IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff–Appellee, v. SHANNON PAIGE HIGHTOWER, Defendant–Appellant.	S. CT. NO. 22–1920

APPEAL FROM THE IOWA DISTRICT COURT
FOR BLACK HAWK COUNTY
THE HONORABLE LINDA FANGMAN, JUDGE

APPELLANT'S BRIEF AND ARGUMENT AND REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF SERVICE

On 7th day of December, 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 Shannon Paige Hightower, PO Box 232, Waterloo, IA 50704.

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I. Hightower's guilty pleas were unknowing and involuntary.

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Iowa R. Crim. P. 2.8(2)(d) (2019)

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Iowa Supreme Ct. Supervisory Order, In the Matter of Ongoing Provisions for Coronavirus/COVID-19 Impact on Court Services ¶11 (Amended Dec. 6, 2021), available at https://www.iowacourts.gov/collections/698/files/1446/embedDocument/

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State v. Hursey, No. 16-0187, 2016 WL 6270000, at *2 (Iowa Ct. App. Oct. 26, 2016 (unpublished decision)

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Iowa Const. art. V, § 4

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Jon M. Woodruff, Note, Plain Error by Another Name: Are Ineffective Assistance of Counsel Claims a Suitable Alternative to Plain Error Review in Iowa?, 102 Iowa L. Rev. 1811, 1834-35, 1840 (May 2017)

ABA Standards for Criminal Justice: Pleas of Guilty, Receiving and Acting upon the Plea 14-1.4, 14-1.5 14-1.6 (1999)

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II. The district court erred by considering and relying on an improper factor when it determined Hightower's sentences.

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

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Iowa Code § 910.2(1) (2019)

Iowa Code § 910.3 (2019)

State v. Matlock, No. 04-0405, 2005 WL 1958370, at *2 (Iowa Ct. App. Aug. 17, 2005) (unpublished decision)

State v. Phipps, No. 17-1037, 2018 WL 2084812, at *3 (Iowa Ct. App. May 2, 2018) (unpublished decision)

Dr. Amy K. Glasmeier, Massachusetts Institute of Technology, Living Wage Calculation for Black Hawk County, Iowa, https://livingwage.mit.edu/counties/19013 (last visited July 15, 2023)

State v. Ashley, 462 N.W.2d 279, 282 (Iowa 1990)

State v. Gonzalez, 582 N.W.2d 515, 517 (Iowa 1998)

State v. Lovell, 857 N.W.2d 241, 243 (Iowa 2014)

III. The district court erred when it failed to allow Hightower the opportunity to withdraw her guilty plea.

Authorities

State v. Thompson, 856 N.W.2d 915, 921-22 (Iowa 2014)

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State v. Keller, No. 17-1854, 2018 WL 6120047, at *1-2 (Iowa Ct. App. Nov. 21, 2018) (unpublished decision)

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IV. The district court abused its discretion by imposing a $17,000 cash-only appeal bond. Additionally, the provision of the court's order forfeiting the appeal bond to be applied to victim restitution is illegal.

Authorities

State v. Formaro, 638 N.W.2d 720, 727 (Iowa 2002)

McVay v. Kenneth E. Montz Implement Co., 287 N.W.2d 149 (Iowa 1980)

State v. Letscher, 888 N.W.2d 880, 883-84 (Iowa 2016)

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

Iowa R. App. P. 6.907 (2019)

State v. Kellogg, 534 N.W.2d 431, 433 (Iowa 1995)

Iowa Const. art. I, § 12

Iowa Code ch. 811 (2019)

Iowa Code § 811.1 (2019)

Iowa Code § 811.5 (2019)

A. The district court abused its discretion by setting a $17,000 cash-only appeal bond.

Iowa Supreme Court Judicial Council, In re Unif. Bond Schedule, at 1 (June 23, 2017) (effective July 1, 2017), *available at* https://www.iowacourts.gov/iowa-courts/district-court/uniform-bond-schedule

State v. Chew, No. 17-1692, 2018 WL 5850225, at *8-10 (Iowa Ct. App. Nov. 7, 2018) (unpublished decision)

Brangan v. Commonwealth, 80 N.E.3d 949, 963 (Mass. 2017)

B. The provision forfeiting the bond and applying it to victim restitution is not supported by statute.

Estate of Lyon ex rel. Lyon v. Heemstra, No. 08-0934, 2009 WL 1676662, at *2 (Iowa Ct. App. June 17, 2009) (unpublished decision)

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Iowa Code ch. 196 (1851)

Iowa Code § 811.8 (2019)

Iowa Code § 811.6(1) (2019)

Iowa Code § 811.2 (2019)

ROUTING STATEMENT

The Iowa Supreme Court should retain this case and hold a defendant establishes "good cause" for an appeal following a guilty plea when there was an inadequate motion-in arrest-of-judgment advisory. *See* Iowa R. App. P. 6.1101(2)(c), (d), (f); *see also* Iowa Code § 814.6(1)(a)(3) (2019). This holding is a logical conclusion from the Court's opinions defining "good cause," but the Court has not yet been presented with the issue directly. *See, e.g.*, *State v. Treptow*, 960 N.W.2d 98, 109 (Iowa 2021) ("[W]e have recognized a defendant may challenge his guilty plea on appeal despite not filing a motion in arrest of judgment where the district court failed to adequately advise the defendant of the consequences of not filing a motion in arrest of judgment."); *see also State v. Vennink*, No. 20-1629, 2021 WL 3378547, at *2-3 (Iowa Ct. App. Aug. 4, 2021) (unpublished decision) (finding good cause exists when there was an inadequate motion-in-arrest-of-judgment advisory). Additionally, this case presents the question of whether a defendant must establish the burden set

forth in Iowa Code section 814.29 of demonstrating they would not have pled guilty but for the plea's defects when there was an inadequate motion-in-arrest-of-judgment advisory, and if so, whether that obligation renders the statute unconstitutional. *See* Iowa R. App. P. 6.1101(2)(a), (c); *see also State v. Bradford*, No. 22–0168, 2022 WL 3066179, at *2 (Iowa Ct. App. Aug. 3, 2022) (unpublished decision) (concluding the motion-in-arrest-of-judgment advisory was insufficient but also finding the defendant did not meet the burden required by section 814.29).

STATEMENT OF THE CASE

Nature of the Case: Defendant-Appellant Shannon Paige Hightower appeals her convictions, sentences, and judgment following written guilty pleas to dependent adult abuse and theft in the second degree, in Black Hawk County District Court Case No. FECR235066.

Course of Proceedings: On May 13, 2020, the State charged Hightower with dependent adult abuse, a class "D" felony, in violation of Iowa Code section 235B.20(5); and theft

in the second degree, a class "D" felony, in violation of Iowa Code section 714.2(2). (Trial Information) (App. pp.6-8). Hightower initially pleaded not guilty to the charges. (Arraignment) (App. pp.9-10). However, Hightower later filed written guilty pleas to each of the offenses as charged. (Plea) (App. pp.12-18). The State agreed to follow the PSI's recommendation or recommend concurrent suspended sentences. (Plea) (App. p.14). The court accepted the guilty pleas and ordered a PSI. (Order Following Plea) (App. pp.19-20). The PSI recommended the five-year prison sentences be suspended and probation. (PSI) (Conf. App. p.52).

The sentencing hearing was rescheduled several times in part because Hightower believed the PSI contained convictions that were later expunged. (06/07/2022 Order) (App. p.24). The court ordered DCS to file an amended PSI if it confirmed there were errors in its prior report. (06/07/2022 Order) (App. p.24). DCS filed an addendum on November 16, 2022, one day before sentencing. (Addendum) (Conf. App. pp.56-59). The addendum indicated defense counsel had "two letters from three counties

verifying the reported expungements" and he stated would forward them. (Addendum) (Conf. App. p.57). However, at the time of the filing, the writer had not received any documentation. (Addendum) (Conf. App. pp.57-58).

The addendum noted "a new arrest record search was obtained" in order to see if any of Hightower's felony convictions showed as expunged; they did not. (Addendum) (Conf. App. p.58). The addendum noted arrest records showed Hightower had five separate felony convictions. (Addendum) (Conf. App. p.58).

At the hearing, counsel maintained Hightower was eligible for a deferred. (Sentencing 3:10-7:4). The court sentenced Hightower to an indeterminate term not to exceed five years on each offense. (Sentencing 21:13-22:13) (Sentencing Order) (App. p.27). The court declined to suspend the sentences but ordered them to run concurrently. (Sentencing 21:13-18, 22:1-13) (Sentencing Order) (App. p.27). The court also ordered Hightower to pay fines of $750, plus the surcharges, but then immediately suspended them.

(Sentencing 21:19-25) (Sentencing Order) (App. p.27).

Counsel asked the court to delay the execution of the mittimus so Hightower could take care of her children. (Sentencing 23:22-24). Hightower expressed dismay at the sentence, noting she thought she would "be getting five years suspended to five years probation." (Sentencing 24:4-21). She stated she had "no idea" she would be going to prison; she noted she was the sole provider for her children and had not arranged for anyone to pick them up. (Sentencing 24:12-18). The district court agreed to withhold the mittimus until 6:00 p.m. the next day. (Sentencing 26:3-27:2) (Sentencing Order) (App. p.30).

The morning after sentencing, counsel filed a motion for hearing, staying of the sentencing order, and setting bond. (11/18/2022 Mot.) (App. pp.32-34). In the motion, counsel indicated Hightower believed she was filing a Rule 2.10 plea, with the court bound by the parties' recommendations for maximum of a suspended sentence. (11/18/2022 Mot.) (App. pp.32-33). Hightower asked the court to withdraw the pleas, or

alternatively, to set an appeal bond. (11/18/2022 Mot.) (App. pp.32-33).

Hightower filed a notice of appeal. (11/21/2022 Notice) (App. p.35).

Later that same day, the district court denied the defense's motion for hearing and its request to withdraw the guilty plea. (11/21/2022 Order) (App. pp.36–38). The court's order noted it was "bound by the Supreme Court's interpretation" of "good cause" in *State v. Damme*. Thus, the court ordered an appeal bond "set in the amount of $17,000 CASH ONLY." (11/21/2022 Order) (App. p.37). The court ordered: "All parties are advised any appeal bond posted, regardless of who posts it, SHALL be used to satisfy victim restitution. The Clerk of Court shall notify any person posting the appeal bond that it will not be returned, but rather be used for victim restitution." (11/21/2022 Order) (App. p.37).

