IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. MURPHY LEE RUTHERFORD, Defendant-Appellant.	S. CT. NO. 22-0553

APPEAL FROM THE IOWA DISTRICT COURT
FOR WASHINGTON COUNTY
HONORABLE MARK KRUSE, JUDGE

APPELLANT'S APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS FILED MARCH 8, 2023

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CERTIFICATE OF SERVICE

On the 22nd day of March, 2023, 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 Murphy Rutherford, No. 6800480, Mt. Pleasant Correctional Facility, 1200 East Washington, Mt. Pleasant, IA 52641.

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TRW/ls/03/23

QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals err in upholding Rutherford's sentence when the District Court declined to suspend his sentence despite his need for life-saving medical treatment?

II. Did the Court of Appeals err in upholding Rutherford's plea to Theft in the Second Degree where nothing in the record established he had the necessary intent to permanently deprive another of their property or that he understood the charge required such intent?

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STATEMENT IN SUPPORT OF FURTHER REVIEW

COMES NOW Defendant-Appellant and pursuant to Iowa R. App. P. 6.1103 requests further review of the March 8, 2023, decision in State of Iowa v. Murphy Lee Rutherford, Supreme Court No. 22-0553.

1. The Court of Appeals erred in affirming Rutherford's convictions and sentence for two counts of Felon in Possession of a Firearm and Theft in the Second Degree.

2. The Court of Appeals agreed that Rutherford had good cause to appeal his sentence, but declined to consider his challenges to the factual basis for his guilty plea. Opinion pp. 4-5. The Court of Appeals refused to read the Iowa Supreme Court's statement in State v. Wilbourn that "Once a defendant crosses the good-cause threshold as to one ground for appeal, the court has jurisdiction over the appeal" as permitting the appeal of Rutherford's factual basis challenge. Opinion p. 4 (citing State v. Wilbourn, 974 N.W.2d 58, 66 (Iowa 2022)). Yet this is exactly what the language in

Wilbourn suggests. Iowa R. App. P. 6.1103(1)(b)(1) (2023).

3. Furthermore, the challenge to an invalid factual basis supporting a guilty plea is essentially a sentencing issue. Ryan v. Iowa State Penitentiary, 218 N.W.2d 616, 620 (Iowa 1974); State v. Schminkey, 597 N.W.2d 785, 792 (Iowa 1999). The appellate courts are certainly capable of providing such relief on appeal. See State v. Newman, 970 N.W.2d 866, 869 (Iowa 2022) (defining "good cause").

4. The Court of Appeals erred in affirming the sentence issued by the District Court, which failed to fully consider Rutherford's medical treatment.

WHEREFORE, Rutherford respectfully requests this Court grant further review of the Court of Appeals' decision in his case.

STATEMENT OF THE CASE

Nature of the Case: Defendant-Appellant Murphy Rutherford appeals his conviction, sentence, and judgment for two counts of Felon in Possession of a Firearm, class D felonies in violation of Iowa Code section 724.26(1) (2021), and Theft in the Second Degree, a class D felony in violation of Iowa Code sections 714.1 and 614.2(2) (2021), entered following his guilty plea in Washington County District Court.

Course of Proceedings and Facts: Rutherford generally accepts the Court of Appeals' recitation of the course of proceedings and facts. Additional and disputed facts will be discussed below.

JURISDICTIONAL STATEMENT REGARDING IOWA CODE SECTIONS 814.6(1)(A)(3) AND 814.7

Iowa Code section 814.6(1)(a)(3) prohibits a right of appeal for a defendant who pleaded guilty, with two exceptions: Guilty pleas to class A felonies and guilty pleas in which there is "good cause" to appeal. Iowa Code § 814.6(1)(a)(3) (2021). The statute itself does not define "good

cause," but the Iowa Supreme Court has defined the phrase to mean "a legally sufficient reason." State v. Newman, 970 N.W.2d 866, 869 (Iowa 2022). A legally sufficient reason includes a claim "for which an appellate court potentially could provide relief." Id.

