ELECTRONICALLY FILED JUL 09, 2020 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA

ANNA SOTHMAN,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	S.CT. NO. 19-1837
	)	
STATE OF IOWA,	)	
	)	
Respondent-Appellee.	)	

APPEAL FROM THE IOWA DISTRICT COURT
FOR MARION COUNTY
HONORABLE MICHAEL K. JACOBSEN, JUDGE

APPELLANT'S BRIEF AND ARGUMENT

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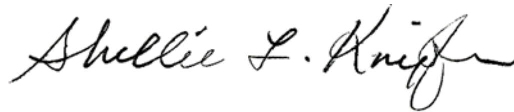
CERTIFICATE OF SERVICE

On the 9th day of July, 2020, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Anna Sothman, No. 6955912, Iowa Correctional Institution for Women, 420 Mill Street, SW, Mitchellville, IA 50169.

APPELLATE DEFENDER'S OFFICE



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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Trial counsel was ineffective for not assuring Sothman made a knowing and voluntary plea. Counsel misinformed Sothman she would be immediately eligible for parole and she would be supported and considered within six months of entering the prison. While technically immediately eligible for parole, the reality is that the prison will not support and consider her for parole for at least seven years.

<u>Authorities</u>

State v. Clay, 824 N.W.2d 488, 494 (Iowa 2012)

Harrington v. State, 659 N.W.2d 509, 520 (Iowa 2003)

Millam v. State, 745 N.W.2d 719, 721 (Iowa 2008)

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A. Counsel breached his duty in misinforming Sothman she would be immediately eligible for parole and would be immediately considered and supported for parole within six to 12 months when the reality is she will not be supported or given true consideration for at least seven years, thereby, resulting in a plea that was not knowing and voluntary.

Iowa R. Crim. P. 2.8(2)(b)

Meier v. State, 337 N.W.2d 204, 207 (Iowa 1983)

State v. Kress, 636 N.W.2d 12, 22 (Iowa 2001)

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Iowa Board of Parole Annual Report Fiscal Year 2016, App. B (found at bop.iowa.gov/sites/default/files/documents/2017/12/fy16_bop_annual_report.pdf

B. Prejudice.

Dempsy v. State, 860 N.W.2d 860, 869 (Iowa 2015)

Lafler v. Cooper, 566 U.S. 156, 163 (2012)

Hill v. Lockhart, 474 U.S. 52, 60 (1985)

State v. Kress, 636 N.W.2d 12, 22 (Iowa 2001)

II. Trial counsel was ineffective for not asserting Sothman's right to have her plea proceedings in open court or having her waive that right.

Authorities

State v. Clay, 824 N.W.2d 488, 494 (Iowa 2012)

A. Background.

B. Sothman did not voluntarily waive her right to a public plea proceeding so counsel should have objected.

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1. Structural Error

Chapman v. California, 386 U.S. 18, 22, 87 S.Ct. 824, 827 (1967)

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Weaver v. Massachusetts, 137 S.Ct. 1899, 1907 (2017)

Waller v. Georgia, 467 U.S. 39, 43, 104 S.Ct. 2210, 2214 (1984)

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2. Sixth Amendment right to a public trial

Iowa Code § 814.7 (2015)

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Goods v. State, No. 18-1986, 2020 WL 1548483, at *4 (Iowa Ct. App. Apr. 1, 2020)

State v. Levy, No. 18-0511, 2020 WL 567696 (Iowa Ct. App. Feb. 2, 2020)

3. Article I, section 10 right to a public trial

Lado v. State, 804 N.W.2d 248, 251 (Iowa 2011)

Weaver v. Massachusetts, 137 S.Ct. 1899, 1907 (2017)

4. Strickland Prejudice

Weaver v. Massachusetts, 137 S.Ct. 1899, 1907 (2017)

ROUTING STATEMENT

This case should be transferred to the court of appeals because the issues raised involve applying existing legal principles. Iowa R. App. P. 6.903(2)(d) and 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case: This is an appeal by the petitioner-appellant, Anna Sothman, from the denial of appellant's application for postconviction relief. The Honorable Michael K. Jacobsen presided in Marion County District Court.