Hightower posted the appeal bond. The Appellate Defender's Office was appointed. On December 15, 2022, the Appellate Defender's Office filed a notice of appeal "from the

final order setting the appeal bond and eventual forfeiture of the bond for victim restitution entered in this case." (12/15/22 Notice Appeal) (App. p.39). Upon appellate counsel's request, the two appellate proceedings were consolidated.

Jurisdiction: Iowa Code section 814.6 requires a guilty plea defendant to establish good cause to proceed with an appeal. Iowa Code § 814.6(1)(a)(3) (2019). Good cause confers the appellate court with jurisdiction. *State v. Wilbourn*, 974 N.W2d 58, 66 (Iowa 2022). "An appellate court either has jurisdiction over a criminal appeal or it does not." *Id.*

If a guilty plea defendant has "*a* legally sufficient reason to appeal", they establish good cause for the appeal. *Id.* (quoting *State v. Damme*, 944 N.W.2d 98, 104 (Iowa 2020) (emphasis in original). That is, "[o]nce a defendant crosses the good-cause threshold as to one ground for appeal, the court has jurisdiction over the appeal." *Id.* The Court does not "do partial dismissals of criminal appeals—such a procedure would be unwieldy and burdensome." *Id.*

Our Supreme Court has held "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." *Damme*, 944 N.W.2d at 105. The issues raised in Division II (the consideration of an improper sentencing factor), Division III (the failure to give Hightower an opportunity to withdraw her pleas prior and after sentencing), and Division IV (an illegal order on bond), are challenges to the sentence rather than the underlying guilty plea. Good cause for the appeal is thus established by those challenges. *See, e.g., id.*; *State v. Barnes*, 21-1939, 2023 WL 3860153, at *1 (Iowa Ct. App. June 7, 2023) (citations omitted) (unpublished decision); *State v. Letscher*, 888 N.W.2d 880, 883-84 (Iowa 2016). Thus, because Hightower has "crosse[d] the good-cause threshold" as to at least "one ground for appeal, the court has jurisdiction over the appeal" as a whole. *See Wilbourn*, 974 N.W.2d at 66.

Good cause also exists as to the challenge to the guilty pleas as unknowing and involuntary in Division I, independent

of the sentencing challenges. "Good cause" means a "legally sufficient reason." *State v. Treptow*, 960 N.W.2d 98, 109 (Iowa 2021) (citations omitted). "By definition, a legally sufficient reason is a reason that would allow a court to provide some relief." *Id.*

This Court may address the challenge to Hightower's pleas directly because she was not adequately advised of her right to file a motion in arrest of judgment. *See State v. Tucker*, 959 N.W.2d 140, 153-54 (Iowa 2021) (noting the court has recognized an inadequate motion-in-arrest-of-judgment advisory is an exception to the bar in Rule 2.24(3)(a)); *see also State v. Vennink*, No. 20-1629, 2021 WL 3378547, at *2-3 (Iowa Ct. App. Aug. 4, 2021) (unpublished decision) (considering the defendant's challenge to the factual basis when there was an inadequate motion-in-arrest-of-judgment advisory). Accordingly, Hightower's challenge in Division I independently establishes "good cause", separate from the sentencing challenges, because this Court is able to provide

relief due to the inadequate motion-in-arrest-of-judgment advisory.

Moreover, 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) (2019) (emphasis added). This requirement was intended to ensure the voluntariness of a defendant's plea. *See State v. Mensah*, 424 N.W.2d 453, 455 (Iowa 1988) (citation omitted) ("The personal colloquy requirement, like the other components of rule [2.]8(2)(b), codifies the due process mandate that a waiver of constitutional rights, implicit in all guilty pleas, must be made voluntarily.").

Simply put, the trial court has an independent duty to ensure a guilty plea substantially complies with Iowa Rule of Criminal Procedure 2.8(2) before it accepts the defendant's plea. If there is not, the court should reject the written plea and either require a new one that complies with the Rule or engage in an in-person colloquy with the defendant. Likewise,

a sentencing court, if different than that of the guilty plea court, should arrest judgment on its own accord if plea does not comply with Rule 2.8(2) and due process.

If this Court determines Hightower cannot appeal her guilty pleas, she requests this Court to treat her appeal as a petition for writ of certiorari. *See* Iowa R. App. P. 6.108 (2020) (noting the court shall "proceed as though the proper form of review had been requested"); *see also State v. Propps*, 897 N.W.2d 91, 97 (Iowa 2017) ("Accordingly, we will treat Propp's notice of appeal and accompanying briefs as a petition for writ of certiorari . . . ."). As discussed in Division I, the guilty plea did not comply with Rule 2.8(2)(b) and due process requirements. Thus, the district court acted illegally when it accepted the plea and when it subsequently refused to vacate it when alerted of the errors. *See* (Order Following Plea; 11/18/2022 Mot.; 11/22/2022 Order) (App. pp.24-26, 36-38); *see also* (Iowa R. App. 6.107(1) (2020) (noting a party claiming a district court judge exceeded its jurisdiction or otherwise acted illegally could file a petition for writ of certiorari).

***Facts*:** Hightower had power of attorney over Julie Stuber, the grandmother of two of Hightower's children. (Mins. Test. 1 p.10) (Conf. App. p.14). The minutes showed Hightower misused Stuber's money and credit cards while Stuber was institutionalized. (Mins 1 pp.10-13, 16) Conf. App. pp.14-17, 20). In all, the victim restitution claimed was $16,561.57. (Restitution) (App p.23).

ARGUMENT

I. Hightower's guilty pleas were unknowing and involuntary.

Preservation of Error: "Generally, a defendant must file a motion in arrest of judgment to preserve a challenge to a guilty plea on appeal." *State v. Meron*, 675 N.W.2d 537, 540 (Iowa 2004) (citation omitted); *see also* Iowa R. Crim. P. 2.24(3)(a) (2019). Here, Hightower did not timely file a motion in arrest of judgment.

However, a "defendant may challenge his guilty plea on appeal despite not filing a motion in arrest of judgment where the district court failed to adequately advise the defendant of

the consequences of not filing a motion in arrest of judgment." *State v. Treptow*, 960 N.W.2d 98, 109 (Iowa 2021); *see also* Iowa R. Crim. P. 2.8(2)(d) (2019). To comply with Iowa Rule of Criminal Procedure Rule 2.8(2)(d), the district "court must inform the defendant that (1) any challenge to the plea based on alleged defects in the plea proceeding must be raised in a motion in arrest of judgment and (2) the failure to do so will preclude the right to appeal." *State v. Oldham*, 515 N.W.2d 44, 46 (Iowa 1984) (citations omitted); *see also Meron*, 675 N.W.2d at 540 (citations omitted) ("Yet this requirement does not apply where a defendant was never advised, as required by rule 2.8(2)(d), that challenges to the plea must be made in a motion in arrest of judgment *and that the failure to challenge the plea by filing the motion within the time provided prior to sentencing precludes a right to assert the challenge on appeal*." (emphasis added)). "Failure . . . to comply with this rule operates to reinstate the defendant's right to appeal the legality of his plea." *Oldham*, 515 N.W.2d at 44 (citations omitted).

In this case, Hightower filed written guilty pleas.[1] (Plea) (App. pp.12-18). The court accepted the written pleas. (Order Following Plea) (App. p.19).

In part, the guilty 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 by asking the Court to impose sentence immediately that I waive my right to challenge the plea of guilty which I have hereby entered. . . .
>
> 25. I understand that I have the right to the preparation of a pre-sentence investigation report for a felony offense that is not a class A and delay of at least 15 days between the date this plea is entered and the date of sentencing. *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*, as well as my right to have a judge rely on a pre-sentence investigation report. Knowing the above, ☐

[1] Hightower filed the plea pursuant to the supervisory order authorizing the acceptance of "written guilty pleas in nonforcible class 'D' felonies in the same manner as in serious and aggravated misdemeanor cases." *See* Iowa Supreme Ct. Supervisory Order, *In the Matter of Ongoing Provisions for Coronavirus/COVID-19 Impact on Court Services* ¶11 (Amended Dec. 6, 2021), *available at* https://www.iowacourts.gov/collections/698/files/1446/embedDocument/

> I ask the court to sentence me immediately. ☒ *I ask the court to sentence me at a later date* and for the court to order a pre-sentence investigation report. . . .

(Plea) (App. p.17) (emphasis added). Hightower initialed each paragraph above. (Plea) (App. p.17).

"A defendant's written plea or waiver can foreclose an appeal when it complies with rule 2.8(2)(d)." *State v. Fisher*, 877 N.W.2d 676, 681 (Iowa 2016) (citation omitted). The language of the plea was sufficient to alert Hightower of the deadlines of filing a motion in arrest of judgment. However, the language does not comply with rule 2.8(2)(d) because it does not adequately convey the consequences of the failure to file the motion.

Specifically, the guilty plea did not make it clear that, if Hightower failed to file a motion in arrest of judgment, she would forfeit the ability to ever challenge any inadequacies in the plea, including on appeal. *See, e.g.*, *id.* at 681-82; *Loye*, 670 N.W.2d at 150 (finding the motion-in-arrest-of-judgment advisement was insufficient where "the court's comments in

no way conveyed the fact that the defendant's failure to file a motion attacking the adequacy of her plea would forfeit her right to challenge the plea on appeal."); *State v. Worley*, 297 N.W.2d 368, 370 (Iowa 1980); *State v. Ball*, No. 15-1319, 2016 WL 1697071, at *1 (Iowa Ct. App. Apr. 27, 2016) (unpublished decision) (finding the defendant's failure to file a motion in arrest of judgment did not prevent him from challenging the guilty plea proceedings on appeal because the "written plea did not inform him that a failure to file a motion in arrest of judgment would preclude his right to appeal. It does not mention the word 'appeal' at all."); *State v. Hursey*, No. 16-0187, 2016 WL 6270000, at *2 (Iowa Ct. App. Oct. 26, 2016 (unpublished decision) (same).

