THE SENTENCING HEARING.

Authorities

State v. Lathrop, 781 N.W.2d 288, 292–93 (Iowa 2010)

State v. Hess, 533 N.W.2d 525, 527 (Iowa 1995)

State v. Lorrah, 761 P.2d 1388, 1389 (Utah 1988)

State v. Suchanek, 326 N.W.2d 263, 266 (Iowa 1982)

ROUTING STATEMENT

Defendant–Appellant Korki Ricoh Wilbourn requests the Iowa Supreme Court retain this case because it presents substantial constitutional questions regarding the application and validity of the legislature's recent amendments to Iowa Code section 814.6(1). See Iowa Rs. App. P. 6.903(2)(d), 6.1101(2) (a) (2019). 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) (c)–(d). Moreover, he requests the Supreme Court retain the case because its guidance is needed on what constitutes the "good cause"—the threshold set forth in Iowa Code section 814.6(1)(3).

STATEMENT OF THE CASE

Nature of the Case: Defendant–Appellant Korki Ricoh Wilborn appeals following his convictions, judgment, and sentence imposed following his guilty pleas to possession of methamphetamine with intent to deliver and failure to affix a

drug tax stamp, in Marshall County District Court Case No. FECR095804.

Course of Proceedings: On September 17, 2019, the State charged Wilbourn with two counts of attempted murder, a class "B" felony, in violation of Iowa Code sections 707.11; reckless use of a firearm, an aggravated misdemeanor, in violation of Iowa Code section 724.30(1); going armed with intent, a class "D" felony, in violation of Iowa Code section 708.8; intimidation with a dangerous weapon, a class "C" felony, in violation of Iowa Code section 708.6; felon in possession of a firearm, a class "D" felony, in violation of Iowa Code section 724.26; possession of methamphetamine with intent to deliver, a class "B" felony, in violation of Iowa Code sections 124.401(1)(b)(7) and 124.413, with the sentencing enhancement of being in possession of a firearm, pursuant to section 124.401(1)(e); failure to affix a drug tax stamp, a class "D" felony, in violation of Iowa Code sections 453B.1, 453B.3, 453B.12; assault causing bodily injury, a serious misdemeanor, in violation of Iowa Code sections 708.1 and

708.2(2); and driving while revoked, a serious misdemeanor, in violation of Iowa Code section 321J.21. (Trial Information) (App. pp. 4–6). On October 4, 2019, Wilbourn was arraigned in open court. (Order Trial) (App. pp. 8–10). He entered a plea of not guilty to all the charges and demanded a speedy trial. (Arraignment Hr'g p.3 L.4–p.7 L.9) (Order Trial) (App. pp. 8–10).

On November 27, 2019, Wilbourn entered guilty pleas to a possession of methamphetamine with intent to deliver, a class "B" felony, without the firearm sentencing enhancement, and failure to affix a drug tax stamp, a class "D" felony. (Plea Tr. p.2 L.10–p.31 L.12) (Order) (App. pp. 11–13). In exchange for Wilbourn's guilty pleas to the charges, the State agreed to dismiss the remaining counts on the trial information. (Plea Tr. p.11 L.4–p.11 L.24). The parties agreed to jointly recommend that the sentences run consecutively for a total sentence of thirty years. (Plea Tr. p.11 L.4–24). When asked by the plea court regarding the plea agreement concerning the mandatory minimum, the prosecutor stated "My

understanding is that the 25 years has a mandatory minimum of one-third. However, that can be further reduced by one-third upon a plea of guilty." (Plea Tr. p.23 L.21–p.24 L.5). Defense counsel agreed that was also his understanding. (Plea Tr. p.23 L.21–p.24 L.9).

However, when informing Wilbourn of the offense's penalties, the court stated:

> You are not eligible for parole until you've served between one-half of one-third of the maximum indeterminate sentence and the maximum indeterminate sentence. They say that in a confusing way but basically one-third of the 25 years equals 8.3333 years, one-half -- one half of 8.33 years is 4.167 years. So there's a mandatory minimum period of time that you would have to serve in prison before you would be eligible for parole.

(Plea Tr. p.24 L.10–17). After the court discussed all the consequences of the plea, it then addressed the prosecutor, asking if it forgot anything. (Plea Tr. p.27 L.8–10). The two then had the following exchange:

> [THE PROSECUTOR]: Well, I'm -- I suppose I'm a little confused. I'm looking at 901.10(2). My understanding is that the one-third could be reduced up to one-third. I think you said one-half. Am I incorrect in that?

> THE COURT: If I did, I misstated that. So that one-third could be reduced by an additional one-third, and I think that's the -- that's the provision that the parties have agreed to. So if I previously misstated it, that is a correct statement.
>
> [THE PROSECUTOR]: Okay.

(Plea Tr. p.27 L.8–20).

At the sentencing hearing, the State summarized its recommendations as "So 25 years on the B felony, five on the D, consecutive to each other, agree to a reduction of one-third of that mandatory minimum on the B felony." (Sentencing Tr. p.5 L.18–20). Defense counsel agreed, stating that "we would ask for the same recommendation. We think it's appropriate given what's the State's -- and also the family hardship issues. I believe the one-third additional reduction in under . . . 910.10 if the court wanted that." (Sentencing Tr. p.5 L.21–p.6 L.3). The district court sentenced Wilbourn to an indeterminate term not to exceed twenty-five years on the "B" felony and an indeterminate term not to exceed five years on the class "D" felony. (Sentencing Tr. p.10 L.1–18) (Sentencing

Order) (App. pp. 14–18). The court ordered the sentences to run consecutive with each other. (Sentencing Tr. p.10 L.21–22) (Sentencing Order) (App. p. 17). With regards to the mandatory minimum on the possession-with-intent offense, the district court stated:

> I will recommend the reduction in the mandatory minimums of that sentence that has been negotiated as part of the plea agreement, which is basically a two-thirds reduction of that mandatory minimum I believe; one-third and one-third if I heard what the parties had recommended correctly.

(Sentencing Tr. p.10 L.2–7). Regarding the mandatory minimum sentence, the sentencing order stated: "The Defendant shall serve the mandatory minimum sentence described in Iowa Code Section 124.413, reduced to the maximum extent possible described in Iowa Code Section 901.10(2)." (Sentencing Order) (App. p. 16).

The district court ordered the minimum fines and thirty-five percent criminal surcharges for each offense but then ordered them suspended. (Sentencing Tr. p.10 L.8–9, L.19–20). It also assessed the $125 law enforcement initiative

surcharge and $10 drug abuse resistance education surcharge. (Sentencing Tr. p.10 L.9–11) (Sentencing Order) (App. p. 16). The court also ordered Wilbourn to submit a DNA sample. (Sentencing Tr. p.10 L.14–15, p.11 L.17–19) (Sentencing Order) (App. p. 15). It dismissed the remaining counts of the trial information and one additional simple misdemeanor case, with costs to Wilbourn, pursuant to the plea agreement. (Sentencing Tr. p.12 L.22–p.13 L.20) (Sentencing Order) (App. pp. 14-18). Lastly, the district court found Wilbourn did not have the reasonable ability to pay restitution for court-appointed attorney fees or court costs. (Sentencing Tr. p.13 L.1–20) (Sentencing Order) (App. pp. 15–16).

