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IN THE SUPREME COURT OF IOWA
Supreme Court No. 20-1571

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TIMOTHY BASQUIN,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR FAYETTE COUNTY
THE HONORABLE RICHARD D. STOCHL, JUDGE (SENTENCING)
AND ALAN T. HEAVENS (HEARINGS)

APPELLEE'S BRIEF

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ROUTING STATEMENT

Since March 2020, the Supreme Court has issued no less than thirty-four temporary orders addressing Judicial Branch procedures in response to the COVID-19 pandemic. *See* https://www.iowacourts.gov/iowa-courts/supreme-court/orders/ (Supreme Court Orders Archive). Timothy Basquin contends the Court does not have authority to do so, at least to the extent an order suspends operation of an existing rule of procedure. Appellant's Pr. Br. *passim*. This poses a substantial constitutional question, issue of first-impression, issue of fundamental and urgent public importance, or question of enunciating or changing legal principles. Iowa R. App. P. 6.1101(2)(a), (b), (d), (f). The Supreme Court should retain this appeal.

STATEMENT OF THE CASE

Nature of the Case

Pursuant to this Court's temporary order, Timothy Basquin entered an *Alford* plea in Fayette County District Court to possession with intent to manufacture or deliver less than five grams of methamphetamine, a Class "C" felony. Iowa Code § 124.401(1)(*c*)(6) (2019); Written Guilty Plea; App. 122-33; *North Carolina v. Alford*, 400 U.S. 25 (1970). He contends this Court's orders relating to

written guilty pleas to felony offenses conflict with its precedent, violate due process, and infringe on separation of powers principles.

The Honorable Richard D. Stochl accepted Basquin's plea and entered judgment.

Course of Proceedings and Facts

The State does not contest Appellant's discussion of the procedural history of the case or the facts. Iowa R. App. P. 6.903(3).

ARGUMENT

I. The Supreme Court has the authority and duty to temporarily amend or suspend a rule of criminal procedure during a crisis.

Preservation of Error and Insufficient Cause to Appeal

Basquin pleaded guilty, acknowledging he understood he had "no right to appeal a guilty plea" and that whether appellate courts might review his case depended on a showing of "good cause." Written Guilty Plea ¶ 18; App. 126. He acknowledged his right to file a motion in arrest of judgment and understood that "if I am sentenced immediately, I lose my right to challenge any defect in this plea or plea proceeding by motion in arrest of judgment and appeal to a higher court…." *Id.* ¶¶ 24, 25; App. 127. Basquin's election to be sentenced immediately forecloses direct appeal.

Iowa Code section 814.6(1)(*a*)(3) precludes direct appeal from guilty pleas unless the offense is a Class "A" felony or the defendant shows "good cause." This is not a Class "A" offense and there is no good cause as a matter of law.

The Supreme Court defined "good cause" to mean a "legally sufficient reason." *State v. Boldon*, 954 N.W.2d 62, 69 (Iowa 2021) (quoting *State v. Damme*, 944 N.W.2d 98, 104 (Iowa 2020)). "A legally sufficient reason to appeal as a matter of right is a reason that, at a minimum, would allow a court to provide some relief on direct appeal." *State v. Tucker*, 959 N.W.2d 140, 159 (Iowa 2021); *see State v. Treptow*, 960 N.W.2d 98, 109 (Iowa 2021) ("By definition, a legally sufficient reason is a reason that would allow a court to provide some relief."); *see also State v. Chindlund*, No. 20-1368, 2021 WL 2708944, slip op. p. 4 (Iowa Ct. App. June 30, 2021) (noting that although *Damme* "liberally interpreted good cause, … [m]ore recently, the court declined an invitation to expand the concept of good cause" in *Tucker*).

There "is no such possibility" of relief when a defendant pleads guilty and requests immediate sentencing. *Tucker*, 959 N.W.2d at 159; *accord Treptow*, 2021 WL 2172073 at 109; *see* Iowa R. Crim. P.

2.24(3)(a) ("A defendant's failure to challenge the adequacy of a guilty plea proceeding by motion in arrest of judgment shall preclude the defendant's right to assert such challenge on appeal.").

There are (or were) two exceptions to this rule. One existed when defendants asserted the failure to file a motion in arrest of judgment arose from ineffective assistance of counsel. *Tucker*, 959 N.W.2d at 159; *Treptow*, 960 N.W.2d at 109. Iowa Code section 814.7 now reserves this claim for postconviction relief. Iowa Code § 814.7; *Treptow*, 960 N.W.2d at 109; *Tucker*, 959 N.W.2d at 159.

The second exception arose when the district court failed to—or incorrectly—advised a defendant of the right to file a motion in arrest of judgment. Iowa Rule of Criminal Procedure 2.8(2)(d) governs the motion in arrest of judgment advisory. It makes no distinction between felony and misdemeanor pleas. It states,

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

Iowa R. Crim. P. 2.8(2)(d). The rule does not by its terms require an in-person colloquy.

In *State v. Barnes*, the Iowa Supreme Court confirmed misdemeanor pleas do not require an in-person motion in arrest of judgment advisory. 652 N.W.2d 466, 468 (Iowa 2002) (overruling *State v. Hook*, 623 N.W.2d 865, 868 (Iowa 2001)); *see* Iowa R. Crim. P. 2.8(2)(b) (last paragraph) (allowing written pleas in misdemeanors). In *State v. Meron*, the State argued that *Barnes* should permit a defendant pleading to a felony to acknowledge this right in writing, obviating the need for the court to repeat it. 675 N.W.2d 537, 541 (Iowa 2004). But because the writing in *Meron* did not mention appeal, the Supreme Court declined to answer whether *Barnes* applied.