Course of Proceedings in the District Court: On August 6, 2016, Sothman was charged by trial information with the offense child endangerment in violation of Iowa Code sections 726.6(1)(a), 726.6(3), and 726.6(4) (2015). (Trial Information, 8/5/16)(App. pp. 4-5). That same day Sothman entered a plea of guilty pursuant to the charge. (Order, 8/5/16)(App. pp. 6-7).

On September 28, 2016, the defendant appeared in open court and was adjudged guilty of child endangerment causing

death. She was sentenced to an indeterminate term of 50 years. Probation was denied as the offense was a forcible felony. (Judgment Entry, 9/28/16; Order Nunc Pro Tunc, 6/9/17)(App. pp. 8-12).

No appeal was taken. (PCR, ¶ II, A, 4/16/19)(App. p. 13).

Two and a half years later Sothman filed an application for postconviction relief. (PCR, 4/16/19; Applicant's Trial Brief, 9/3/19)(App. pp. 13-54). A hearing was held October 2nd. (10/2/19 tr.). The district court dismissed the application. (Findings of Fact, Conclusions of Law and Order, 10/22/19)(App. pp. 55-69).

Notice of appeal was timely filed. (Notice, 11/4/19)(App. p. 70).

Facts: The following facts were found by the district court.

> On June 20, 2016 Anna Sothman was at her home in Pella, IA with her three minor children. Ms. Sothman placed her fourteen-month old daughter in the bathtub between 8:39 a.m. and

8:44 a.m. because of a dirty diaper. [Ex. 6 (7/29/16 letter)(Conf. App. pp. 20-21)][1] Ms. Sothman placed a phone call to her mother, received a phone call, sent and received text messages and logged on to the social media cite Pinterest, leaving her daughter unattended in the bathtub. Ms. Sothman checked on her daughter only to find the child floating face down in the tub. Ms. Sothman called 911 at 9:22 a.m. [Id. (Conf. App. pp. 20-21)] The child died. The Medical Examiner determined the child's manner of death was accidental drowning. [Ex.4 (autopsy report)(Conf. App. pp. 4-19)]

Ms. Sothman was interviewed by law enforcement during which she provided a variety of timeframes for the morning of June 20, 2016 and reasons for her failure to check on her daughter. [Id. (Conf. App. pp. 4-19)] The timeframes she provided included that the child was left alone in the bathtub for two to three minutes. [Id. (Conf. App. pp. 4-19)] The evidence and potential witness testimony was inconsistent with this short of time frame. [Id. (Conf. App. pp. 4-19)] Ms. Sothman in her eventual plea of guilty admitted that the child was in the bathtub from approximately 8:45 to 8:50 a.m. until about 9:15 to 9:20 a.m. [Plea tr. p. 21 L.12-15]

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[1] The district court footnoted its citations. Appellate counsel inserted the citations into the text. Further, when the district court cites the State's exhibits A (attorney file) appellate counsel cites the equivalent petitioner exhibit. And when the district court cites exhibit B (plea transcript) appellate counsel cites the actual plea transcript.

Ms. Sothman retained the services of attorney Wesley Chaplin. Mr. Chaplin has been a licensed attorney in the State of Iowa since 1998 and has a general practice in Pella, Iowa. He also has experience in serious felony defense cases. Mr. Chaplin met initially with Ms. Sothman shortly after the death of her daughter.

Mr. Chaplin contacted the Marion County Attorney, Ed Bull to advise Mr. Bull that he would be representing Anna Sothman. (Ex.1 (4/14/16 letter)(Ex. App. p. 3)] Mr. Chaplin asked Mr. Bull to inform him if an arrest warrant was issued for Ms. Sothman as she would voluntarily appear on the warrant. [Id. (Ex. App. p. 3)] Mr. Chaplin kept in contact with Mr. Bull and Ms. Sothman throughout the investigation. Mr. Chaplin shared information with Ms. Sothman throughout the investigation including the potential evidence he received from the Marion County Attorney. [Ex.A pp.7-8 (7/25/16 letter, 7/26/16 letter)(Conf. App. pp. 28-29)].