On January 15, 2020, the State filed a motion for an order nunc pro tunc. (Mot. Nunc Pro Tunc) (App. pp. 19–20). The motion stated that the prosecutor "was contacted by the Iowa Department seeking clarification of the Defendant's mandatory minimum sentence and reduction." (Mot. Nunc Pro Tunc) (App. p. 19). The motion further stated the

prosecutor spoke to defense counsel and;

> it is the parties mutual understanding that . . . [the possession-with-intent charge's] sentence carries a mandatory minimum term of confinement of 1/3 the maximum indeterminate sentence prescribed by law, and that under Iowa Code 901.10(2), this mandatory term of confinement should be reduced by 1/3 considering that the Defendant entered a guilty plea in this matter.

(Mot. Nunc Pro Tunc) (App. pp. 19–20). Later that same day, the district court entered an order that stated in part:

> Under Iowa Code 124.413(1), the Defendant shall not be eligible for parole or work release until he has served a minimum term of confinement of one-third of the maximum indeterminate sentence provided by law; however, pursuant to Iowa Code Section 901.10(2), as the Defendant has entered a guilty plea, this mandatory minimum term of confinement is reduced by one-third.

(Nunc Pro Tunc Order) (App. pp. 21–22).

Wilbourn timely filed a notice of appeal on January 31, 2020. (Notice) (App. p. 23).

Facts: During the guilty plea proceeding, Wilbourn admitted that he knowingly possessed methamphetamine that he intended to deliver or share with others. (Plea Tr. p.20 L.2–p.21 L.10, p.22 L.1–7). Wilbourn agreed that this occurred on

September 4, 2019, and it happened in Marshall County. (Plea Tr. p.20 L.2–4, p.19–21, p.21 L.5–7). Wilbourn acknowledged that he did not have a tax stamp nor did he pay the Iowa excise tax for the methamphetamine he possessed. (Plea Tr. p.21 L.1–4). Wilbourn also admitted there was more than seven grams of methamphetamine. (Plea Tr. p.21 L.11–4).

Any additional relevant facts will be discussed below.

ARGUMENT

I. THE LEGISLATURE'S RECENT AMENDMENT TO IOWA CODE SECTION 814.6 SHOULD NOT AFFECT THE DEFENDANT'S APPEAL. ALTERNATIVELY, THE DEFENDANT HAS ESTABLISHED "GOOD CAUSE" TO APPEAL OR THE COURT SHOULD TREAT THE DEFENDANT'S NOTICE OF APPEAL AND BRIEF AS AN APPLICATION FOR DISCRETIONARY REVIEW OR WRIT OF CERTIORARI AND GRANT RELIEF.

A. Preservation of Error: Challenges to the amendments to Iowa Code section 814.6 are of a nature that cannot be preserved in district court. The district court cannot determine this Court's 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, Wilbourn preserved error on this issue by timely filing a notice of appeal.

B. Standard of Review: The Court reviews questions of statutory interpretation for correction of errors of law. State v. Nall, 894 N.W.2d 514, 517 (Iowa 2017) (citations omitted). It reviews constitutional issues de novo. Klouda v. Sixth Judicial Dist. Dept. of Corr. Serv., 642 N.W.2d 255, 260 (Iowa 2002).

C. Discussion: During the 2019 legislative session, the Iowa legislature enacted statutes that prohibit the appellate courts from applying long-standing standards of appellate procedure. Relevant to this case, the legislature amended Iowa Code section 814.6(1) to no longer grant a right of direct appeal from a final judgment of sentence from "[a] conviction where the defendant has pled guilty". From this category, it exempted class "A" felony guilty pleas and cases "where the

defendant establishes good cause." 2019 Acts, ch. 140, § 28, codified as Iowa Code § 814.6(1) (Supp. 2020). Wilbourn entered his guilty pleas and was sentenced after July 1, 2019, which was the effective date of the amendment. See State v. Macke, 933 N.W.2d 225, 227–28 (Iowa 2019) (noting the amended statute went into effect on July 1, 2019).

1. Iowa Code section 814.6 only removes the right of direct appeal of the underlying guilty plea itself; a defendant, like Wilbourn, who entered a guilty plea, still has a right to direct appeal of his sentence.

This Court should find the amended statutory language of section 814.6 does not prohibit Wilbourn from raising the challenges below because he only seeks direct review of his sentence; he does not seek to challenge the underlying guilty pleas. Accordingly, Wilbourn does not need to establish "good cause" and may file a direct appeal as a matter of right, just as he could prior to the amendment. Compare Iowa Code § 814.6 (2019), with Iowa Code § 814.6 (2017). The statute at issue, Iowa Code section 814.6, states:

1. Right of appeal is granted the defendant from:

a. *A final judgment of sentence*, except in the following cases:

(1) A simple misdemeanor conviction.

(2) An ordinance violation.

(3) A *conviction* where the defendant has pled guilty. This subparagraph does not apply to a guilty plea for a class "A" felony or in a case where the defendant establishes good cause.

b. An order for the commitment of the defendant for insanity or drug addiction.

2. Discretionary review may be available in the following cases:

a. An order suppressing or admitting evidence.

b. An order granting or denying a motion for a change of venue.

c. An order denying probation.

d. Simple misdemeanor and ordinance violation convictions.

e. An order raising a question of law important to the judiciary and the profession.

f. An order denying a motion in arrest of judgment on grounds other than an ineffective assistance of counsel claim.

Iowa Code § 814.6 (2019) (emphasis added).

When the Court interprets a statute, it considers the plain meaning of the statutory language. State v. Nall, 894 N.W.2d 514, 518 (Iowa 2017) (citations omitted). If the Court determines the statute is unambiguous, it applies it as written. Id. However, if "reasonable minds could differ or be

uncertain as to the meaning of the statute", the statute is ambiguous. State v. McCullah, 787 N.W.2d 90, 94 (Iowa 2010). "Ambiguity arises in two ways—either from the meaning of specific words or from the general scope and meaning of the statute when all its provisions are examined." Id. (internal quotation marks omitted). If there is ambiguity, the Court applies the principles of statutory construction in order to determine legislative intent. See id.; State v. Lindell, 828 N.W.2d 1, 5 (Iowa 2013) (citation omitted).

When there are multiple plausible interpretations of a statute, the court examines the statute beyond its plain language to resolve the ambiguity. State v. Adams, 810 N.W.2d 365, 369 (Iowa 2012) (citation omitted). The Iowa Supreme Court has stated:

> When we interpret a statute, we attempt to give effect to the general assembly's intent in enacting the law. Generally, this intent is gleaned from the language of the statute. To ascertain the meaning of the statutory language, we consider the context of the provision at issue and strive to interpret it in a manner consistent with the statute as an integrated whole.

State v. Pickett, 671 N.W.2d 866, 869–70 (Iowa 2003) (citations omitted). In addition, the court interprets statutes "in a manner to avoid absurd results." Id. (citations omitted). The court "strictly construe[s] criminal statutes" and resolves any doubts in favor of criminal defendants. Adams, 810 N.W.2d at 369 (citation omitted). Moreover, "the legislative history of a statute is also instructive." State v. Dohlman, 725 N.W.2d 428, 431 (Iowa 2006) (citation omitted).

Here, the statute is ambiguous because there are multiple, reasonable interpretations. See McCullah, 787 N.W.2d at 94. One interpretation of the statutory language is it removes the right of direct appeal from all cases in which there was an underlying plea of guilty. However, the words and "the general scope and meaning of the statute" also support a different interpretation of the language: it only removes the right of direct appeal for defendants who pled guilty in challenging the underlying plea itself, but not the sentence imposed. This Court should interpret the statute in the latter manner.

