IN THE SUPREME COURT OF IOWA
Supreme Court No. 19-1159

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAQUON BOLDON,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR BLACK HAWK COUNTY
THE HONORABLE JOEL A. DALYRYMPLE, JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

Because this case can be decided based on existing legal principles transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3); *State v. Macke,* 933 N.W.2d 226 (2019); *State v. Martin,* 877 N.W.2d 859 (Iowa 2016); *State v. Reed,* No.16-1703, 2017 WL 2183751 (Iowa Ct. App. Jan. 9, 2020); *State v. Smith,* No.16-1325, 2017 WL 2684350 (Iowa Ct. App. June 21, 2017).

STATEMENT OF THE CASE

Nature of the Case

The defendant, Daquon Boldon, directly appeals from the district court's entry of judgment and sentence on his guilty pleas to possession of firearms as a felon, interference with official acts while in possession of a firearm, and carrying weapons, two class D felonies and an aggravated misdemeanor offense, in Black Hawk County FECR226296 and FECR226943. *See* Iowa Code §§ 719.1, 724.26(1), 724.4(1). On appeal the defendant argues that (1) application of recent amendments to Iowa Code section 814 to bar direct review of his guilty plea and ineffective assistance claims violates his constitutional rights, or alternatively, there is good cause to warrant review, (2) his trial counsel was ineffective in failing to object to the State's alleged breaches of the plea agreement, and (3) the district

court improperly considered his multiple juvenile delinquency adjudications in sentencing him to consecutive prison terms.

Course of Proceedings

The State accepts the defendant's summary of the proceedings below. Iowa R. App. P. 6.903(3).

Facts

The minutes of testimony in FECR226943 establish that shortly after midnight on August 2, 2018, defendant Boldon was a passenger in a vehicle subject to a traffic stop in Waterloo. Minutes (FECR226943); App.-----. Upon stopping, Boldon exited the car along with another passenger, Torey Dunn, and both fled from officers on foot. *Id.* After a short pursuit, Boldon and Dunn were both taken into custody. *Id.* Backtracking along their routes, officers located a .45 caliber Smith & Wesson handgun discarded by Boldon during the chase as well as a firearm thrown by Dunn. *Id.* Boldon and Dunn admitted to throwing those guns. *Id.*

At the March 2019 plea hearing, Boldon admitted to the factual basis supporting his guilty pleas to interference with official acts while armed with a loaded firearm and to carrying weapons. Plea Tr.p.12, line 9-p.15, line 22. The district court accepted Boldon's

guilty pleas in FECR226943 as knowing, voluntary, and supported by a factual basis. Plea Tr.p.16, lines 3-24.

The minutes of testimony in FECR226296 establish that Boldon was adjudicated delinquent on the basis of conduct involving firearms in 2016 and 2017 that would constitute a felony if committed by an adult. Minutes (FECR226296); App.-----. At the plea hearing, Boldon admitted to three prior juvenile delinquency adjudications and that he was in possession of a firearm as charged on August 2, 2018. Plea Tr.p.10, line 15-p.12, line 8. The court accepted Boldon's guilty plea to possession of a firearm as a felon in FECR226296. Plea Tr.p.15, line 23-p.16, lines 1-2, 17-24.

Additional relevant facts will be discussed as part of the State's argument.

ARGUMENT

I. Application of the Amendments to Iowa Code Chapter 814 to the Defendant's Guilty Plea and Ineffective Assistance Challenges on Direct Appeal Does Not Violate Defendant's Constitutional Rights. In Any Regard, the Defendant Has Not Shown Good Cause to Warrant Direct Review.

Jurisdiction/Dismissal

On July 1, 2019, the Senate File 589 amendments to Iowa Code chapter 814 became effective, stripping appellate courts of the

jurisdiction to hear most guilty plea appeals and granting the authority to review guilty pleas other than class A felonies only after a showing of "good cause." *See State v. Macke*, 933 N.W.2d 226, 227 (Iowa 2019) (summarizing amendments to Iowa Code section 814.6). In considering the application of SF589 to pending cases, the Supreme Court unanimously held that the amendments "do not apply to a direct appeal from a judgment and sentence entered before July 1, 2019." *Id.* at 228. The judgment and sentence in this case was entered on July 1, 2019—not before. *See* Sent. Tr.p.1, lines 15-18, p.16, lines 3-20; Sent. Orders (7/01/19); Notice (7/05/19); App. 21-26. As a result, the amendments to section 814.6 apply. *See also State v. Trane*, 934 N.W.2d 447, 464-65 (Iowa 2019) (summarizing *Macke*, noting that SF589 does not apply "if the appeal was already pending on July 1, 2019," but does apply to later appeals); *State v. Draine,* 936 N.W.2d 205, 206 (Iowa 2019). This guilty plea appeal should be dismissed absent a showing of "good cause." *See* Iowa Code § 814.6(1)(a)(3) (effective July 1, 2019).

Further, amended Iowa Code section 814.7 provides that claims of ineffective assistance of counsel "shall not be decided on direct appeal from the criminal proceedings." Iowa Code § 814.7 (effective

July 1, 2019). Similarly, amended section 814.6(2)(f) provides that in a guilty plea setting discretionary review of order denying a motion in arrest of judgment on grounds other than ineffective assistance of counsel may be permitted. Iowa Code § 814.6(2)(f) (7/01/19). Therefore, to the extent Boldon argues trial counsel breached the parties' plea agreement as to its sentencing recommendation, such claims may only be considered in a postconviction proceeding. In addition, sentencing errors can be reviewed by filing a motion to correct an illegal sentence in the district court or by a petition for a writ of certiorari. *See State v. Propps*, 897 N.W.2d 91, 97 (Iowa 2017).

General Savings Clause

Boldon initially argues that application of the amendments to sections 814.6 and 814.7 in his case when his guilty plea was entered prior to July 1 but sentencing took place on July 1 violates the General Savings Clause of Iowa Code section 4.13(1). Appellant's Brief pp.28-30. He also notes that sentencing was originally scheduled well before July 1 but that at least two continuances, one requested by each party, resulted in the later July 1 sentencing date. Section 4.13(1) provides that the revision or amendment of a statute does not

affect any right previously "acquired, accrued, accorded, or incurred" under the statute. Iowa Code § 4.13(1)(b).

The law does not support Boldon's claim of a vested right. *Bruner v. United States*, 343 U.S. 112, 117 (1952) (statute that "simply reduced the number of tribunals authorized to hear and determine such rights and liabilities" did not alter any substantive rights). When the legislature modifies appellate jurisdiction, it "has not altered the nature or validity of [one party's] rights or the [other party's] liability but has simply reduced the number of tribunals authorized to hear and determine such rights and liabilities." *Id.*; *see also Hallowell v. Commons*, 239 U.S. 506, 508 (1916) (holding jurisdiction-stripping statute "takes away no substantive right, but simply changes the tribunal that is to hear the case").

In *Iowa Dep't of Transp. v. Iowa Dist. Ct. for Scott County*, this Court considered the application of the general savings clause to the repeal of Iowa Code section 321J.4(3)(b) (1995), which provided an opportunity for criminal defendants who suffered a six-year license revocation to have their eligibility for a driver's license restored after two years. *Iowa Dep't of Transp. v. Iowa Dist. Ct. for Scott County*, 587 N.W.2d 781 (Iowa 1998). The case involved defendants for whom

the two-year period had expired prior to the repeal of the statute. They argued that they had acquired a right to a hearing to seek restoration of their eligibility and that such right could not be taken away by the repeal of the statute. *Id*. at 783.