Mr. Chaplin and Mr. Bull entered into plea negotiations prior to any charges being filed. A plea agreement was reached and accepted by Ms. Sothman. [Ex.6 (7/29/16 letter)(Conf. App. pp. 20-21)] The plea agreement called for Ms. Sothman to be charged with Child Endangerment Resulting in Death in violation of Iowa Code § 726.6(1)(a) a Class B Felony, punishable by a maximum indeterminate sentence not to exceed 50 years. [Id. (Conf. App. pp. 20-21)] The plea agreement further contemplated that Ms. Sothman would turn herself into the Pella Police Department on August 5, 2016 and appear for her initial appearance that morning.

Ms. Sothman would then enter a plea of guilty to the charge and provide a factual basis. The plea agreement further contemplated that at the time of sentencing the parties would jointly recommend the imposition of a prison sentence not to exceed fifty (50) years. [Id. (Conf. App. pp. 20-21)] Mr. Chaplin advised Ms. Sothman that she would be "immediately eligible for parole, and the State is in agreement that we can file a Motion to Reconsider your sentence." [Id. (Conf. App. pp. 20-21)] Mr. Chaplin further advised Ms. Sothman that he had spoken with the anticipated sentencing Judge regarding the motion to reconsider sentence. Mr. Chaplin informed Ms. Sothman that the Judge indicated that the "[m]otion to Reconsider should be filed approximately 90 to 120 days after you are sentenced to prison and should be set for hearing 6 months after your sentence begins." [Id. (Conf. App. pp. 20-21)] The State also agreed not to resist any request to Reconsider her sentence. [Id. (Conf. App. pp. 20-21)] Finally, the State agreed not to charge Ms. Sothman with Murder in the First Degree, Neglect of Dependent Person regarding the other two children, and Child Endangerment Resulting in Death in violation of Iowa Code § 726.6(1)(b), which carries a mandatory minimum sentence prior to parole eligibility. [Ex.6 (7/29/16 letter)(Conf. App. pp. 20-21)] On August 2, 2016 Mr. Chaplin again wrote to Ms. Sothman outlining the plea agreement, discussions they had about the evidence, and how long a Defendant convicted of the charge of Child Endangerment Resulting in Death served in prison on average. [Ex.7 (8/2/16 letter)(Conf. App. pp. 22-24)] Ms. Sothman signed the letter acknowledging she understood. [Id. p.3 (Conf. App. p. 24)]

Ms. Sothman surrendered herself to the Pella Police Department on August 5, 2016. Ms. Sothman was transported to the Marion County Courthouse where she entered a plea of guilty to Child Endangerment Resulting in Death. [Plea tr.] Mr. Bull outlined the plea agreement for the Court. [Plea tr. p.5 L.19-p.8 L.14] Mr. Bull did not mention that the parties' agreement contemplated a Motion to Reconsider Sentence. [Id.] The Court also mentioned the plea agreement but there was no mention of Reconsideration of Sentence. [Plea tr. p.15 L.3-p.16 L.3] Mr. Chaplin pointed out that there was no minimum sentence and Ms. Sothman would be eligible for immediate parole. [Plea tr. p.16 L.13-16] The Court informed Ms. Sothman that Iowa law required she be sentenced to 50 years in the women's institution, that no fine was applicable, that she would need to provide a sample of her DNA and pay restitution. The Court also informed Ms. Sothman that there was no mandatory minimum sentence that applies to the charge. [Plea tr. p.16 L.22-24] Ms. Sothman entered her plea of guilty and provided the Court with a factual basis for the plea. [Plea tr. p.18 L.7-p.21 L.25] The Court accepted her plea of guilty, ordered that a presentence investigation be prepared and set a sentencing date. [Plea tr. p.24 L.25-p.26 L.1] The Court also informed Ms. Sothman regarding the mandatory sentence, the fact there wasn't a mandatory minimum sentence and that "[i]t is up to the parole board to determine when and if you will be eligible for parole. They make those decisions, the Court does not." [Plea tr. p.27-L.1-4] Ms. Sothman was remanded to custody pending sentencing.