Discretionary Sentencing Issue: A defendant establishes "good cause" for an appeal "when the defendant challenges his or her sentence rather than the guilty plea." State v. Damme, 944 N.W.2d 98, 105 (Iowa 2020). The Court of Appeals agreed that Rutherford's challenge to his sentence was appropriately before it. Opinion p. 5.

Lack of a Factual Basis to Support the Plea:

"An appellate court either has jurisdiction over a criminal appeal or it does not. Once a defendant crosses the good-cause threshold as to one ground for appeal, the court has jurisdiction over the appeal." State v. Wilbourn, 974 N.W.2d 58, 66 (Iowa 2022). This language is fairly clear, yet the

Court of Appeals determined the Iowa Supreme Court did not mean what it said. Opinion pp. 4-5. Rutherford disagrees.

Notably, Wilbourn acknowledged that while a court may have jurisdiction over an appeal, it might not have authority to decide a particular issue. Id. In State v. Damme, the Court had jurisdiction over the appeal based upon a discretionary sentencing issue, but did not have authority to decide the accompanying ineffective assistance of counsel claim based on Iowa Code section 814.7. State v. Damme, 944 N.W.2d 98, 109 (Iowa 2020). There is no such statutory prohibition on consideration of the factual basis challenge in this case.

Even if the Iowa Supreme Court limits the Wilbourn rule to sentencing issues, Rutherford still has good cause to appeal the factual basis for his plea.

1. Challenge to Inadequate Factual Basis

Traditionally, a defendant seeking to challenge the factual basis for his guilty plea would claim plea counsel ineffective for allowing him to plead guilty and not filing a

motion in arrest of judgment. See, e.g., State v. Keene, 630 N.W.2d 579, 581 (Iowa 2001). Claims of ineffective assistance of counsel may no longer be decided on direct appeal. Iowa Code § 814.7 (2021). This statutorily-created lack of authority prevents the Iowa Supreme Court from finding "good cause" for appeal in such cases. State v. Treptow, 960 N.W.2d 98, 107 (Iowa 2021).

Yet the claim here is more than whether defense counsel was ineffective. When defense counsel allows a defendant to plead guilty based upon an inadequate factual basis, counsel is deemed ineffective and prejudice is presumed. Rhoades v. State, 848 N.W.2d 22, 29 (Iowa 2014). Ineffective assistance that prejudices a defendant deprives that defendant of their right to counsel under the Sixth And Fourteenth Amendments to the United States Constitution and Article I Section 10 of the Iowa Constitution. Cf. State v. Treptow, 960 N.W.2d 98, 107 (Iowa 2021)("The right to the effective assistance of

appellate counsel is the right to have counsel in an appeal and to have counsel perform competently in that appeal.").

The denial of the right to counsel – and the failure to provide a factual basis for a guilty plea -- is a denial of due process. Powell v. Alabama, 287 U.S. 45, 70-72 (1932)(denial of effective counsel is a due process violation); Henderson v. Morgan, 426 U.S. 637, 645 (1976) ("notice of the true nature of the charge" against a defendant "is the first and most universally recognized requirement of due process"). Regardless of whether a guilty plea violates due process or the right to counsel based on the lack of a factual basis, the deficiency should be considered "good cause" to appeal said plea.

More importantly, defense counsel is not the only entity obliged to ensure a defendant's guilty plea is supported by a factual basis. A district court "may refuse to accept a plea of guilty, *and shall not accept a plea of guilty without first determining that the plea* is made voluntarily and intelligently

and *has a factual basis*." Iowa R. Crim. P. 2.8(2)(b) (2022) (emphasis added). This requirement was intended to ensure the voluntariness of a defendant's plea:

> Requiring this examination of the relation between the law and the acts the defendant admits having committed is designed to "protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge."

McCarthy v. United States, 394 U.S. 459, 467 (1969).

