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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 REPLY BRIEF AND ARGUMENT

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STATEMENT OF THE CASE

COMES NOW the Defendant–Appellant Shannon Paige Hightower, pursuant to Iowa Rule of Appellate Procedure 6.903(4), and hereby submits the following argument in reply to the State's brief filed on or about November 15, 2023. While the Defendant–Appellant's brief adequately addresses the issues presented for review, a short reply is necessary to address certain contentions raised by the State.

ARGUMENT

I. The appellate court has jurisdiction over this appeal because Hightower has established good cause.

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.*

As outlined in her opening brief, Hightower asserted she established good cause for this appeal in several ways, including by way of the arguments in Division II, III, and IV, which are all challenges to her sentences. (Def. Br. pp. 27–31). Hightower's argument is consistent with the Court's opinion in *State v. Rutherford*, 997 N.W.2d 142 (Iowa 2023), which came out after Hightower filed her brief. In *Rutherford*, the Iowa Supreme Court confirmed what it stated in the *Wilbourn* decision: when a defendant establishes good cause for the appeal by challenging a discretionary sentence, the appellate court has "jurisdiction over the entire appeal." *See id.* at 146 (citations omitted). Thus, as Hightower raised several challenges to her discretionary sentence, this Court clearly has jurisdiction of the *entire* appeal. *See id.*

II. Iowa caselaw establishes the Court may address a challenge to a guilty plea on direct appeal when the defendant is not adequately advised on the right to file a motion in arrest of judgment and the consequences of failing to file the motion, even following the recent amendments to Iowa Code chapter 814.

The State's brief starts and is based on an incorrect premise. In its routing statement, the State asserts that "[f]ollowing the adoption of Iowa Code section 814.6(1)(3) and 814.29, Iowa's appellate courts have held that filing a motion in arrest of judgment is a prerequisite to permit an appellate court to review an attack on a plea." (State's Br. p. 16). This assertion, however, is only partially true. It is correct that Iowa appellate courts have rejected numerous challenges to guilty pleas. However, the Iowa Supreme Court has never held a defendant must file a motion in arrest of judgment for the appellate court to have the authority to review a guilty plea challenge. Rather, in numerous decisions following the adoption of Iowa Code sections 814.6(1)(a)(3) and 814.29, the Supreme Court has consistently declared an avenue where a defendant is still able to attack their guilty plea on direct

appeal—where a defendant is inadequately advised of their right to file a motion in arrest of judgment and the consequences of the failure to file said motion.

In *State v. Treptow*, the Iowa Supreme Court examined whether a defendant who had entered a guilty plea had good cause for his appeal. *State v. Treptow*, 960 N.W.2d 98, 109 (Iowa 2021). Ultimately, the Court determined he did not have a legally sufficient reason to appeal, and therefore good cause, for his appeal. *See id.* In doing so, the Court defined "a legally sufficient reason [a]s a reason that would allow a court to provide some relief." *Id.* The Court ultimately concluded that Treptow's "failure to file a motion in arrest of judgment preclude[d] appellate relief." *See id.* (citing Iowa R. Crim. P. 2.24(3)(a)). However, the Court's discussion did not end there; it went on to explain that the court "has recognized two exceptions to this bar, but neither exception would allow for the possibility of relief" for Treptow. *Id.* The Court stated:

> First, we have recognized a defendant may challenge his guilty plea on appeal despite not filing a motion in arrest of judgment 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. . . .
>
> Second, we have allowed a defendant to indirectly challenge his guilty plea on appeal despite not filing a motion in arrest of judgment "if the failure to file a motion in arrest of judgment resulted from ineffective assistance of counsel." Because we have just upheld the constitutionality of section 814.7, this court is without authority to decide ineffective-assistance-of counsel claims on direct appeal. Thus, the second exception no longer provides an avenue for relief on direct appeal.
>
> . . .
>
> The defendant has not advanced a legally sufficient reason to pursue an appeal as a matter of right. The defendant was adequately advised of the necessity of filing in a motion in arrest of judgment to challenge his guilty plea and the consequences of failing to do so. Upon being properly advised of his right and the consequences of waiving that right, the defendant waived the right and proceeded to immediately sentencing. The defendant has no right to assert a claim of ineffective assistance of counsel on direct appeal, and this court has no authority to decide a claim of ineffective assistance of counsel n direct appeal. Under the circumstances, the appellate courts cannot provide the defendant with relief. . . .