Sometime, shortly after the guilty plea, Mr. Bull informed Mr. Chaplin that he did not believe that Ms. Sothman would be eligible for a reconsideration of sentence. [Ex.10 (8/11/16 letter)(Ex. App. pp. 5-6)] Child endangerment is a Forcible Felony. [Iowa Code § 702.11] A court may reconsider a sentence and impose any sentence permitted by law. [[Iowa Code § 902.4] Iowa law does not permit a suspended prison sentence for a forcible felony. [Iowa Code § 907.3]. Therefore, a person who is sentenced for a conviction on a forcible felony is not eligible for a reconsideration of that sentence. Mr. Chaplin visited Ms. Sothman in the Marion County Jail and explained to her that she would not be eligible for a reconsideration of sentence. [Ex.10 (8/11/16 letter)(Ex. App. pp. 5-6)] Mr. Chaplin and Ms. Sothman discussed setting aside her guilty plea and filing a Motion in Arrest of Judgment, which the State would not resist. [Id. (Ex. App. pp. 5-6)] They further discussed proceeding with sentencing with the understanding that Mr. Bull would write a letter of recommendation to the parole board. [Id. (Ex. App. pp. 5-6)] On August 16, 2016 Mr. Chaplin informed Ms. Sothman again that she was not eligible for reconsideration of sentence and the fact that she would be sentenced to prison. [Ex.11 (8/16/16 letter)(Ex. App. pp. 7-8)] Mr. Chaplin also informed Ms. Sothman that Mr. Bull indicated that "if you agree not to file a Motion in Arrest of Judgment, seeking to have your guilty plea set aside he will write a letter of recommendation in support of your parole after 6 months in prison." [Id. (Ex. App. pp. 7-8)] Ms. Sothman signed the letter acknowledging that she desired "to seek parole in

this matter and not file a Motion to Reconsider, and do not wish to challenge my guilty plea." [Id. p.2 (Ex. App. p. 8)].

On September 23, 2016 Ms. Sothman, Mr. Chaplin and Mr. Bull appeared in chambers before Judge Mertz for the purposes of making a record outside the presence of the public, Ms. Sothman's family and supporters. [Sent. tr. p.4 L.2-25] The purpose of the record was apparently to memorialize the parties' plea discussions including the discussions regarding reconsideration of sentence and parole eligibility after sentencing. [Sent. tr. p.5 L.2-p.10 L.8] Ms. Sothman acknowledged that she understood that she would be sentenced to an indeterminate term for up to fifty years and that there was no mandatory minimum sentence so she would be eligible for parole. [Sent. tr. p.11 L.15-20] Ms. Sothman further acknowledged that she would have to go through the parole board for parole. [Sent. tr. p.11 L.20-23] Ms. Sothman, on cross examination, acknowledged that she could have filed a motion in arrest of judgment to take back her guilty plea. [Sent. tr. p.13 L.12-18] She further acknowledged that she had not chosen to file a motion in arrest of judgment as it was in her best interest not to file the motion. [Sent. tr. p.13 L.19-20]

Upon completion of the record in chambers the proceedings moved to open court. [Sent. tr. p.14 L.8-9] Mr. Bull and Mr. Chaplin requested that the Court impose the mandatory sentence. After the sentencing colloquy, Ms. Sothman was sentenced to an indeterminate term not to exceed fifty years in prison. [Sent. tr. p.26 L.15-p.27 L.3].