Barnes' reasoning indicates it should. Rule 2.8(2)(**b**) states specifically, "the court must address the defendant personally in open court." Rule 2.8(2)(**d**) does not. Noting this difference, *Barnes* concluded an in-court Rule 2.8(2)(d) advisory was not necessary in a written guilty plea. 652 N.W2d at 468.

This view should prevail for felonies. *Contra State v. Kalvig*, No. 13-1252, 2014 WL 1999186, *3 (Iowa Ct. App. May 14, 2014) (stating without explanation that *Hook* requires an in-person rule 2.8(2)(d) advisory). No difference exists between felony and

misdemeanor pleas with respect to a motion in arrest of judgment. The right to and consequences of failing to file a motion in arrest of judgment are the same whether the person is pleading guilty to a felony or a misdemeanor. The only arguable difference is the length of sentence a person might serve. But that has nothing to do with the complexity of a motion in arrest of judgment advisory. A motion in arrest of judgment advisory is no more or less difficult to understand in a felony case as opposed to a misdemeanor.

The necessity of an in-person colloquy under subsection (d) makes less sense than the subsection (b) colloquy. There are rights, practices, and procedures to discuss in the heart of the plea colloquy. *See* Iowa R. Crim. P. 2.8(2)(b) (requiring court "personally" address nature of chare, maximum and minimum punishments, immigration consequences, six constitutional trial rights, and that there will not be a trial). Rule 2.8(2)(d) on the other hand is shorter and simpler: challenges to the plea require motions in arrest of judgment and failure to file such a motion precludes an appeal.

Consistent with *Barnes*, the Court should permit written Rule 2.8(2)(d) advisories, irrespective of the grade of offense.

Also, the Supreme Court extended the procedures for misdemeanor pleas to felonies as part of its response to COVID-19. "[D]istrict courts may accept written guilty pleas in felony cases in the same manner as in serious and aggravated misdemeanor cases. *See* Iowa R. Crim. P. 2.8(2)(b) (last paragraph)." *In the Matter of Ongoing Provisions For Coronavirus/COVID-19 Impact on Court Services*, April 2, 2020 Order, ¶ 15 (filed Apr. 2, 2020). The Court has retained this principle from March 2020 and extended it to January 2022. *In the Matter of Ongoing Provisions For Coronavirus/COVID-19 Impact on Court Services*, May 22, 2020 Order, ¶ 22 (filed May 22, 2020); *In the Matter of Ongoing Provisions For Coronavirus/COVID-19 Impact on Court Services*, November 10, 2020, preamble (filed Nov. 10, 2020); *In the Matter of Ongoing Provisions For Coronavirus/COVID-19 Impact on Court Services*, November 24, 2020, ¶ 14 (filed Nov. 24, 2020); *In the Matter of Lessons Learned From the Judicial Branch Response To COVID-19*, April 28, 2021 (filed Apr. 28, 2021); *In the Matter of Ongoing COVID-19 Iowa Judicial Branch Court Services and Processes Continued to January 1, 2022*, June 21, 2020 [sic] (filed June 21, 2021). If the Court has the authority to issue these orders,

then Rule 2.8(2)(d) allows for a written advisory. And the advisory here would preclude direct appeal.

While the Court prefers strict or actual compliance with Rule 2.8(2), "substantial compliance is all that our caselaw has required." *State v. Weitzel*, 905 N.W.2d 397, 406 (Iowa 2017) (citing *State v. Fisher*, 877 N.W.2d 676, 680 (Iowa 2016); *State v. Kirchoff*, 452 N.W.2d 801, 804 (Iowa 1990)); *see also State v. Straw*, 709 N.W.2d 128, 132 (Iowa 2006) (applying "substantial compliance" standard to motion in arrest of judgment advisory). Here, the court substantially complied with Rule 2.8(d).

Basquin's written plea stated:

> 24. I understand that if I wish to challenge this plea of guilty, I must do so by filing a Motion in Arrest of Judgment at least five (5) days prior to the Court imposing sentence, but no more than 45 days from today's date. I understand that by asking the Court to impose sentence immediately that I waive my right to challenge the plea of guilty which I have hereby entered. Initials _/tb/__
>
> 25. … *I understand that if I am sentenced immediately, I lose my right to challenge any defect in this plea or plea proceeding by motion in arrest of judgment and appeal to a higher court*…. Knowing the above, X I ask the court to sentence me immediately. … Initials __/tb/____.

Written Guilty Plea ¶ 24, 25; App. 127 (emphasis added). If a written advisory is permissible, *Straw* shows this advisory substantially complied with Rule 2.8(2)(d). It informed Basquin that if he wanted to appeal or challenge the guilty plea, he had to file a motion in arrest of judgment … and immediate sentencing foreclosed that possibility. *Straw*, 709 N.W.2d at 132.

Standard of Review

The State accepts Basquins' statement of the nature of review. Iowa R. App. P. 6.903(3).

Merits

As the novel coronavirus reached and permeated Iowa, the Iowa Supreme Court responded with a series of orders modifying or suspending various rules of procedure. The Court had the authority and duty to do so, lest the judicial system grind to a halt. The Court properly granted district courts the discretion to accept felony and misdemeanor guilty pleas pursuant to the last paragraph of Iowa Rule of Criminal Procedure 2.8(2)(b). Neither the Court's precedent, due process, nor separation-of-powers principles prohibit a defendant from waiving his presence at a felony guilty plea.

A. The Pandemic Threatens Iowa.

In early March 2020, three Iowans tested positive for the coronavirus. https://www.desmoinesregister.com/story/news/health/2020/03/08/coronavirus-iowa-kim-reynolds-cases-covid-outbreak/4954032002/ (last accessed October 16, 2021). This prompted state government officials recommend little more than that Iowans cover their coughs and sneezes. *Id.* That would change.