This Court rejected that claim, holding that "a litigant's interest in a certain procedure is not an accrued right or privilege in the context of a savings statute." *Id*. at 783-84. Other courts agree. *See, e.g*., *State ex rel. Buechler v. Vinsand*, 318 N.W.2d 208, 209-10 (Iowa 1982) (stating that savings statutes do not apply to procedural statutes; procedural statutes do not "create or take away vested rights"); *Denton v. Moser*, 241 N.W.2d 28, 31 (Iowa 1976) ("No one can claim to have a vested right in any particular mode of procedure for an enforcement or defense of his rights."); *Bascom v. Dist. Ct.*, 231 Iowa 360, 362–63, 1 N.W.2d 220, 221 (1941) (same); *see also* 14 Uniform Laws Annotated *Model Statutory Construction Act* § 14 commentary at 405 (1990) (in commenting on prospective versus retrospective application of a statute, the commissioners state, "[i]f a procedural statute is amended, the rule is that the amendment applies to pending proceedings as well as those instituted after the amendment.").

Senate File 589 does not affect Boldon's ability to pursue his ineffective assistance of counsel claims; it merely changes the tribunal authorized to hear them in the first instance. He can proceed under Iowa Code chapter 822. The savings clause does not "preserve the right to have a claim heard by any particular tribunal." *Barthelemy v. J. Ray McDermott & Co.*, 537 F.2d 168, 172 (5th Cir. 1976). Because Boldon's interest in a specific procedure, direct appeal versus postconviction relief, is not an accrued right or privilege for purposes of section 4.13(1), that section does not apply in this case. *See Iowa Dist. Ct. for Scott County*, 587 N.W.2d at 783-84.

Merits

Defendant Boldon raises several constitutional challenges to application of the section 814.6 and 814.7 amendments to his case involving the entry of guilty pleas prior to July 1 but judgment and sentence entered on July 1, asserting separation of powers, equal protection, and due process violations. He also argues for adoption of a broad standard of good cause to warrant direct review of guilty plea challenges. Iowa Code § 814.6(1)(a)(3). This Court should find no constitutional violations and, in any regard, no showing of good cause.

A. Separation of Powers.

Boldon argues the new legislation violates the separation of powers. Appellant's Brief pp.30-37. The Iowa Constitution "establishes three separate, yet equal, branches of government." Iowa Const. art. III, § 1. Laws contrary to the Constitution may not stand. Iowa Const. art. XII, § 1; *Varnum v. Brien,* 763 N.W.2d 862, 875 (Iowa 2009).

The Iowa Constitution defines the jurisdiction of the Supreme Court and grants the General Assembly authority to prescribe restrictions over its appellate review:

> The supreme court shall have appellate jurisdiction only in cases in chancery, *and shall constitute a court for the correction of errors at law, under such restrictions as the general assembly may, by law, prescribe*; and shall have power to issue all writs and process necessary to secure justice to parties, and shall exercise a supervisory and administrative control over all inferior judicial tribunals throughout the state.

Iowa Const. art. V, § 4 (emphasis added). When an appellate court reviews a criminal conviction, it acts as a court for correction of errors at law. *See* Iowa R. App. P. 6.907 ("Review in equity cases shall be de novo. In all other cases the appellate courts shall constitute courts for correction of errors at law . . . ."); Iowa Code § 602.4102(1).

Therefore, the constitution subjects the appellate courts' consideration of criminal appeals to "such restrictions as the general assembly may, by law, prescribe." Iowa Const. art. V, § 4.

Article V, section 4 grants the general assembly authority limit what types of appeals the appellate courts may consider. "[W]e note that the right of appeal is not an inherent or constitutional right; it is a purely statutory right that may be granted or denied by the legislature as it determines." *James v. State*, 479 N.W.2d 287, 290 (Iowa 1991); *see also Wissenberg v. Bradley,* 229 N.W. 205, 209 (Iowa 1929) ("The right of appeal is not a constitutional right, and it is wholly within the power of the legislature to grant or deny it in either civil or criminal cases."); *State v. LePon,* No.18-0777, 2019 WL 2369887, at *2 (Iowa Ct. App. June 5, 2019) (same). The legislature, for example, may set deadlines on when a party must invoke appellate jurisdiction. *See State v. Olsen*, 162 N.W. 781, 782 (Iowa 1917) (recognizing that "[t]he right to appeal is purely statutory" and dismissing the appeal filed later than permitted by statute).

Similarly, the legislature may place amount-in-controversy limits on appeals in the appellate courts. *See Andrews v. Brudick*, 16 N.W. 275, 278–79 (Iowa 1883) (upholding a statute that precluded

appeals in the Supreme Court in cases that involved amounts less than $100). Over time, the General Assembly has flexed its constitutional authority by granting or limiting appeals in different categories of criminal cases. *See*, *e.g.*, Iowa Code § 814.6(1)(a) (denying the right to appeal judgment of sentence for a simple misdemeanor).

Article V, section 4 also grants the general assembly authority to enact procedures that restrict the appellate courts. If the General Assembly can deny the right to appeal altogether, then it follows that the General Assembly also has constitutional authority to prescribe lesser restrictions on the courts' exercise of appellate jurisdiction. *Cf. In re Durant Community Sch. Dist.*, 106 N.W.2d 670, 676 (Iowa 1960) ("If failure to provide any appeal does not violate constitutional rights, certainly the limitations placed upon courts in an appeal to them from the action of a county board or the state department in a controversy like this is not a violation of the constitutional right of due process."). For example, the legislature can exercise its Article V, section 4 authority to discontinue the practice of filing a separate pleading assigning error. *See Wine v. Jones*, 168 N.W. 318, 321 (Iowa 1918). Or the legislature can enact its own time-computation statutes

that trump the Supreme Court's supervisory order that followed a different method. *See Root v. Toney*, 841 N.W.2d 83, 87 (Iowa 2013). In the realm of criminal appeals, the General Assembly has acted to control the appellate process to expedite criminal appeals over civil appeals (Iowa Code § 814.15), to not require the personal appearance of the defendant in the appellate courts (§ 814.17), and to end appellate jurisdiction when procedendo issues (§ 814.25).

Additionally, the General Assembly has separate authority to enact procedural rules for the courts to follow. The Constitution states, "[i]t shall be the duty of the general assembly to provide for the carrying into effect of this article, and *to provide for a general system of practice in all the courts of this state*." Iowa Const. art. V, § 14 (emphasis added). "We recognize our legislature possesses the fundamental responsibility to adopt rules of practice for our courts." *Butler v. Woodbury County*, 547 N.W.2d 17, 20 (Iowa Ct. App. 1996) (citing *Iowa Civil Liberties Union v. Critelli*, 244 N.W.2d 564, 568–69 (Iowa 1976)).