As a general rule, a right of appeal from final judgment of "sentence" allows appeals of both sentence and the underlying guilty plea conviction. However, the new statutory language of subsection (1)(a)(3) excludes a guilty plea "conviction" from direct appellate challenges as a matter of right. This Court has previously noted that the word "'conviction' has an 'equivocal meaning' that depends upon the context in which it is used." Daughenbaugh v. State, 805 N.W.2d 591, 597 (Iowa 2011) (citing State v. Hanna, 179 N.W.2d 503, 507 (Iowa 1970)). Specifically, the word "conviction" may be used in a commonly understood, popular sense or in a technical, legal sense.

The commonly understood meaning of the word "conviction" is the determination that a defendant is guilty of the crime; this occurs at the guilty plea itself. See Daughenbaugh, 805 N.W.2d at 597 ("[W]hen the word is used in its general and popular sense, conviction means the establishment of guilt independent of judgment and sentence."); see also Common Legal Terms, Iowa Judicial

Branch, http://www.iowacourts.gov/for-the-public/common-legal-terms (last visited May 5, 2020) ("Conviction: A legal finding or determination that a person is guilty of a crime.") (emphasis omitted). However, the Court has also noted the word "conviction" in a technical, legal sense "requires a formal adjudication by the court and the formal entry of a judgment of conviction." Daughenbaugh, 805 N.W.2d at 597. Additionally, this Court has followed the principle that if "the statute was a punishment measure, the court would use the term 'conviction' in its narrow, technical sense, but if the statute served a protective purpose, a broad definition would be applicable." Id. at 598 (citation omitted). As the right to appeal serves a protective purpose, this Court should interpret "conviction" in the broad sense and find it means the determination of the defendant's guilt—the guilty plea—in the context of section 814.6. See id. Moreover, such a construction resolves doubts in the favor of defendants. See Adams, 810 N.W.2d at 369 (citation omitted).

The additional language of the statute also supports this interpretation. After prohibiting the right of an appeal of a conviction where the defendant has pled guilty, section 814.6(3) further provides: "This subparagraph does not apply to *a guilty plea* for a class "A" felony or in *a case* where the defendant establishes good cause." See Iowa Code § 814.6(1)(a)(3) (2019). This language supports the interpretation that the statute only prohibits the right of direct appeal of the guilty plea itself; rather than stating the subparagraph does not apply to class "A" felonies, it provides the subsection does not apply to a "*guilty plea*" for a class "A" felony. See Iowa Code § 814.6(1)(a)(3) (emphasis added). Thus, the word choice of "guilty plea" in the exceptions of subsection 814.6(1)(3) indicates the legislature's intent only to remove the right to appeal and to challenge a guilty plea itself, not the sentence.

Moreover, the subsequent word "case" in that sentence then provides an avenue for defendants to still attempt to directly appeal a guilty plea—in situations where they

establish good cause. The use of the word "case" in this sentence is consistent with the legislature's use of the same word in subsection 814.6(2). The use is in the common, ordinary meaning: "a particular situation or example of something". See Iowa Code § 814.6(2) (2019) ("Discretionary review may be available in the following *cases*:") (emphasis added); Case, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/case (last visited May 4, 2020). This same meaning of the word "case" must also be extended to the statute's use of that term in subsection 814.6(1)(a). See Iowa Code § 814.6(1)(a) (2019) (providing the right of appeal from "[a] final judgment of sentence, except in the following *cases*") (emphasis added). That is, the effect of this language is not to exclude from the general "[r]ight of appeal . . . granted the defendant from a final judgment of sentence" of any and all criminal proceedings in which the defendant has pled guilty—but only to exclude the right to appeal the particular instance of a guilty plea

"conviction" itself, as distinct from the sentencing in the same criminal proceeding.

Moreover, the legislature's addition of section 814.6(2)(f) supports the interpretation that section 814.6(1)(a)(3) only applies to the guilty plea itself. In section 814.6(2)(f), the legislature amended the statute to allow a defendant the ability to seek discretionary review from an "order denying a motion in arrest of judgment on grounds other than an ineffective assistance of counsel claim". Iowa Code § 814.6(2)(f) (2019). This subsection provides an avenue of appellate review for guilty plea challenges in response to the legislature's removal of the right to directly appeal the guilty plea itself in section 814.6(1)(3). This is comparable to the provision of the statute that allows discretionary review of simple misdemeanors and ordinance violations, which also do not have direct appeal to the appellate courts as a matter of right. See id. § 814.6(2)(d). Notably, the legislature did not add any provision for discretionary review dealing with sentencing in cases where the defendant entered a guilty

plea—because the defendant still has the right to directly appeal his or her sentence following a guilty plea under section 814.6(1)(3).

Furthermore, there is additional support for the recognition of a distinction between an appeal of a guilty plea and an appeal simply from a sentence. For example, the Iowa Rules of Appellate Procedure acknowledge the availability of an appeal of a criminal sentence only. See, e.g., Iowa R. App. P. 6.902(1) (2019) (providing expedited timelines for "[c]riminal proceedings in which an appeal is taken from a judgment and sentence entered upon a guilty plea *or from the sentence only"*) (emphasis added). In addition, Iowa appellate courts have recognized that a notice of appeal may be limited, including by specifying the appeal is from the sentence only, thereby disallowing any challenges to the underlying conviction. State v. Allen, No. 98–1865, 2000 WL 204065, at *1 (Iowa Ct. App. Feb. 23, 2000) (unpublished opinion) (noting the "defense counsel filed a notice of appeal from his sentence only. [The defendant] claims his counsel was ineffective in limiting the

issues in the notice of appeal" and considering whether the defendant's trial counsel was ineffective for failing to also appeal "the district court's refusal to permit [the defendant] to introduce evidence he pled guilty to the charge of interference with official acts"); see also State v. Boyer, 940 N.W.2d 429, 430–31 (Iowa 2020) (per curiam) ("Boyer identified a specific order in his notice of appeal, namely, the district court's judgment and sentence entered on September 24. When a party, even a pro se party, files a notice of appeal related to a specific order, we cannot rewrite it to include an order entered on a later date. . . . Although we found good cause for a delayed appeal of the September 24 order, this extension of time does not provide a basis for expanding the notice of appeal to include the October 5 restitution order or any other order.").

The interpretation that the amendment to section 814.6 only prohibits direct appeals of the guilty plea itself and not to a defendant's sentence is also corroborated by the legislative history and stated purpose of the statute. See Dohlman, 725

N.W.2d at 431 (citation omitted). The legislature designed the recent amendments to the statute in order to address the "waste" caused by "frivolous appeals" in the criminal justice system. See 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. This reasoning does not apply to challenges to errors in the sentence itself, which are typically only subject to clear errors discernible from the existing record, such as an abuse of discretion, illegal or unauthorized sentences, or procedural errors, like the district court's consideration of an improper factor or failure to state reasons for the sentence on the record. Rather, the changes the legislature made to Chapter 814 appear to be aimed defendants challenging and getting their guilty pleas reversed over what the legislature deemed "technical" violations of Rule 2.8(2)(b) and raising ineffective-assistance-of-counsel claims or other challenges on direct appeal that need further record

development. See, e.g., Iowa Code § 814.7 (2019) ("An ineffective assistance of counsel claim shall be determined by filing an application for postconviction relief . . . , and the claim shall not be decided on direct appeal."); id. § 814.29 (2019) ("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."). As such, it makes sense that the limitations of section 814.6(1)(a)(3) only apply to the guilty plea itself, not the subsequent sentence, which does not implicate the same concerns regarding frivolity and waste.