On March 11, the World Health Organization declared the COVID-19 outbreak a global pandemic; President Donald Trump issued a proclamation stating the disease constituted a national emergency on March 13, and Governor Kim Reynolds declared a Public Health Disaster Emergency on March 17. https://www.desmoinesregister.com/story/news/health/2020/03/17/coronavirus-iowa-reynolds-state-public-health-emergency-covid-19-social-distancing/5067571002/ (last accessed October 16, 2021). A cascade of public disaster proclamations began to flow from the Governor's office. *See* https://governor.iowa.gov/sites/default/files/documents/20200310818.pdf (last accessed October 16, 2021).

By the end of March, public health experts suggested over 1,300 Iowans might die from the novel coronavirus by the end of the summer. https://www.desmoinesregister.com/story/news/health/2020/04/01/data-offers-clues-potential-covid-19-cases-deaths-iowa-covonavirus/5094043002/ (last accessed October 16, 2021). The Governor responded with the first of several declarations that closed entire private and public sectors. https://www.desmoinesregister.com/story/news/health/2020/03/17/coronavirus-iowa-reynolds-state-public-health-emergency-covid-19-social-distancing/5067571002/ (last accessed October 16, 2021). The Legislature suspended its session, not to resume until June 2020. https://iowacapitaldispatch.com/2020/04/09/legislature-remains-in-limbo-as-session-delay-extended-to-april-30/ (last accessed October 16, 2021); https://www.desmoinesregister.com/story/news/politics/2020/05/13/coronavirus-iowa-republicans-say-legislature-resume-session-june-3/5183166002/ (last accessed October 16, 2021). Everything from gyms and restaurants to schools and state offices shuttered as more and more people fell ill, sometimes gravely.

By the time Basquin pleaded guilty in the fall of 2020, COVID-19 cases stretched hospitals to the breaking point. *See* https://coronavirus.iowa.gov/ (chart of hospitalizations) (last accessed October 16, 2021); https://www.desmoinesregister.com/story/news/health/2020/11/02/iowa-hospitals-entering-danger-zone-covid-19-pandemic-worsens/6125343002/ ("Leaders of Iowa's largest hospital systems say the COVID-19 surge is stretching their facilities and threatens to get worse.") (last accessed October 16, 2021). Hospitalizations and deaths would not peak until January 2021. https://coronavirus.iowa.gov/ (last accessed October 16, 2021).

As of this writing, over 480,000 Iowans have tested positive for the virus, this in a population of just over 3.15 million. https://www.census.gov/quickfacts/fact/table/IA# (last accessed October 16, 2021); https://coronavirus.iowa.gov/ (accessed October 16, 2021). The true number of Iowans sickened is likely higher. The virus has cost nearly 6,500 Iowans their lives. https://coronavirus.iowa.gov/ (last accessed October 16, 2021). Government and business have had to balance continued operations with protecting participants' health and mitigating contagion.

B. The Supreme Court Implements Temporary Procedures to Preserve Judicial Function.

As the State braced for widespread closures and an uncertain future, the Iowa Supreme Court commenced efforts to maintain judicial branch functions. *In the Matter of Preparation for Coronavirus/COVID-19 Impact on Court Services*, Order (filed Mar. 12, 2020). The Court endeavored to keep "courts open to the fullest possible extent while protecting public safety by mitigating the impact" of the disease. *Id.* The Court advised that "[a]s circumstances change, this order may be updated." *Id.*

Two days later, the Court issued a thirteen-page order. *In the Matter of Ongoing Preparation for Coronavirus/COVID-19 Impact on Court Services*, March 14, 2020 Order (filed Mar. 14, 2020). Echoing its earlier order, the Court said, "[t]he Iowa Judicial Branch is instituting procedures to keep the courts open to the fullest extent possible while protecting public safety by mitigating the impact of coronavirus/COVID-19." *Id.* It found that the outbreak constituted "good cause" to extend speedy trial deadlines. *See id.* ¶ 3 (citing Iowa R. Crim. P. 2.33). It permitted written waivers of initial appearances. *Id.* ¶ 10 (citing Iowa R. Crim. P. 2.2(1)-(4)(a). It continued civil trials that had not already commenced. *Id.* ¶ 11. It altered juvenile

proceedings. *Id.* ¶¶ 14, 15. It "suspend[ed] the operation of any Iowa Court Rules" to the extent contrary to any provision of the order. *Id.* ¶ 21. It would update the order as necessary. *Id.* ¶ 22.

Pertinent here, the Court wrote, "[t]hrough April 20, district courts may accept written guilty pleas in felony cases in the same manner as in serious and aggravated misdemeanor cases. *See* Iowa R. Crim. P. 2.8(2)(b) (last paragraph)." *Id.* ¶ 6. Iowa was not the only state to offer this procedure to mitigate defendants', attorneys', judges', and staff's virus exposure. *See, e.g.*, N.D. Order 0018, C.O. 0018 Court Rules, State of North Dakota [COVID-19] N.D. Sup. Ct. Admin. O. ("(b) **Presence for Plea.** ~~Any defendant facing sentence of presumptive probation for an offense may plead to the offense in writing in a manner consistent with the requirements of N.D.R. Crim. P. 43(b).~~ In addition to the circumstances provided in N.D.R. Crim. P. 43(b), a defendant need not be present for entry of a guilty plea or sentencing for any class C felony if the plea is made by written agreement under N.D.R. Crim. P. 11(c)(1)(C)." and effective immediately).