The legislature has delegated some of that rule-making authority to the Supreme Court. *See* Iowa Code § 602.4201 ("The supreme court may prescribe all rules of pleading, practice, evidence,

and procedure . . . ."). However, the General Assembly retains the power to supersede any rule adopted by the Supreme Court. *See id.* § 602.4202(4) ("If the general assembly enacts a bill changing a rule or form, the general assembly's enactment supersedes a conflicting provision in the rule or form as submitted by the supreme court."). And to any extent the courts possess an inherent or common-law power to enact rules of practice, that authority ends when the legislature enacts a conflicting statute. *See Critelli*, 244 N.W.2d at 568–69 (recognizing an inherent common-law power to adopt rules "in the absence of statute").

Sections 814.6(1)(a)(3) and 814.7 properly invoke the General Assembly's constitutional authority to provide rules of practice and to prescribe limitations on the exercise of appellate jurisdiction. Because article V, section 4 grants the legislature authority to prescribe restrictions on the appellate court's jurisdiction, it can impose restrictions on how the courts exercise appellate review in criminal cases. Therefore, the legislature had constitutional authority to enact those restrictions.

Contrary to Boldon's argument, the challenged amendments do not unconstitutionally "intrude" on the Supreme Court's judicial

powers. The constitution's separation-of-powers provision generally prohibits one department of government from exercising powers belonging to another "except in cases hereinafter expressly directed or permitted." Iowa Const. art. III, § 1. The new statutes fall within specific constitutional grants of authority for the General Assembly to provide a general system of practice in all courts (article V, section 14), and to prescribe restrictions on the courts' exercise of appellate jurisdiction (article V, section 4). The generalized separation-of-powers analysis must yield to these express grants of authority empowering the General Assembly to control the procedure and jurisdiction of the appellate courts.

This Court should find no separation of powers violation in applying the amended statutes to Boldon's appeal.

B. Equal Protection.

Boldon next contends that the new legislation violates principles of equal protection. Appellant's Brief pp.37-44. He argues that the distinction in section 814.6 as to direct appeal rights between persons who have pled guilty and persons who have asserted their innocence and demanded trial is unfair. He also argues that the inability to have his ineffective assistance claim addressed on direct

appeal deprives him of a fundamental right. The State disagrees on both fronts.

The United States Constitution ensures "equal protection of the laws." U.S. Const. amend. XIV. Article I, section 6 of the Iowa Constitution similarly provides: "All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens." Iowa Const. art. I, § 6. "Iowa's constitutional promise of equal protection is essentially a direction that all persons similarly situated should be treated alike." *Varnum*, 763 N.W.2d at 878 (quotations omitted).

However, "the constitutional pledge of equal protection does not prohibit laws that impose classifications." *Id.* at 882. "Instead, equal protection demands that laws treat alike all people who are similarly situated with respect to the legitimate purposes of the law." *Id.* (quotations omitted). Thus, a "threshold test" to the equal protection analysis under the Iowa Constitution requires a party to show "as a preliminary matter that they are similarly situated" to the class of persons enjoying the legal benefit the plaintiff desires. *Id.* at 882; *Nguyen v. State,* 878 N.W.2d 744, 758 (Iowa 2016) ("The first

step in our equal protection analysis under the Iowa Constitution is to determine whether there is a distinction made between similarly situated individuals."). "Under this threshold test, if plaintiffs cannot show as a preliminary matter that they are similarly situated, courts do not further consider whether their different treatment . . . is permitted under the equal protection clause." *Varnum*, 763 N.W.2d at 882. Boldon cannot satisfy the threshold test here.

In *Nguyen*, the Iowa Supreme Court unanimously rejected an equal protection claim rooted in a retroactivity analysis of state court decisions. The defendant contended that the state equal protection clause required application of the *Heemstra* merger rule to cases on collateral review. *Nguyen,* 878 N.W.2d at 757-58. After recognizing that the United States Supreme Court has repeatedly held that state courts may choose to apply new rules of state law prospectively only, the court considered whether the Iowa Constitution required a different result, concluding "that defendants whose convictions become final before the law changed in *Heemstra* are not similarly situated to defendants charged after *Heemstra*." *Id.* at 758.

In *Wright v. State*, No.16-1613, 2017 WL 140175, *1-3 (Iowa Ct. App. April 19, 2017), the defendant raised a state equal protection

claim similar to Boldon's. He contended that *Heemstra's* application to only non-resolved cases in which the issue had been raised in the district court rather than cases in which counsel had failed to raise the issue violated equal protection. *Id.* at *1-2 (*citing State v. Heemstra,* 721 N.W.2d 549, 558 (Iowa 2006). In ordering a new trial, the postconviction court in *Wright* found "little perceptible difference" between defendants who had timely objected at trial and those who had not. *Id.* On appeal, the Court disagreed, collecting cases and distinguishing between the two classes and their legal claims: "It is not unconstitutional or even unreasonable to treat as similarly situated only those parties who cases are "factually and legal similar' and 'share similar procedural histories.'" *Id.* at *3 (quoting *State ex rel. Brown v. Bradley*, 658 N.W.2d 427, 433 n. 7 (Wis. 2003) (citation omitted).

The distinction drawn by section 814.6(1)(a)(3) is a reasonable one because a guilty plea waives all defenses that are not intrinsic to the voluntariness of the plea. *State v. Antenucci*, 608 N.W.2d 19, 19 (Iowa 2000); *see also Kyle v. State*, 322 N.W.2d 299, 304 (Iowa 1982) ("A guilty plea is normally understood as a lid on the box, whatever is in it, not a platform from which to explore further

possibilities.") (internal citation and quotation marks omitted). Moreover, "[a] plea of guilty . . . is itself a conviction." *State v. LaRue*, 619 N.W.2d 395, 397 (Iowa 2000) (quoting *Boykin v. Alabama,* 395 U.S. 238, 242 (1969)). The General Assembly could rationally limit appellate review following a plea of guilty because, as this Court has said, "the State is entitled to expect finality in the conviction" once a defendant pleads guilty. *State v. Mann*, 602 N.W.2d 785, 789 (Iowa 1999). The expectation of finality is further reinforced by the extensive safeguards this Court has developed to ensure pleas are knowing, voluntary, and intelligent. *See* Iowa R. Crim. P. 2.8(2)(b). It is rational, if not self-explanatory, that a guilty plea should be less susceptible to appellate reversal than a trial verdict, as a "a guilty plea implicitly eliminates any question of the defendant's guilt." *Mann*, 602 N.W.2d at 789. In short, all lines drawn by section 28 of SF589 satisfy equal protection.

Boldon's equal protection challenge to amended section 814.7 also fails. Rejecting a state law equal protection challenge on collateral review in *Nguyen*, 878 N.W.2d at 758, the Iowa Supreme Court relied on a much earlier equal protection case that recognized a retroactivity claim "involved no fundamental constitutional right."

*Id. (*citing *Everett v. Brewer*, 215 N.W.2d 244, 245-54 (Iowa 1974)). Thus, the court need only determine whether there is a rational basis or "a plausible policy reason for the classification," which is a "very deferential standard." *See Varnum*, 763 N.W.2d at 879. The plausible policy reason or rational basis for the classification here is to reduce the burgeoning appellate caseload and conserve judicial resources, as well as providing more complete records for review.

