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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 APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS FILED AUGUST 4, 2021

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CERTIFICATE OF SERVICE

On August 24, 2021, 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, North Central Correctional Facility, 313 Lanedale, Rockwell City, IA 50579.

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QUESTIONS PRESENTED FOR REVIEW

I. Does Iowa Code section 814.6 require an appellant to establish "good cause" whenever an appeal follows a plea or does it provide a right to directly appeal the sentence irrespective of "good cause"?

II. Did the Court of Appeals err in interpreting State v. Damme, finding Wilbourn lacked "good cause", despite his appeal raising only sentencing challenges?

III. Did the sentencing court abuse its discretion when the record establishes 1) it was unaware it could order additional reductions to the mandatory minimum; 2) it incorrectly believed it was reducing the mandatory by 2/3 rather than 1/3 of 1/3; and 3) a 2/3 reduction was statutorily authorized?

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STATEMENT IN SUPPORT OF FURTHER REVIEW

This Court should determine whether the plain language of Iowa Code section 814.6 removes only the right to directly appeal underlying plea itself, leaving Wilbourn with a right to still directly appeal his sentence. See (Def.'s Br. pp.34-47); Iowa R. App. P. 6.1103(1)(b)(1), (4) (2021). The Court of Appeals found this issue was addressed by Damme and its prodigy. (Opinion p.2 n.1). However, the Supreme Court has not yet considered this argument.

Additionally, this Court should accept further review because the Court of Appeals interpreted State v. Damme, 944 N.W.2d 98 (Iowa 2020), too narrowly, finding a defendant cannot establish "good cause" if there is a plea agreement. Wilbourn's proof brief was filed prior to the Supreme Court's decision in Damme. In its brief, citing Damme, the State declared: "Because Wilbourn 'challenges [his] sentence rather than the guilty plea,' he has good cause to appeal and this Court has jurisdiction." (State's Br. p.11). This is the correct interpretation of "good cause".

Although Damme contains language that the defendant established "good cause" after receiving a sentence that "was neither mandatory nor agreed to as part of her plea bargain", this Court's opinion holds "good cause exists to appeal from a conviction following a guilty plea when the defendant challenges his or her sentence rather than the guilty plea." See Damme, 944 N.W.2d at 100, 105. That opinion's analysis focused on the fact that the appeal arose from an allegation of an error in the sentencing process. Id. at 100, 103-105. Accordingly, the Damme Court's broader statement that "good cause" is established when a defendant raises only a sentencing challenge rather than a challenge to the underlying guilty plea—without any references to a mandatory sentence or to a plea agreement—is repeated in several other of the Supreme Court's opinions. See, e.g., State v. Boldon, 954 N.W.2d 62, 69 (Iowa 2021); State v. Fetner, 959 N.W.2d 129, 134 n.1 (Iowa 2021); State v. Tucker, 959 N.W.2d 140, 153 (Iowa 2021); State v. Jordan, 959 N.W.2d 395, 399 (Iowa 2021); State v. Treptow, 960 N.W.2d 98, 109 (Iowa 2021);

State v. Henderson, No. 19-1425, 2020 WL 2781463, at *1 (Iowa May 29, 2020)(per curiam).

In determining a defendant establishes "good cause" when challenging their sentence, this Court focused on the timing of the error. "A sentencing error invariably arises after the court has accepted the guilty plea. This timing provides a legally sufficient reason to appeal the guilty plea." Damme, 944 N.W.2d at 105. Thus, the focus is not whether there was a plea agreement, but whether there was an error at the sentencing hearing, as Wilbourn alleges here. See id.; see also State v. Thompson, 951 N.W.2d 1, 5 (Iowa 2020). The Supreme Court's statements in its opinions in Damme, Thompson, Boldon, Fetner, Tucker, Jordan, Treptow, and Henderson all indicate "good cause" is broadly construed to apply to all sentencing issues and challenges, even those that followed a plea. Accordingly, Wilbourn, who does not challenge his plea but only his sentence, has established "good cause". Therefore, Court of Appeals's opinion is in conflict

with decisions of the Supreme Court, warranting further review. See Iowa R. App. 6.1103(1)(b)(1).