Rather, the plea's language tied the forfeiture of the right to challenge defects in the plea and on appeal to a defendant's election to be sentenced immediately. (Plea) (App. p.17) ("I understand that *if I am sentenced immediately*, I lose my right to challenge any defect . . . and appeal to a higher court . . . .") (emphasis added). Hightower did not waive the delay between

the acceptance of her pleas and sentencing; she specifically requested to be sentenced later. (Plea) (App. p.17). Thus, the guilty plea did not inform Hightower that the failure to timely file a motion in arrest of judgment would preclude her from ever challenging any defects in the plea on appeal, despite her election to not be immediately sentenced. *See Fisher*, 877 N.W.2d at 681 (quoting *Loye*, 670 N.W.2d at 148 (Iowa 2003)) ("The right to appeal is waived only if such waiver is an express element of the particular agreement made by that defendant.").

Because the guilty plea failed to properly advise Hightower of the preclusive effect of failing to file a motion in arrest of judgment, Hightower's failure to timely file a motion that challenged the specific defects in her plea does not preclude a challenge to her plea on direct appeal. *See Fisher*, 877 N.W.2d at 682; *Treptow*, 960 N.W.2d at 109 (citation omitted). Thus, the Court may directly review this claim despite Hightower's failure to timely file a motion in arrest of judgment. *See id.*

***Standard of Review*:** The Court reviews claims of error in guilty plea proceedings for correction of errors at law. Iowa R. App. P. 6.907 (2019); *see also Meron*, 675 N.W.2d at 540.

A claim that a plea was not knowingly and intelligently made implicates the due process clauses; therefore, review is de novo. *Loye*, 670 N.W.2d at 150 (citation omitted).

Discussion: The guilty plea did not properly advise Hightower of all the rights and consequences set forth in Iowa Rule of Criminal Procedure 2.8(2)(b). Where there is an insufficient motion-in-arrest-of-judgment advisory, Iowa Code section 814.29 does not apply. Regardless, Hightower can demonstrate she more likely than not would not have pled guilty if the defects in her plea had not occurred. Lastly, the Court should find Iowa Code 814.29 is unconstitutional.

A. The guilty plea's defects

"The Due Process Clause requires that a guilty plea be voluntary." *Loye*, 670 N.W.2d at 150. "To be truly voluntary, the plea must not only be free from compulsion, but must also be knowing and intelligent." *Id.* (internal quotation marks

omitted). Thus, when pleading guilty, a defendant must not only be cognizant of the constitutional protections she waives "by pleading guilty, but he must also be conscious of the nature of the crime with which [s]he is charged and the potential penalties." *Id.* at 150-151 (citations omitted; *see also State v. White*, 587 N.W.2d 240, 242 (Iowa 1998) (citation omitted) (noting the defendant "must be fully aware of the direct consequences" of the guilty plea in order for it to be constitutionally valid). Rule of Criminal Procedure 2.8(2)(b) "codifies this due process mandate." *Loye*, 670 N.W.2d at 151 (citations omitted).

For a guilty plea to be valid under Rule 2.8(2)(b), the defendant must be provided an on-the-record advisement of the rights and consequences set forth in that rule. Iowa R. Crim. P. 2.8(2)(b) (2019). The plea court may not rely on counsel's assurances that the defendant has been sufficiently informed off the record. *State v. Fluhr*, 287 N.W.2d 857, 867-68 (Iowa 1980), *overruled on other grounds by State v. Kirchoff*,

452 N.W.2d 801 (Iowa 1990). Rule 2.8(2)(b) lays forth the procedure for a guilty plea. Iowa R. Crim. P. 2.8(2)(b).

The purpose of the Rule 2.8(2)(b) advisement is "to ensure that a plea is knowingly and voluntarily made" as required by due process principles. *State v. Sayre*, 566 N.W.2d 193, 195 (Iowa 1997) (citations omitted). Thus, the record must demonstrate substantial compliance with the requirements of Rule 2.8(2)(b). *State v. Myers*, 653 N.W.2d 574, 577 (Iowa 2002). It is not necessary for the district court to recite the Rule's language verbatim. *Id.* at 578 (citation omitted). Noncompliance "normally constitutes reversible error." *Meron*, 675 N.W.2d at 542 (citation omitted); *see also State v. Kress*, 636 N.W.2d 12, 21 (Iowa 2001) (citation omitted) ("Failure to substantially comply with [Rule 2.]8(2)(b)(2) renders the plea involuntary."). "In such circumstances, the remedy is to set aside the conviction and sentence and allow the defendant to plead anew." *Id.*

Pursuant to Rule 2.8(b)(2)(2), "the court must inform the defendant of and determine that the defendant understands

'[t]he mandatory minimum punishment, if any, and the maximum possible punishment provided by the statute defining the offense to which the plea is offered.'" *Kress*, 636 N.W.2d at 21 (quoting Iowa R. Crim. P. 2.8(2)(b)(2)) (alteration in original). When it comes to the minimum and maximum punishment possible, the court must inform a defendant of any mandatory minimum fine and the maximum fine. *Fisher*, 877 N.W.2d at 685 (citation omitted).

In this case, the guilty plea stated:

> 11. I know that the maximum sentence for each charge for which I am pleading guilty as provided by statute is confinement in the jail/prison for a period of not more than _____**five years**_____ year(s) and fine(s) of not more than _____0_____. Minimum fine(s) of _____~~1,000.00~~ $750_____.

(Plea) (App. p.14) (emphasis in original).

At the time of the offense[2], Iowa Code section 902.9 provided: "A class 'D' felon, not an habitual offender, shall be

[2] At the time of sentencing, legislation had increased the maximum fine to one thousand twenty-five dollars and the minimum fine to ten thousand two hundred forty-five dollars. Iowa Code § 902.9(1)(e) (2022).

confined for no more than five years, and in addition shall be sentenced to a fine of at least seven hundred fifty dollars but not more than seven thousand five hundred dollars." Iowa Code § 902.9(1)(e) (2019). The plea does not make it clear both the mandatory and minimum sentence for the offense is five years, with probation available. Additionally, the minimum fine on the plea was corrected to accurately reflect that it was $750; however, the plea does not inform Hightower of the maximum fine for each offense, which is $7,500. *See* Iowa Code § 902.9(1)(e). Thus, the plea did not substantially comply with Rule 2.8(b)(2) when it failed to adequately inform Hightower of the mandatory minimum punishment and the maximum possible punishment. *See Kress*, 636 N.W.2d at 21; *Fisher*, 877 N.W.2d at 685-86.

The guilty plea itself contains other irregularities that raise questions of whether Hightower knowingly and intelligently pled guilty. For example, under paragraph 11, the plea stated:

> ☐ I am requesting a deferred judgment and if granted a civil penalty of $ _____**1,000.00**_____ will be assessed. **Initials** __SH____

(Plea) (App. p.14). This box was not checked, despite the record clearly indicating Hightower was seeking a deferred judgment. *See, e.g.*, (Sentencing p.3 L.5-p.7 L.2). Nor is it clear why the civil penalty would be $1000, as generally a civil penalty is equal to the minimum criminal fine for the offense. *See* Iowa Code § 907.14 (2019). Rather, it appears the $1000 was a mistake, as it is typewritten; whoever corrected the mistake by hand in the paragraph above to change the minimum fine from $1000 to $750 did not make a similar correction in the paragraph regarding the civil penalty.

Additionally, the factual basis paragraph of the plea states:

> 7. I admit that on or about _4/10/2019 through 12/4/2019 _____, 20 ____ I did the following things that constitute the crime(s)____commit dependent adult abuse by exploiting Julie Stuber, by using her money and credit cards with value over $100 in Black Hawk County, and did commit theft in the 2nd degree by taking property belonging to Julie Stuber the property having a value of $1500.00.

(Plea) (App. p.13). A handwritten section appearing immediately below this paragraph stated, "as 'Alford plea', court may rely on T.I. this is best interest." (Plea) (App. p.13). The district court characterized it as "a written Alford plea of guilty." (Order Following Plea) (App. p.19). However, just under the handwritten notions discussed above, Hightower initialed next to the typed statement, "I admit that my actions would satisfy each and every element set forth in paragraph 5 above." (Plea) (App. p.13). Paragraph 5 set forth the elements of the crimes. (Plea) (App. p.13).

Thus, the language of the guilty plea itself does not make it clear whether Hightower was actually admitting the offenses or if she was entering *Alford* pleas.[3] (Plea) (App. p.19). Additionally, the factual basis for theft in the second degree provided in paragraph 7 is inaccurate. For Hightower to be

[3] At sentencing, counsel referred to Hightower as having entered "an Alford plea in terms of not disagreeing with the events that happened; but the extent of them is what's in question." (Sentencing 15:20-23).

sentenced for theft in the second degree[4], a class "D" felony, the value of the property must *exceed* $1500. *See* Iowa Code § 714.2(2) (2023). However, paragraph 7 states the property has a value of *$1500.00*. (Plea) (App. p.13). Accordingly, that would only be theft in the third degree, which is an aggravated misdemeanor. *See id.* § 714.2(3) (2023).

Additionally, although it is not specifically marked, paragraph 12 incorrectly suggests Hightower would have to pay a law enforcement initiative surcharge of $125. It states: "Pursuant to 911.3 Defendant shall pay the law enforcement initiative surcharge of $125 on each violation of chapter . . . 714 . . . ." (Plea) (App. p.15). The mention of the statute under

[4] Iowa Code section 714.2(2) was amended in SF589 and took effect on July 1, 2019. *Compare* Iowa Code § 714.2(2) (2019), *with* Iowa Code § 714.2(2) (2023). Thus, Iowa Code section 4.13(4) applies, requiring the greater value of the property (exceeding $1500) for a class "D" felony. *See* Iowa Code § 4.13 (2019); *State v. Austin*, 503 N.W.2d 604 (Iowa 1993) ("While the State must meet its burden to establish the dollar value of the stolen property in order to designate the crime for sentencing, the proof of the property's value is relevant only to punishment. We conclude the provision of section 4.13(4) concerning a mitigated penalty is applicable in this case.").

which Hightower was convicted of theft—chapter 714—paired with the language of shall indicates Hightower is subject to the surcharge. However, Iowa Code section 911.2 was repealed prior to Hightower's sentencing, so Hightower would not be subject to the surcharge, pursuant to the ameliorative amendment clause of the savings statute. *See* Iowa Code § 911.2 (2019) (repealed 2020); Iowa Code § 4.13(2) (2019); *State v. Chrisman*, 514 N.W.2d 57, 61-62 (Iowa 1994) (finding section 4.13 gives "a defendant who has not been sentenced the benefit of a reduced punishment enacted after the commission of the offense"); *State v. Emanuel*, No. 21-1888, 2022 WL 2824731, at *1-2 (Iowa Ct. App. July 20, 2022) (unpublished decision) (concluding the court erred in ordering the repealed surcharges).