The Iowa Supreme Court updated its order on April 2, 2020. *In the Matter of Ongoing Provisions For Coronavirus/COVID-19*

Impact on Court Services, April 2, 2020 Order (filed Apr. 2, 2020). Replacing all previous orders, and balancing the need to protect the public with the "commitment to conducting business as necessary," the Court issued forty three changes to the operation of the court system. *Id.* It did so "pursuant to its available legal authority, including Article III, section 1 and Article V, section 1 of the Iowa Constitution."[1] *Id.* The Court "temporarily" approved changes to procedures relevant to child custody under Iowa Code section 598.15, or final reports in estate closures under Rule of Probate 7.6, statute of limitations, continuing legal education, client security, and electronic filing. *Id.* ¶¶ 24, 25, 33, 35, 42. Relevant here, the court extended permission to accept written felony guilty pleas through August 2020. *Id.* ¶ 15.

The Court continued to update procedures through the spring. *In the Matter of Ongoing Provisions for Coronavirus/COVID-19 Impact on Court Services*, May 22, 2020 Order (filed May 22, 2020).

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[1] Other state supreme courts have relied on the "inherent authority to supervise the administration of all courts" of the state to implement COVID-19 procedures. *See In the Matter of Administrative Rule 17 Emergency Relief for Indiana Trial Courts Relating to the 2019 Novel Coronavirus (COVID-19)* S. Ct. Case No. 20S-BB-123 Emergency Order Permitting Expanded Remote Proceedings, 2020 Ind. Ct. Order 0043 (C.O. 0043).

As before, the Court relied on its legal and constitutional authority. *Id.* The Court thanked various state agencies and task forces for their assistance. *Id.* In addition to a variety of continued, modified, or new procedures, the Court extended permission to accept written felony guilty pleas through December 31, 2020. *Id.* ¶ 26. As before, it "temporarily suspend[ed] the operation of any Court Rule or statute to the that it is contrary to the provisions of this order." *Id.* ¶ 58.

On November 11, 2020, the Court confirmed its earlier orders pursuant to its legal authority including Article III, section 1 and Article V, sections 1 and 4 of the Iowa Constitution. *In the Matter of Ongoing Provisions For Coronavirus/COVID-19 Impact on Court Services*, November 10, 2020 (filed Nov. 10, 2020). On November 24, 2020, the Court revised its earlier orders and extended discretion to accept written felony guilty pleas through June 2021. *Id.* ¶ 14; *see id.* ¶ 32 (temporary suspension of conflicting Iowa Court Rules).

In the spring of 2021, the Court began to prepare "for a post COVID-19 world." *In the Matter of Lessons Learned From The Judicial Response To COVID-19*, April 28, 2021 (filed Apr. 28, 2021). The Court observed,

> As the pandemic worsened and more information about the virus became available,

> the Iowa Supreme Court issued orders to protect the public and court employees while keeping the courts as open and operational as possible. Between March 12 and November 24, nearly thirty supervisory orders were issued.

Id. p. 1. To prepare for a more normal operation, the Court created a twenty-person Task Force. *Id.*

Two months later, the Task Force offered its recommendations which the Court accepted as part of a "bridge order." *Lessons Learned Task Force Recommendations* (filed June 21, 2021). Among the recommendations, the Task Force advised the Court to continue the practice of allowing district courts to accept written guilty pleas with modification. *Id.* ¶ 15. The Task Force received public comment to inform its recommendations. Relevant here, twenty-eight people favored retention of written guilty pleas in felony cases. *Public Comments on Current Iowa Court Covid-Related Processes* ¶ 15 (filed June 21, 2021). Five disagreed.[2] *Id.*

[2] The State Appellate Defender's Office believed the practice should cease because "in-person proceeding for felonies ensure that defendant's knowingly, intelligently, and voluntarily waive their constitutional rights when entering a guilty plea with an understanding of its consequences." *Public Comments on Current Iowa Court Covid-Related Processes* ¶ 15, Comment 30 (filed June 21, 2021).

The Court began to consider the Task Force recommendations and public comments. *In the Matter of Ongoing COVID-19 Iowa Judicial Branch Services and Processes Continued to January 1, 2022*, June 21, 2021 Order (filed June 21, 2021). Digesting this information, the Court felt it best to continue existing procedures, but only to a date certain. *Id.* As such,

> The court directs that existing protocols, policies, and procedure set forth in its Amended November 24, 2020 Order, which provided a sunset date of June 30, 2021, will continue until January 1, 2022, to ensure that litigants, attorneys, and court personnel will have sufficient time to adjust to the retention, modification, or termination of pandemic-related processes. The court will provide permanent policies and rule changes on these matters following its August 2021 Administrative Term meetings.

Id.

C. The Constitution and Code Confer Authority and Duty to Employ Temporary Rules of Procedure

Several provisions of the Iowa Constitution and the Iowa Code control the legitimacy of the Court's response to the COVID-19 pandemic. Article III, section 1 establishes Legislative, Executive, and Judicial branches and the principle that none shall exercise the powers of the other except as expressly directed or permitted. Iowa

Const. Art. III, § 1. Article V, section 1 states, "The judicial power shall be vested in a supreme court, district courts, and such courts, inferior to the supreme court, as the general assembly may, from time to time, establish." Iowa Const. Art. V, § 1. Section 4 states, in relevant part, "The supreme court … shall have the 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 through the state." Iowa Const. Art. V, § 4.

Section fourteen of Article V grants a role to the Legislature in effecting the judicial branch's power. "It shall be the duty of the general assembly to provide for the carrying into effect of this article, and to provide for a general system of practice in all the courts of this state." Iowa Const. Art. V, § 14.