As the Supreme Judicial Court of Maine recognized, several important policy considerations justify the restriction of ineffective assistance claims to postconviction proceedings:

> Today we make clear that we will not consider a claim of the ineffective assistance of counsel on direct appeal ... There are a number of pragmatic considerations that underlie our decision. Considering a claim of ineffective assistance of counsel on direct appeal (1) deprives the State, in responding to the defendant's arguments, of the benefit of an evidentiary hearing, including trial counsel's testimony; (2) places us in the role of factfinder with respect to evaluating counsel's performance; (3) encourages a defendant to seek a different counsel for the purpose of raising on a direct appeal the claim of the ineffective assistance of counsel; and (4) constitutes a significant drain on our resources in responding to such claims.
>
> Regardless of the merit of the defendant's contentions, the resolution of his claim, and all

> claims of ineffective assistance of counsel, must in the first instance be determined in a post-conviction proceeding.

State v. Nichols, 698 A.2d 521, 522 (Me. 1997); *see also State v. Spreitz*, 39 P.3d 525, 527 (2002) ("[W]e reiterate that ineffective assistance of counsel claims are to be brought in [postconviction] proceedings. Any such claims improvidently raised in a direct appeal will not be addressed by appellate courts regardless of merit . . . . This ensures criminal defendants a timely and orderly opportunity to litigate ineffectiveness claims and, we believe, promotes judicial economy by disallowing piecemeal litigation.").[1]

While Boldon may disagree that this method best promotes judicial economy, the legislature is free to craft a remedy that is a rational attempt at solving a problem this court has recognized.

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[1] For a discussion of the three approaches to the presentation of ineffective assistance of counsel claims, see *Woods v. State*, 701 N.E. 1208, 1216-21 (Ind. 1998), *cert. denied*, 528 U.S. 861 (1999) (dividing cases into 1) those that require defendants to bring an ineffective assistance claim on direct appeal or forfeit the claim; 2) those that require ineffectiveness claims to be brought in a collateral proceeding and absolutely prohibit the claim on direct appeal; and 3) those that permit consideration of ineffective assistance claims on direct appeal only in limited circumstances where the record contains all of the information necessary to decide the claim). In Iowa, the courts have employed versions of each of the three approaches during the evolution of the case law and statutory framework.

Addressing an unpreserved claim of error due to counsel's act or omission on direct appeal is nearly always premature, if not impossible, without additional record. *See State v. Straw*, 709 N.W.2d 128, 138 (Iowa 2006) ("In only rare cases will the defendant be able to muster enough evidence to prove prejudice without a postconviction relief hearing."). In general, appellate courts will be spared the time and effort previously required of them by now bypassing the inquiry of whether the record is sufficient to address ineffectiveness claims. Even if this procedure is not a perfect fit in every single case, it does not have to be to pass constitutional muster. It is a plausible and rational policy goal. Boldon has not been deprived of a fundamental right. There is no obstacle to prevent Boldon from immediately seeking postconviction relief upon judgment entry on what he asserts are clear errors not requiring further development of the record.

Boldon's equal protection arguments should be rejected.

C. Due Process.

Boldon claims that application of amended sections 814.6 and 814.7 in his case constitutes a denial of due process and the right to effective assistance of counsel on direct appeal. Appellant's Brief

pp.44-47. On this ground Boldon urges that section 814.7 interferes with appellate counsel's ability to effectively represent him even when the record is sufficiently developed, or the error is clear or obvious. This argument appears to be a variation of Boldon's equal protection claims discussed above—that it is unfair to make him pursue postconviction review, which may result in a delay in obtaining relief to which Boldon contends he is entitled.

Further, Boldon points to the lack of notice prior to the date of sentencing that his appeal rights may be limited. While it is true Boldon was not specifically offered an opportunity to withdraw his guilty pleas at the July 1 hearing, the sentencing court did in fact mention the July 1 change in the law following the pronouncement of sentence may affect his right to appeal. Sent. Tr.p.19, line 25-p.20, line 14. Neither Boldon nor defense counsel questioned or objected to the court's statement regarding appeal.

In any regard, if the appeal advisory is deemed defective, the defendant should be required to satisfy the new, more searching standard in new section 814.29 to obtain appellate review or relief. It is unlikely any defendant would know or care about the difference between appeal as a matter of right, good cause review, discretionary

review, certiorari, and postconviction relief. A defendant can still apply for or initiate proceedings for review by a higher tribunal after July 1, 2019. In fact, "application" is the operative noun for seeking discretionary review, which means "apply" is the correct verb. *See* Iowa R. App. P. 6.106. The colloquy thus did not mislead the defendant: it told him he could try to get review if he complied with jurisdictional deadlines, and that is still the case, particularly given that this Court's rules permit the Court to "treat the documents upon which the action was initiated as seeking the proper form of review." Iowa R. App. P. 6.108.

To the extent the defendant is indirectly asserting some kind of reliance interest on the advisory, this claim is misplaced. A guilty plea is intended as a "lid on the box" that prevents review of nearly all errors. *See Kyle*, 322 N.W.2d at 304. It is not rational to believe that this defendant, or any defendant, pled guilty with a certainty that he could obtain appellate review and reversal. A defendant who does so under our procedural system would demand a trial on the minutes, not enter a guilty plea. The State submits the record does not show that the advisory here had any effect on Boldon's decision to plead.

As discussed above, neither this Court nor the United States Supreme Court have found any constitutional provision compels appeal for a criminal conviction, let alone a conviction obtained by guilty plea. *See Griffin v. Illinois*, 351 U.S. 12, 18 (1956) ("[A] State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all."); *e.g.*, *Olsen*, 162 N.W. at 782 ("The right of appeal is purely statutory."). Moreover, the defendant still has the opportunity to obtain post-judgment review of a guilty plea, although potentially in a forum other than the appellate courts: he can apply for "good cause" appellate review or discretionary review, move to correct an illegal sentence in the district court or petition for certiorari in the appellate courts, and he can file a postconviction relief action, which is itself appealable to the appellate courts. This scheme of post-plea review is more than sufficient to satisfy any concerns about constitutional due process.

D. Good Cause.

Lastly, Boldon argues that if section 814.6 applies to his appeal the Court should find good cause to grant review. Appellant's Brief pp.48-56. Boldon urges this Court to interpret "good cause" broadly to include any colorable or non-frivolous claim and without requiring

a defendant to show he or she would likely prevail on the merits. The State disagrees the legislature intended such a low bar. The statutory amendments enacted in SF589 were aimed at reducing congestion in the appellate courts and to encourage efficient use of appellate resources by limiting the Court's jurisdiction to only those guilty plea challenges that are likely meritorious and cannot be resolved before other tribunals. *See* 2019 Iowa Acts ch.140 §§ 28, 31 (codified at Iowa Code §§ 814.6(1), 814.7 (2020)).

As noted, the amendments provide that when a criminal defendant pleads guilty, direct appellate review is available only if a criminal defendant can show "good cause" or if they seek discretionary review of a denied motion in arrest of judgment. *See* Iowa Code §§ 814.6(1)(a)(3), 814.6(2)(f) (2020). The amendments shift all ineffective assistance claims, including those related to a guilty plea, from the appellate courts to postconviction proceedings in the district courts. *See* Iowa Code § 814.7 (2020). Existing law permits litigation of illegal sentence challenges in the district court "at any time," and in the appellate courts by certiorari. Iowa R. Crim. P. 2.24(5)(a); *Propps*, 897 N.W.2d at 97. Notably, Boldon's asserted "sentencing challenge" arises from defense counsel's failure to raise

the State's alleged breaches of the plea agreement involving sentencing recommendations—for which the remedy is a new sentencing hearing before a different judge with specific performance of the agreed upon recommendation. The State alternatively addresses the merits of Boldon's underlying Sixth Amendment claims below in division II.