Id. at 109–10 (internal citations omitted).

This discussion is notable, because it notes there is an avenue for relief on direct appeal if the defendant was not

adequately advised of the necessity of filing a motion in arrest of judgment and the consequences of failing to do so. *See id.* Thus, perhaps unsurprisingly, the Court's subsequent opinions also reflect this proposition.

In its recent decision in *State v. Rutherford*, 997 N.W.2d 142 (Iowa 2023), the Court noted that "Rutherford failed to file a motion in arrest of judgment, and he does not dispute that he was advised of the need to file the motion and the consequences of failing to do so." *Rutherford*, 997 N.W.2d at 146 (citation omitted). It then stated, "The *only other way around the appeal bar*—through an ineffective-assistance-of-counsel claim—is seemingly cut off by Iowa Code section 814.7 . . . ." *Id.* (citation omitted). Thus, again, the Court recognized that a defendant who was not adequately advised of their motion-in-arrest-of-judgment rights and consequences was able to pursue their challenge to the guilty plea on direct appeal, as a recognized exception to the requirement of filing a motion in arrest of judgment. *See id.* at 148 ("[A]s long as a defendant is adequately informed of the need to file a motion

in arrest of judgment and the consequences for failing to do so, the only way around that failure is through an ineffective-assistance-of-counsel claim.”).

Though no Iowa Supreme Court case has *squarely* held a defendant who was inadequately advised of their motion-in-arrest-of-judgment rights may still directly challenge their guilty plea on direct appeal, several cases between *Treptow* and *Rutherford* indicate they may bring this attack. *See, e.g.*, *State v. Hanes*, 981 N.W.2d 454, 455–56 (Iowa 2022) (“But this defendant admittedly was advised of the requirement to file a motion in arrest of judgment to preserve the issue for appeal and we again hold his failure to do so precludes relief in this direct appeal.”); *State v. Tucker*, 959 N.W.2d 140, 153 (Iowa 2021) (citation omitted) (“We have recognized two exceptions to this bar, but neither exception would allow for the possibility of relief on the facts of this case. First, we have recognized a defendant may challenge his guilty plea on direct appeal despite not filing a motion in arrest of judgment where the district court failed to adequately advise the defendant of the

necessity for filing a motion in arrest of judgment and the consequences of not filing a motion in arrest of judgment. . . . Here, Tucker was adequately advised and waived that right.”). In its decisions following the legislative amendments to chapter 814, the Supreme Court consistently noted that the bar for failing to file a motion in arrest of judgment contained in Iowa Rule 2.24(3)(a) does not apply when the defendant is inadequately advised. As Justice McDermott emphasized in his concurring opinion in *Rutherford*,

> “Rule 2.24(3)(a)’s requirement that defendants must file a motion in arrest of judgment before we will consider a plea challenge on appeal is not inviolate. . . . [W]e do not require a motion in arrest of judgment to challenge a guilty plea in cases where a judge fails to advise the defendant that such a motion is required. . . . When the court neglects this duty, we excuse a defendant’s failure to file a motion in arrest of judgment and will decide in a direct appeal—*on the merits*—challenges to a guilty plea. Our hard line requiring motions in arrest of judgment when the court is alleged to have violated rule 2.8(2) all but disappears when the court is alleged to have violated subsection *d*.”

Rutherford, 997 N.W.2d at 149–50 (McDermott, J., concurring). The Court of Appeals has also interpreted these

decisions as allowing it to consider the claims on the merits when there is a faulty motion-in-arrest-of-judgment advisory. *See, e.g.*, *State v. Vinnink*, No. 20–1629, 2021 WL 3378547, at *2–3 (Iowa Ct. App. August. 4, 2021) (unpublished decision) (finding good cause and considering the appellant's argument his plea lacked a factual basis because the "written guilty plea did not include adequate information regarding his right and the consequences surrounding a motion in arrest of judgment").

The State has not established that the long-established precedent holding Rule 2.8(2) codifies the due process mandate that a waiver of constitutional rights must be made voluntarily is incorrect. Nor has it provided a compelling reason why the Court should not continue its practice of excusing a defendant from the requirement of filing a motion in arrest of judgment when they were inadequately advised of the necessity and consequences of the motion. As such, stare decisis requires the appellate court to directly consider a defendant's guilty plea challenge on direct appeal when they

are not adequately advised regarding the motion in arrest of judgment. *See State v. Brown*, 930 N.W.2d 840, 854 (Iowa 2019) (discussing the general principles surrounding the "venerable doctrine of stare decisis").