For the reasons above, this Court should find the amended statute only prohibits the direct appeal of a "conviction" (the guilty plea itself). Therefore, the statute does not change a defendant's ability to file a direct appeal of the "final judgment of sentence" imposed following a guilty plea

conviction. Accordingly, this Court should find Wilbourn may directly appeal his sentence.

2. If the amendment to section 814.6 applies, it should be invalidated for improperly restricting the role and jurisdiction of Iowa's appellate courts.

If the Court determines the language does remove the right to direct appeal even sentencing issues in cases where the defendant pleads guilty, Wilbourn contends the change to section 814.6 improperly interferes 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)). This doctrine means that one branch of government may not impair another branch in "the performance of its constitutional duties." Id. (emphasis omitted). 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). "For the judiciary to play an undiminished role in [our] constitutional scheme, nothing must impede the immediate, necessary, efficient and basic functioning of the courts." State ex rel. Allee v. Gocha, 555 N.W.2d 683, 685 (Iowa 1996) (citation omitted) (internal quotation marks omitted).

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 made similar remarks. 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.").

Even assuming there is no right to appeal, the Iowa Supreme Court has stated: "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". 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). A statute that seeks to divest Iowa's appellate courts of their ability to decide and remedy claimed deprivations of constitutional rights and court errors improperly intrudes upon the jurisdiction and authority of the judicial branch. See Webster Cnty. Bd. of Supervisors v. Flattery, 268 N.W.2d 869, 873 (Iowa 1978) (citations omitted) ("For the judiciary to play an undiminished role as an independent and equal branch of government nothing must impeded the immediate, necessary, efficient and

basic functioning of the courts."). 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.

Moreover, it is clear that sentencing is squarely within "the realm of judicial power." Klouda, 642 N.W.2d at 261–62. "Any encroachment on [sentencing] power is a violation of the separation-of-powers doctrine." Id. at 262. If the statute does prohibit the appellate court from reviewing a defendant's sentence on direct appeal, then the statute has impeded the necessary, efficient and basic functioning of the appellate court: ensuring district courts are justly applying and

enforcing the law in sentencing, which is in the "sole province of the judiciary". State ex. rel. Allee, 555 N.W.2d at 685 (citations omitted); State v. Iowa Dist. Court for Black Hawk Cnty., 616 N.W.2d 575, 578 (Iowa 2000) (citation omitted). Thus, to the extent the statute removes defendants who pled guilty from directly appealing their sentences and related errors, it violates separation of powers.

By removing the court's consideration of challenges to cases arising from pleas of guilty on direct appeal, the legislature is intruding on Iowa appellate courts' independent role in interpreting the constitution and protecting Iowans' 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 change and permit even defendants who enter guilty pleas to directly appeal their convictions and sentences.

4. If the amendment to section 814.6 applies, it violates equal protection.

Wilbourn contends the change Senate File 589 made to Iowa Code section 814.6 denies him equal protection under the law because it deprives him of the ability to challenge his conviction and/or sentence on direct appeal based upon the fact that he pled guilty. 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, Wilbourn 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 unlawfully treated Wilbourn and defendants like him differently based

upon his decision to forgo certain constitutional rights and plead guilty. See Griffin v. Illinois, 351 U.S. 12, 17 (1956) ("Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'")

Wilbourn further contends that his claim of disparate treatment involves the deprivations of fundamental rights. 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 Wilbourn of his right to direct review his guilty plea and his sentence following a guilty plea, the legislature has deprived him of fundamental rights. Accordingly, the Court should review his claim under strict scrutiny. Varnum, 763 N.W.2d 862, 879 (Iowa 2009); City of Cleburne, 473 U.S. at 440.

However, regardless of whether this Court considers Wilbourn's claims under strict scrutiny or rational scrutiny, it should find the statutory change is 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, 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). The Iowa Supreme Court has stated that "[p]reserving ineffective assistance of counsel claims that can be resolved on direct appeal wastes time and resources." Id. The same will be true for not directly resolving

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 some type of 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 unless the Court liberally applies the concept of "good cause", accepts review, and decides the claims directly. However, the addition of the "good cause" standard still will add more work for appellate courts and waste judicial time and resources by adding another layer of review. It also fails to eliminate burdens elsewhere in the criminal justice system and appellate process: defense attorneys will still have to review the merits of the case and present arguments accordingly and the Attorney General's Office will still respond. Therefore, the amendment of Senate File 589 to Iowa Code section 814.6 not only fails to be narrowly tailored or rationally related to the government's professed purpose, but it directly contravenes it.

Additionally, even if the Court finds that Iowa Code section 814.6 does not violate federal equal protection, it should apply a more stringent review and conclude the statute violates article I, section 6 of the Iowa Constitution. The Iowa Supreme Court has noted the "Iowa Constitution affords individuals greater rights than does the United States Constitution." See Schmidt v. State, 909 N.W.2d 778, 793 (Iowa 2018); see also State v. Ingram, 914 N.W.2d 794, 799 (Iowa 2018) ([O]ur recent case law under the search and seizure provision of the Iowa Constitution has emphasized the robust character of its protections."); State v. Lyle, 854 N.W.3d 378, 387 (Iowa 2014) ("Iowans have generally enjoyed a greater degree of liberty and equality because we do not rely on a national consensus regarding fundamental rights . . . ."). Notably, the Iowa Supreme Court has also previously conducted a "more stringent review" than what might be available under the federal constitution. See, e.g., Racing Ass'n of Cent. Iowa v. Fitzgerald, 675 N.W.2d 1, 6–7 (Iowa 2004) (applying established federal equal protection principles

in a different and more stringent fashion under the Iowa Constitution); State v. Bruegger, 773 N.W.2d 862, 883 (Iowa 2009) (citations omitted) ("[W]e conclude that review of criminal sentences for 'gross disproportionality' under the Iowa Constitution should not be a 'toothless' review and adopt a more stringent review than would be available under the Federal Constitution."). Moreover, other states have employed more protective standards protecting additional rights than that required under federal law with regards to equal protection claims. See Behm v. City of Cedar Rapids, 922 N.W.2d 524, 546 (Iowa 2019) (citations omitted); see, e.g., Baker v. State, 744 A.2d 864, 869–873 (Vt. 1999) (discussing when the court applies stricter review than federal standard even where fundamental interests are not implicated); Planned Parenthood of Cent. New Jersey v. Farmer, 762 A.2d 620, 632–38 (N.J. 2000) ("We have not hesitated, in an appropriate case, to read the broad language of [the New Jersey Constitution] to provide greater rights than its federal counterpart."); State v. Mowrey, 9 P.3d 1217, 1220–22 (Idaho 2000) (discussing

"means-focus" scrutiny the appellate courts apply under the state constitution when "the discriminatory character of a challenged statutory classification is apparent on its face and whether there is also a patent indicate of a lack of relationship between the classification and the declared basis of the statute"); Trujillo v. City of Albuquerque, 965 P.2d 305, 314 (N.M. 1998) (describing its rational basis scrutiny under equal protection as heightened and stating it is not "largely toothless" or a "virtual rubber-stamp"); Alaska Pacific Assur. Co. v. Brown, 687 P.2d 264, 269–70 (Alaska 1984) (applying, under its equal protection provision, "an adjustable 'uniform-balancing' test which place[s] a greater or lesser burden on the state to justify a classification depending on the importance of the individual right involved"). Therefore, this Court should find the legislative amendment to Iowa Code section 814.6(1) violates the Iowa Constitution.