Ms. Sothman was transferred to the Iowa Correctional Institution for Women (ICIW) at Mitchellville, Iowa. After her transfer to ICIW Ms. Sothman began inquiring about the possibility of applying for parole. Ms. Sothman was encouraged by her counselor, to seek reconsideration of sentence rather than parole. [Ex.16 (11/28/16 letter)(Ex. App. p. 12)] Ms. Sothman contacted Mr. Chaplin who promised to again check with Mr. Bull and the Judge regarding eligibility for reconsideration of sentence. [Id. (Ex. App. p. 12)] Mr. Chaplin spoke with Mr. Bull and again they concluded that Ms. Sothman was not eligible for a reconsideration of sentence. [Ex.17 (12/5/16 letter)(Ex. App. p. 13)]

Ms. Sothman turned her attention to seeking parole. [Ex.21 (3/19/17 letter)(Ex. App. pp. 14-15)] Ms. Sothman learned that her annual review would not occur until October 2017. [Ex.15 (Kiosk Messages, 5/15/17)(Ex. App. p. 11)] Ms. Sothman's ICIW counselor informed her both in writing and in person that she should expect to be turned down for parole for several years and that ICIW would not support her before the Board of Parole at that time. [Id.; Ex.18 (Bohnett 12/6/16 email)(Ex. App. pp. 11; Conf. App. p. 25)] Ms. Sothman's 2017 annual review came and she was denied, despite several letters of support to the board of parole including the promised letter from Mr. Bull. [Ex.23 (8/4/17 letter)(Ex. App. pp. 16-17)] Ms. Sothman was also denied parole in 2018 and remained in the ICIW at the time of trial of this matter. Ms. Sothman testified at trial that she learned that the average time a person serves on a sentence like hers is approximately seven years.

Ms. Sothman filed her Petition for Post-Conviction Relief on April 26, 2019. Ms. Sothman alleges ineffective assistance of counsel, rendering her plea involuntary and violation of her right to public proceedings at the time of sentencing. The ineffective assistance of counsel claim centers around the reconsideration of sentence/immediate parole discussions. Ms. Sothman claims that the hope of early release from prison by either reconsideration of sentence or immediate or quick parole induced her to accept the plea agreement. Ms. Sothman further claims that the in chambers record prior to sentencing violated her right to public proceedings. Ms. Sothman had approximately 15-20 supporters at her sentencing hearing. Among her supporters were church members, husband and her parents.

Ms. Sothman testified at trial that the reason she chose to plead guilty rather than go to trial included the hope of early release but also focused on the fact that it was the quickest resolution to the matter. Ms. Sothman's other two minor children were removed from her home, were subject to a Department of Human Services case and were living with a relative before her arrest. Ms. Sothman desired the return of her children to her husband. Ms. Sothman was aware that the children would not return to her husband's care while she lived in the home. Her plea of guilty and subsequent incarceration would clear the way for the children to return home. Ms. Sothman also did not want to put her children through a trial and desired to get the case over with as soon as possible. Ms. Sothman acknowledged at trial that by pleading

> guilty she avoided listening to the medical examiner and other witnesses describe the death of her daughter and also spared her seeing the crime scene photographs. She further acknowledged that the plea of guilty seemed like a good decision at the time and the quickest way to resolve the case and that there was a really good chance she would have been convicted at trial.
>
> Ms. Sothman also testified at trial that the record made in chambers seemed unusual to her. She further testified that her father would have open court. Ms. Sothman valued her father's opinion and said that he is wise. She also acknowledged that while she was in the Marion County Jail pending sentencing, she did not discuss the issues related to the motion to reconsider with her father when she visited with him. Ms. Sothman contends that if the in chambers record would have been made in the courtroom she may have not continued with sentencing and withdrawn her guilty plea.

(Findings of Facts, Conclusion of Law and Order, pp.1-8, 10/22/29)(App. pp. 55-62).

Any further facts relevant to the appeal will be discussed in the argument below.

ARGUMENT

I. Trial counsel was ineffective for not assuring Sothman made a knowing and voluntary plea. Counsel misinformed Sothman she would be immediately eligible for parole and she would be supported and considered within six months of entering the prison. While technically immediately eligible for parole, the reality is that the prison will not support and consider her for parole for at least seven years.