Thus, the appellate court may *directly consider* the defects in Hightower's guilty plea *because it violated rule 2.8(2)(d), thereby excusing her of Rule 2.24(3)'s requirement* of filing a motion in arrest of judgment. *See id.* This Court has never found it lacks authority to decide such cases directly; the Court only has no authority to determine whether counsel was ineffective for failing to file a motion in arrest of judgment, which Hightower does not argue in the appeal.

The Court should find that a defendant independently establishes "good cause" to appeal a guilty plea when they are inadequately advised on the necessity of filing a motion in arrest of judgment and the consequences of failing to file the motion. *See* Iowa Code § 814.6(1)(a)(3) (2021). This is because, as the Iowa Supreme Courts have long held and recently affirmed, the faulty advisement provides an exception to the

appeal bar outlined in Iowa Rule of Criminal Procedure 2.24(3) and allows the Court to directly consider the plea challenge on direct appeal. Because the Court may provide the defendant relief, there is a legally sufficient reason for the appeal; thus, the defendant has established good cause. *See Treptow*, 960 N.W.2d at 109.

III. The motion-in-arrest-of-judgment advisory contained in Hightower's guilty plea did not adequately inform her of the necessity of filing the motion and the consequences of her failing to do so.

The State largely relies on the Iowa Supreme Court's decision in *State v. Damme*, 944 N.W.2d 98 (Iowa 2020), to argue that Hightower's guilty plea contained an adequately advisory concerning the necessity and consequences of filing or failing to file a motion in arrest of judgment. *See* (State's Br. p. 19–20). Any reliance on *Damme* is misplaced. As the Court noted, Damme did not seek to vacate her guilty plea; thus, it categorized her claim as "puzzling." *See State v. Damme*, 944 N.W.2d 98, 107 (Iowa 2020). Because there was no challenge to the underlying guilty plea, the adequacy of the

motion in arrest of judgment advisory was inconsequential and quickly disposed of by the Court. *See id.*

The motion in arrest of judgment advisory contained in Hightower's guilty plea is similar to the advisory the Iowa Supreme Court found inadequate in *State v. Fisher*, 877 N.W.2d 676 (Iowa 2016). In *Fisher*, the Court noted, "Absent from Fisher's form was any statement that by signing it or proceeding to immediate sentencing, Fisher was giving up his ability to contest the plea in the future, even if the conviction resulted in consequences . . . that Fisher may not have been told about before pleading guilty." *Id.* at 682. Thus, the Court found the plea did not substantially comply with Rule 2.8(2)(d). Accordingly, the Court considered Fisher's challenge to his guilty plea on direct appeal, even despite the plea's assurance that his attorney had explained the procedure for filing a motion in arrest of judgment. *See id.*

Similar to the plea in *Fisher*, Hightower's guilty plea did not make it clear that she would give up the ability to contest the plea in the future even if incorrectly advised of the

consequences of the plea. *See id.* Furthermore, Hightower's guilty plea provides an additional wrinkle. As discussed in the opening brief, the language in the plea ties the need to file a motion in arrest of judgment with the request to be sentenced immediately. *See* (Plea §§ 24, 25) (App. p. 17). Thus, the language does not make it clear that in order to have a chance to challenge her guilty plea in the future, Hightower had to timely file a motion in arrest of judgment *even if she did not request to be immediately sentenced.* (Plea §§ 24, 25) (App. p. 17). Therefore, this Court should find Hightower's guilty plea does not substantially comply with Iowa Rule of Criminal Procedure 2.8(2)(d). As such, this Court may directly consider her challenge to the defects contained in the plea. *See Rutherford*, 997 N.W.2d at 146, 148.

IV. This Court may address Hightower's constitutional challenges to Iowa Code section 814.29, and it should conclude the statute does not apply to Hightower.