With respect to the appropriate standard, the State argues good cause means that the defendant has raised an extraordinary legal claim that cannot be addressed elsewhere in the criminal justice system. A possible example is a preserved challenge to a defendant's competency to plead guilty. Interpreting "good cause" to mean "non-frivolous" would undermine all other appellate changes in SF589, directly conflicting with the intent of the legislation. *See Horner v. State Bd. of Eng'g Examiners*, 110 N.W.2d 371, 374 (Iowa 1961) ("[I]n determining the meaning of a statute all provisions of the act of which it is a part, and other pertinent statutes, must be considered."). Finding "good cause" encompasses all "non-frivolous" claims would also render the addition of section 814.6(2)(f) superfluous—there would be no reason to establish discretionary review for denial of a motion in arrest of judgment if the appellate courts automatically

acquired jurisdiction of every "non-frivolous" guilty plea challenge. *See Town of Mechanicsville v. State Appeal Bd.*, 111 N.W.2d 317, 320 (Iowa 1961) ("A cardinal rule of statutory construction is that, if reasonably possible, effect should be given every part of a statute."). This is not a claim that cannot otherwise be addressed. This Court should find the General Assembly intended to define good cause narrowly in this context.

II. The Court Should Not Adopt a Plain Error Standard to Allow Review of Ineffective Assistance Claims on Direct Appeal. If this Court Reviews the Defendant's Ineffective Assistance Claims of Alleged Breaches of the Plea Agreement, it Will Find Such Claims Without Merit.

Plain Error

If this Court applies the amended statutes to Boldon's case to bar consideration of his ineffective assistance claims on direct appeal, Boldon invites the Court to adopt the plain error rule. Appellant's Brief pp.68-79; *see* Fed. R. Crim. P. 52(b). It has in the past unequivocally held that it will not. *See, e.g.*, *State v. Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999) ("We do not subscribe to the plain error rule in Iowa, have been persistent and resolute in rejecting it, and are not at all inclined to yield on the point.") (citing *State v. McCright*, 569 N.W.2d 605, 607 (Iowa 1997)); *see also State v. Martin,* 877

N.W.2d 859, 866 (Iowa 2016) (citing cases); *State v. Hernandez-Lopez*, 639 N.W.2d 226, 234 (Iowa 2002) ("We reject the defendants' suggestion that the importance and gravity of an unpreserved constitutional issue creates an exception to our error preservation rules."); *State v. Miles*, 344 N.W.2d 231, 233 (Iowa 1984) ("We do not have a plain error rule."). Under a plain error standard an appellant must establish (1) an error; (2) the error is "clear or obvious, rather than subject to reasonable dispute;" (3) such error "affected the appellant's substantial rights," meaning "it affected the outcome" of the trial court proceedings; and (4) "the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *United States v. Marcus,* 560 U.S. 258, 262 (2010) (citations omitted).

The change to section 814.7 does not support adopting a plain error rule. The statutory change itself addresses a problem this Court has recognized—that addressing claims of unpreserved error on direct appeal is nearly always premature. *See Straw*, 709 N.W.2d at 138 ("In only rare cases will the defendant be able to muster enough evidence to prove prejudice without a postconviction relief hearing."). Moreover, Boldon and other defendants are precluded from

challenging most guilty pleas on direct appeal even if this Court did recognize plain error. *See* Iowa Code § 814.6(1)(a)(3) (2019).

There is no true gap in the Court's ability to redress wrongs from the failure to preserve error. Between the correction of preserved errors on direct appeal and the presentation of ineffective assistance claims in postconviction proceedings with a corresponding right to appeal, criminal defendants in Iowa will continue to have their claims fully addressed and reviewed. Under a plain error analysis, the defense lawyer would be subject to a finding that his or her misstep was "obvious" or "clear under the current law at the time it was made," which is essentially the same criticism of counsel's judgment or performance. *See United States v. Olano*, 507 U.S. 725, 734 (1993).

Iowa's ineffective assistance framework already mirrors the plain error framework that the defendant proposes–it requires a showing of error (breach) and substantial resultant effect (prejudice). *See*, *e.g.*, *State v. Yaw*, 398 N.W.2d 803, 805 (Iowa 1987) (rejecting plain error standard, and suggesting that if true, "failure to lodge the confrontation objection constituted deficient performance by counsel and resulted in prejudice to the defendant, the issue would be

properly raised and preserved by a post-trial claim of ineffective assistance of counsel"). Moreover, Iowa's ineffective assistance framework–unlike the plain error standard–does not require showing an impact on "the fairness, integrity or public reputation of judicial proceedings"–which strikes the State as a nebulous and unworkably vague standard for determining whether to grant relief.

Further, the rubric of ineffective assistance does not leave the decision whether to grant relief within the discretion of the court once the required showing has been made. *See Olano*, 507 U.S. at 732, 736-37. As such, Iowa's current ineffective assistance framework makes relief *more* accessible and predictable by simplifying the required showing. Boldon's argument that adopting a plain error rule would enhance Iowa courts' ability to remedy trial errors should be rejected.

In advocating for plain error, Boldon also urges that justice delayed may be justice denied, suggesting that postconviction proceedings may drag on for extended periods of time. Appellant's Brief pp.54-55,78-79. Yet, there is no systemic reason for a slow-moving postconviction case. Nothing in chapter 822 prevents the expeditious resolution of a postconviction claim, and some claims can

be resolved within a matter of months. The appellate process can be a lengthy one, and it is less capable of compression than district court proceedings given the various stages of an appeal.

The change to section 814.7 ensures that defendants will proceed directly to postconviction proceedings and the appellate court will have the benefit of a completely developed record when deciding those claims on appeal. As the United States Supreme Court has recognized:

> When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose. Under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984), a defendant claiming ineffective counsel must show that counsel's actions were not supported by a reasonable strategy and that the error was prejudicial. The evidence introduced at trial, however, will be devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose the facts necessary to decide either prong of the Strickland analysis. If the alleged error is one of commission, the record may reflect the action taken by counsel but not the reasons for it. The appellate court may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive or was taken because the counsel's alternatives were even worse.

> *See Guinan*, supra, at 473 (Easterbrook, J., concurring) ("No matter how odd or deficient trial counsel's performance may seem, that lawyer may have had a reason for acting as he did .... Or it may turn out that counsel's overall performance was sufficient despite a glaring omission ..."). The trial record may contain no evidence of alleged errors of omission, much less the reasons underlying them. And evidence of alleged conflicts of interest might be found only in attorney-client correspondence or other documents that, in the typical criminal trial, are not introduced. *See*, *e.g.*, *Billy-Eko*, supra, at 114. Without additional factual development, moreover, an appellate court may not be able to ascertain whether the alleged error was prejudicial.
>
> Under the rule we adopt today, ineffective-assistance claims ordinarily will be litigated in the first instance in the district court, *the forum best suited to developing the facts necessary to determining the adequacy of representation during an entire trial*. The court may take testimony from witnesses for the defendant and the prosecution and from the counsel alleged to have rendered the deficient performance.