Preservation of Error: Error was preserved by petitioner's application for postconviction relief and the district court's denial thereof. (PCR, 4/16/19; Applicant's Trial Brief, 9/3/19; Findings of Facts, Conclusions of Law and Order, pp.8-14, 10/22/19)(App. pp. 13-54, 62-68).

Scope of Review: This court reviews claims of ineffective assistance of counsel de novo. State v. Clay, 824 N.W.2d 488, 494 (Iowa 2012). It will affirm if the court's findings of fact are supported by substantial evidence and the law was correctly applied. Harrington v. State, 659 N.W.2d 509, 520 (Iowa 2003).

Merits: In order to prevail on a claim of ineffective assistance of counsel, the defendant must prove by a

preponderance: (1) that trial counsel failed to perform an essential duty and (2) that she was prejudiced by counsel's breach. Millam v. State, 745 N.W.2d 719, 721 (Iowa 2008). This court has expressed a preference for resolving claims of ineffective assistance of counsel by postconviction relief; however, such claims will be resolved on direct appeal when "the record is clear and plausible strategy and tactical considerations do not explain counsel's actions." Hopkins, 576 N.W.2d at 378. The current record here is sufficient to resolve the claim on direct appeal.

"An attorney fails to perform an essential duty when the attorney 'perform[s] below the standards demanded of a reasonably competent attorney.' " Millam, 745 N.W.2d at 721 (quoting Ledezma v. State, 626 N.W.2d 134, 142 (Iowa 2001)). Counsel's performance is measured against the standard of a reasonably competent attorney. State v. Clay, 824 N.W.2d 488, 495 (Iowa 2012). Counsel is presumed to have performed competently. Millam, 745 N.W.2d at 721.

"Miscalculated trial strategies and mere mistakes in judgment normally do not rise to the level of ineffective assistance of counsel.' However, 'strategic decisions made after a "less than complete investigation" must be based on reasonable professional judgments which support the particular level of investigation conducted.' " Id.

A defendant suffers prejudice "by counsel's failure to perform an essential duty when 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " Id. at 722 (citation omitted). "A reasonable probability is one that is "sufficient to undermine confidence in the outcome."' " Id. (citation omitted). This court considers the totality of the evidence, what factual findings would have been affected by counsel's errors, and whether the effect was pervasive or isolated and trivial. Everett v. State, 789 N.W.2d 151, 158 (Iowa 2010).

In the present case counsel failed to perform an essential duty when he misadvised Sothman that she would be immediately eligible for parole and be supported and considered for parole within six to 12 months of entering prison. (Ex.11 (8/16/16 letter))(Ex. App. pp. 7-8). However, because a death was involved Sothman will not be supported by the prison for parole for several years. (PCR tr. p.58 L.15-19; Ex.15 (kiosk))(Ex. App. p. 11). Further, trial counsel told Sothman the average time served for her type of sentence was 4.6 years. (Ex.11 (8/16/16 letter))(Ex. App. pp. 7-8). In fact, Sothman was told in prison a person in her position typically serves seven or more years and the Administrative Law Judge said it could be "as little as 30%" of her 50-year sentence, which would be 16.7 years. (PCR tr. p.53 L.4-p.54 L.7; Ex.24 (9/18/19 letter))(Ex. App. pp. 18-23). All of this misinformation led to an unknowing and involuntary guilty plea. (PCR tr. p.33 L.10-18).

A. Counsel breached his duty in misinforming Sothman she would be immediately eligible for parole and would be immediately considered and supported for parole within six to 12 months when the reality is she will not be supported or given true consideration for at least seven years, thereby, resulting in a plea that was not knowing and voluntary.