For these reasons, the Court should find the amendment to section 814.6 denies Wilbourn equal protection under the law, and it should allow him to directly appeal.

5. If the amendment to section 814.6 applies, it denies Wilbourn due process.

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. Even if the Court finds that Iowa Code section 814.6 does not violate federal due process, it should conclude the statute violates article I, section 9 of the Iowa Constitution. The "Iowa Constitution affords individuals greater rights than does the United States Constitution." See Schmidt, 909 N.W.2d at 793; see also Ingram, 914 N.W.2d 794, 799 (Iowa 2018); Lyle, 854 N.W.3d at 387 ("Iowans have generally enjoyed a greater degree of liberty and equality because we do not rely on a national consensus regarding fundamental rights . . . ."). Other states have employed more protective standards than that required under federal law with regards to due process. See Behm, 922 N.W.2d at 546 (citations omitted) (listing several states, including South Dakota, New Jersey, and Minnesota, that have employed more stringent review under

their respective state constitutions). Furthermore, the Iowa Supreme Court has previously conducted a "more stringent review" than available under the federal constitution. See, e.g., Racing Ass'n of Cent. Iowa, 675 N.W.2d at 6–7 (applying a more stringent review under the Iowa Constitution's equal protection clause); Bruegger, 773 N.W.2d at 883 (Iowa 2009) (citations omitted) reviewing criminal sentences under the Iowa Constitution more stringently than the federal constitution and refusing to conduct a "toothless" review).

Wilbourn acknowledges the Iowa Supreme Court has previously recognized statutory limitations placed on the right to appeal. See In re Durant Comm. Sch. Dist., 106 N.W.2d 670, 676 (Iowa 1960) (citations omitted); see also Wissenberg v. Bradley, 229 N.W. 205, 209 (Iowa 1929). Similarly, the United States Supreme Court has also stated appellate review is not a necessary element of due process. 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 conclusions are subject to much criticism. See, e.g., Cassandra Burke Robinson, The Right to Appeal, 91 N.C. L. Rev. 1219, 1221 (2013) (arguing U.S. Supreme Court 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); Alex S. Ellerson, The Right of Appeal and Appellate Procedural Reform, 91 Columbia L. Rev. 373, 376 (1991) ("Although the Court has since that time repeatedly reaffirmed this dictum, it has also qualified McKane's blanket statements considerably—to the point of qualifying them out of existence.").

Notably, after the U.S. Supreme Court's decision in McKane, the U.S. Supreme Court suggested there is a right of appeal under the due process clause: "As to the due process clause of the Fourteenth Amendment, it is sufficient to say

that, as frequently determined by this court, the right of appeal is not essential to due process, *provided that due process has already been according in the tribunal of first instance*." State v. Ohio ex. rel. Bryant v. Akron Metropolitan Park Dist., 281 U.S. 74, 80 (1930) (emphasis added). "Because it is impossible to be sure that due process was accorded at the trial level without actually reviewing the trial proceedings, an appeal is essential to ensure that due process is accorded to each criminal defendant." Ellerson, The Right to Appeal, at 378. Approximately ninety years after the Supreme Court's decision in McKane, in 1983, Justice Brennan believed if the court were squarely faced with the issue it would hold that federal due process requires a right to appeal a criminal conviction. See Jones v. Barnes, 463 U.S. 745, 756 n. 1 (1983) (Brennan, J., dissenting). He stated:

> [T]he reversal rate of criminal convictions on mandatory appeals in the state courts, while not overwhelming, is certainly high enough to suggest that depriving defendants of their right to appeal would expose them to an unacceptable risk of erroneous conviction. Of course, a case presenting this question is unlikely to arise, for the very reason

> that a right of appeal is now universal for all significant criminal convictions.

Id.

Due process protects those liberties that are "'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" Griswold v. Connecticut, 381 U.S. 479, 487 (1965) (citation omitted). "At its core, the right to due process reflects a fundamental value in our America constitutional system." Boddie v. Connecticut, 401 U.S. 371, 374 (1971); Michael H. v. Gerald D., 491 U.S. 110, 122–223 (1989) (citation omitted) ("Our cases reflect . . . solid recognition of the basic values that underlie our society . . . ."). Appellate review has become an integral part of the United States criminal justice system for adjudicating the guilt or innocence of a defendant. See Griffin, 351 U.S. at 18 (citations omitted).

> Justice demands an independent and objective assessment of a district court's . . . conduct . . . . The possibilities of error, oversight, arbitrariness and even venality in any human institution are such that subjective decisions to review of some kind answers a felt need; it would simply go against the grain, today, to make a matter as sensitive as a criminal

> conviction subject to unchecked determination by a single institution.

Suzuki v. Quisenberry, 411 F. Supp. 113, 1133 (D. Haw. 1986) (quotation marks and internal citations omitted). Criminal defendants in the federal system and almost all states have a right to directly appeal their convictions and sentences. See Gregory M. Dyer, Criminal Defendants' Waiver of the Right to Appeal—An Unacceptable Condition of a Negotiated Sentence or Plea Bargain, 65 Notre Dame L. Rev. 649, 651 (1990) (citations omitted); Rosanna Cavallaro, Better Off Dead: Abatement, Innocence, and the Evolving Right of Appeal, 72 U. Colo. L. Rev. 943, 986 (2002). The right of appeal has become . . . sacrosanct." Harlon Leigh Dalton, Taking the Right to Appeal (More or Less) Seriously, 95 Yale L.J. 62, 62 (1985). "'The right of appeal . . . is a fundamental element of procedural fairness as generally understood in this country.'" Id. at 66 (quoting ABA Comm. on Standards of Judicial Administration: Standards Relating to Appellate Courts § 3.10, at 12 (1977)). The right of appeal and what it

ensures—fairness and a just criminal conviction and sentence—reflect fundamental values in American society and the criminal justice system. This Court should recognize a constitutional right of direct appeal under federal and state due process protections.

Moreover, without a direct review of sentencing errors, many criminal defendants may be completely without any redress for those errors. The changes to section 814.6 essentially extinguish a defendant's ability to raise sentencing challenges, such as the abuse of discretion regarding the mandatory minimum in this case, or a breach of the plea agreement, a judge's consideration of improper sentencing factors, or some other improper sentencing procedure. Because of the lengthy process, it is quite possible that a defendant would never be able to challenge sentencing errors 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. See State v.

Wilson, 234 N.W.2d 140, 140–41 (Iowa 1975); see also Jones, 463 U.S. at 756 n. 1 (There are few, if any, situations in our system of justice in which a single judge is given unreviewable discretion over matters concerning a person's liberty or property."). "Prior cases establish . . . that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced . . . through the judicial process must be given a meaningful opportunity to be heard." Boddie, 401 U.S. at 377. Criminal defendants have no choice but to go through the criminal proceedings, including sentencing; in order to comply with due process, defendants are entitled to meaningful appellate review of the sentencing process and the actions of the sentencing judge. See id.; Jones, 463 U.S. at 756 n.1. Denying adequate review means that many criminal defendants will lose their liberty because of unjust, improper, inadequate judicial, prosecutorial, or defense actions that the appellate court would have corrected on appeal prior to the statutory amendment. See Griffin, 351 U.S. at, 20–21. If the Court

determines the statute prevents defendants from directly appealing even their sentences following a guilty plea, 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.