Massaro v. United States, 538 U.S. 500, 505 (2003) (emphasis added). Postconviction proceedings remain the best vehicle to litigate ineffective assistance claims. The new legislation is not a reason to adopt plain error in Iowa.

Finally, this court should refuse to adopt a plain error standard for another reason. Respecting the long tradition of requiring error

preservation to reach claims on appeal, the legislature has now acted to ensure that unpreserved claims will be fully litigated in postconviction proceedings rather than on direct appeal. The legislation mandated a process that was followed in the great majority of cases already. *See Straw*, 709 N.W.2d at 138. To adopt a plain error rule to specifically avoid that result–as Boldon requests–would frustrate the intent of the legislature to require error preservation and ensure complete records and would constitute judicial legislation. *See Webster County Bd. Of Supervisors v. Flattery*, 268 N.W.2d 869, 873-74 (Iowa 1978) ("We have repeatedly declined to legislate."). To create an exception for plain error resolution on appeal essentially usurps "the prerogative of the legislature to declare what the law shall be." *State ex. rel. Lankford*, 508 N.W.2d 462, 463 (Iowa 1993). This court should decline Boldon's invitation.

In any regard, for the reasons discussed below, Boldon's ineffective assistance claims fail under either standard because there was no clear or obvious breach of the parties' plea agreement by the prosecutor at sentencing.

Preservation of Error and Standards for Review

Boldon argues that his trial counsel was ineffective in failing to object to the State's alleged breaches of the plea agreement at sentencing, which is an exception to the error preservation rule. *State v. Carroll*, 767 N.W.2d 638, 641-42 (Iowa 2009); *Ledezma v. State*, 626 N.W.2d 134, 141-42 (Iowa 2001).

The Court reviews ineffective assistance of counsel claims *de novo*. *State v. Rodriguez*, 804 N.W.2d 844, 848 (Iowa 2011); *Ledezma*, 626 N.W.2d at 141. To establish a claim of ineffective assistance of counsel, a defendant must prove both "(1) counsel failed to perform an essential duty and (2) prejudice resulted." *Carroll*, 767 N.W.2d at 641 (citations omitted); *see also State v. Shanahan*, 712 N.W.2d 121, 136 (Iowa 2006). Prejudice means "there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *Carroll*, 767 N.W.2d at 641 (internal quotations omitted).

A prosecutor may not, intentionally or accidentally, violate either the express terms or the spirit of a plea agreement. *State v. Bearse*, 748 N.W.2d 211, 215 (Iowa 2008) (prosecutor may not make a recommendation "with a wink and a nod"); *State v. Horness*, 600

N.W.2d 294, 298-300 (Iowa 1999) (prosecutor may not make an "alternative recommendation"); *State v. Fannon*, 799 N.W.2d 515, 520-22 (Iowa 2011). In the context of a breached promise involving a sentencing recommendation, a defendant need only show that the outcome of the sentencing hearing was tainted by the prosecutor's improper comments. *Bearse*, 748 N.W.2d at 216-17 (citing *Horness*, 600 N.W.2d at 299-301); *State v. Carrillo*, 597 N.W.2d 497, 500-01 (Iowa 1999). The remedy for a breached plea agreement may be either an opportunity to plead anew or resentencing before a different judge with specific performance of the plea agreement. *Macke,* 933 N.W.2d at 236-37; *Bearse*, 748 N.W.2d at 218; *Horness*, 600 N.W.2d at 301.

Merits

Boldon asserts that the prosecutor breached the terms of the plea agreement in two respects and that counsel had a duty to object but failed to do so. Specifically, he claims the prosecutor recommended the payment of court costs not contemplated by the agreement, and the prosecutor failed to "actually commend[]" the district court as to concurrent terms. Appellant's Brief pp.62-65. Neither allegation is supported by the record.

A. Terms of the Plea Agreement.

As noted, at the March 25 hearing Boldon pled guilty to possession of a firearm as a felon (FECR226296), and interference with official acts while in possession of a firearm and carrying weapons (FECR226943), one aggravated misdemeanor and two class D felonies. Orders Following Guilty Pleas (3/26/19); App. 16-19. Defense counsel stated that Boldon had agreed to plead guilty to all three offenses in exchange for the State's recommendation of concurrent prison terms and suspended fines, while the defense was free to request a lesser sentence. Plea Tr.p.6, lines 2-20, p.8, line 16-p.9, line 11. The plea agreement was not conditioned on the court's concurrence, and Boldon was advised the sentencing court could impose consecutive prison terms. Plea Tr.p.6, line 21-p.7, line 10, p.8, line 16-p.9, line 11. The court further advised Boldon applicable penalties could include fines and surcharges, and there would be "a determination concerning [his] reasonable ability to pay certain matters which would include court costs, correctional and public agency fees, crime victim compensation, medical assistance programs, and court-appointed attorney fees." Plea Tr.p.9, lines 12-21. Following a full plea colloquy, the court accepted Boldon's guilty

pleas as knowing, voluntary, and supported by factual basis. Plea Tr.p.15, line 14-p.16, line 24.

B. Sentencing Recommendations.

At the July 1 sentencing hearing, defense counsel first discussed the PSI. Sent. Tr.p.3, line 1-p.7, line 21. The prosecutor then recommended as to counts I in both cases "a $750 suspended fine plus surcharge and court costs and five years in prison." Sent. Tr.p.8, lines 3-9. As to count II in FECR226943, the prosecutor recommended "a $625 suspended fine plus surcharge and court costs and two years in prison." Sent. Tr.p.8, lines 10-14. Defense counsel did not address fines, surcharges, or other costs aside from attorney fees in response to the court's question about finances. Sent. Tr.p.16, line 21-p.17, line 4.

After hearing from counsel, the court entered judgment, imposed prison terms, and suspended the applicable minimum fines, surcharges, and attorney fees. Sent. Tr.p.16, lines 3-p.17, line 4. With respect to court costs the court stated that costs "will be entered as a judgment." Sent. Tr.p.17, lines 3-4; *see also* Sent. Orders p.2-3; App. 22-23.

Boldon's claimed breach of plea agreement as to court costs fails. First, as detailed above, the payment of court costs was not a term of the plea agreement one way or the other, and the State points out there were no dismissed charges for which Boldon was being asked to pay costs. *See, e.g., State v. McMurray,* 925 N.W.2d 592, 595, 600-01 (Iowa 2019); *State v. Brown,* 905 N.W.2d 846, 856-57 (Iowa 2018). Nor does the record show the State agreed Boldon would not be subject to the payment of any court costs. Plea Tr.p.6, line 2-p.7, line 10.

Second, it makes sense there would be no agreement between the parties about the payment of court costs in this context because costs are subject to the court's determination of the defendant's reasonable ability to pay. Iowa Code § 910.2(1); *State v. Albright,* 925 N.W.2d 144, 159 (Iowa 2019); *State v. Thompson,* No.19-0230, 2020 WL 110397, *1 (Iowa Ct. App. Jan. 9, 2020). The defense made no argument specific as to costs—only attorney fees. Sent. Tr.p.16, line 21-p.17, line 4. Because there was no breach the plea agreement counsel had no duty to object.