Iowa Code section 602.4201 provides the Supreme Court may "prescribe all rules of pleading, practice, evidence, and procedure." Iowa Code § 602.4201(1). The following subsection describes the formal rule-making process. Under it, the Supreme Court submits a rule or form to the Legislative Council and the chairpersons and ranking members of the house and senate judiciary committees. Iowa Code § 602.4202(1). The rule takes effect sixty-days after submission

(or a later date if the Court specifies), unless a majority of the Legislative Counsel "delays the effective date." *Id.* § 602.4202(2). The Legislative Council cannot amend or veto the rule. But "[i]f the general assembly enacts a bill changing a rule or form, the general assembly's enactment supersedes a conflicting provision of the rule or form as submitted by the supreme court." *Id.* § 602.4202(4).

But *prior* to formal rulemaking, neither Article III, section 4 nor Iowa Code section 602.4202 prevent the Court from acting. Neither prohibits the Court from creating pilot projects, task forces, or temporary procedures. They do not proscribe the length of time the Court may experiment with a rule or form before submitting it. They do not prohibit the Court from making a rule immediately effective subject to the Legislative Council's action. And they do not stand in the way of the Court's occasional prerogative to follow an amended procedure when necessity requires. Several instances have illustrated these propositions.

The Court has noted its constitutional authority to supervise inferior tribunals with protocols of its own design. *See State v. Dahl*, 874 N.W.2d 348, 351 (Iowa 2016) (implementing protocol for securing services of an investigator). And it has observed its

"constitutional, statutory, inherent, and common law authority to regulate practice and procedure in its courts…." *State v. Thompson*, 954 N.W.2d 402, 411 (Iowa 2021). That power, however, "must give way where the legislative department has acted." *Id.* (citing Iowa Code § 602.4202(4)). Where the Legislature has *not* spoken, the Court enjoys an interstitial power and duty to act. *See Iowa Civil Liberties Union v. Critelli*, 244 N.W.2d 564, 568–70 (Iowa 1976) (noting district court's inherent power to manage its docket in the absence of statute or rule).

From time to time, the Court has "temporarily adopted" rules of civil and criminal procedure "effective immediately," and stated they "will permanently take effect subject to Legislative Council review consistent with the provisions of Iowa Code section 602.4202." *In the Matter of Adopting Felony Conviction Challenge for Cause Amendments to Chapter 1 Rules of Civil Procedure and Chapter 2 Rules of Criminal Procedure*, Order (filed Feb. 19, 2021); *see also In the Matter of Adopting Amendments to Chapter 22 Iowa Judicial Branch Travel Reimbursement Rules*, Order (filed Aug. 31, 2020) ("The amendments … provided with this order are effective September 1, 2020").

The Court has also, on occasion, exercised its underlying constitutional powers under Article V notwithstanding a countervailing rule of criminal or civil procedure. For example, in 1992 the Court granted discretionary review of a magistrate's sentence for a simple misdemeanor, even though the rules of civil and criminal procedure required an appeal to district court first. *State v. Davis*, 493 N.W.2d 820, 822 (Iowa 1992). Relying on Article I, section 4, the Court held "Rule of Criminal Procedure 54 and Iowa Rule of Civil Procedure 309 do not limit *our* Article V constitutional power…." The Court granted discretionary review notwithstanding impediments because, if the statute at issue "calls for a mandatory minimum two-day jail term, the bench, bar, and the public are entitled to know now." *Id.*

In 1964, the Supreme Court looked to Article III, section 4 when two judges refused to implement certain laws. *In re Judges of Municipal Ct. of City of Cedar Rapids*, 256 Iowa 1135, 1136, 130 N.W.2d 553, 554 (1964). "The grant of the power of supervision and administration implies a duty to exercise it. In fact, the language of the constitution is mandatory that we must do so." *Id.* at 1136, 130 N.W.2d at 554.

Since the Iowa Supreme Court began issuing its temporary COVID-19 orders, the Legislature has concluded two sessions. In that time, the Legislature has acquiesced to the Court's undertakings. The Legislature could have passed, for example, a law limiting written pleas to misdemeanors. The Legislature could have abrogated the Court's temporary rules wholesale. It could have amended Rule 2.8(2)(b) and (d). But it did not.

1. Rule 2.8(2)(b) requires a personal advisory for felony pleas and the Court's orders obviously amend that.

Basquin states this Court's COVID-19 orders permitting written felony guilty pleas violate its own precedent. Appellant's Pr. Br. pp. 28–42. In one sense, this is incontestable.

The Court has held that Iowa Rule of Criminal Procedure 2.8(2)(b) requires an in-person colloquy for felonies. *See, e.g.*, *State v. Moore*, 638 N.W.2d 735, 738 (Iowa 2002) ("Our recent *Hook* case made it clear that, in a felony case, the court may not rely, to any extent, on a written plea of guilty to satisfy the requirements of rule 8(2)(b)."); *Hook*, 623 N.W.2d at 869–70 (requiring in-person colloquy for waiver of advisory of right to file motion in arrest of judgment) *overruled by Barnes*, 652 N.W.2d at 468 (holding in

misdemeanor pleas that arrest of judgment advisory *may* be in writing).

The Court temporarily countermanded the in-person requirement. "[D]istrict courts *may* accept written guilty pleas in felony cases in the same manner as in serious and aggravated misdemeanors." *In re the Matter of Ongoing Provisions For Coronavirus/COVID-19 Impact On Court Services*, April 2, 2020 Order ¶ 15 (filed Apr. 2, 2020) (emphasis added). Thus, the question is not whether the orders conflict with the Court's precedent interpreting Rule 2.8(2)(b). They obviously do.

The question is whether the Court has the authority to overrule precedent. It does. *See Foley v. Argosy Gaming Co.*, 688 N.W.2d 244, 247 (Iowa 2004) (stating "it is manifest that we are free to overrule precedents when circumstances warrant"); *State v. Eichler*, 248 Iowa 1267, 1270, 83 N.W.2d 576, 578 (1957) ("If our previous holdings are to be overruled, we should ordinarily prefer to do it ourselves."). The question next becomes whether some *other* impediment prevents the Court from issuing an order temporarily amending a rule. Basquin proposes two barriers: due process and separation of powers.