More circumstances also indicate Hightower did not knowingly and voluntarily enter into the guilty pleas. Both at and after sentencing, Hightower expressed the belief she was getting a five-year suspended sentence and probation if she did not receive deferred judgments. *See* (11/18/2022 Mot.)

(App. pp.32-33); (Sentencing 24:4-21, 25:14-26:2). Her belief is not surprising given the form and conflicting statements that appeared within the guilty plea.

For example, paragraph 8 stated:

> x☐ This guilty plea is entered without any agreement with the State's attorney regarding the charge(s) against me or my sentence.
>
> ☐This guilty plea is entered pursuant to Iowa Rule of Criminal Procedure 2.10 based upon an agreement with the State's attorney regarding the charges against me and/or my sentence. I understand the agreement is binding on the Court unless the Court specifically tells me otherwise. **Initials** __SH____

(Plea) (App. p.14). Accordingly paragraph 8 provided Hightower with misleading information. While it appears the first box was checked (albeit outside the box), the record shows there was in fact a plea agreement regarding the charges against Hightower and her sentence. As outlined in paragraph 9, the State agreed to follow the PSI if it recommended a deferred judgment or recommend a five-year suspended sentence for each offenses and probation, with the two sentences running concurrent to one another. (Plea) (App. p.14); *see also* (Sentencing 4:11-13)

("The maximum the State was going to make -- and it was agreed it would be a suspended sentence."). Additionally, the spot Hightower initialed in paragraph 8 came directly after a statement that *correctly noted there was an agreement regarding her charges and sentence but also stated the agreement was binding on the sentencing court*. (Plea) (App. p.14).

Paragraph 10 also had a confusing placement where Hightower signed her initials.

> ☒ I understand that the Court is not bound by the plea agreement and may sentence me up to the maximum sentence provided by law.
>
> ☐ I understand that this is a Rule 2.10 plea agreement, which means that if the Court does not accept the plea agreement, I may withdraw my plea of guilty.
> **Initials** __SH____

(Plea) (App. p.14). As noted by counsel later, Hightower believed by initialing under the second portion of paragraph 10, she was signing a Rule 2.10 plea. (11/18/2022 Mot.) (App. pp.32-33). Yet another provision in the plea also suggests it was pursuant to Rule 2.10; in the last paragraph appearing

before Hightower provided her full signature on the guilty plea—number twenty-nine—the plea stated: "My entry of this guilty plea IS contingent upon the Court accepting the plea bargain. **Initials** __SH____." (Plea) (App. p.18).

Furthermore, paragraph 28, which dealt with "provisions concerning attorney fees and costs", also provides support for Hightower's claim she was unaware she could get a harsher sentence than probation. (Plea) (App. pp.17-18). That paragraph states to "[i]nitial applicable provisions". (Plea) (App. p.17). The statement regarding Hightower's responsibility for "paying jail fees in this matter if I was or will be taken into custody" was not marked; this supports Hightower's claim she did not know she could get taken into custody if the judge did not accept the agreement. (Plea) (App. p.18). Additionally, a different provision, contained in paragraph 12, indicated Hightower would owe a $300 supervision fee if placed on probation. (Plea) (App. p.15). Accordingly, the guilty plea supports Hightower's statements that she did not know the

judge could order a harsher sentence than five years with probation.

As outlined above, the guilty plea was riddled with incorrect information, misleading and contrary statements, and defects. Accordingly, the district court erred in accepting the plea despite its defects and refusing to vacate the plea once alerted to its defects. *See* Iowa R. Crim. P. 2.8(2)(b). Because the plea did not substantially comply with Rule 2.8(2)(b), Hightower's guilty plea was rendered unknowing and involuntary. *See Kress*, 636 N.W.2d at 21 (citation omitted). The proper remedy is to reverse Hightower's convictions and sentence and remand her case to allow her to plead anew. *See id.*

B. The application of Iowa Code section 814.29

In 2019, the legislature amended several aspects of Iowa Code chapter 814, as part of a criminal omnibus bill, also known as S.F. 589. *See generally Treptow*, 960 N.W.2d at 103 (discussing the bill and some of its changes). As part of the

bill, the legislature added section 814.29 to the chapter. It provides:

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

Iowa Code § 814.29 (2019). This Court should find the insufficient motion-in-arrest-of-of judgment advisory also excuses Hightower from the burden of section 814.29. Alternatively, Hightower can meet her burden of showing she more likely than not would not have plead guilty but for the defects in the plea proceedings. If not, the Court should find Iowa Code section 814.29 is unconstitutional.

1. ***Iowa Code section 814.29 does not apply to cases where the defendant is inadequately advised on the requirement of filing a motion in arrest of judgment.***

It is fundamentally unfair to apply Iowa Code section 814.29, and a hard-to-establish burden of proof, to a

defendant who did not even know it existed because the defendant was not adequately advised of the need to file a motion in arrest of judgment. In all but the rarest cases, the defendant would have to admit additional evidence into the record to meet their burden under section 814.29, which is not allowed in a direct appeal. *See* Iowa R. App. P. 6.801 (2019). Without a motion in arrest of judgment, there is no hearing at which the defendant can present evidence to support their claim that had they known of the defects in the guilty plea, they would not have pled guilty. For this reason, the Court should find an inadequate motion-in-arrest-of-judgment advisory excuses the defendant from Iowa Code section 814.29.

Applying section 814.29 to cases where a defendant was not properly advised of the motion-in-arrest-of-judgment requirement would not comport with due process as guaranteed by the United States and Iowa Constitutions. *See* U.S. Const. amend. XIV, § 1; Iowa Const. art. I, § 9. "At the very least, procedural due process requires notice and

opportunity to be heard in a proceeding . . . ." *State v. Seering*, 701 N.W.2d 655, 665-66 (Iowa 2005) (citation omitted). Because Hightower was inadequately informed regarding the requirement to file a motion in arrest of judgment, section 814.29 would require a new burden of proof for her to establish that she was not aware of; nor does Hightower have any opportunity to enter evidence that would give her the chance to establish this burden of proof on appeal. *See id.* Thus, the Court should decline to apply section 814.29's burden to defendants whom were improperly advised of the responsibility of filing a motion in arrest of judgment because doing so would violate due process.

2. The record demonstrates Hightower would not have pled guilty without the plea's defects.

The sentencing hearing transcript establishes Hightower would have not pled guilty if she had been fully aware of the guilty pleas' consequences. After the court sentenced her to prison, Hightower pleaded:

> Can I just have one day, please? I haven't even told my kids good-bye. *I had no idea this was*

> *happening, Your Honor. I had no idea. I had none*. I haven't even said good-bye to my kids. I have no -- like, *I did not expect this. I was under the assumption I was getting a -- I was getting the five years with it suspended, so I did not come prepared to come to jail today.*
>
> *If I would have known that I was going to prison, I would have came prepared to go to prison today; but I had no idea*. Like, my kids don't have anybody to pick them up or anything. I'm the sole provider for my children. So I need at least 24 hours to get my brother to fly here and pick up my children because *I was not told about any of this. I was told that there was an agreement and that I was supposed to be getting five years suspended to five years probation.*
>
> . . .

(Sentencing p.24 L.4-p.25 L.10) (emphasis added). The court asked if anyone else lived with her children besides Hightower. Hightower responded:

> No. I'm their sole provider. My brother is in Utah. All I have to do is make a couple of phone calls so he can come pick them up, and I can sign over all the paperwork that I need to give him because I'm not -- *I did not come prepared for this because I had no clue.*
>
> *If I would have known, I would have came prepared, and my kids would have already been with somebody. But this was not what -- I was under the assumption of the agreement that I was signing when I signed my sentencing agreement. I signed it with the assumption that I was supposed to be getting five years suspended to five years probation. That's --*

when I signed this with -- under the assumption that I was when I got this signed.

(Sentencing p.25 L.13-p.26 L.2) (emphasis added).

These statements illustrate Hightower would not have entered guilty pleas if she had fully been aware of the consequences of the plea and if the plea did not contain the defects, as outlined above. Hightower was completely blindsided by being sent to prison; the record shows Hightower was a loving mother and would not have agreed to plead guilty if she knew she could be sent to prison. *See, e.g.*, (PSI pp. 15-17) (Conf. App. pp.53-55). Hightower's comments show her guilty plea was not voluntary, intelligent, and knowing. Hightower "had an unqualified constitutional right to a trial on the issue of [her] guilt, which she [may have] abandoned on the strength of" the guilty plea's misinformation. *See Kress*, 636 N.W.2d at 22 (quoting *Meier v. State*, 337 N.W.2d 204, 207 (Iowa 1983)) (alterations in original). Her comments establish she more likely than not

would not have pled guilty if the plea did not have the defects discussed above.

3. Iowa Code section 814.29 is unconstitutional.

If the Court finds Iowa Code section 814.29 does apply to Hightower and the record does not demonstrate Hightower would more likely than not would not have pled guilty without the plea's defects, it should find Iowa Code section 814.29 is unconstitutional.

a. Due Process

The due process clauses of the U.S. and Iowa Constitutions both require a defendant enter a guilty plea voluntarily. *Loye*, 670 N.W.2d at 150 (Iowa 2003) (citation omitted); *see also* U.S. Const. amend. VI, XIV; Iowa Const. art. I, § 9. The Iowa Supreme Court has explained:

> To be truly voluntary, the plea must not only be free from compulsion, but must also be knowing and intelligent. Consequently, a defendant must be aware not only of the constitution protections that he gives up by pleading guilty, but he must also be conscious of the 'nature of the crime with which he is charged' and the potential penalties.