When Iowa adopted the colloquy outlined in the ABA Minimum Justice Standards in State v. Sisco in 1969, the Iowa Supreme Court acknowledged the primary role of district courts in ensuring a plea was knowing, voluntary, and supported by a factual basis:

> … [A] sentencing court may not abrogate or delegate to anyone, including attorney for accused, the duty to determine defendant's knowledge of the charge, appreciation of legal consequences of a guilty plea, whether it is voluntarily entered, or existence of facts supporting it.

State v. Sisco, 169 N.W.2d 542, 548 (Iowa 1969). Simply put, the trial court has an independent duty to ensure there is a

factual basis in the record to support the plea before entering judgment. If there is not, the court should arrest judgment on its own accord.

In this respect, factual basis challenges are similar to sufficiency of the evidence challenges presented in jury trials. The trial court had an independent duty to ensure a factual basis, the record on the factual basis was to be made prior to entry of judgment, and the appellate courts can decide if the record establishes a factual basis. Cf. State v. Crawford, 972 N.W.2d 189, 195 (Iowa 2022) (appellate courts have constitutional and statutory authority to review and interfere with an unjust verdict). The difference is only in remedy – for a sufficiency challenge from a jury trial, the remedy is dismissal of the unsupported charge; for a factual basis challenge from a guilty plea, the remedy is to remand for determination of whether a factual basis can be made. State v. Chapman, 944 N.W.2d 864, 875 (Iowa 2020) (double jeopardy requires dismissal of charge without possibility of

retrial if evidence is insufficient); State v. Gines, 844 N.W.2d 437, 441-442 (Iowa 2014) (inadequate factual basis for guilty plea requires remand). In both situations, the appellate courts can provide relief albeit in a slightly different form. This is the definition of good cause.

To the extent State v. Treptow held this Court had no authority to provide relief based on an ineffective assistance challenge to the factual basis, it should be distinguished. State v. Treptow, 960 N.W.2d 98, 109 (Iowa 2021). Treptow can be distinguished because 1) resorting to ineffective assistance of counsel is unnecessary to resolve this claim, and 2) this Court retains inherent authority to resolve due process challenges.

Finally, a challenge to the factual basis for a plea does not require vacating the plea itself but only requires vacating the sentence. Ryan v. Iowa State Penitentiary, 218 N.W.2d 616, 620 (Iowa 1974). The District Court will have the option of reaffirming the plea if a factual basis exists, or vacating it if

one cannot be found. Id. Accordingly, appeals challenging the factual basis for a guilty plea should fall under the "good cause" exception because 1) they are an attack on the sentence rather than the plea itself, and 2) the appellate courts are able to provide appropriate relief. State v. Newman, 970 N.W.2d 866, 869 (Iowa 2022).

2. Challenge to voluntary and knowing nature of plea as related to the factual basis

The Iowa Supreme Court has recognized two strands of constitutional analysis relating to challenges to an invalid factual basis. State v. Finney, 834 N.W.2d 46, 54-55 (Iowa 2015). The first strand – discussed in Subsection 1 above – involves a Sixth Amendment violation where the defendant's attorney provides incompetent advice in allowing his client to plead guilty where an objective review of the record reveals an inadequate factual basis. Id. at 54-55.

The second strand under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution obligates a district court to find a defendant has

made a knowing and voluntary choice to waive their constitutional rights and plead guilty. Id. at 55. "[F]ederal courts look on the record developed at the plea colloquy for evidence of the subjective state of mind of the defendant." Id.

The factual basis requirement is part and parcel of the broader requirement for a voluntary and knowing plea. A plea that is neither knowing nor voluntary is entered in violation of due process and "because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." McCarthy v. United States, 394 U.S. 459, 466 (1969). The judge must not only question the defendant regarding his knowledge of the nature of the charge but also establish that there is a factual basis for the plea. Id. at 467. "Requiring this examination of the relation between the law and the acts the defendant admits having committed is designed to 'protect a defendant who is in the position of pleading voluntarily with

an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.'" Id.

To the extent Rutherford claims his written plea failed to show his understanding of the elements of the offense in relation to the facts he provided, he is alleging his plea is involuntary.