2. *Due process itself does not prohibit all defendants pleading to a felony from waiving an in-person colloquy.*

The State and federal constitutions protect a defendant's right to due process of law. U.S. Const. Amend. V, XIV; Iowa Const. Art. I, § 9. A trial brings with it numerous protections to ensure a just result such as notice, an impartial jury, confrontation, compulsory process, and effective assistance of counsel. *See*, *e.g.*, U.S. Const. Amend. V, VI, XIV; Iowa Const. Art. I, §§ 9, 10. A defendant need not always take advantage of these rights. A defendant may waive trial and plead guilty. But the defendant must make a knowing, voluntary, and intelligent waiver "done with an awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970); *see*, *e.g.*, *Straw*, 709 N.W.2d at 133 (noting knowing and voluntary standard).

Iowa Rule of Criminal Procedure 2.8(2)(b) requires the court to "personally" address the defendant and assure understanding of five things: the nature of the charge, the maximum and minimum punishment, that conviction might affect immigration status, and several trial rights. Iowa R. Crim. P. 2.8(2)(b)(1)–(5); *Weitzel*, 905 N.W.2d at 407. The rule already provides that the "court may, in its

discretion and with the approval of the defendant, waive the above procedures in a plea of guilty to a serious or aggravated misdemeanor." Iowa R. Crim. P. 2.8(2)(b) last par. By virtue of the Court's COVID-19 order, a court has the discretion to accept a defendant's waiver of an in-person colloquy. Thus, the real issue asks whether due process bars defendants from waiving the right to enter a plea in person.

In-person felony guilty pleas are the norm, of course. Few states commonly see defendants waive their presence at felony guilty pleas. *See, e.g.*, *State v. Frey*, 461 P.3d 875, 2020 WL 202960, *3 (Mont. Apr. 28, 2020) (holding defendant may waive presence at felony plea if ratified later, such as by paying fines). But that does not mean due process bars the practice. Afterall, neither state nor federal due process principles require any specific guilty plea procedure in the first place.[3] *See, e.g.*, *McCarthy v. United States*, 394 U.S. 459,

[3] In general, the Court has deemed state and federal due process clauses "identical in scope, import, and purpose." *Bruns v. State*, 503 N.W.2d 607, 611 (Iowa 1993). Basquin does not suggest otherwise. The Court, of course, retains the power to interpret the Iowa Constitution differently, but typically applies established principles in the absence of briefing showing why it should not. *See State v. Halverson*, 857 N.W.2d 632, 635 (Iowa 2015) (applying established principles while reserving the right to apply them in a different manner). Judicial restraint suggests that the Court should refrain

465 (1969) (noting Fed. R. Crim. P. 11 for entry of guilty pleas is not constitutionally mandated). Iowa has never held rule 2.8(2) marks a constitutional floor. *See Kirchoff*, 452 N.W.2d at 804 ("the rule does not establish a litany that must be followed without variation before a plea may be accepted").

So, it should come as no surprise that while written felony pleas are uncommon, due process does not prohibit them. A court must still ensure the plea is knowing, voluntary, and intelligent. It is possible that a court, in its discretion, will refuse to allow a defendant to waive an in-person colloquy. If it permits the waiver, it must still determine that the written plea is knowing, voluntary, and intelligent. That is true whether the charges are misdemeanors or felonies. The grade of offense does not itself suggest the plea is knowing, voluntary or intelligent. Thus waiver of personal presence for felony pleas does not itself offend due process.

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from indulging theories the appellant has not researched, briefed, or argued. *See* Iowa R. App. P. 6.903(2)(g)(3) (stating court may deem failure of briefing or citation may amount to waiver of issue); *State v. Piper*, 663 N.W.2d 894, 913-14 (Iowa 2003) (stating the Court should not research and advocate for a position a party did not advance) (overruled on other grounds by *State v. Hanes*, 790 N.W.2d 545, 550 (Iowa 2010)).

Basquin argues, however, that the district court could not have found *his* written plea voluntary and intelligent without a personal colloquy. He first proposes that the plea document was long and confusing. Appellant's Pr. Br. pp. 45–46. The record does the Court few favors. Basquin elected to forego a motion in arrest of judgment. So the Court does not know what Basquin knew or believed. Typically, the Court requires extrinsic evidence when a defendant seeks to show the objective record is wrong.

Basquin next suggests the record shows the plea was not voluntary because he fought the charges, tangled with numerous attorneys, and let an earlier plea offer expire. *Id.* p. 45. On the other hand, this plea offer presented a "sweetheart" deal: plead to possession with intent to deliver or manufacture less than five grams of methamphetamine for an agreed-upon sentence of two-years' "self" probation; this where a witness saw a couple weighing a "mound of cocaine," police found a scale, and Basquin had methamphetamine when he went to jail. Written Plea ¶ 9; App. 122-23; Mins. Test. Davis Rep. p. 2, Lab. Rep.; Conf. App. 11, 24. The record gives a plausible, permissible reason for his plea.

Basquin also argues the plea document itself was confusing, indicating a plea to counts I and II and to just count I. Appellant's Pr. Br. p. 46 (citing Written Plea ¶¶ 6–7, 9). Another way to read the Written Plea is that Basquin was admitting to have committed both offenses charged. But the plea agreement was the State would dismiss Count I on the condition Basquin received an agreed-upon sentence. Written Plea ¶¶ 6–7, 9; App. 122-23.