As a preliminary matter, Hightower's constitutional challenges are properly before this Court for review. *Cf.*

(State's Br. p. 29). It is unnecessary that Hightower have argued the constitutional challenges to section 814.29 in district court in order to have the appellate court consider them now. The challenges Hightower makes on appeal are similar to those raised and decided by the Supreme Court in several recent appellate cases regarding other amendments to chapter 814. *See, e.g.*, *Treptow*, 960 N.W.2d 103–108; *Brief for Defendant–Appellant*, *State v. Treptow*, 960 N.W.2d 98 (Iowa 2022) (No. 20–0280), 2020 WL 5705867, at *34–35 ("Challenges to the amendments to Iowa Code sections 814.6 and 814.7 and the enactment of Iowa Code section 814.29 are of a nature which cannot be preserved in district court.").

Furthermore, the challenges that Hightower makes to section 814.29 apply to *the appellate court's application* of the statute to her, not the district court's; this is because, as discussed, the district court did not make Hightower aware of nor did it give her the opportunity to present evidence to meet the burden provided in section 814.29. Without that knowledge and opportunity, Hightower can hardly be faulted

for failing to raise the constitutional challenges below. Additionally, it makes little sense to have the district court consider whether the appellate court's *future* application of the statute to the appellant violates her constitutional rights. Rather, such a determination is for *the appellate court* to make, as it concerns its own actions.

In addition, the Court has addressed "issues that are 'incident' to a determination of other issues properly presented" even where those issues were not raised in district court proceedings below. *See Feld v. Borkowski*, 790 N.W.2d 72, 84 (Iowa 2010) (citing *Presbytery of Se. Iowa v. Harris*, 226 N.W.2d 232, 234 (Iowa 1975)). Here, the question of whether the statute is constitutional is necessarily intertwined with the issue of whether section 814.29 applies to Hightower and if she has established the burden outlined in the statute. As such, the Court should consider and address Hightower's arguments regarding the constitutionality of section 814.29 on appeal as incident to the determination of issues she properly presents in the direct appeal. *See id.*

Moreover, the Iowa Supreme Court has "been willing to relax ordinary rules of issue preservation based on notions of judicial economy and efficiency." *Feld*, 790 N.W.2d at 84; *see also DeVoss v. State*, 648 N.W.2d 56, 60–63 (Iowa 2002) (noting that the appellate court may affirm an evidentiary ruling where the record reveals an alternate ground for admission of evidence). It makes little sense to require Hightower to go through yet another proceeding when this Court can resolve her argument regarding the statute's constitutionality in this case and on this record. There is no claim by the State that it would have presented any or different evidence if Hightower made this particular argument in the trial court. Understandably so, as the arguments Hightower makes regarding the statute's constitutionality are purely legal challenges and not based on any factual determinations. *See State v. Gaskins*, 866 N.W.2d 1, 43 n.20 (Iowa 2015) (Waterman, J., dissenting) (noting the State argued that if the defendant had raised the abandonment of the automobile exception in district court, the State could

have developed a record at the suppression hearing on that issue); *Feld*, 790 N.W.2d at 85 ("Nor is this a case where the factual record developed below is inadequate, thereby preventing meaningful appellate review.").

Nor is this a case where the State did not have the opportunity to advocate for its position. Rather, the opposite is true: in its brief, the State was given the opportunity to and did respond to Hightower's challenges to section 814.29. Accordingly, the general principles behind the error preservation doctrine do not support the State's assertion that the Court should not address Hightower's challenges to the statute. Moreover, the interests of judicial economy and efficiency are served if the Court addresses whether the section 814.29 should even be applied to defendants who were inadequately advised regarding the necessity and the consequences of failing a motion in arrest of judgment, and if so, the constitutionality of that statute. Accordingly, this Court should consider Hightower's challenges to section 814.29.

Moreover, the vast majority of the cases within the criminal justice system resolved with guilty pleas. *See Rhoades v. State*, 880 N.W.2d 431, 436 n.10 (Iowa 2016) (citing data indicating that ninety-six percent of cases were resolved by plea bargaining from 2008 to 2012); *State v. Patten*, 981 N.W.2d 126, 127 (Iowa 2022) (citation omitted) ("'Estimates suggest that ninety-five percent of criminal convictions are based on guilty pleas . . . .'"). "No less an authority than the United States Supreme Court has declared that plea-bargaining '*is* the criminal justice system.'" *Southman v. State*, 957 N.W.2d 512, 540 (Iowa 2021) (McDermott, J., dissenting) (quoting *Missouri v. Frye*, 566 U.S. 134, 144 (2012)) (emphasis in original). "*Criminal defendants surrender important constitutional rights by pleading guilty*. Due process thus requires that defendants who enter guilty pleas do so 'voluntarily and intelligently.'" *Id.* at 533 (quoting *State v. Philo*, 697 N.W.2d 481, 488 (Iowa 2005)) (emphasis added). Given the reality of most cases being resolved by guilty pleas, Hightower raises a broad issue of public importance

that is likely to reoccur. The Court's guidance regarding the applicability and constitutionality of section 814.29 is necessary for defendants, practitioners, and lower courts.