Lastly, this Court has stated: "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). Here, the parties agreed Wilbourn's sentence carried a mandatory minimum sentence of one-third and that it should be reduced by one-third. (Sentencing p.5 L.21-p.6 L.3). The underlying plea proceeding establishes both attorneys were unaware of the reductions available pursuant to sections 124.413 and 901.11(1) and such additional reductions were outside any agreement of the parties. See (Plea p.27 L.8-20). Because the agreement did not address any additional reductions to the mandatory minimum, it was silent on the matter; the court could either further reduce the mandatory minimum or decline to do so—this decision was outside the purview of the parties' agreement and solely within the court's discretion. See Boldon, 954 N.W.2d at 72. As such, even under the

narrowly interpreted "good cause" by the Court of Appeals, the court had to exercise discretion in determining whether an additional reduction to the minimum was appropriate.

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 State v. Hill, 878 N.W.2d 269, 276 (Iowa 2016)(Appel, J., concurring). Here, the court was unaware it 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 stated it was reducing the mandatory minimum by two-thirds, illustrating it was mistaken as to the actual effects of the sentencing decision and that it believed such a reduction was appropriate. Under these circumstances, this Court should accept review and remand for resentencing because the Court of Appeals's opinion is in conflict with its decisions. See Iowa R. App. 6.1103(1)(b)(1); State v. Ayers, 590 N.W.2d 25, 28 (Iowa 1999); see also State v. Washington,

356 N.W.2d 192, 197 (Iowa 1984)(citation omitted); State v. Johnson, 445 N.W.2d 337, 343 (Iowa 1989), overruled on other grounds by Hill, 878 N.W.2d at 274-75 (citation omitted).

Alternatively, if Wilbourn's sentence was entirely covered by the plea agreement, this Court should grant further review because this case requires the clarification of existing Supreme Court precedent or overturning of such precedent. Iowa R. App. P. 6.903(2)(d), 6.1101(2)(c). Specifically, Wilbourn requests this Court find State v. Hill, 878 N.W.2d 269, 275 (Iowa 2016), implicitly overturned State v. Cason, 532 N.W.2d 755 (Iowa 1995) and State v. Snyder, 336 N.W.2d 728 (Iowa 1983), and that Hill requires the district court to exercise discretion and memorialize the specific reasons for selecting a particular sentence, even when the court adopts the parties' plea agreement.

The cases finding harmless error when the court gives effect to the parties' plea agreement without reasoning are premised on the understanding that the sentence imposed is not a product of the court's discretion. See, e.g., Snyder, 336

N.W.2d at 729. The Court of Appeals partly relied on this flawed reasoning. (Opinion p.6 n.4).

Even in cases where there is an agreement, *the court is not bound by it*; thus, the sentencing court must still exercise discretion when determining the defendant's sentence and whether or not to follow the parties' agreement. The court has a duty to consider all available options and "to exercise that option which will best accomplish justice for both society and the individual defendant." State v. Hildebrand, 280 N.W.2d 393, 396 (Iowa 1979)(citation omitted). Certainly the court should consider the parties' sentencing recommendation and determine whether it is appropriate given the characteristics of the defendant, the circumstances of the crimes, and the protection of the public when it decides whether to impose or reject the suggested sentence. The court should not blindly accept the sentence suggested in the agreement without articulating the reasons it believes the sentence was appropriate. This is perfectly illustrated here, where the court's statements indicate it believed a more lenient sentence

than what was covered by the plea agreement was appropriate. Accordingly, the court should be required to state, on the record, specific reasons that the court found compelling in deciding to adopt the sentencing recommendation put forth by the parties. This Court should accept further review and clarify that district courts must articulate reasons for a sentence, even addressed by plea agreement, and that courts still use discretion in determining whether to accept the parties' sentencing agreement.