The court suspended most of the fines, surcharges, and fees finding Boldon lacked the reasonable ability to pay but ordered the

payment of court costs. Sent. Tr.p.16, line 21-p.17, line 4; Sent. Orders pp.2-3; App. 22-23. If Boldon disagrees with the court's finding or the restitution plan, he is free to petition for a hearing under Iowa Code section 910.7(1). Iowa Code § 910.7(1).

Boldon's second allegation is that counsel should have objected to the prosecutor's "formal recitation" of the parties' agreement to recommend concurrent terms as between the three offenses "without any advocacy." He contends the prosecutor's single mention of concurrent terms followed by a lengthy statement of reasons why prison was appropriate failed to indicate "it was worthy" as an option. Viewed in context, the State disagrees the prosecutor violated the spirit of the agreement to recommend concurrent terms. *Contrast Horness,* 600 N.W.2d at 298-301.

While the prosecutor agreed to recommend concurrent terms at sentencing, it is clear the State intended to ask for prison terms and the defense was free to argue for something less. Plea Tr.p.6, lines 2-20. At sentencing, the prosecutor did in fact recommend all sentences be served concurrently. Sent. Tr.p.8, lines 3-14. He then went on to detail why the State believed prison was appropriate pointing to "the facts and circumstances of this case," problems

during pretrial supervision, Boldon's continued drug use, prior juvenile adjudications, and number of offenses involving firearms. Sent. Tr.p.8, line 3-p.10, line 21. The PSI writer recommended in favor of prison and against probation based on Boldon's prior juvenile record. PSI pp.11-12; Conf.App. 14-15.

Defense counsel urged the court to consider a deferred judgment emphasizing Boldon's young age and immaturity. Sent. Tr.p.10, line 22-p.11, line 15. Counsel noted Boldon "has done okay" since his release from custody eight months ago returning to treatment and obtaining a job. Sent. Tr.p.11, line 16-p.12, line 20, p.13, line 14-p.14, line 2. Boldon sought a deferred judgment to avoid felony convictions on his record. Sent. Tr.p.14, line 22-p.15, line 11. Notably, defense counsel did not speak to the issue of consecutive versus concurrent but was presumably requesting deferred judgment in both cases. Boldon did not add any comments. Sent. Tr.p.15, lines 12-21.

Following the statements of counsel, the court indicated that with Boldon's history a prison term was appropriate because it was not "willing to take that type of risk" and put him on probation. Sent. Tr.p.16, lines 14-20. The court went on to note "the real issue here is

whether or not . . . these sentences should run concurrently or consecutively to one another." The court moved on to discuss Boldon's extensive juvenile history in detail from age fourteen until the present offenses at seventeen, and his multiple failures on probation. Sent. Tr.p.17, line 9-p.19, line 7. Therefore, the court determined "a consecutive sentence is appropriate" ordering the two felonies to be served consecutively. Sent. Tr.p.18, line 20-p.19, line 24; Sent. Orders p.2; App. 22.

Considering the above record as a whole, the State disagrees that trial counsel had a duty to object to the prosecutor's failure to more strongly argue that Boldon should serve concurrent prison terms. The prosecutor affirmatively stated its explanation for recommending prison rather than probation. Sent. Tr.p.8, line 15-p.10, line 21. Defense counsel countered with Bolden's youth and his recent positive efforts showing a desire to change his life. Sent. Tr.p.10, line 22-p.15, line 11. It cannot reasonably be argued that Boldon's criminal history supports the shortest prison term possible. In any regard, how long he spends in prison on the two consecutive terms is up to the parole board. Sent. Tr.p.19, lines 2-24.

Accordingly, the Court should find defendant Boldon is not entitled to resentencing before a different judge with specific performance of the State's promised sentencing recommendations. Notably, the defendant has not expressed any interest in withdrawing his guilty pleas and going to trial on all charges.

III. The District Court Properly Considered the Defendant's Multiple Juvenile Delinquency Adjudications Involving Firearms in Sentencing Him to Consecutive Prison Terms on His Guilty Pleas to Felony Firearms Related Offenses.

Preservation of Error

Neither defense counsel nor defendant Boldon objected to the extended discussion of Boldon's juvenile criminal record at sentencing. As Manning notes, challenges to void, illegal, or procedurally defective sentences are not typically subject to the usual error preservation and waiver rules. *See*, *e.g.*, *State v. Lathrop*, 781 N.W.2d 288, 292-93 (Iowa 2010); *Tindell v. State*, 629 N.W.2d 357, 358 (Iowa 2001); *State v. Woody*, 613 N.W.2d 215, 217 (Iowa 2000); Iowa R. Crim. P. 2.24(5)(a).

Standards for Review

The Court reviews sentencing decisions for correction of errors at law. *State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002). Reversal is not required absent an "abuse of discretion or defect in the

sentencing procedure" such as the consideration of improper factors. *State v. Hopkins*, 860 N.W.2d 550, 553 (Iowa 2015) (citing *State v. Thompson*, 856 N.W.2d 915, 918 (Iowa 2014)); *see also State v. Hill*, 878 N.W.2d 269, 272 (Iowa 2016); *State v. Washington*, 832 N.W.2d 650, 660 (Iowa 2013); *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996).

When exercising its sentencing discretion, "the court should [w]eigh and consider all pertinent matters in determining proper sentence, including the nature of the offense, the attending circumstances, defendant's age, character and propensities and chances of his [or her] reform." *State v. Leckington*, 713 N.W.2d 208, 216 (Iowa 2006) (citations omitted); *see also* Iowa Code §§ 901.5, 907.5(1)(a-g); *Hopkins*, 860 N.W.2d at 554-55; *Formaro*, 638 N.W.2d at 724-25; *State v. August*, 589 N.W.2d 740, 744 (Iowa 1999).

Merits

Boldon further argues that he should be entitled to resentencing before a different judge because the district court not only considered and relied on his record of juvenile adjudications in determining he should serve consecutive prison terms, rather than a deferred

judgment with probation, but also erred in considering his youth and juvenile record as aggravating factors. Appellant's Brief pp.80-92. Thus, he urges such considerations were "improper factors" and the court should have instead viewed that evidence as mitigating in light of recent changes in the arena of juvenile sentencing. The Court should reject Boldon's argument and find no abuse of discretion or consideration of improper factors in Boldon's sentencing.

The State first points out that in the present cases Boldon was charged with possession of a firearm by a felon, a class D felony, at the age of seventeen based on prior juvenile delinquency adjudications in 2016 and 2017 for first-degree burglary, trafficking in stolen weapons, and carrying weapons—all offenses involving the possession of firearms. Trial Information (FECR226296) (8/10/18); App. 4-6; Iowa Code § 724.26(1). As part of the same incident, the State later charged Boldon with interference with official acts in possession of a firearm and carrying weapons. Trial Information (FECR226943) (9/14/18); App. 10-12; Iowa Code §§ 719.1(b), 724.4(1).

The minutes of testimony and subsequent PSI detail additional conduct by Boldon at the ages of fourteen, fifteen, and sixteen for

which he was adjudicated delinquent and placed in juvenile detention centers for periods of time. *See, e.g.,* PSI pp.3-4; Conf.App. 6-7. The present offenses were committed about one month after Boldon returned to his mother's home from the state training school in Eldora. PSI p.4; Conf.App. 7.