When a defendant is not adequately advised of the rights and consequences of filing or not filing a motion in arrest of judgment, their ability to satisfy the burden in Iowa Code section 814.29 is clearly compromised. Under the State's interpretation, it does not matter if a defendant is not advised of their motion-in-arrest-of-judgment rights or if the district court gives them an opportunity to establish their burden of proof. (State's Br. pp. 30–33). Such an interpretation is at odds with the defendant's constitutional rights they surrender when pleading guilty and their rights to due process. Rather, "[p]rior cases establish . . . that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced . . . through the judicial process must be given a meaningful opportunity to be heard." *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971).

In recognition that is patently unfair to apply an appellate bar to a defendant who was not adequately advised regarding a motion in arrest of judgment, pursuant to Iowa Rule of Criminal Procedure 2.8(3)(d), Iowa appellate courts allow those defendants to directly challenge the guilty plea. *See, e.g.*, *Rutherford*, 997 N.W.2d at 146 (citation omitted); *Tucker*, 959 N.W.2d at 153. This logic applies equally to the burden set forth in Iowa Code 814.29. Without being aware of the necessity of filing a motion in arrest of judgment, a defendant does not have an opportunity to establish that burden.

"The process of justice must always be fair." *Schmidt v. State*, 909 N.W.2d 778, 800 (Iowa 2018) (Cady, C.J., concurring specially). It is unfair to apply this burden to a defendant who does not know it exists because they were not informed of the necessity of filing a motion in arrest of judgment (in violation of the Rules of Criminal Procedure); thus, they have no meaningful opportunity to establish the burden in section 814.29. *See Boddie*, 401 U.S. at 378

(citations omitted) ("What the Constitution does require is 'an opportunity . . . granted at a meaningful time and in a meaningful manner,' . . . [and] 'for [a] hearing appropriate to the nature of the case.'"). Excusing a defendant from the burden outlined in section 814.29 when they were inadequately informed regarding the motion in arrest of judgment promotes fairness and justice, and it reinforces the integrity of and encourages confidence in the criminal justice system as a whole.

To the extent the State argues Hightower had this opportunity after sentencing when the district court denied her motion to withdraw her guilty plea, it is incorrect. In the motion, Hightower specifically requested "a hearing set for review of the issues concerning the plea." (11/18/2002 Mot.) (App. pp. 34-35). The State had not even filed a resistance to the motion when the district court denied Hightower's request for a hearing. The district court's denial effectively prevented Hightower from having an opportunity to present evidence that could establish she more than likely would not have pleaded

guilty if she had been aware of the plea's defects. *See* (11/21/2022 Order) (App. pp. 32-34). Thus, if the Court declines to bypass the burden set forth in Iowa Code section 814.29 and finds the information in the record is insufficient to establish that burden, it should remand for hearing in the district court. Due process requires that Hightower has the opportunity to present evidence and establish she would not have entered the guilty plea without the plea's defects. The district court violated her constitutional rights by not allowing her a meaningful opportunity to present evidence regarding the burden in section 814.29 and what she believed was called for in the guilty plea and the plea agreement. *See Boddie*, 401 U.S. at 377.

The principle of finality, while important, is less so when considering the context it arises in. Because a defendant waives significant rights when pleading guilty, it is imperative that they do so unknowingly and voluntarily. "[F]inality can be frustrated by failure to adhere to proper procedures at the trial court level." *Blackledge v. Allison*, 431 U.S. 63, 84 (1977)

(Powell, J. concurring). “If all participants in the process at the plea stage are mindful of the importance of adhering carefully to prescribed procedures and of preserving a full record thereof, the causes of justice and finality both will be served.” *Id.*