Id. (internal citations omitted).

The requirements of the Rule 2.8(b)(2) colloquy are based on the principle that a defendant entering a guilty plea waives several constitutional rights, and "[f]or this waiver to be valid, there must be an intentional relinquishment of known rights." *State v. Kress*, 636 N.W.2d 12, 20 (Iowa 2001). Accordingly, when a defendant has entered a guilty plea without substantial compliance with Rule 2.8(2)(b), Iowa courts have repeatedly found the guilty plea to be involuntary, thereby violating due process. *See, e.g., Loye*, 670 N.W.2d at 153 (". . . Loye's plea was not made knowingly and intelligently and, therefore was not voluntary. For this reason, the guilty plea violated the Due Process Clause and must be set aside."); *Kress*, 636 N.W.2d at 21-22 (noting the defendant implicated the due process clause by arguing the district court failed to fully inform her of the mandatory minimum sentence and vacating); *State v. Boone*, 298 N.W.2d 335, 338 (Iowa 1980) ("If a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of constitution guarantees of

due process and is therefore void."); *Fisher*, 877 N.W.2d at 684-85 (finding the plea was involuntary).

In particular, the Iowa Supreme Court found in order to comply with due process, the district court must ensure "the defendant understands the direct consequences of the plea including the possible maximum sentence, as well as any mandatory minimum punishment. *Id.* at 682-83 (quoting *State v. Carney*, 584 N.W.2d 907, 908 (Iowa 1998)). Here, where the guilty plea contained numerous irregularities, including those related to the maximum punishment, the defendant's guilty pleas were not voluntarily and intelligently entered; as such, her guilty pleas violated the due process clauses and must be set aside. *See Loye*, 670 N.W.2d at 153-54; *Carney*, 584 N.W.2d at 908 (internal citation omitted) ("To the extent defendant alleges the sentencing court failed to inform him fully of the consequences of his plea, he implicates the due process clause of the Fourteenth Amendment to the United States Constitution. To adhere to the requirements of the Fourteenth Amendment a sentencing court must insure the

defendant understands the direct consequences of the plea including the possible maximum sentence . . . ."); *State v. Weitzel*, 905 N.W.2d 397, 408 (Iowa 2017) ("The purpose of informing a defendant and determining whether he or she understands the penal consequences to pleading guilty is to ensure he or she makes the plea voluntarily and intelligently.").

In so far as Iowa Code section 814.29 prevents the appellate court from vacating a plea that has not been voluntarily and intelligently entered, it violates due process. *See Loye*, 670 N.W.2d at 153-54 (concluding due process is violated when a plea is not voluntarily and intelligently entered). Thus, the Court should find Iowa Code section 814.29 is unconstitutional and decline to apply its burden of proof on appeal. *See* Iowa Const. art. XII, § 1 ("This Constitution shall be the supreme law of the state, and any law inconsistent therewith shall be void."); *Knowles v. Iowa*, 525 U.S. 113, 117-18 (1998) (noting while an Iowa statute authorized the search, it violated the U.S. Constitution).

Instead, the Court should follow its long-standing precedent of examining whether there was substantial compliance with Rule 2.8(2)(b) if there is an inadequate motion-in-arrest-of-judgment advisory and vacate any guilty plea that does not comply with the Rule.

For decades, Iowa courts have repeatedly affirmed Rule 2.8(2)(b) codifies the due process mandate that a guilty plea be voluntary and intelligent. *See, e.g.*, *State v. White*, 587 N.W.2d 240, 242, 246 (Iowa 1998) ("The letter of the law and spirit of the law requiring that the guilty plea be made voluntarily and intelligently, mandated by Rule [2.]8 and the Due Process Clause . . . have not been satisfied."); *Loye*, 670 N.W.2d at 151 (citations omitted) ("Rule 2.8(2)(b) codifies this due process mandate."); *State v. Mensah*, 424 N.W.2d 453, 455 (Iowa 1988) (citation omitted) ("The personal colloquy requirement, like the other components of rule [2.]8(2)(b), codifies the due process mandate that a waiver of constitutional rights, implicit in all guilty pleas, must be made voluntarily). It is logical to continue to require that district courts substantially comply with Rule

2.8(2)(b) in order attempt to ensure defendants who are forgoing important constitutional rights, such as their right to trial, are doing so knowingly and intelligently; continuing this requirement also attempts to ensure due process is satisfied. *See White*, 587 N.W.2d at 242, 246. This is particularly true and important when the vast majority of the cases within the criminal justice system are being resolved with guilty pleas. *See Rhoades v. State*, 880 N.W.2d 431, 436 n.10 (Iowa 2016).

Requiring substantial compliance with Rule 2.8(2)(b) has many benefits: it assists the district court in making the constitutionally required determination that the defendant's guilty plea is voluntary; it promotes making a complete record at the time the defendant enters a guilty plea of the relevant factors of voluntariness; and if the Rule is followed, it discourages and significantly hampers frivolous post-conviction attacks on the constitutional validity of guilty pleas. *See Weitzel*, 905 N.W.2d at 404 (citation omitted). Indeed, the Iowa Supreme Court has adopted a bright-line rule regarding Rule 2.8(2)(b) violations, stating:

> A line-drawing game in which we play the role of mind reader in order to delve into the defendant's subjective state of mind is inapposite, especially because a guilty plea entails relinquishing important constitutional rights. Moreover, a defendant's decision to plead guilty is a "grave and personal judgment, which a defendant should not be allowed to enter without full comprehension of possible consequences of conviction by such plea.

Id. at 410 (citations omitted). Furthermore, cases where the appellate courts reverse a guilty plea will be rare. *Id.* at 411. Therefore, this Court should find due process requires a guilty plea to substantially comply with Rule 2.8(2)(b). Thus, to the extent Iowa Code section 814.29 attempts to prohibit the appellate court from vacating a plea that has not been voluntarily and intelligently entered, it violates due process.

b. Separation of Powers

The Iowa Constitution provides: "The supreme court . . . *shall* exercise a supervisory and administrative control over all inferior judicial tribunals throughout the state." Iowa Const. art. V, § 4. In Iowa, there has been a longstanding recognition by the appellate courts that a guilty plea accepted without proper compliance with the requirements of due process

results in an unknowing and involuntary guilty plea. *See, e.g.*, *State v. Sisco*, 169 N.W.2d 542, 548-49, 551 (Iowa 1969) ("[W]hen a guilty plea is entered by defendant, the court must address the accused personally and by that procedure heretofore prescribed determine whether he understands the charge made, is aware of the penal consequences of the plea, and that is entered voluntarily. Nothing less will suffice."). Such rule therefore falls squarely within the Supreme Court's constitutional power and duty to "exercise supervisory and administrative control over all inferior judicial tribunals throughout the state." Iowa Const. art. V § 4.

With respect to the Supreme Court's supervisory responsibility over inferior courts, the responsibility to ensure the record reflects a facially knowing and voluntary guilty plea lies with *the district court*, both statutorily and constitutionally. *See, e.g.*, Jon M. Woodruff, Note, *Plain Error by Another Name: Are Ineffective Assistance of Counsel Claims a Suitable Alternative to Plain Error Review in Iowa?*, 102 Iowa L. Rev. 1811, 1834-35, 1840 (May 2017); Iowa R. Crim. Pro. 2.8(2)(b);

ABA Standards for Criminal Justice: Pleas of Guilty, Receiving and Acting upon the Plea 14-1.4, 14-1.5 14-1.6 (1999); *Sisco*, 169 N.W.2d at 548. At least absent an error preservation barrier (which, as discussed above, is not applicable in this case), appellate review is of the *district court's* actions (i.e., the court's acceptance of a guilty plea that does not comply with Rule 2.8(2)) and not of the trial attorney's actions. The error at issue inheres in the district court's determination that the guilty plea can be constitutionally and lawfully accepted where, in fact, the guilty plea does not comport with Rule 2.8, and thereby due process.

Pursuant to its supervision of inferior courts, the Iowa Supreme Court has the responsibility to determine whether such error exists in the district court's acceptance of the plea, and also whether the remedy of a vacated guilty plea and new trial is warranted because of the error. Courts have inherent power—independent of statute—to grant a new trial when, in their judgment, justice has not been done. *Hensley v. Davidson Bros. Co.*, 112 N.W. 227, 227-28 (Iowa 1907) (noting

the appellate court has an inherent right to order a new trial when grounds in the record support it); *see also United States v. Hudson*, 11 U.S. 32, 34 (1812) ("Certain implied powers must necessarily result to our Courts of justice from the nature of their institution."). "'The constitutional duty of the judicial department is to exercise the judicial power to provide for the fair and impartial administration of justice.'" *State v. Crawford*, 972 N.W.2d 189, 195 (Iowa 2022) (quoting *State v. Thompson*, 954 N.W.2d 402, 410 (Iowa 2021)); *see also State v. Brainard*, 25 Iowa 572, 581 (1868) (citation omitted) ("It is made the duty of this court to decide criminal appeals according to the very justice of the case as shown by the record . . . ."). As the New Mexico Supreme Court stated:

> There exists in every court, however, an inherent power to see that a man's fundamental rights are protected in every case. Where a man's fundamental rights have been violated, while he may be precluded by the terms of the statute or the rules of appellate procedure from insisting in this court upon relief from the same, this court has the power, in its discretion, to relieve him and to see that injustice is not done.

State v. Garcia, 128 P.2d 459, 462 (N.M. 1942). To "set aside or vacate a judgment" is "a judicial function, to be exercised by the courts", not the legislature. *State v. Prouty*, 84 N.W. 670, 673 (Iowa 1900) (citations omitted).