6. If the amendment to section 814.6 applies, Wilbourn has established "good cause" to appeal.

As discussed above, the amendment to section 814.6(1) also provides there is a right of appeal from a final judgment of sentence from a "conviction where the defendant has pled guilty . . . where the defendant 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 any due process and equal protection violations. See Simmons v. Pub. Defender, 791 N.W.3d 69, 88 (Iowa 2010) (noting the court construes "statutes to avoid potential constitutional infirmity" if it is reasonably able to do so). Because "good cause" is not defined or limited in the statute, the Court should 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 (2019) (providing violations of speedy indictment and speedy trial warrant dismissal unless "good cause to the contrary is shown."); Iowa R. Civ. P. 1.977 (2019) (stating the court may

set aside default upon showing of "good cause"); Iowa Code §§ 322A.2, 322A.15 (2019) (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) (2019) (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).

As a general rule, the Court interprets statutes in a way that avoids constitutional problems. Simmons, 791 N.W.2d at 74 (citations omitted). 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. amends. V, 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 v. Lucey, 469 U.S. 387, 400–01 (Iowa 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). 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. See Douglas v. People, 372 U.S. 353, 356 (1963) (highlighting the importance

and benefits of written briefs, oral argument, accessibility of transcripts, and the appointment of counsel have in showing an appellate issue has merit).

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. As discussed above, the legislatures amendments to Chapter 814, in part, were aimed at defendants challenging and getting their guilty pleas reversed over what the legislature deemed "technical" violations. Importantly, the challenges raised by Wilbourn in this appeal, if successful, would not result in a reversal and undoing of his guilty pleas; they would simply result in a new sentencing hearing. If Wilbourn had gone to trial and had the same sentencing hearing, this Court could review his claims raised below. This Court should interpret section 814.6(1) as still allowing appeals of sentencing errors or violations of constitutional rights.

Finding a defendant has established "good cause" whenever he or she is only raising sentencing claims may also

avoid some of the separation-of-powers problems the statute presents. As discussed above, sentencing is squarely within "the realm of judicial power" and any "encroachment on [sentencing] power is a violation of the separation-of-powers doctrine." Klouda, 642 N.W.2d at 261–62. If the statute does prohibit the appellate court from even reviewing a defendant's sentence and related errors in a direct appeal, then the statute has impeded the necessary, efficient and basic functioning of the appellate court: ensuring district courts are justly applying and enforcing the law in sentencing, which is in the "sole province of the judiciary". State ex. rel. Allee, 555 N.W.2d at 685 (citations omitted); State v. Iowa Dist. Court for Black Hawk Cnty., 616 N.W.2d 575, 578 (Iowa 2000) (citation omitted). However, if the Court interpreted "good cause" for a direct appeal of a conviction arising from a guilty plea as automatically allowing sentencing challenges, then it may avoid this particular separation-of-powers violation. See Simmons, 791 N.W.3d at 88.

Moreover, it is important this Court interpret "good cause" as including sentencing challenges because it is not clear that claims of errors 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) (2019). 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. Furthermore, in many cases, the defendant will have to await the correction while incarcerated. It is inherently unfair 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. This is particularly true and important when the vast majority of the cases within the criminal justice system resolved with guilty pleas. See Rhoades v. State, 880 N.W.2d 431, 436 n.10 (Iowa 2016) (citing data indicating that ninety-six percent of cases were

resolved by plea bargaining from 2008 to 2012). A criminal defendant needs an avenue to challenge, and more importantly remedy, errors that occur in the sentencing process. Recognizing "good cause" in such instance promotes fairness and justice, and it reinforces the integrity of and encourages confidence in the criminal justice system as a whole.

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, e.g., 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). The same should be true of the defendant's establishment of "good cause" in order to gain direct review of his conviction following a guilty plea.

In this case, as discussed below, the district court abused its discretion because it was unaware it could reduce the mandatory minimum sentence, as provided in Iowa Code sections 124.413(3) and 901.11(1). Moreover, the sentencing court's statements concerning the reduction of the mandatory minimum establish the court's misunderstanding of the mandatory minimum sentence. Additionally, the judgment entry needs to be corrected to reflect the court's clear, oral sentencing pronouncement. Thus, the record supports Wilbourn's claims, and Wilbourn has established "good cause" for his appeal.

7. If the Court determines that Wilbourn cannot directly appeal for any reason, it should treat his notice of appeal and this brief as an application for discretionary review and/or petition for writ of certiorari and consider his challenges to his sentences.

Finally, if for any reason the Court determines that Wilbourn cannot raise his challenges in a direct appeal, Wilbourn requests the Court still review his challenges and grant him relief. A defendant may request appellate review by filing a petition for writ of certiorari under Iowa Rule of Appellate Procedure 6.107 or by filing an application for discretionary review pursuant to Iowa Code section 814.6(2) and Iowa Rule of Appellate Procedure 6.106. State v. Propps, 897 N.W.2d 91, 97 (Iowa 2017); see also Iowa Code § 814.6(2)(c), (e) (2019) (providing that discretionary review is available from an order denying probation and an order raising a question of law important to the judiciary and the profession); Iowa R. App. P. 6.106, 6.107 (2019). Iowa Courts have "inherent power to determine whether [they] have jurisdiction over the subject matter of the proceedings before it." Propps, 897 N.W.2d at 97 (citations omitted) (internal

quotation marks omitted). Furthermore, Iowa Rule of Appellate Procedure 6.108 provides:

> If any case is initiated by a notice of appeal . . . and the appellate court determines another form of review was the proper one, the case shall not be dismissed, but shall proceed as though the proper form of review had been requested.

Iowa R. App. P. 6.108 (2019). Accordingly, if the Court concludes Wilbourn cannot appeal his sentence following the entry of the guilty pleas, he requests the Court treat his notice of appeal and the brief in this case as either a petition for writ of certiorari and/or an application for discretionary review, pursuant to Iowa R. App. P. 6.108. See id.; see also Propps, 897 N.W.2d at 97 ("Accordingly, we will treat Propp's notice of appeal and accompanying briefs as a petition for writ of certiorari . . . .").

II. THE DEFENDANT IS ENTITLED TO A NEW SENTENCING HEARING.

A. Preservation of Error: The Court may review a defendant's argument that the district court abused its discretion during his sentencing, even in the absence of an

objection in the district court. See State v. Thacker, 862 N.W.2d 402, 405 (Iowa 2015) (quoting State v. Lathrop, 781 N.W.2d 288, 292–93 (Iowa 2010)); 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 (2019); see also State v. Formaro, 638 N.W.2d 720, 724 (Iowa 2002).

Because Wilbourn's sentence is within the statutory limits, the appellate court reviews the district court's decision for an abuse of discretion. See Cooley, 587 N.W.2d at 754 (citation omitted). To demonstrate an abuse of discretion, the defendant must show that the sentencing court's discretion "was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Buck, 275 N.W.2d 194, 195 (Iowa 1979).