A guilty plea must be knowing and voluntary. Iowa R. Crim. P. 2.8(2)(b). "While there is no constitutional requirement that a judge provide advice relating to parole…that does not leave a court, or an attorney, free to misinform a defendant regarding the collateral consequences of his plea." Meier v. State, 337 N.W.2d 204, 207 (Iowa 1983). Misinformation as to the consequences of one's guilty plea is a breach of duty even regarding collateral matters such as parole. Id. at (reversing and remanding to permit Meier to plead anew); see also State v. Kress, 636 N.W.2d 12, 22 (Iowa 2001)(counsel's legal misadvice resulting from his unfamiliarity with and failure to research applicable statutory provisions that would have made clear the one-third mandatory minimum sentence applied was a breach of duty);

Strader v. Garrison, 611 F.2d 61, 65 (4th Cir. 1979)("though parole eligibility dates are collateral consequences of the entry of a guilty plea of which a defendant need not be informed if he does not inquire, when he is grossly misinformed about it by his lawyer, and relies upon that misinformation, he is deprived of his constitutional right to counsel. When the erroneous advice induces the plea, permitting him to start over again is the imperative remedy for the constitutional deprivation."); State v. Harris, 648 P.2d 145, 146 (Ariz.App. 1982)(Harris allowed to withdraw guilty plea where guilty plea was based on the mistaken belief that he would be released no later than 15 years from the date his sentence commenced); Howell v. State, 569 S.W.2d 428, 435 (Tenn. 1978)(Howell argued counsel ineffective where he agreed to two life sentences under mistaken advice as to their true effect and, even though trial counsel was not ineffective, Howell was entitled to relief).

In Meier v. State the petitioner was erroneously advised that if he went to trial and was convicted he would have to serve a minimum of five years but if he pled guilty to robbery in the first degree he would not have a five-year-mandatory sentence and would be released in less than five years. 337 N.W.2d at 205. What counsel failed to understand was Meier would have gotten good time credit which would have substantially reduced the mandatory five-year sentence. Id. at 206. Relying on the misinformation Meier pled guilty and this court reversed.

> A guilty plea must represent the informed, self-determined choice of the defendant among practicable alternatives; a guilty plea cannot be a conscious, informed choice if the accused relies upon counsel who performs ineffectively in advising him regarding the consequences of entering a guilty plea and of the feasible options.

Id. at 207 (quoting Hawkman v. Parrott, 661 F.2d 1161 (8th Cir. 1981)).

The plea agreement reached between the State and Sothman was in continuous disarray. Neither defense

counsel nor the county attorney knew the sentencing laws relevant to the charge. As such the plea kept changing as the county attorney's understanding of the sentencing consequences changed. (Ex.6 (7/29/16 letter); Ex.7 (8/2/16 letter); Ex.10 (8/11/16 letter); Ex.11 (8/16/16 letter))(Conf. App. pp. 20-24; Ex. App. pp. 5-8). In one letter she was told the county attorney would write a letter recommending her release *after one year*. (Ex.9 (8/9/16 letter))(Ex. App. p. 4). In the final letter before sentencing, Sothman was informed:

> Child Endangerment Resulting in Death of a Child is a Forcible Felony under Iowa Code Section 702.11. As a result, the State's position is that you are not eligible to have your sentence reconsidered, since the Judge cannot impose a suspended sentence on a Forcible Felony…. The County Attorney has indicated that if you agree not to file a Motion in Arrest of Judgment, seeking to have your guilty plea set aside in this case, *he will write a letter of recommendation in support of your parole after 6 months in prison*. As we've discussed, having a letter from the County Attorney would definitely be of assistance to us in trying to secure your early release on parole.
>
> The purpose of this letter is to confirm the discussions that I've had with the County Attorney in this regard, so that you are aware of what has

> been going on, and further to explain your legal rights in this case. As you know, you pled guilty to Child Endangerment Resulting in Death, which is punishable by a penalty of up to 50 years of incarceration in prison. We've also discussed that typical individuals, pursuant to a Legislative Services Study, *serve on average 4.6 years* on this type of sentence. There is no minimum sentence and *you are eligible for parole immediately upon your sentencing*.
>
> * * *
>
> Once you are sentenced, you will have the opportunity to seek parole while in prison and the State will file a letter on your behalf, recommending parole. As we've discussed, I believe you would be an excellent candidate for parole but you must understand that there are no guarantees on either a Motion to Reconsider or parole request. The ultimate decision is out of your hands.