The Iowa Constitution specifically states the Court is "for the correction of errors at law" and it "shall have power to issue all writs and process necessary to secure justice to parties." Iowa Const. art. V, § 4; *see also* Iowa Code § 602.4102(1) (2019); *Crawford*, 972 N.W.2d at 195 (citations omitted). The determinations of when error exists, and how it may be corrected on appeal, are fundamentally judicial functions. A statutory enactment which "prescribe[s] a rule for the decision of a cause in a particular way" necessarily violates separation of powers in encroaching upon the judiciary. *United States v. Klein*, 80 U.S. 128, 146 (1871). The legislature cannot inflict upon the appellate courts the legislature's own "arbitrary rule of decision" under which "the court is forbidden to give the effect to evidence which, *in its own judgment*, such evidence should have, and is directed to give it an effect

precisely contrary." *Id.* at 147 (emphasis added); *see also State v. Abrahamson*, 696 N.W.2d 589, 593 (Iowa 2005); *State ex rel. Allee v. Gocha*, 555 N.W.2d 683, 685 (Iowa 1996); *Richardson v. Fitzgerald,* 109 N.W. 866, 867 (Iowa 1906).

The Iowa Supreme Court has noted: "The demarcation between a legitimate regulation of court practice and procedure and an unconstitutional encroachment of the judicial power is context specific." *Thompson*, 954 N.W.2d at 418. As discussed, Iowa Code section 814.29 impedes the immediate, necessary, efficient, and basic functioning of the appellate courts. *See id.* Accordingly, insofar as section 814.29 directs the appellate court to withhold relief for errors undermining the acceptance of a guilty plea in a lower court proceeding, without or in spite of the appellate court's *own judicial assessment* of whether such district court error warrants appellate relief, it amounts to a unconstitutional legislative encroachment on the inherent power of the judiciary. *See id.*; *Abrahamson*, 696 N.W.2d at 593 (noting its holding was mandated because to "hold otherwise would

result in a serious intrusion by another branch of government into the area constitutionally vested in the court"). Therefore, section 814.29 cannot constitutionally prohibit the appellate court from vacating Hightower's guilty plea.

Conclusion: Hightower respectfully requests this Court reverse her convictions and remand for further proceedings.

II. The district court erred by considering and relying on an improper factor when it determined Hightower's sentences.

Preservation of Error: The Court may review a defendant's argument that the district court considered an improper factor and abused its discretion during their sentencing on direct appeal, even in the absence of an objection in the district court. *See State v. Thomas*, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994); *State v. Young*, 292 N.W.2d 432, 434-35 (Iowa 1980) (reviewing an improper factor claim despite no objection was made at the sentencing hearing); *see also State v. Cooley*, 587 N.W.2d 752, 754 (Iowa 1998) ("It strikes us as exceedingly unfair to urge that a defendant, on the threshold of being sentenced, must question

the court's exercise of discretion or forever waive the right to assign the error on appeal.").

Standard of Review: The Court reviews a sentence imposed in a criminal case for correction of errors at law. Iowa R. App. P. 6.907; *see also State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002). "A sentence will not be upset on appellate review unless the defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure such as the trial court's consideration of impermissible factors." *State v. Witham*, 583 N.W.2d 677, 678 (Iowa 1998) (citation omitted).

Discussion: Iowa Code section 901.5 mandates a court considers its sentencing options only after examining all pertinent information. *See* Iowa Code § 901.5 (2019). The sentencing court should "weigh and consider all pertinent matters in determining proper sentence", which includes the nature and circumstances of the offense, the defendant's age, character, propensities, and chances of reform. *State v. Hildebrand*, 280 N.W.2d 393, 396 (Iowa 1979). In exercising its

discretion, the district court has a duty to weigh this information when determining the appropriate sentence for a particular defendant for a particular offense. *See State v. Thompson*, 494 N.W.2d 239, 240 (Iowa 1992) (citation omitted).

When sentencing a defendant, the courts owe a duty to both the public and the defendant when determining the appropriate sentence. *Hildebrand*, 280 N.W.2d at 396 (citations omitted). "The punishment should fit both the crime and the individual." *Id.* As such, the court must exercise the sentencing option that would best accomplish justice for both society and the individual defendant, after considering all pertinent sentencing factors. *State v. Fink*, 320 N.W.2d 632, 634 (Iowa Ct. App. 1982). "In applying the abuse of discretion standard to sentencing decisions, it is important to consider the societal goals of sentencing criminal offenders, which focus on rehabilitation of the offender and the protection of the community from further offenses." *Formaro*, 638 N.W.2d at 724 (citing Iowa Code § 901.5). "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) (citing *State v. Berney*, 378 N.W.2d 915, 920 (Iowa 1985)).

During sentencing, the district court stated at the time of the pronouncement of sentence:

> This came to light -- or you were charged back in April of 2020. *That's now two and a half years. And in two and a half years, even though you took over $16,000, you have paid zero dollars in restitution. Zero.* You just told me that you've been working the same job for the last two years and that you've been promoted in that job; and yet, *you haven't made her whole in two and a half years. You haven't attempted to make her whole in two and a half years. And that's significant.*
> . . .
> Ms. Hightower, I don't find that probation is appropriate at this time based upon the acts that you took; based upon the calculations that you made; based upon the fact that it lasted for over eight months; based upon the harm that you did to Ms. Stuber; and based on the fact that, *even though you are working and had capabilities of doing so, you have done nothing to make any victim restitution.*

(Sentencing p.19 L.21-p.22 L.13) (emphasis added). The consideration that Hightower had not "attempted to make [the

victim] whole" by paying restitution while the case was pending is an improper sentencing factor.

The fact that Hightower had not started paying back Stuber had no bearing or relevance to the question of the proper sentence for her convictions. At the time of sentencing, there was no restitution ordered, as restitution, including pecuniary damages, is ordered at the time of sentencing. *See* Iowa Code §§ 910.1, 910.2(1), 910.3 (2019). Additionally, from a legal perspective, it was likely Hightower was advised not to start paying back Stuber until there was a restitution order, as before such order, if the guilty pleas fell through, payment could be interpreted as a sign of guilt of the offenses. Because Hightower had not started paying restitution back had nothing to do with pertinent matters, such as the nature of the offense, the attending circumstances of the offense, Hightower's age, character, or propensity and chances for rehabilitation, it was an impermissible factor for the sentencing court to consider. *See Cooley*, 587 N.W.2d at 755; *State v. Matlock*, No. 04-0405, 2005 WL 1958370, at *2 (Iowa Ct. App. Aug. 17, 2005)

(unpublished decision) (vacating the sentence when the sentencing court improperly considered a fact that was not relevant to the question of the proper sentence); *State v. Phipps*, No. 17-1037, 2018 WL 2084812, at *3 (Iowa Ct. App. May 2, 2018) (unpublished decision) (same).

Furthermore, the record does not support the district court's assertion that Hightower was able to pay back the restitution during the pendency of the case. *See* (Sentencing p. p.22 L.10-13). A financial affidavit Hightower filed at the beginning of the case showed she was working while attending school and only made $200/month before taxes. (Financial Aff't) (Conf. App. p.4). She had made $15,000 in the prior year before taxes. (Financial Aff't) (Conf. App. p.4). That same affidavit showed she had $200 monthly in debts to pay; Hightower had only $35.29 in a bank account and owned no assets worth more than $100. (Financial Aff't) (Conf. App. p.4).

At the time of sentencing, Hightower did have a steady job at a hotel, since March of 2021. (PSI pp.5, 17) (Conf. App. pp.53, 55). However, she only made $13.50 per hour. (PSI p.5)

(Conf. App. p.43). A living wage for one adult working fulltime while supporting two children[5] is $42.89 per hour in Black Hawk County, Iowa. *See* Dr. Amy K. Glasmeier, Massachusetts Institute of Technology, *Living Wage Calculation for Black Hawk County, Iowa,* https://livingwage.mit.edu/counties/19013 (last visited July 15, 2023). Thus, Hightower earned much less than required to even be able to support her family. *See id.* ("The living wage shown is the hourly rate that an individual in a household must earn to support his or herself and their family). Moreover, the presentence investigation report indicated Hightower had several unpaid debts, including $16,000 in delinquent child support. (PSI p.5) (Conf. App. p.44). Thus, the court's assertion Hightower was capable of paying the

[5] Hightower was the sole provider and caretaker of the children. (Sentencing 24:14-18, 25:11-18). The PSI noted that the children's father had been charged with two counts of domestic violence in which Hightower was the victim, they had not been in a relationship since June 2021, and there was a no-contact order prohibiting him from having contact with her and her children. (PSI p.8) (Conf. App. p.46).

restitution while the case was pending is completely unsupported by the record facts.

In order to establish reversible error, the defendant must show the court was not just "merely aware" of the improper sentencing factor, but the sentencing court "relied" on it in rendering its sentence. *State v. Ashley*, 462 N.W.2d 279, 282 (Iowa 1990) (citations omitted). Where such a showing is made, however, the reviewing court "cannot speculate about the weight a sentencing court assigned to an improper consideration and the defendant's sentences must be vacated and the case remanded for resentencing." *State v. Gonzalez*, 582 N.W.2d 515, 517 (Iowa 1998) (citations omitted). This is so even if the impermissible factor was "merely a secondary consideration." *State v. Lovell*, 857 N.W.2d 241, 243 (Iowa 2014) (internal quotation marks omitted) (citation omitted). "The important focus is whether an improper sentencing factor crept into the proceedings; not the result it may have produced of the manner it may have motivated the court." *Thomas*, 520 N.W.2d at 313 (citation omitted).

It is clear from the sentencing court's remarks that it was not "merely aware" of the impermissible factor but actually considered and relied on it. *See Ashley*, 462 N.W.2d at 282; (Sentencing 19:21-22:13). Thus, the improper consideration "crept into the proceedings", and Hightower is entitled to a new sentencing hearing. *See Thomas*, 520 N.W.2d at 313. "In order to protect the integrity of our judicial system from the appearance of impropriety," resentencing must be "before a different judge." *See Lovell*, 857 N.W.2d at 243.

Conclusion: Hightower respectfully requests this Court remand for a new sentencing in front of a different judge.

III. The district court erred when it failed to allow Hightower the opportunity to withdraw her guilty pleas.

Preservation of Error: A defendant may challenge the district court's refusal to follow a Rule 2.10 plea for the first time on appeal. *See State v. Thompson*, 856 N.W.2d 915, 921-22 (Iowa 2014). Additionally, Hightower filed a motion after the sentencing hearing asking the district court to allow her to withdraw her the guilty plea, which the court denied,

preserving error. (11/18/2022 Mot.; 11/21/2022 Order) (App. pp.32-34); *Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012).