Thus, in order to serve both justice and finality, the defense, and in particular an individual criminal defendant, should not be required to bear the entire burden of ensuring Rule 2.8 is followed. As the Iowa Supreme Court has noted, “[R]ule 2.8(2)(b) embodies procedural safeguards that attempt to ensure the defendant enters his or her guilty plea knowingly and intelligently.” *State v. Weitzel*, 905 N.W.2d 397, 403 (Iowa 2017); *see also State v. Loye*, 670 N.W.2d 141, 151 (Iowa 2003) (citations omitted) (“Rule 2.8(2)(b) codifies this due process mandate.”). The other participants in the plea process—the judge accepting the guilty plea and the prosecuting attorney—must also bear some responsibility for ensuring the plea complies with Rule 2.8. *See id.* Because defense counsel, *the prosecuting attorney*, and the district

court all failed to ensure Rule 2.8 was followed, the appellate court need not give heavy weight to the general principle that the State is entitled to finality.

In this case, the record establishes that the prosecuting attorney reviewed and initialed a portion of the guilty plea. (Plea ¶9) (App. p. 14). Thus, it is clear the State had the opportunity to examine the plea before it was filed and to correct any errors, including the inadequate motion-in-arrest-of-judgment advisory and the defects in the plea discussed in the opening brief. Moreover, the State also had the opportunity to review the plea after it was filed and request a hearing to correct these errors. The Supreme Court has recognized that the "prosecutor owes a duty to the defendant . . . [and] the prosecutor's primary interest should be to see that justice is done, not to obtain a conviction." *State v. Plain*, 898 N.W.2d 801, 818 (Iowa 2017) (citation omitted).

Given these principles, the Court has "impose[d] special duties on prosecutors to ensure they cat in accordance with the special role with which they are entrusted." *See id.*

(citation omitted). The Court should find the State has a duty to review a plea and ensure that it complies with Rule 2.8, and accordingly, due process. *See id.* When it fails to do so, the State can hardly complain on appeal regarding the lack of finality of the plea itself, particularly when the plea's defects implicate due process. *See Weitzel*, 905 N.W.2d at 402–03 (citation omitted) (noting that noncompliance with Rule 2.8 implicates whether a defendant voluntarily entered the plea).

Additionally, the district court has an independent duty to ensure a guilty plea is knowingly and voluntarily entered prior to accepting it. *See* Iowa R. Crim P. 2.8(2)(b) (2021) ("The court . . . shall not accept a plea of guilty without first determining that the plea is made voluntarily and intelligently). It is a reasonable expectation for the district court to be familiar with the current state of the law and analyze it properly when presented with a guilty plea. *See, e.g., State v. Neiderbach*, 837 N.W.2d 180, 229 (Iowa 2013) ("District court judges are conscientious, they know the law, and they can be expected to apply the law in a dispassionate

manner.”). Indeed, given the prevalence of plea-bargaining in our criminal justice system, it can be assumed that one of the main tasks of a district court on the criminal docket is to accept and/or take guilty pleas. With two attorneys and a judge failing to ensure the proper plea procedures were followed, it is hardly reasonable to expect Hightower, an untrained layperson, to know the applicable law and assume the burden of the plea’s failures. *See State v. Sutton*, 254 P.3d 62, 67 (Idaho 2011) (“[T]here is no indication in the record that Sutton knew any more about the law than the State or the trial court . . . .”).

V. The district court’s references to “making [the victim] whole” and “restitution” were not “unfortunate phraseology.” The statements and the context in which the court made them establish the sentencing court considered an improper factor.

The State concedes it is improper for a district court to consider the “failure to pay a then-non-existent restitution obligation,” noting that “Hightower could not have failed to fulfill an obligation that did not yet exist.” *See* (State’s Br. p. 55). Yet, the State attempts to frame the district court’s

statements as “unfortunate phraseology,” arguing the “Court’s use of the word ‘restitution’ was not in the legal sense of an order under Iowa Code chapter 910.” *See* (State’s Br. p.55). This argument is belied by the record and the context in which the district court made the remarks.

As outlined in the opening brief, the district court directly referenced that Hightower allegedly took $16,000 dollars from the victim. The district court noted that it had been two and a half years since the State charged Hightower with the crimes. It stated:

> *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.*

(Sentencing p.19 L.21–p.22 L.5) (emphasis added). The district court concluded saying telling Hightower, “even though you are working and had capabilities of doing so, you have done nothing to make any victim restitution.” (Sentencing p.22

L.11–13). The court suspended the fines and surcharges, emphasizing it was "because, frankly, I want you to concentrate on making victim restitution." (Sentencing p.21 L.21–23).