Basquin also argues he had to "digest" a seven-page plea, implying a plea colloquy would make it easier to understand. Appellant's Pr. Br. p. 46. But this document could have as easily been used for an aggravated misdemeanor. The only difference then is the penal consequence. As alluded above, the grade of offense does not change the comprehensibility of a written plea. If that is true, then there is no reason due process should allow written misdemeanor pleas but not felony pleas.

Basquin complains the district court failed to ensure he understood the nature of the offense. Appellant's Pr. Br. pp. 46–49. To the contrary, Basquin informed the trial court that he understood the nature of the offense, all of the elements as alleged in the trial information. Written Plea ¶ 7; App. 122. The trial information alleges

that on June 7, 2019, Basquin did unlawfully "manufacture, deliver, or possess with intent to deliver, a controlled substance … to wit, methamphetamine." Trial Info.; App. 8; *see* Iowa Code § 124.401(1)(*c*)(6). This is no more confusing than if the controlled substance was unlisted, in which case the offense would be an aggravated misdemeanor. Iowa Code § 124.401(1)(*d*). In that instance (and before COVID-19), a defendant would have had the option of waiving an in-person colloquy. Iowa R. Crim. P. 2.8(2)(b) last par. The only difference here is the substance is methamphetamine. As such, whether Basquin's signed plea was confusing does not say much about the nature of written felony pleas and waiver of an in-person colloquy.

In short, the Supreme Court did not offend due process by temporarily extending permission for courts to entertain a defense waiver of in-person colloquy for all offenses.

3. Separation of powers does not prohibit the Court from employing temporary or emergency procedures.

The Court recently summarized separation-of-powers principles:

> "The division of the powers of government into three different departments—legislative,

> executive, and judicial—lies at the very foundation of our constitutional system." *State v. Barker*, 116 Iowa 96, 108, 89 N.W. 204, 208 (1902). The "historic concept of separation of powers to safeguard against tyranny" is memorialized in the Iowa Constitution. *Webster* [*County Bd. of Sup'rs v. Flattery*], 268 N.W.2d [869,] 873 [(Iowa 1978)].
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> The separation-of-powers doctrine has at least three aspects. First, the doctrine prohibits a department of the government from exercising "powers that are clearly forbidden" to it. *Klouda* [*v. Sixth Judicial Dist. Dept. of Corrctional Sevices*], 642 N.W.2d [255,] 260 [(Iowa 2002)] (quoting *State v. Phillips*, 610 N.W.2d 840, 842 (Iowa 2000) (en banc)). Second, the doctrine prohibits one department of the government from exercising "powers granted by the constitution to another branch." *Id.* Third, "[e]ach department of government must be and remain independent if the constitutional safeguards are to be maintained." *Webster Cnty. Bd. of Supervisors*, 268 N.W.2d at 873. Stated differently, one department of the government cannot "impair another in the performance of its constitutional duties." *Klouda*, 642 N.W.2d at 260 (emphasis omitted).

Thompson, 954 N.W.2d at 410.

Basquin proposes that the Court lacks the authority to alter "the rules of criminal procedure, even during times of a public health crisis or disaster." Appellant's Pr. Br. p. 53. The Court does have that

power. It also has the duty. This remains so until such time as the Court determines a temporary procedure should go through the formal rulemaking process.

To summarize the discussion that began this brief, the Iowa Constitution provides that judicial power resides in the Supreme Court. Iowa Const. Art. V, § 1. The Supreme Court "shall exercise a supervisory and administrative control over all inferior judicial tribunals through the state." *Id.* Art. V, § 4. But "[i]t shall be the duty of the general assembly to provide for the carrying into effect of this article, and to provide for a general system of practice in all the courts of this state." *Id.* Art. V, § 14. Accordingly, the Code allows the Supreme Court to "prescribe all rules." Iowa Code § 602.4201(1). Then, the Court "shall submit a rule" to the Legislative Council and it becomes effective in 60 days. *Id.* §§ 602.4202(1), (2). And, if the Legislature ever passes a law changing a rule, that enactment supersedes the Court's rule. *Id.* § 602.4202(4). Together, these principles instruct that the Court has a fundamental, interstitial rulemaking power and duty to act when the Legislature has not. *Thompson*, 954 N.W.2d at 412.

A number of conclusions now follow. First, this Court lacked easy precedent when the novel coronavirus appeared, imperiling the entire judicial function. Unlike the Legislature which can adjourn, the judicial branch must remain accessible to the tens of thousands of citizens whose civil liberties, property, children, and other interests hang in the balance.

Second, in the absence of a Legislative prohibition, the Court has the authority and responsibility to fashion procedures to keep the judiciary functioning. There is no Legislative prohibition stating the court shall not issue temporary orders amending rules of procedure. There is only a procedure for rulemaking once the Court has settled on a rule it wishes to make permanent.

Third, for years the Court has from time to time authored a new rule of procedure effective immediately and subject to later rulemaking pursuant to section 602.4202. In that time, the Legislature has given no indication it believed this violated section 602.4202. *See State v. Iowa D. Ct. for Jones Cty.*, 902 N.W.2d 811, 818 (Iowa 2017) ("Under the doctrine of legislative acquiescence, "we presume the legislature is aware of our cases that interpret its statutes." *Ackelson v. Manley Toy Direct, L.L.C.*, 832 N.W.2d 678,

688 (Iowa 2013)). "When many years pass following such a case without a legislative response, we assume the legislature has acquiesced in our interpretation."). Since 2020, the Legislature has convened and retired twice without amending section 602.4202 to limit the Court's actions. Neither has it amended the Rules of Criminal Procedure. Collectively, the Court may presume the Legislature has acquiesced in how it issues orders concerning rules of procedure. It may also conclude its constitutional and statutory obligations permit the orders it issued.