As addressed in Subsection 1 above, the trial court has an independent duty to ensure a plea is knowing and voluntary. Iowa R. Crim. P. 2.8(2)(b) (2022); McCarthy v. United States, 394 U.S. 459, 467 (1969). This duty was not to be delegated to defense counsel. State v. Sisco, 169 N.W.2d 542, 548 (Iowa 1969). If the record fails to disclose such an understanding, the court itself should arrest judgment until the defendant's understanding can be clarified.

The court's failure to arrest judgment based upon an unknowing and involuntary plea should be considered "good cause." As discussed in Section 1 above, such appeals 1) are

an attack on the sentence rather than the plea itself, Ryan v. Iowa State Penitentiary, 218 N.W.2d 616, 620 (Iowa 1974), and 2) are the type of appeals where the appellate courts are able to provide appropriate relief. State v. Newman, 970 N.W.2d 866, 869 (Iowa 2022).

3. State v. Hanes does not foreclose relief

During the pendency of this appeal, the Iowa Supreme Court decided State v. Hanes, 981 N.W.2d 454 (Iowa 2022). Hanes does not direct the outcome in this case. As to the question of jurisdiction, Rutherford presents certain arguments that do not appear to have been addressed in Hanes. First, that State v. Wilbourn suggests that once the Iowa Supreme Court has jurisdiction over a discretionary sentencing matter, it has jurisdiction over the entire appeal. State v. Wilbourn, 974 N.W.2d 58, 66 (Iowa 2022). Second, that the challenge to an invalid factual basis is essentially a sentencing issue. Ryan v. Iowa State Penitentiary, 218

N.W.2d 616, 620 (Iowa 1974); State v. Schminkey, 597 N.W.2d 785, 792 (Iowa 1999).

As to the question of error preservation, Rutherford claims the District Court has an independent duty under Iowa Rule of Criminal Procedure 2.8(2)(b) to reject a plea that is not knowing and voluntary or which lacks a factual basis. Iowa R. Crim. P. 2.8(2)(b) (2022). The defendant in Hanes did not rely upon this language, arguing instead that Rule 2.24(3)(c) allows a court to arrest judgment on its own motion. State v. Hanes, 981 N.W.2d at 460. While the District Court's ability to arrest judgment is discretionary, its obligation to reject a guilty plea that is either unknowing and involuntary or supported by an insufficient factual basis is mandatory. It is a violation that should entitle Rutherford to appellate review. Id. at 466 (McDermott, J., dissenting).

The Hanes Court noted doing away with the requirement of a motion in arrest of judgment would "undermine one of the chief values of guilty pleas: finality." Id. at 460. One could

read the Hanes opinion as suggesting that finality is more important than accuracy, or even guilt. This should be of particular concern where an element of the offense appears to have been overlooked, as it was here when there was no reference to an intent to "permanently" deprive the complainant of her property. (App. p. 11). State v. Schminkey, 597 N.W.2d 785, 789 (Iowa 1999). Any concern regarding finality should yield to the greater interest in ensuring a conviction is valid under the law. Furthermore, guilty plea convictions are not truly final. They can be challenged through a postconviction proceeding. Iowa Code § 822.2 (2021) (listing claims that can be raised in postconviction).

That a defendant chose to plead guilty is irrelevant – defendants may not plead to an unsupported charge, attorneys cannot agree to it, and the court has an obligation to deny it. See, e.g., McCarthy v. United States, 394 U.S. 459, 467 (1969) (recognizing defendant may not even realize his

actions do not constitute the charge); State v. Finney, 834 N.W.2d 46, 54-55 (Iowa 2013) (defense counsel may not allow defendant to plead guilty to charge without factual basis; Iowa Supreme Court Attorney Disciplinary Bd. v. Howe, 706 N.W.2d 360 (Iowa 2005) (prosecutor commits ethical violation by amending charge to cowl lamp violation without probable cause).