These statements clearly indicate that the district court was considering the fact that Hightower failed to "fulfill an obligation that did not yet exist." *See* (State's Br. p. 55). The district court specifically enumerated the approximate amount of the victim restitution claim and then stated that Hightower had "paid zero dollars in restitution." It then referenced Hightower's fulltime job and scolded her for not attempting to repay the victim in the two and a half years since the charges arose. These statements are not unfortunately phraseology but a clear consideration of restitution in the legal sense. The consideration of a defendant's failure to pay restitution pursuant to chapter 910 prior to sentencing is an improper factor for the court to consider, as the State concedes. *See* (State's Br. p. 55; Def. Br. pp. 68–76). Resentencing in front of

a different judge is required. *See State v. Lovell*, 857 N.W.2d 241, 243 (Iowa 2014) (citation omitted).

Lastly, it is also notable that the sentencing court later took it upon itself to attempt to collect the restitution for the victim. *See* (11/21/2022 Order) (App. p. 37) ("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."). As the State concedes, the district court had no authority for this condition regarding the appeal bond, and as such, the court's order was illegal. The district court's illegal order is illustrative of the fact that the amount of restitution Hightower owed the victim was still forefront in the court's mind in the three days following the sentencing hearing. Accordingly, the provision in the court's later order also supports the conclusion the district court

considered the improper factor that Hightower had not started repaying restitution back to her victim.

VI. Hightower's challenge to the forfeiture of her appellate bond is not moot, and this Court should consider both of her challenges to the appeal bond.

In its error preservation section in Division IV concerning Hightower's appellate bond, the State suggests her challenges are moot and the appellate court does not need to address them. *See* (State's Br. p. 74). This is incorrect. As the State later concedes in its brief, the district court illegally ordered the forfeiture of Hightower's appeal bond to pay the victim restitution. *See* (11/21/2022 Order) (App. p. 37) ("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."); (State's Br. p. 70–71) ("The State recognizes that portions of the Iowa Supreme Court's opinion in *Letscher* foreclose a district court from

ordering the forfeiture of an appeal bond in the manner that occurred here.”).

As such, the issue is not moot. The Court must reach and decide this issue, as it still presents a “justiciable controversy.” *See State v. Briggs*, 666 N.W.2d 573, 576 (Iowa 2003) (citation omitted). The district court’s unlawful forfeiture of the appellate bond would still be in effect if not addressed by this Court. The appellate court must vacate the unlawful portion of the district court’s order. The failure to do so would not only allow the clerk of court to forfeit Hightower’s posted appeal bond towards victim restitution, it would condone the district court’s unlawful order to the clerk to do so. Contrary to the State’s assertion, a decision this Court makes regarding the bond forfeiture still has an effect on Hightower, and as such, the Court should reach the merits of her argument. *See id.*

Additionally, despite recognizing that challenges to bonds are generally moot, Iowa appellate courts have routinely still addressed such challenges. *See, e.g.*, *State v. Formaro*, 638

N.W.2d 720, 726 (Iowa 2002); *State v. Kellogg*, 534 N.W.2d 431, 433 (Iowa 1995); *State v. Chew*, No. 17–1692, 2018 WL 5850225, at *8–10 (Iowa Ct. App. Nov. 7, 2018) (unpublished decision); *State v. Olofson*, No. 17–0737, 2018 WL 1098906, at *2 (Iowa Ct. App. Feb. 21, 2018) (unpublished decision); *State v. Maxwell*, No. 15–1392, 2016 WL 6652361, at *12 (Iowa Ct. App. Nov. 9, 2016) (unpublished decision). In doing so, the courts have generally cited the principle that such challenges are of a "pressing public interest" and are "highly likely to recur yet evade our review." *See Briggs*, 666 N.W.2d at 576–77. As such, the Court should also reach the issue of whether the appellate bond here was excessive.

CONCLUSION

For the reasons stated above and in the original brief and argument, Defendant–Appellant Shannon Paige Hightower requests the Court vacate her guilty plea and remand for further proceedings. Alternatively, she asks that the Court remand for a new sentencing hearing in front of a different judge and that the Court vacate the portion of the district court's order requiring her appeal bond be forfeited and applied to the victim restitution.

ATTORNEY'S COST CERTIFICATE

The undersigned hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $0, 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 BRIEFS

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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