Fourth, the Court need not wait for the legislature when illness and death threaten *en masse*. Neither must it sit idle for 60 days. Bear in mind also, that when the Court issued its first temporary orders, the Legislature had closed until June. Nor was it in session as COVID-19 cases began their algorithmic progression to a breathtaking peak in January 2021. It is conceivable the Legislature could anticipate such an emergency or pass enabling legislation in the middle of this pandemic. But it is unrealistic.

And neither is enabling legislation necessary because, fifth, the judiciary enjoys the prerogative to employ a temporary procedure while it contemplates permanent rules (if any) to submit to the

Legislature under section 602.4202. For what it is worth, a contrary view does not prevail among the bench and bar. The "Lessons Learned" Task Force–to say nothing of the public commentary–breathed little notion that the Court cannot employ a modified rule or temporarily suspend another. Even among those who believed a process should end or change, none said the Court lacked temporary or emergency powers. *See In the Matter of Lessons Learned From the Judicial Branch Response to COVID-19*, April 28, 2021 (filed Apr. 28, 2021); Lessons Learned Task Force Recommendations (filed June 21, 2021); *Public Comments on Current Iowa Court Covid-Related Processes* Comments Rec'd through May 28, 2021 (filed June 21, 2021).

Sixth, and finally, there is probably a point in time at which a temporary modification or suspension of a rule functionally violates the rulemaking procedure for permanent rules. But this Court has been clear that its directives are temporary. Each order came with sunset date. The Court created a Lessons Learned Task Force and took its recommendations (along with public comment) into its Administrative Term. The sunset date of January 1, 2022 dovetails with the beginning of the next legislative term. Presumably, the

Court will then propose rules or forms according to Iowa Code section 602.4202.

Temporary, emergency modifications or suspensions of rules of procedure do not offend separation of powers principles, especially when a pandemic strikes.

D. The Consequences of a Contrary Ruling Reach Far.

If the Court lacks the authority to modify court rules either on an emergency basis or subject to section 602.4202, it should consider the reach of that conclusion. The Court found "good cause" under rule 2.33 to continue cases past speedy trial and indictment deadlines notwithstanding that these cases were not on appeal. *See*, *e.g.*, *In the Matter of Ongoing Provisions For Coronavirus/COVID-19 Impact on Court Services*, April 2, 2020 Order, ¶¶ 8, 12 (filed Apr. 2, 2020). The Court authorized waivers of initial appearances by new methods under Rule 2.2(1)–(4)(a). *Id.* ¶ 10. It amended sentencing procedure. *Id.* ¶ 18; *see State v. Emmanuel*, No. 20-0737, 2021 WL 1906366, *1 (Iowa Ct. App. May 12, 2021) ("Following the commencement of the COVID-19 pandemic's wreak of havoc around the globe, our supreme court entered a number of supervisory orders concerning the

pandemic's impact on court services" and upholding right to waive personal appearance at sentencing).

In other areas, the Court reworked jury trials, juvenile proceedings, original notices, statutes of limitations, and professional regulation. *In the Matter of Ongoing Provisions For Coronavirus/COVID-19 Impact on Court Services* April 2, 2020 Order, ¶¶ 20–21, 24, 26, 29, 30, 33, 33; Iowa Code § 598.15 (required courses involving child custody); Iowa R. Civ. P. 1.302, 1.305, 1.306; Iowa Ct. R. 34.17, 34.18, 39.8(1).

A reversal here would reverberate widely. If, for example, there is no other route but formal rulemaking, then criminal convictions, civil judgments, juvenile placement orders, and professional licenses will lose finality. True, the judiciary will have to bear any burden the constitution requires. *See State v. Lyle*, 854 N.W.2d 378, (Iowa 2014) (recognizing that constitutionally required resentencing of juveniles would impose a heavy burden). But sometimes a proposition's scope suggests it lacks merit. The widespread consequence of invalidating the Court's own COVID-19 orders implies Basquin's theory is incorrect.

E. If the Court Must Reverse, the Parties Will Return To Their Original Positions.

Basquin elected to enter a conditional written guilty plea. *See* Iowa R. Crim. P. 2.10. That is, he conditioned his admission of guilt on the district court granting him two years of "self" probation. Written Plea ¶¶ 9, 10; App. 123-24; *see* Iowa R. Crim. P. 2.10 (court to bind itself to the agreement or allow the defendant to withdraw). In exchange, the State agreed to the sentence and to dismiss the "C" felony burglary charge. Written Plea ¶ 9; App. 123. If the court would not grant him the sentence he requested, he could "back out." Iowa R. Crim. P. 2.10.

If the Court reverses this plea, "the State may reinstate any charges dismissed in contemplation of a valid plea bargain, if it so desires, and file any additional charges supported by the available evidence." *State v. Ceretti*, 871 N.W.2d 88, 97-98 (Iowa 2015) (quoting *State v. Allen*, 708 N.W.2d 361, 369 (Iowa 2006)). The State need not agree to "self" probation again. *Id.* at 98.[4] As plea bargains

[4] And the State might not be *able* to recommend "self" probation again. The Code requires, at the least, "monitored sanctions." Iowa Code § 901B.1(1)(*b*)(1). Although "informal probation," as the district court ordered it, is a common disposition, the Code does not use the phrase. Even in the lowest of sanctions, probation will require some oversight. *State v. Pickett*, 671 N.W.2d

are creatures of contract, if the Court must reverse, it should place the parties in their original positions.

CONCLUSION

The Court should dismiss this appeal. Alternatively, it should affirm.

REQUEST FOR ORAL SUBMISSION

The State requests oral argument given the significance of the issue.

Respectfully submitted,

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866, 868 (Iowa 2003). This could be more than Basquin underwent before he appealed.

CERTIFICATE OF COMPLIANCE

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

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **7,535** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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