Juveniles committing certain offenses, including those under chapter 724, and those committing subsequent offenses may be prosecuted as adults. Iowa Code §§ 232.8(1)(c), 232.8(5)(b). Under those provisions Boldon was correctly prosecuted as an adult in these cases. In general, juvenile adjudications and dispositions are inadmissible except "in a sentencing proceeding after conviction of the person for an offense other than a simple or serious misdemeanor," and they may properly be included in the PSI as they were in this case. Iowa Code §§ 232.55(2)(a), (b); *see State v. Banks,* No.18-0721, 2020 WL 105078, at *5 (Iowa Ct. App. Jan. 9, 2020) (citing Iowa Code section 232.55(2)(a)).

At his plea hearing, Boldon admitted to the prior juvenile adjudications and that he had the assistance of counsel for those proceedings. Plea Tr.p.10, line 6-p.12, line 8. As noted, details concerning Boldon's prior juvenile offenses were set forth in the PSI.

PSI pp.3-4; Conf.App. 6-7. Boldon has a history of associating with others charged with firearms and drug offenses. PSI p.8; Conf.App. 11. He admitted to frequent marijuana use and was scheduled for treatment but failed to attend more than one session. PSI p.9; Conf.App. 12. Boldon turned eighteen during the pendency of these cases. PSI p.1; Conf.App. 4.

The PSI writer noted at age eighteen "he appears to be a seasoned criminal and his illicit behaviors are clearly dangerous and a threat to the community." PSI p.11; Conf.App. 14. She added he continued to use marijuana under pretrial supervision, failed to attend treatment as recommended, and was mostly unemployed. *Id.* Thus, she found Boldon "dishonest" and that he had "shown he is not a good candidate for probation supervision," and considering the seriousness of the crimes "he is a considerable community threat and needs to be incarcerated for his criminal behaviors." *Id.* While in prison, Boldon should participate in substance abuse treatment and learn an employable skill. PSI pp.11-12; Conf.App. 14-15.

At the beginning of Boldon's sentencing hearing, defense counsel noted a few corrections and updates to the PSI and indicated the court should not consider conduct that did not result in juvenile

adjudications. Sent. Tr.p.3, line 8-p.7, line 21. The court agreed it would not consider such conduct. Sent. Tr.p.7, lines 1-21. As discussed in division II above, the prosecutor focused on Boldon's problems during pretrial supervision including ongoing drug use and his "horrible record" in juvenile court. Sent. Tr.p.8, line 15-p.9, line 24. He expressed concern over Boldon's "multiple adjudications for firearms-related offenses and for violent offenses" noting one offense involved firing a handgun presenting a danger to the community. Tr.p.10, lines 6-21.

By contrast, defense counsel conceded Boldon's substantial juvenile history but focused on his youth noting juveniles are "impetuous," and they do not understand the consequences of their behaviors. Sent. Tr.p.10, line 22-p.11, line 15. He then focused on the positive things Boldon had done over the eight months since his release from custody, including obtaining a job, returning to treatment, and staying out of trouble. Tr.p.11, line 16-p.12, line 20, p.15, lines 2-10. Counsel noted it would be harder for Boldon to obtain future employment with felonies on his record. Tr.p.12, line 21-p.14, line 2. Finally, he urged the court to consider the fact Boldon did not have a "good father figure" in his life and to give him an

opportunity to succeed with a deferred judgment. Tr.p.14, line 3-p.15, line 1.

In light of Boldon's criminal history, the court was not "willing to take that type of risk" determining it would not place Boldon on probation. Sent. Tr.p.16, lines 3-20. The court pointed out Boldon's offenses began at age fourteen and he "dealt with that supervision poorly" followed by escalating criminal behavior. Tr.p.17, lines 7-25. In connection with the burglary offense, Boldon with others "shot the homeowner's dog" and he later escaped from the youth shelter. Tr.p.17, line 18-p.18, line 7. Additional firearms offenses followed landing him in adult court and after being waved back to juvenile court Boldon violated probation "eight different ways from Sunday . . . ." Tr.p.18, lines 8-25. For those reasons, the court determined the two felonies should be consecutive. Tr.p.18, line 23-p.19, line 7. The court concluded reciting "the nature of this offense, the circumstances of this offense, [Boldon's] relatively young age in comparison to this extensive criminal history with firearms," and that "given the amount of efforts put forth thus far regarding [Boldon's] chances of – for reform, in [the court's] opinion, are nearly nil." Tr.p.19, lines 16-24.

Boldon appears to recognize that under section 232.55(2)(a) it was appropriate to admit and consider evidence of his juvenile delinquency adjudications in connection with his 2019 sentencing proceeding. Appellant's Brief pp.83-84. But Boldon urges that it is improper for the court to consider his juvenile record as aggravating rather than mitigating factors. Appellant's Brief pp.83-92. However, the argument Boldon is making arises from this Court's recent decisions on factors relevant to juvenile sentencing, particularly those cases involving mandatory minimum terms. *See, e.g., State v. Lyle,* 854 N.W.2d 378, 395 (Iowa 2014); *State v. Pearson,* 836 N.W.2d 88, 92 (Iowa 2013). The cases at issue here do not involve mandatory minimum terms. The State also points out that Boldon's possession offense became a class D felony based on his prior juvenile offenses. Iowa Code §§ 232.8(1)(c), 232.8(5)(b), 724.26(1).

More importantly, the Court of Appeals has rejected defense arguments that juvenile adjudications must be considered in any particular manner. *See State v. Parson,* No.16-2067, 2017 WL 3065169, at *3 (Iowa Ct. App. July 19, 2017) (finding no abuse of discretion in not considering the "mitigating factors of youth"); *State v. Smith,* No.16-1325, 2017 WL 2684350, at *3 (Iowa Ct. App. June

21, 2017) (no abuse of discretion in considering defendant's juvenile adjudication "in the context of its judgment regarding Smith's capacity for reform"); *State v. Reed,* No.16-1703, 2017 WL 2183751, at *1-*2 (Iowa Ct. App. May 17, 2017) (section 232.55(2) "does not require the court to consider the juvenile adjudications in any particular manner").[2] Notably, in *Reed* the Court agreed with the State's comment that "[t]he characteristics of juveniles that renders them less culpable for their actions have already been considered in the venue of the juvenile justice system" finding no abuse of discretion. *Reed,* 2017 WL 2183751, at *2. As in *Reed*, the sentencing court here did in fact consider Boldon's young age and the seriousness of multiple juvenile offenses and failed efforts to rehabilitate him. *Id.*

Consequently, this Court should reach the same conclusion. Defendant Boldon is not entitled to resentencing on this ground.

[2] This Court denied further review in *Reed* and *Smith* and no further review application was filed in *Parson*. *See* Order No.16-1325 (8/14/17); Order No.16-1703 (7/27/17).

CONCLUSION

For the reasons stated above, the State respectfully requests that this Court affirm the sentences imposed on defendant-appellant Daquon Boldon's guilty pleas.

REQUEST FOR NONORAL SUBMISSION

Appellant has requested oral argument. The State, however, believes that oral argument would not be of material assistance in connection with the guilty plea and sentencing challenges raised on appeal. Iowa R. App. P. 6.903(2)(i), 6.908(2). Should the Court order oral argument, the State would request to also be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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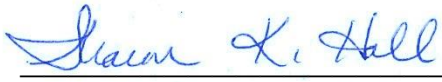

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