Standard of Review: The Court reviews a sentence imposed in a criminal case for correction of errors at law. Iowa R. App. P. 6.907; *see also Formaro*, 638 N.W.2d at 724. "A sentence will not be upset on appellate review unless the defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure such as the trial court's consideration of impermissible factors." *Witham*, 583 N.W.2d at 678 (citation omitted).

Discussion: Iowa Rule of Criminal Procedure 2.10 allows the State and defendant to condition a plea agreement on "the court's approval of the sentencing agreement." Iowa R. Crim. P. 2.10(2) (2019). The district court may accept the plea agreement and sentence the defendant accordingly, sentence the defendant to a more favorable sentence than that agreed upon, or refuse to be bound by the parties' plea agreement.

See Iowa R. Crim. P. 2.10(3), (4). However, if the court rejects the plea agreement,

> the court shall inform the parties of this fact, afford the defendant the opportunity to then withdraw the defendant's plea, and advise the defendant that if persistence in a guilty plea continues, the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

Iowa R. Crim. P. 2.10(4).

Iowa courts have maintained the importance of compliance with the Rules of Criminal Procedure related to plea bargains. "[B]ecause a plea agreement requires a defendant to waive fundamental rights, we are compelled to hold prosecutors and courts to the most meticulous standards of both promise and performance." *State v. Macke*, 933 N.W.2d 226, 236 (Iowa 2019) (citation omitted). Thus, when a court refuses to be bound by the parties' plea agreement, it must not only inform the defendant of that fact, but also allow the defendant an opportunity to withdraw their guilty plea. *See* Iowa R. Crim. P. 2.10(4). Failure to do so requires reversal.

See, e.g., *State v. Holton*, No. 19-0342, 2020 WL 2988001, at *2 (Iowa Ct. App. June 3, 2020) (unpublished decision).

The plea, as described in Division I, was not a model of clarity. *See State v. DeWitt*, No. 18-1344, 2019 WL 6894271, at *3 (Iowa Ct. App. Dec. 18, 2019) (unpublished decision). As outlined in paragraph 9, the State agreed to follow the PSI if it recommended a deferred judgment; if it did not, then the State would recommend concurrent, five-year suspended sentences and probation. (Plea) (App. p.14); *see also* (Sentencing 4:11-13). As the presentence investigation report recommended a suspended sentence, the prosecutor followed suit at the sentencing hearing. (Sentencing 12:12-13:19) (Conf. App. p.52).

As discussed in Division I, the guilty plea contained conflicting information as to whether it was entered in accordance with Rule 2.10 or not. Paragraph 8 had a check mark next to a box that said there was no agreement as to the sentence; however, there was a plea agreement, as noted in paragraph 9. (Plea) (App. p.14). Moreover, Hightower initialed

right after the second paragraph under paragraph 8 which contained language indicating the agreement was binding on the sentencing court. (Plea) (App. p.14). Paragraph 10 indicated the court was not bound by the agreement, but Hightower again initialed directly after a statement stating the guilty plea was pursuant to Rule 2.10 and she would receive an opportunity to withdraw the guilty plea if the Court refused to be bound by the plea agreement. (Plea) (App. p.14). In the motion to allow Hightower to withdraw the guilty plea, defense counsel Allan Richards noted, "the defendant clearly indicated she though[t] the written plea required a suspended sentence" and Hightower "indicated [the Rule 2.10 language in paragraph 10] was what she saw, thought, and believed what she was signing." (11/18/2022 Mot.) (App. pp.32-34).

Furthermore, paragraph 29 conflicted with the marked box of paragraph 10, stating "My entry of this guilty plea IS contingent upon the Court accepting the plea bargain." (Plea) (App. p.18). Hightower initialed directly following that language and then dated and signed the plea. (Plea) (App. p.18). Where

a guilty plea has contained conflicting information whether it was tendered pursuant to Rule 2.10, the appellate court has treated it as conditioned on the court's concurrence. *See, e.g.*, *DeWitt*, 2019 WL 6894271, at *3; *State v. Keller*, No. 17-1854, 2018 WL 6120047, at *1-2 (Iowa Ct. App. Nov. 21, 2018) (unpublished decision).

The sentencing court did inform the parties it was not binding itself to any agreement. (Sentencing 4:19-22). At sentencing, the district court did not follow the terms of the plea agreement and ordered Hightower to serve a prison sentence of five years. (Sentencing 21:13-22:13). Before imposing the sentence, the court did not give Hightower an opportunity to withdraw her guilty pleas, in direct violation of Iowa Rule of Criminal Procedure 2.10. Nor did the court allow Hightower to withdraw her guilty pleas after counsel alerted the court to the plea's defects. (11/18/2022 Mot.; 11/21/2022 Order) (App. pp.32-34, 36-38). Accordingly, Hightower's sentences should be vacated, and the Court should remand for further proceedings. *See DeWitt*, 2019 WL 6894271, at *3.

Conclusion: Hightower respectfully requests this Court remand for a new sentencing in front of a different judge. *See State v. Hoffman*, No. 21-1134, 2022 WL 468739, at *3 (Iowa Ct. App. Feb. 16, 2022) (unpublished decision).

IV. The district court abused its discretion by imposing a $17,000 cash-only appeal bond. Additionally, the provision of the court's order forfeiting the appeal bond to be applied to victim restitution is illegal.

***Preservation of Error*:** In this case, the district court's order regarding the appeal bond is part of the sentencing order. Although the court entered the order four days after the dispositional order, a provision setting an appeal bond normally appears in a sentencing order. *See Formaro*, 638 N.W.2d at 727 ("[T]he terms and conditions of bail are normally contained in a judgment and sentence . . . ."). Notably, the sentencing order in this case did contain a section entitled "Appeal and Bond"; however, it only addresses Hightower's appellate rights and does not address the bond. (Sentencing Order) (App. p.29). Rather, the portion of the court's November 21st order regarding the appellate bond

seems to be a nunc pro tunc order, as it corrects the court's prior mistake of failing to set an appeal bond. *See McVay v. Kenneth E. Montz Implement Co.*, 287 N.W.2d 149 (Iowa 1980) (noting a "mistake of a type 'easily made and easily overlooked'" is more likely to be found to be one that could be corrected by the entry of a nunc pro tunc order). Accordingly, it is part of the sentencing order, and Hightower may challenge it as such. *State v. Letscher*, 888 N.W.2d 880, 883-84 (Iowa 2016) ("A defendant is not required to object to a term of the sentence to preserve error on appeal."); *Formaro*, 638 N.W.2d at 727 ("[A] subsequent notice of appeal from such a judgment and sentence by the district court would permit a defendant to assert a challenge on appeal to the terms and conditions of bail set forth in the judgment.").

However, even if the court's order regarding the appeal bond is not part of Hightower's sentence, this Court may consider her challenge. Hightower timely filed another[6] notice

[6] Hightower's first notice of appeal was filed on the same day as the district court's order; EDMS shows it was file stamped

of appeal after the district court's order setting the bond. The notice specifically states it is appealing from "the final order setting the appeal bond and eventual forfeiture of the bond for victim restitution entered . . . on the 21st day of November, 2022." (12/15/2022 Notice) (App. p.39). As such, the issue regarding Hightower's appeal bond is properly before the Court. *See Formaro*, 638 N.W.2d at 727 ("Thus, when a court addresses the issue of bail following the entry of a judgment and sentence, any appeal from a ruling on the issue must be separately appealed."); *Thomas*, 520 N.W.2d at 313 (citation omitted) ("There is no procedure which allows the defendant to address the court during or after the pronouncement of sentence . . . .").

***Standard of Review*:** The Court reviews a sentence imposed in a criminal case for correction of errors at law. Iowa R. App. P. 6.907; *see also State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002). Review of an appeal bond amount and

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approximately an hour and a half before the court's order. (11/21/2022 Notice; 11/21/2022 Order)(App. pp.35-38).

conditions is for an abuse of discretion. *State v. Kellogg*, 534 N.W.2d 431, 433 (Iowa 1995).

***Discussion*:** At the sentencing hearing, the district court told Hightower she "may have the right to appeal this judgment and sentence". (Sentencing 23:2-17). The court did not set an appeal bond. (Sentencing 23:2-27:3) (11/18/2022 Mot.) (App. p.33). The written sentencing order has a section entitled "Appeal and Bond"; however, it also did not set an appeal bond. (Sentencing Order) (App. p.29).

The morning after the sentencing, Hightower filed a motion for a hearing and to set aside the guilty plea; in the motion, she also requested the district court set an appeal bond, noting she was eligible and that she had good cause for an appeal. (11/18/2022 Mot.) (App. p.33). The court denied the motion for hearing and to withdraw Hightower's guilty pleas. (11/21/2022 Order) (App. pp.36-37). However, the court acknowledged it was "bound by the Supreme Court's interpretation" of good cause to appeal. (11/21/2022 Order) (App. p.37). It then stated:

> IT IS THEREFORE ORDERED appeal bond is set in the amount of $17,000 CASH ONLY. All parties are advised any appeal bond posted, regardless of who posts it, SHALL be used to satisfy victim restitution. The Clerk of Court shall notify any person posting the appeal bond that it will not be returned, but rather will be used for victim restitution.

(11/21/2022 Order) (App. p.37).

The Iowa Constitution guarantees the right to bail before conviction. Iowa Const. art. I, § 12. However, the "right of a defendant to be admitted to bail following a judgment and sentence in certain criminal cases is strictly statutory." *Formaro*, 638 N.W.2d at 726-27 (citation omitted). Iowa Code chapter 811, in turn, governs bail and conditions of release. Iowa Code ch. 811 (2019).