C. Discussion: Iowa Code section 901.5 states that a court must consider its sentencing options only after examining all pertinent information. See Iowa Code § 901.5 (2019). In exercising its discretion, the district court has a duty to weigh this information when determining the appropriate sentence for a particular defendant for a particular offense. See State v. Thompson, 494 N.W.2d 239, 240 (Iowa 1992) (citation omitted). "When a sentence is not mandatory, the district court must exercise its discretion in determining what sentence to impose." State v. Thomas, 547 N.W.2d 223, 225 (Iowa 1996) (citation omitted).

At the sentencing hearing, when the district court asked for the State's sentencing recommendations, the prosecutor stated:

> . . . This is a joint plea recommendation. On the B felony possession with intent to deliver, that is a 25-year term of incarceration with a mandatory minimum of one-third to be served. Due to Mr. Wilbourn's acceptance of responsibility, his guilty plea, the parties agree to recommend a reduction of that mandatory minimum by an additional one-third of that one-third.
> . . .

> On the D felony tax stamp charge, five-year term of incarceration. It's to be served consecutive to the B felony charge for a total of 30 years.
> . . .
> So 25 years on the B felony, five on the D, consecutive to each other, agree to a reduction of one-third of that mandatory minimum on the B felony.

(Sentencing Tr. p.5 L.18–20). Defense counsel agreed, stating that "we would ask for the same recommendation. We think it's appropriate given what's the State's -- and also the family hardship issues. I believe the one-third additional reduction is under . . . 910.10 if the court wanted that." (Sentencing Tr. p.5 L.21–p.6 L.3).

The district court sentenced Wilbourn to an indeterminate term not to exceed twenty-five years on the "B" felony and an indeterminate term not to exceed five years on the class "D" felony. (Sentencing Tr. p.10 L.1–18) (Sentencing Order) (App. p. 16). The court ordered the sentences to run consecutive with each other. (Sentencing Tr. p.10 L.21–22) (Sentencing Order) (App. p. 17). With regards to the

mandatory minimum on the possession- with-intent offense, the district court stated:

> I will recommend the reduction in the mandatory minimums of that sentence that has been negotiated as part of the plea agreement, *which is basically a two-thirds reduction of that mandatory minimum I believe*; *one-third and one-third* if I heard what the parties had recommended correctly.

(Sentencing Tr. p.10 L.2–7) (emphasis added). The sentencing order stated: "The Defendant shall serve the mandatory minimum sentence described in Iowa Code Section 124.413, reduced to the maximum extent possible described in Iowa Code Section 901.10(2)." (Sentencing Order) (App. p. 16).

In this case, Wilbourn is entitled to a new sentencing hearing because the record establishes the district court was not aware it had the discretion to order Wilbourn's mandatory minimum sentence reduced up to one half, pursuant to Iowa Code sections 123.413(3) and 901.11(1). Moreover, resentencing is required because the district court failed to understand the mandatory minimum portion of the sentence when he pronounced Wilbourn's sentence and the nunc pro

tunc order cannot fix the court's mistaken thinking and incorrect application of the law.

Iowa Code section 124.401(1)(b) provides that possession of methamphetamine with the intent to deliver is a class "B" felony. Iowa Code § 124.401(1)(b) (2019). Section 902.9(1)(b) mandates an indeterminate sentence not to exceed twenty-five years for a class "B" sentence. Iowa Code § 902.9(1)(b) (2019). Section 124.413 provides mandatory minimum sentences for certain drug offenses. It states:

> 1. *Except as provided in subsection 3* and sections 901.11 and 901.12, *a person sentenced pursuant to section 124.401, subsection 1, paragraph* "a", *"b",* "e", or "f", *shall not be eligible for parole or work release until the person has served a minimum term of confinement of one-third of the maximum indeterminate sentence prescribed by law.*
>
> 2. This section shall not apply if:
>
> a. The offense is found to be an accommodation pursuant to section 124.410; or
>
> b. The controlled substance is marijuana.
>
> 3. *A person serving a sentence pursuant to section 124.401, subsection 1, paragraph "b", shall be denied parole or work release, based upon all the pertinent information as determined by the court*

> *under section 901.11, subsection 1, until the person has served between one-half of the minimum term of confinement prescribed in subsection 1 and the maximum indeterminate sentence prescribed by law.*

Id. § 124.413 (emphasis added). Section 901.11(1) provides:

> At the time of sentencing, the court shall determine when a person convicted under section 124.401, subsection 1, paragraph "b", shall first become eligible for parole or work release within the parameters described in section 124.413, subsection 3, based upon all the pertinent information including the person's criminal record, a validated risk assessment, and the negative impact the offense has had on the victim or other persons.

Id. § 901.11(1) (2019).

Accordingly, under Iowa law, as a general proposition, Wilbourn's possession offense carried a mandatory minimum sentence of one-third of twenty-five years (approximately 8.333 years). See id. § 124.413(1). However, subsection 3 of section 124.413, in accordance with Iowa Code section 901.11, mandates the sentencing court determine when an offender is eligible for parole or work release; pursuant to these statutes, an offender may be eligible for release after serving between one-half of the minimum one-third sentence (approximately

4.167 years) and the full one-third mandatory minimum (approximately 8.333 years). See id. § 124.413(3). The record establishes that the district court was not aware it had this discretion. Neither of the parties nor the judge mentioned section 124.413(3) and/or section 901.11 at the sentencing hearing. Additionally, the prosecutor's comments and defense counsel's failure to correct the misinformation, establish the sentencing judge was under the impression that a full one-third mandatory minimum had to be imposed and the only reduction that could be made in these circumstances was one-third of the one-third because Wilbourn pleaded guilty. (Sentencing Tr. p.4 L.22–p.5 L.3, 18–p.6 L.3); see also (Plea Tr. p.23 L.21–p.24 L.17, p.27 L.8–20); Ayers, 590 N.W. at 28 (reversing for resentencing and noting that the prosecutor incorrectly stated there was no sentencing discretion in imposing the mandatory minimum sentence and the defense counsel and court followed suit).

As a general rule, the trial court does not need to give reasons for rejecting particular sentencing options. Thomas,

547 N.W.2d at 225 (citation omitted). However, the record must reveal the sentencing court, in fact, exercised discretion with respect to the options it had. Id. In this case, the record here shows the district court's failure to exercise discretion with respect to mandatory minimum sentence for the possession-with-intent offense. A remand for resentencing is required where a court fails to exercise discretion because it was unaware it had discretion. See State v. Washington, 356 N.W.2d 192, 197 (Iowa 1984) (citation omitted) ("In this case, the trial court failed to exercise discretion because it erroneously believed it had none. The court's failure to exercise the discretion granted it by the law requires that the case be remanded for resentencing."); State v. Johnson, 445 N.W.2d 337, 343 (Iowa 1989), overruled on other grounds by State v. Hill, 878 N.W.2d 269, 274–75 (Iowa 2016) (citation omitted) (noting that resentencing is necessary when the district court's statements left the impression that it mistakenly believed the sentence was mandatory). Thus, this Court should vacate Wilbourn's mandatory minimum on the

possession-with-intent offense and remand for a hearing for the court to exercise its discretion in accordance with Iowa Code sections 123.413(3), and 901.11(1). See State v. Benes, No. 16–1214, 2017 WL 104966, at *1 (Iowa Ct. App. Jan. 11, 2017) (unpublished table decision) (remanding for resentencing when the district court did not consider whether to reduce the mandatory minimum pursuant to Iowa Code sections 124.413 and 901.11).