Finally, the Hanes Court faulted criminal defendants for failing to raise the issue before the District Court where it could have been more quickly rectified. State v. Hanes, 981 N.W.2d 454, 460 (Iowa 2022). But the fault can just as easily be laid at the feet of the District Court, which had the duty to ensure the defendant understood the law in relation to the facts and had an obligation to reject any plea lacking a factual basis. McCarthy v. United States, 394 U.S. 459, 467 (1969); Iowa R. Crim. P. 2.8(2)(b) (2022).

Petition for Writ of Certiorari: Should this Court determine Rutherford does not have a right to appeal his guilty

plea, Rutherford respectfully asks this Court to treat his appeal as a petition for writ of certiorari. Iowa R. App. P. 6.108 (2022). Iowa Rule of Appellate procedure 6.107 provides that a party may file a petition for certiorari if the judge "exceeded the judge's jurisdiction or otherwise acted illegally." Iowa R. App. P. 6.107(1)(a) (2022).

To the extent Rutherford claims the trial court accepted a guilty plea without a valid factual basis and thereby violated its duty under the Rules and the Constitution. Iowa R. Crim. P. 2.8(2)(b) (2022); McCarthy v. United States, 394 U.S. 459, 467 (1969). Cf. State v. Newman, 970 N.W.2d 866, 872-73 (Iowa 2022)(McDermott, J., dissenting)(holding that certiorari would be available to address district court's failure to properly notify defendant of his right to appeal as required by the Iowa Rules of Criminal Procedure). Certiorari is an appropriate form of review of the District Court's illegal action.

ARGUMENT

I. The Court of Appeals erred in upholding Rutherford's sentence when the District Court declined to

suspend his sentence despite his need for life-saving medical treatment.

Preservation of Error: A defendant is not required to make a challenge the district court's abuse of discretion at the sentencing hearing to preserve error for appeal. State v. Gordon, 921 N.W.2d 19, 22 (Iowa 2018).

Standard of Review: Sentencing decisions are reviewed for an abuse of discretion when the sentence is within the statutory limits. State v. Seats, 865 N.W.2d 545, 552 (Iowa 2015).

Merits: When a sentence is not mandatory, a district court must exercise its discretion in determining what sentence to impose and state on the record the reasons for the particular sentence imposed. State v. Thomas, 547 N.W.2d 223, 225 (Iowa 1996); see also Iowa R. Crim. P. 2.23(3)(d) (2022). Generally, the district court is not required to give the reasons for rejecting particular sentencing options. State v. Thomas, 547 N.W.2d at 225.

In applying discretion, the court should weigh and consider all pertinent matters in determining a proper sentence, including "the nature of the offense, the attending circumstances, defendant's age, character and propensities and chances of his reform." State v. August, 589 N.W.2d 740, 744 (Iowa 1999) (citations omitted). See also Iowa Code § 907.5(1) (2021) (identifying particular factors).

When a sentencing court has options to grant probation or impose incarceration, it must exercise its discretion with respect to such options and give reasons for the choices made. State v. Thomas, 547 N.W.2d at 225. A good sentence is one which can reasonably be explained. State v. Matlock, 304 N.W.2d 226, 228 (Iowa 1981). A sentencing court has a duty to consider all the circumstances of a particular case. State v. Robbins, 257 N.W.2d 63, 70 (Iowa 1977). In the end, a court makes each sentencing decision on an individual basis and seeks to fit the particular person affected. State v. McKeever, 276 N.W.2d 385, 387 (Iowa 1979).

The District Court abused its discretion by failing to adequately consider Rutherford's medical difficulties and need for treatment in fashioning its sentence.