Iowa Code section 811.1 provides defendants are "bailable both before and after conviction" except for a few exceptions that are inapplicable to Hightower. *See* Iowa Code § 811.1. Iowa Code section 811.5 applies specifically to bail on appeal. Iowa Code § 811.5 (2019). It states:

> After conviction, upon appeal to the appellate court, the defendant must be admitted to bail, if it be from the judgment imposing a fine, upon the undertaking of bail that the defendant will, in all respects, abide the orders and the judgment of the appellate court upon appeal; if from a judgment of imprisonment, except as provided in section 811.1 upon the undertaking of bail that the defendant will surrender in execution of the judgment and direction of the appellate court, and in all respects abide the orders and judgment of the appellate court upon the appeal. Such bail may be taken, either by the court where the judgment was rendered, or the district court of the county in which the defendant is imprisoned, or by the appellate court, or a judge or clerk of any of such courts. Provided, that in lieu of bail, bailable defendants as described herein may be released in accordance with the provisions of section 811.2.

Id.

In this case, the district court abused its discretion by failing to consider any of the proper factors in setting the appeal bond and using it as a mechanism to collect victim restitution. Additionally, the provision of the district court's order that Hightower's appeal bond be forfeited and applied to satisfy victim restitution in the case was a statutorily unauthorized and, therefore,

illegal. This Court should vacate the order regarding Hightower's appeal bond.

A The district court abused its discretion in setting a $17,000 cash-only appeal bond.

The Iowa Supreme Court has stated "the purpose of bail on appeal . . . is to suspend the execution of judgment and maintain the status quo pending appellate review. *Formaro*, 638 N.W.2d at 726. "The primary purpose of imposing conditions or restrictions on bail following the appeal of a bailable offense is to assure the future appearance of the defendant upon completion of the appeal and to provide for the safety of others during the course of the appeal." *Id.* District courts have discretion to impose the amount of an appeal bond with these purposes in mind. *Id.* The factors courts may consider include the seriousness of the offense and the defendant's prior record. *Id.*

The offenses of dependent adult abuse and theft in the second degree are serious; they are felonies. However, if Hightower had been arrested for this offense when court was

not in session, she could have been released pending an initial appearance bond of $5000 on each offense. *See* Iowa Supreme Court Judicial Council, In re Unif. Bond Schedule, at 1 (June 23, 2017) (effective July 1, 2017), *available at* https://www.iowacourts.gov/iowa-courts/district-court/uniform-bond-schedule; *see also State v. Chew*, No. 17-1692, 2018 WL 5850225, at *8-10 (Iowa Ct. App. Nov. 7, 2018) (unpublished decision) (considering the bond schedule as "reality check" and "point of reference for what dollar amount would attach to certain offenses in the absence of a judicial officer exercising his or her discretion"). As it was, Hightower was released on both charges *only on her written promise to appear*. (Initial Appearance) (App. p.5). During the pendency of the district court case, which lasted roughly two and a half years during a pandemic, Hightower never missed a court appearance and was never out to warrant. A review of the record also indicates she kept in contact with her attorneys. *See, e.g.*, (Mot. Hr'g 3:8-5:18; Continuance 3:3-9); (Request

New Attorney; DCS Letter; Addendum p.2) (App. pp.11, 21; Conf. App. p.57).

With respect to Hightower's criminal history, the PSI indicated she had a criminal arrests and dispositions out of Florida and South Carolina. However, the record also indicated some of those offenses had been expunged because they arose from situations where Hightower was a victim of human trafficking. (PSI p.12) (Conf. App. p.50); (Sentencing 5:3-14, 7:20-11:19, 13:5-10). Moreover, the offenses all occurred approximately eight years prior to the sentencing in this case.

Moreover, Hightower had significant ties to the community. She had lived in Waterloo since July 2017. (PSI p.10) (Conf. App. p.47). She had attended colleges in the area and made friends. (PSI pp.5-6, 16, 17) (Conf. App. pp.43-44, 54-55). She actively attended programing in the community and enrolled her children in weekly programming as well to better her and her children's lives. (PSI pp.9-10, 15) (Conf. App. pp.47-48, 53). Hightower had maintained employment at

a hotel since March of 2021 and her manager described her as "an integral part of our team". Even prior to her arrest, Hightower had sought treatment for substance abuse treatment and her mental health. (PSI p.11) (Conf. App. p.49).

In its order, there is no indication the court considered any of the proper factors when setting the bond. As outlined above, Hightower had not failed to appear and there was no indication the cash only bond was necessary to assure her future appearance after the appeal. *See Formaro,* 638 N.W.2d at 726. Nor was there any indication from Hightower's history or the circumstances of her offenses that such a bond was necessary to ensure the safety of others during the appeal. *See id.* As discussed, Hightower's criminal history was old and directly related to a situation where she was a victim in a human trafficking scheme. Additionally, the current offenses were financial crimes, with the victim being the grandmother of Hightower's children. The record does not indicate Hightower was a danger to the safety of others in the community.

Not coincidentally, the amount of the cash only bond was almost the exact amount of the restitution claimed in this case. *See* (PSI p.13) (Conf. App. p.51). Moreover, the court ordered the bond to be forfeited to satisfy the victim restitution, no matter who posted it. (11/21/2022 Order) (App. p.37). Thus, the record indicates that the amount of the appeal bond was not based on one of the proper factors discussed above, but rather solely as an attempt to collect victim restitution. *See Thomas*, 520 N.W.2d at 314 ("The statement by the trial court in this case, however, cannot be overlooked as an insignificant or misconstrued remark."). "[W]hen a judge sets bail in an amount so far beyond a defendant's ability to pay making it all-but impossible the defendant could post . . . , the order amounts to the 'functional equivalent' of denying bail." *Chew*, 2018 WL 5850225, at *9 (citing *Brangan v. Commonwealth*, 80 N.E.3d 949, 963 (Mass. 2017)). The district court abused its discretion in ordering a $17,000 cash-only bond. *See id.*

B The provision forfeiting the bond and applying it to victim restitution is not supported by statute.

The district court unlawfully ordered any posting of the $17,000 cash-only appeal bond to be forfeited and directly applied to the $16,561.57 pecuniary damages. (11/21/2022 Order) (App. p.37). The district court lacked statutory authority to order such a forfeiture. As such, this Court should vacate the order.

"'The authority of a court to apply cash bail to the payment of court costs or a fine imposed on the accused depends wholly on statute, since the court has no inherent power to do so.'" *Estate of Lyon ex rel. Lyon v. Heemstra*, No. 08-0934, 2009 WL 1676662, at *2 (Iowa Ct. App. June 17, 2009) (unpublished decision) (quoting 8 C.J.S. Bail § 146, at 192 (2008)). "Prior to 1978, the Iowa Code expressly provided that cash bail was subject to deduction for court costs and fines assessed against the defendant." *Estate of Lyon*, 2009 WL 1676662, at *2 (citing Iowa Code § 765.4 (1977)); *see also State v. Schultz*, 245 N.W.2d 316, 318 (Iowa 1976) (citing Iowa

Code ch. 196 (1851)) ("The statutes comprising Chapter 765, The Code, have been a part of our law from the beginning."). "Effective January 1, 1978, Iowa Code chapter 765 was repealed and replaced with Iowa Code chapter 811, which does not authorize the deduction of court costs and fines from cash bail." *Estate of Lyon*, 2009 WL 1676662, at *3 (citations omitted). "Rather, Iowa Code section 811.8(2) explicitly provides that cash bail shall be returned to the person who posted it." *Id.*

Section 811.8 provides if a defendant "surrender[s]" to custody "[a]t any time before the forfeiture" of the bond, "the court or clerk shall immediately order return of the money deposited to the person who deposited the same, or order an exoneration of the surety." Iowa Code § 811.8. The bond can be deemed "forfeited" only if the defendant "fails to appear" as required, or fails "to surrender in execution of the judgment." Iowa Code § 811.6(1). In the present case, Hightower did not fail to appear or fail to surrender in execution of the judgment. To the contrary, she made all necessary court appearances

and ultimately "surrender[ed] in execution of the judgment" at sentencing. *Id.* It is possible after the appeal concludes, if Hightower fails to surrender to authorities after procedendo if her conviction and sentence is affirmed or appear for a court hearing if her case is remanded, the appeal bond could be forfeited. However, such a forfeiture would be a civil matter, triggered by that occurrence. *See Letscher*, 888 N.W.2d at 886 (citations omitted). The district court's order that the appeal bond be forfeited prior to those occurrences is premature and without statutory support.

Iowa Code chapter 811 does authorize the district court to impose reasonable conditions of release on an appeal bond. Iowa Code §§ 811.2, 811.5 (2019). However, the language of district court's order is not a condition of release. The district court have not imposed any such requirement as a condition of release under Iowa Code section 811.2. *See id.* § 811.2. The use of a posted bond to pay off financial obligations is not listed therein as a permissible condition of release. *See id.* Other conditions of release may be imposed only if they are

reasonably necessary to the specific purposes of (a) assuring the appearance of the defendant and (b) protecting the personal safety of others. *See id.* A condition requiring a posted bond to be used to pay off the defendant's financial obligations would not reasonably relate to either such purpose. *See Estate of Lyon*, 2009 WL 1676662, at *2 (the "primary purpose of bail is to assure the defendant's appearance in court" not "to ensure court costs and fines are satisfied.").

There is no statutory authority for the district court to forfeit an appeal bond as a part of Hightower's sentence. *See Letscher*, 888 N.W.2d at 886. The district court's order did not comply with the statutory terms and conditions. *See id.* Because the district court acted illegally when ordering the forfeiture of the $17,000 cash-only appeal bond to be applied directly to victim restitution, this Court should vacate the district court's order.

Conclusion: Hightower requests this Court vacate the provision of the district court's order requiring Hightower's

appeal bond to be forfeited and applied to the victim restitution in this case. *See Letscher*, 888 N.W.2d at 886.

REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $5.67, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

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

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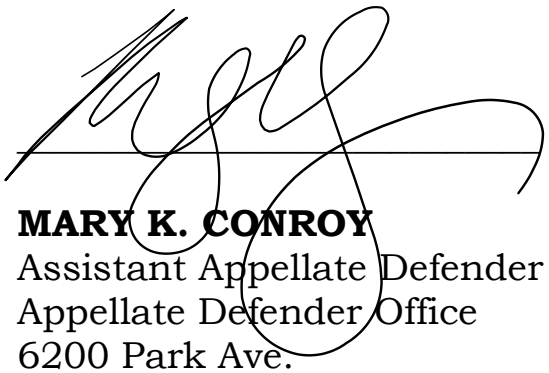

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