Alternatively, remand is also required because the sentencing court's statements during the hearing illustrate the court's confusion regarding the reduction of the mandatory minimum sentence and the nunc pro tunc order is at odds with the court's pronouncement regarding the mandatory minimum. When pronouncing its sentence, the court stated:

> I will recommend the reductions in the mandatory minimums of that sentence that has been negotiated as part of the plea agreement, *which is basically a two-third reduction of that mandatory minimum* I believe; one-third and one-third if I heard the parties correctly."

(Sentencing Tr. p.10 L.2–7) (emphasis). The reductions discussed by the parties at the sentencing is not two-thirds reduction of the mandatory minimum. As discussed above, one-third of twenty five years is approximately 8.333 years. A two-thirds reduction of this mandatory minimum would result in a mandatory minimum sentence of approximately 2.78 years. However, a one-third reduction of the one-third mandatory minimum actually results in a mandatory minimum sentence of approximately 5.56 years. Thus, the sentencing court's statements illustrate he believed he was ordering *half* of the length of the mandatory minimum the parties recommended. Importantly, the district court did have the discretion to order a mandatory minimum sentence of only 2.78 years in this case, which by his statements he felt was appropriate for this defendant and offense. If, pursuant to Iowa Code section 123.413(3), the court ordered the one-third minimum reduced by one-half, the mandatory minimum would have resulted in a mandatory term of 4.167 years; a further one-third reduction of that sentence, pursuant to Iowa

Code section 901.10(2), results in a mandatory minimum of 2.78 years—exactly the sentence the court thought was appropriate, a two-thirds reduction. See State v. Cory, No. 18–0328, 2019 WL 6894254, at *2 (Iowa Ct. App. Dec. 18, 2019) (unpublished table decision) ("Pursuant to Iowa Code section 124.413(3), the court reduced the one-third mandatory minimum term of incarceration by one-half. The court declined to further reduce the mandatory minimum under section 901.10(2) . . . .").

The initial sentencing order stated that the "Defendant shall serve the mandatory minimum sentence described in Iowa Code Section 124.413, reduced to the maximum extent possible described in Iowa Code Section 901.10(2). (Sentencing Order) (App. p. 16). This statement could fit the district court's assertion that he was essentially reducing the mandatory minimum by two-thirds. The nunc pro tunc order replaced this statement with

> Under Iowa Code 124.413(1), the Defendant shall not be eligible for parole or work release until he has served a minimum term of confinement of one-third

> of the maximum indeterminate sentence provided by law; however pursuant to Iowa Code Section 901.10(2), as the Defendant has entered a guilty plea, this mandatory minimum term of confinement is reduced by one-third.

(Nunc Pro Tunc Order) (App. pp. 21–22).

A nunc pro tunc order is "limited to situations where there is an obvious error that needs correction or *where it is necessary to conform the order to the court's original intent*." State v. Johnson, 744 N.W.2d 646, 648 (Iowa 2008) (citation omitted) (emphasis added). The record establishes that the mandatory minimum ordered in the nunc pro tunc order is significantly longer than what the court's original intent was at the sentencing order; therefore, the use of a nunc pro tunc order in this situation is improper. See id. Furthermore, it is also clear under Iowa law that the "court may not use a nunc pro tunc order 'for the purpose of correcting judicial thinking, a judicial conclusion or a mistake of law.'" Id. at 649 (citation omitted). Thus, in so far it may have been an attempt to correct the court's incorrect thinking, it is unlawful. See id.

A mandatory minimum is a crucial part of a sentence and greatly affects a sentence's severity, as illustrated in this case. Sentencing "requires a careful, thoughtful discretionary decision by the district court." See Hill, 878 N.W.2d at 276 (Appel, J., concurring specially). As discussed above, the sentencing court did not engage in a thoughtful, discretionary decision regarding the mandatory minimum sentence of the possession-with-intent charge. Rather, the record establishes that the court was unaware he was able to reduce the mandatory minimum sentence under 124.413(3) and 901.11(1) then further reduce it pursuant to Iowa Code section 901.10(2). Moreover, the court's remarks further illustrate he was mistaken as to the actual effects of his sentencing decision and that he meant to order a greater reduction of the mandatory minimum than he actually ordered in the nunc pro tunc order. As such, this Court should find Wilbourn is entitled to a "careful, thoughtful discretionary decision by the district court" and remand for resentencing. See id.

III. THE DISTRICT COURT ERRED IN ORDERING THE DEFENDANT TO PAY A $5,000 FINE FOR FAILURE TO AFFIX A DRUG TAX STAMP IN THE JUDGMENT ENTRY WHEN IT ORDERED A FINE OF $750 AT THE SENTENCING HEARING.

A. Preservation of Error: Wilbourn preserved error on the correction of an unintended sentence by filing a timely notice of appeal. See Lathrop, 781 N.W.2d at 292–92.

B. Standard of Review: "When a party asserts that an inconsistency exists between an oral sentence and a written judgment entry, [the Court] review[s] the matter for correction of errors at law." State v. Hess, 533 N.W.2d 525, 527 (Iowa 1995) (citations omitted).

C. Discussion: The district court sentenced Wilbourn to the minimum fine of $750, suspended, for the drug-tax-stamp offense. (Sentencing Tr. p.10 L.16–20). However, despite the court's clear oral statement at the sentencing hearing that the amount of the fine was $750, the judgment entry stated: "Concerning Count VIII, . . . [t]he Defendant shall pay a fine in the amount of $5,000 . . . ." (Sentencing Order p. 4) (App. p. 17).

In a situation where the written order differs from the oral pronouncement of sentence, the appellate court examines the record and attempts to harmonize the intent of the oral pronouncement of sentence with the sentencing order. See Hess, 533 N.W.2d at 528 (citing State v. Lorrah, 761 P.2d 1388, 1389 (Utah 1988)). If the Court is unable to determine the judicial intent, it will remand for "an evidentiary hearing for a determination of the proper method of correcting the defective written sentence." Id. at 527 (citing State v. Suchanek, 326 N.W.2d 263, 266 (Iowa 1982)). "However, when the record unambiguously reflects that a clerical error has occurred," the Court directs "the district court to enter a nunc pro tunc order to correct the judgment entry." Id. (citations omitted). Furthermore, ". . . where there is a discrepancy between the oral pronouncement of sentence and the written judgment and commitment, the oral pronouncement of sentence controls." Id. at 528 (citations omitted).

In this case, the district court's error was "not the product of judicial reasoning and determination", and therefore, clerical in nature. See id. at 527 (citations omitted). It appears the district court mistakenly inputted the amount of the fine it ordered for the possession-with-intent offense—$5,000—instead of the amount it ordered for the drug-tax-stamp violation. Accordingly, Wilbourn's case should be remanded to the district court for the entry of a nunc pro tunc order to correct the judgment entry to change the amount of the fine for the tax-stamp violation from $5,000 to $750 to "'accurately reflect what was unambiguously pronounced at the sentencing hearing.'" Id. at 527–28 (citation omitted).

CONCLUSION

Defendant–Appellant Korki Ricoh Wilbourn requests the Court vacate his sentences and remand for a new sentencing hearing. Alternatively, because of a clerical error in the judgment entry, Wilbourn's case should be remanded for the entry of an order nunc pro tunc to correct the judgment entry to provide the correct amount of Wilbourn's fine.

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 $7.02, and that amount has been paid in full by the Office of the Appellate Defender.

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