A defendant's need for medical care can be a mitigating factor at sentencing. See Iowa Code § 907.5(1)(g) (2021) (sentencing court may consider other factors as appropriate); State v. Mealancon, 334 So.3d 792, 804-05 (La. Ct. App. 2021) (court meaningfully considered defendant's medical concerns when it imposed less than the maximum sentence and relayed the concerns to the jail so defendant could obtain treatment); State v. Arrington, 855 P.2d 133 (N.M. Ct. App. 1993) (upholding trial court's finding that incarceration would constitute a "deliberate indifference to Defendant's serious medical needs" in violation of constitutional proscription against cruel punishments); State v. Lynch, 312 N.W.2d 871, (Wis. Ct. App. 1981) ("A defendant's need for specialized treatment is a factor for the trial court to consider when choosing a disposition for a convicted defendant"); People v.

Kosanovich, 387 N.E.2d 1061, 1064 (Ill. App. Ct. 1979) (citing defendant's need for health care in vacating prison sentence). But see State v. Lynch, 312 N.W.2d 871 (Wis. Ct. App. 1981) (holding Constitution does notobligate sentencing court to ascertain availability of treatment program).

The plea agreement the parties entered into acknowledged that Rutherford would be sentenced to five years on each count and that the counts would run consecutively to one another. (App. p. 15). The agreement also acknowledged that Rutherford retained his right to ask for a suspended sentence with probation. (App. p. 15).

At the sentencing hearing, the State asked that Rutherford be sentenced to prison and that the sentence not be suspended. (Sent. Tr. p. 4 L.13-15). The State based its recommendation on Rutherford's criminal history, his prior failure on pretrial release and probation, and the nature of the offense. (Sent. Tr. p. 7 L.10-16).

Defense counsel asked that Rutherford's sentences be suspended with probation for five years. (Sent. Tr. p. 4 L.20-24). Defense counsel based his recommendation on Rutherford's diagnosis of cancer, which required treatment and was getting worse while he was being held in jail without treatment, and liver problems. (Sent. Tr. p. 4 L.24-p. 5 L.11). Defense counsel suggested placement at the halfway house or ankle monitoring would allow Rutherford to get the treatment he needed while under supervision. (Sent. Tr. p. 5 L.17-p. 6 L.5). Rutherford likewise told the court that he needed cancer and liver treatments. (Sent. Tr. p. 6 L.9-14).

The presentence investigation report made a brief mention of Rutherford's self-reported medical issues. It noted Rutherford's report of liver damage, kidney failure, and thyroid cancer. (PSI p. 10 of 12)(Conf. App. p. 25). It also listed Rutherford as saying he was waiting for surgery for his cancer, and that he should be undergoing dialysis but was not. (PSI p. 10 of 12)(Conf. App. p. 25). Under the "Problems and

Needs" portion of the Recommendations section, the report mentioned Rutherford "appears to have health problems." (PSI p. 12 of 12)(Conf. App. p. 27). The report indicated he was "currently receiving medical treatment," though there is no indication in the report he had received any medical treatment outside of substance abuse treatment. (PSI p. 12 of 12)(Conf. App. p. 27). The PSI author recommended a sentence of incarceration, but did not refer to Rutherford's medical conditions in explaining the recommendation. (PSI p. 12 of 12)(Conf. App. p. 27).

Ultimately, the District Court decided to impose an indeterminate term of imprisonment not to exceed 15 years. (Sent/ Tr. p. 8 L.4-14, 25-p. 9 L.6). The court explained the specific reasons for the sentence imposed:

> [THE COURT:] The reasons for sentence, sir: I've taken into account your prior criminal record. I've taken into account your job history, which is poor to nonexistent.
>
> It appears you have two kids. You don't have -- it appears you have limited contact with one of them. Now you're telling me here today you have several kids.

> You're not able to follow the rules of pretrial release or, it doesn't appear, probation either. You're not going to go to absolutely no stability.
>
> Sir, you just seem to be kind of aimless at this point in your life. *If you do have medical conditions that need to be dealt with, I think the prison system at this time would provide the best opportunity for you to get those taken care of.*

(Sent. Tr. p. 10 L.5-18) (emphasis added).

The District Court abused its discretion in failing to properly consider Rutherford's medical conditions as mitigating factors. First, it appears the court questioned the validity of Rutherford's claimed medical conditions, suggesting that "if" he had medical conditions, the prison system could deal with them. (Sent. Tr. p. 10 L.15-18). Nothing in the record disputes or contradicts Rutherford's claims regarding his health.