STATEMENT OF THE CASE

Nature of the Case: Wilbourn seeks further review of the portion of the decision of the Court of Appeals affirming the sentence[1].

Facts: Any relevant facts will be discussed below.

[1] The Court of Appeals found no good cause for the appeal; yet, it still affirmed the sentence in part and remanded, rather than dismissing the appeal. (Opinion p.9-10). Cf. Tucker, 959 N.W.2d at 154.

ARGUMENT

I. IOWA CODE SECTION 814.6 ONLY REMOVES THE RIGHT TO DIRECTLY APPEAL THE UNDERLYING GUILTY PLEA; WILBOURN STILL HAS A RIGHT TO DIRECTLY APPEAL THE SENTENCE.

This Court should find the amended statutory language of section 814.6 does not prohibit Wilbourn from appealing because he only seeks 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).

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).

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 court "strictly construe[s] criminal statutes" and resolves any doubts in favor of criminal defendants. Id. at 369. 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 previously noted 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)(citation omitted). 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.

The additional language of the statute 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); Case, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/case (last visited May 4, 2020). This same meaning of the word "case" must be extended to the statute's use of that term in subsection 814.6(1)(a). See Iowa Code § 814.6(1)(a) (2019). 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. The legislature amended

section 814.6(2)(f) to allow 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). 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 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 retained the right to directly appeal his or her sentence following a guilty plea under section 814.6(1)(3).

There is additional support for the recognition of a distinction between an appeal of a guilty plea and an appeal simply from a sentence. 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). Additionally, Iowa appellate courts have recognized 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); see also State v. Boyer, 940 N.W.2d 429, 430-31 (Iowa 2020)(per curiam).

The interpretation that the amended section 814.6 only prohibits direct appeals of the guilty plea itself and not to a defendant's sentence is 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. 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 on direct appeal that need further record development. See, e.g., Iowa Code § 814.7 (2019); id. § 814.29 (2019). As such, it makes sense 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.

This Court should find the amended statute only prohibits the direct appeal of a "conviction" (the guilty plea itself). 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, Wilbourn may directly appeal his sentence.

II. IF "GOOD CAUSE" IS REQUIRED TO APPEAL, WILBOURN HAS ESTABLISHED IT.

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. Id.; Damme, 944 N.W.2d at 100. This Court has "liberally interpreted 'good cause' to mean the defendant need only show a 'legally sufficient reason'." Tucker, 959 N.W.2d at 149 (citations omitted). "A legally sufficient reason is a ground that potentially would afford the defendant relief." Id. Accordingly, Wilbourn has established "good cause" for this appeal.

First, the Court of Appeals did find Wilbourn was entitled to relief and remanded the case. See (Opinion p.9). This alone establishes "good cause" for the appeal under Tucker. See id.

Secondly, this Court has stated the timing of "[a] sentencing error[, which] invariably arises after the court accepted a guilty plea[,] . . . provides a legally sufficient reason to appeal notwithstanding the guilty plea." Damme, 944 N.W.2d at 105. Thus, Wilbourn, who raised only sentencing challenges, has a legally sufficient reason, and therefore good cause, to appeal. See id.

Moreover, this Court should continue to interpret "good cause" broadly to avoid any constitutional concerns. See Simmons v. Pub. Defender, 791 N.W.3d 69, 88 (Iowa 2010). Finding a defendant has established "good cause" whenever he or she is only raising sentencing claims may avoid separation-of-powers problems the statute presents. 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, 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). Cf. Tucker, 959 N.W.2d at 150 (noting limiting the right of appeal did not violate separation of powers).

Moreover, it is important this Court interpret "good cause" as always including sentencing challenges because it is not clear errors in the sentencing process would be able to be addressed in any other forum, such as postconviction proceedings. See Iowa Code § 822.2(1). Moreover, because of the lengthy time delay it takes to file, present, and get a ruling in a postconviction-relief action, many sentences will be discharged, and therefore moot, before the defendant is afforded a correction of the process. See State v. Macke, 933 N.W.2d 226, 233 (Iowa 2019). Furthermore, in many cases, the defendant will have to await the correction while incarcerated. See id. (citations omitted). 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.

Due process requires that a criminal defendant has an avenue to challenge, and more importantly remedy, errors that occur in the sentencing process. "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 v. Connecticut, 401 U.S. 371, 377 (1971). 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 v. Barnes, 463 U.S. 745, 756 n.1 (1983)(Brennan, J., dissenting); State v. Ohio ex. rel. Bryant v. Akron Metropolitan Park Dist., 281 U.S. 74, 80 (1930)(emphasis added)("As to the due process clause .

. . . , 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.*"). Denying adequate review means that many criminal defendants will lose their liberty because of unjust, improper and inadequate judicial, prosecutorial, or defense actions. See Griffin v. Illinois, 351 U.S. 12, 20-21 (1956). 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 State v. Delano, 161 N.W.2d 66, 74 (Iowa 1968).

If this Court has interpreted "good cause" for a direct appeal of a conviction arising from a guilty plea as automatically allowing sentencing challenges, as Damme seems to do, then it avoids these constitutional concerns. See Simmons, 791 N.W.3d at 88. However, as the Court of

Appeals is not interpreting "good cause" as allowing sentencing challenges, rendering further review necessary.

III. WILBOURN IS ENTITLED TO A NEW SENTENCING HEARING.

Iowa Code section 901.5 states a court must consider its sentencing options only after examining all pertinent information. See Iowa Code § 901.5. In exercising its discretion, the 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." Thomas, 547 N.W.2d at 225 (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 p.5 L.18-20). Defense counsel agreed, stating "we would ask for the same recommendation. . . . I believe the one-third additional reduction is under . . . 910.10 if the court wanted that." (Sentencing p.5 L.21-p.6 L.3).

The court sentenced Wilbourn to an indeterminate term not to exceed twenty-five years on the possession-with-intent offense. (Sentencing p.10 L.1-18)(Sentencing Order)(App. p.16). With regards to the mandatory minimum, the 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 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. Subsection 1 provides:

> *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.*

Id. § 124.413 (emphasis added). Subsection 3 provides:

> 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. 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).

Accordingly, under Iowa law, 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 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 p.4 L.22-p.5 L.3, 18-p.6 L.3); see also (Plea p.23 L.21-p.24 L.17, p.27 L.8-20); Ayers, 590 N.W. at 28 (reversing and noting that the prosecutor incorrectly stated there was no sentencing discretion and defense counsel and court followed suit).

Generally, the 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 shows the 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 Washington, 356 N.W.2d at 197 (citation omitted); Johnson, 445 N.W.2d at 343. 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).

Alternatively, remand is also required because the court's statements illustrate its 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 . . . ."

(Sentencing p.10 L.2-7)(emphasis added). The reductions discussed by the parties at the sentencing is not two-thirds reduction of the mandatory minimum. One-third of twenty-five years is 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).

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 fits the court's assertion it was reducing the mandatory minimum by two-thirds. The nunc pro tunc replaced this statement:

> 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; therefore, the use of a nunc pro tunc order was improper. See id. Furthermore, 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 was 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. The sentencing court did not engage in a thoughtful, discretionary decision regarding the mandatory minimum sentence of the possession-with-intent charge. See Hill, 878 N.W.2d at 276. 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 section 901.10(2). Moreover, the court's remarks illustrate it was mistaken as to the actual effects of its sentencing and it meant to order a greater reduction of the

mandatory minimum than it actually ordered. As such, this Court should remand for resentencing. See id.

CONCLUSION

Wilbourn requests this Court grant this application, vacate the Court of Appeals's decision, and remand for resentencing.

ATTORNEY'S COST CERTIFICATE

The undersigned hereby certifies that the true cost of producing the necessary copies of the foregoing Application for Further Review was $3.94, 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 FOR FURTHER REVIEWS

This application complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because:

> [X] this application has been prepared in a proportionally spaced typeface using Bookman Old Style, font 14 point and contains 5,591 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).

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