Second, the District Court made a blanket assumption that Rutherford could receive adequate treatment through the prison system without any record evidence supporting such an assumption. The presentence investigation report briefly referred to Rutherford's claimed medical issues, but then

provided no information regarding treatment services available in the prison for those conditions. (PSI Report p. 10 of 12) (Conf. App. p. 25).

The District Court did not adequately consider Rutherford's need for medical treatment and appeared to question the validity of his claims. This is hardly the sort of "meaningful consideration" expected when determining the appropriate sentence. State v. Mealancon, 334 So.3d 792, 804-05 (La. Ct. App. 2021). Sentencing courts are expected to make sentencing decisions on an individual basis to fit the particular person affected. State v. McKeever, 276 N.W.2d 385, 387 (Iowa 1979). The sentencing court failed to do so, and Rutherford's sentence should be vacated and his case remanded for resentencing.

II. The Court of Appeals erred in upholding Rutherford's plea to Theft in the Second Degree where nothing in the record established he had the necessary intent to permanently deprive another of their property or that he understood the charge required such intent.

Preservation of Error: As a general rule, a defendant must first file a motion in arrest of judgment to preserve error from a guilty plea on direct appeal. Iowa Rs. Crim. P. 2.8(2)(d), 2.24(3)(a) (2022). As discussed in the jurisdictional statement above, Rutherford contends the District Court had an independent duty to arrest judgment if it failed to ensure a defendant's guilty plea was knowing, voluntary, and supported by a factual basis. See Iowa R. Crim. P. 2.8(2) (2022) (court's duty to ensure valid plea); State v. Sisco, 169 N.W.2d 542, 548 (Iowa 1969)(court may not delegate its responsibilities for ensuring valid plea to anyone else). Error was preserved by the filing of the notice of appeal with good cause.

Standard of Review: Claims involving the interpretation of a rule are usually reviewed for correction of errors at law. State v. Smith, 924 N.W.2d 846, 850 (Iowa 2019). To the extent the factual basis claim implicates constitutional standards, review is de novo. State v. Ortiz, 789 N.W.2d 761, 764 (Iowa 2010).

Merits: In State v. Finney, the Iowa Supreme Court recognized two strands of constitutional analysis relating to challenges to an invalid factual basis. State v. Finney, 834 N.W.2d 46, 54-55 (Iowa 2015). The first strand involves a Sixth Amendment violation where the defendant's attorney provides incompetent advice in allowing his client to plead guilty where an objective review of the record reveals an inadequate factual basis. Id. at 54-55.

The second strand under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution obligates a district court to find a defendant has made a knowing and voluntary choice to waive their constitutional rights and plead guilty. Id. at 55. "When a Fifth Amendment due process voluntariness claim based on a lack of factual basis is asserted, federal courts look on the record developed at the plea colloquy for evidence of the subjective state of mind of the defendant." Id.

In this case, neither an objective review of the record nor the record of Rutherford's subjective state of mind permits conviction for Theft in the Second Degree.

For a guilty plea to be truly voluntary, a defendant must have an understanding of the law in relation to the facts. McCarthy v. United States, 394 U.S. 459, 466 (1969). The judge must not only question the defendant regarding his knowledge of the nature of the charge but also establish that there is a factual basis for the plea. Id. at 467.

Rutherford entered a written plea to the offenses charged in his case. The written plea did not provide the elements for the crime of Theft in the Second Degree. (App. pp. 10-15). While the offense of Felon in Possession of a Firearm might be self-explanatory from the name, Theft in the Second Degree is not. See Brainard v. State, 222 N.W.2d 711, 714 (Iowa 1974)(name of offense can be sufficiently descriptive). Theft can be committed in numerous ways, and theft in the traditional sense requires an intent to permanently deprive,

not simply a deprivation. See Iowa Code § 714.1 (2021)(defining alternatives of theft); State v. Schminkey, 597 N.W.2d 785, 789 (Iowa 1999).

To establish Rutherford's guilt for Theft in the Second Degree, the State would have to establish that "on or about July 23, 2021 at or near in the County of Washington, State of Iowa, did take possession or control of the property of another, the property having a value in excess of $1,500 but not exceeding $10,000, with the intent to deprive the other thereof." (App. pp. 5-6). The trial information was the only document that even remotely laid out the elements for Theft in the Second Degree, and Rutherford's written waiver indicated he had reviewed the trial information. See State v. Yarborough, 536 N.W.2d 493, 497 (Iowa Ct. App. 1995)(finding defendant was aware of elements of offense based on description in trial information).

Notably, Rutherford's written plea did not specifically acknowledge he understood the nature of the offense. In fact,

his written statement of what he did to constitute Theft in the Second Degree reveals he did not:

> I admit that I did, on or about the 23rd day of July, 2021… I took control of property, two guns, that were not mine and deprived the owner of them. The guns had a value of between $1500 and $10,000.

(App. p. 11). It is not sufficient for Theft to admit that you *deprived* someone of their property – you have to admit you had the *intent* to *permanently* deprive them of their property. State v. Schminkey, 597 N.W.2d 785, 789 (Iowa 1999).

Nor do the minutes of testimony provide a factual basis for the Theft charge. According to the minutes of testimony and attachments, Melissa Beaudette would testify that she was the owner of the firearms and that she did not give permission or authority to Rutherford to take them. (7/30/21 Minutes p. 1)(Conf. App. p. 4). Rutherford told officers that Beaudette had asked him to remove the two guns and an ammunition can from her house. (7/30/21 Secured Attachment p. 9)(Conf. App. p. 15). Rutherford's statement to

officers is consistent with his written plea statement that he simply deprived her of the property and inconsistent with an intent to permanently deprive her of the items.

Rutherford's plea was faulty in two respects. First, it failed to establish a factual basis for Theft in the Second Degree. Second, it failed to establish that he understood the nature of the charge in relation to the facts. The District Court should not have accepted Rutherford's plea when the written plea did not show it was knowing, voluntary, and supported by a factual basis. Iowa R. Crim. P. 2.8(2)(b) (2022); McCarthy v. United States, 394 U.S. 459, 467 (1969); State v. Sisco, 169 N.W.2d 542, 548 (Iowa 1969). The remedy is to vacate the plea and remand the case to the District Court to fulfill its obligations in ensuring a valid plea. Ryan v. Iowa State Penitentiary, 218 N.W.2d 616, 620 (Iowa 1974).

Finally, Rutherford recognizes Iowa Code section 814.29 now provides that a 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." Iowa Code § 814.29 (2021). This provision has no practical impact upon the remedy in this case.

A district court may not accept a guilty plea that is involuntary or lacking in a factual basis. Iowa R. Crim. P. 2.8(2)(b) (2022); McCarthy v. United States, 394 U.S. 459, 467 (1969); State v. Sisco, 169 N.W.2d 542, 548 (Iowa 1969). A defense attorney may not allow their client plead guilty to an offense that has no factual basis. State v. Finney, 834 N.W.2d 46, 54-55 (Iowa 2013). See also Iowa Supreme Court Attorney Disciplinary Bd. v. Howe, 706 N.W.2d 360 (Iowa 2005) (prosecutor commits ethical violation by amending charge to cowl lamp violation without probable cause). Under the circumstances, the "more likely than not" standard has no application to a situation where a defendant would not be allowed to plead guilty without a factual basis.

CONCLUSION

Defendant-Appellant Murphy Rutherford respectfully requests this Court accept further review, vacate his judgment and sentence, and remand his case to the District Court to make further record on his understanding of and the factual basis for his plea, and 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 $5.08 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 requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because:

[X] this application has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 5,562 words, excluding the parts of the application exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Theresa R. Wilson Dated: 03/22/23

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