(emphasis added)(Ex.11 (8/16/16 letter)(Ex. App. pp. 7-8). Sothman signed the bottom of the letter acknowledging her legal rights and stating she did not want to challenge her guilty plea. (Id. p.2)(Ex. App. p. 8).

Prior to sentencing the parties made a record in chambers where Sothman was questioned, under oath, as to her understanding of the final plea agreement.

> Q. And it's your understanding today that you will be sentenced, and the State is seeking a fifty-year – term of incarceration for – indeterminate term for up to fifty years and that there is no mandatory minimum and you would be eligible for parole. But the Court will not be granting that. That would have to go through the parole board? A. That's correct.

(Sent. tr. p.11 L.15-23).

At prison, however, Sothman was told that she would not be seriously considered for parole for several years because her case involved a death. The counselor said that the prison staff would not support her release for several years and the parole board would deny her request. (Ex.15 (Kiosk Messages))(Ex. App. p. 11). Yet, she had been told by trial counsel in the August 9th letter that the county attorney would write a letter of recommendation for her to be paroled after one year and a week later sent a letter saying the county attorney would support her parole after six months. (Ex.9 (8/9/16 letter); Ex.11 (8/16/16))(Ex. App. pp. 4, 7-8). Sothman obviously believed that release within six to 12 months was a realistic possibility given the county attorney's promised

recommendations for early release within six to 12 months combined with repeatedly being told that she would be immediately eligible for parole, as is demonstrated by her March 13, 2017 letter to trial counsel. There she refers to the possibility of being paroled in August 2017, or sooner. (Ex.21 (3/19/17 letter))(Ex. App. pp. 14-15).

Counsel's erroneous belief that Sothman could secure such an early release is evident in his September 29th letter where he tells her that when she gets to Mitchellville she should begin exploring the parole process and contact him when she is ready to proceed. (Ex.14 (9/29/16 letter))(Ex. App. pp. 9-10). However, inmates do not start the parole process. It is in the control of the prison and the parole board. (PCR tr. p.28 L.15-p.29 L.1). Counsel also told Sothman's parents that the prison institution would support her parole after ten month. (Ex.20 (Chaplin 12/7/16 email)); PCR. Tr. p.59 L.3-19)(Conf. App. pp. 26-27). The reality is that the prison institution and the parole board would not

even consider a parole request for "several years." (Ex.15 (Kiosk Messages))(Ex. App. p. 11).

Sothman was told that there were no guarantees as to being paroled, however, she was still set up to believe that being paroled within a year was a realistic possibility. (Ex.11 (8/16/16 letter))(Ex. App. pp. 7-8). This clearly is not the case as demonstrated by the counselor's testimony. (PCR tr. p.58 L.15-p.59 L.19).

Trial counsel also told Sothman the average time served for this type of offense was 4.6 years. But it appears she cannot even get seriously considered for parole in 4.6 years. As noted above, Sothman would be up for annual review, but the prison would not support her for parole for several years because a child died. (Ex.15 (Kiosk Messages))(Ex. App. p. 11). The administrative Law Judge said her time served could be "as little as 30%" of her sentence, which mean she

would serve 16.7 years before being paroled.[2] (Ex.24 (9/18/19 letter)) (Ex. App. pp. 18-23). That is well beyond an average of 4.6 years.

Sothman based her decision to plead guilty upon this misinformation. She was told she was a good candidate for parole, was receiving a county attorney letter of recommendation for release after six to twelve months, and

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[2] Appellate counsel found a summary chart from Legislative Services Division showing child endangerment class "B" to average 15 to 35 years. There was no differentiation between sections 726.6(1)(a) and 726.6(1)(b). Section 726.6(1)(b) carries a mandatory minimum between three-tenths and seven-tenths of the maximum, but was not enacted until 2016. See Iowa Code § 902.12(2)(2016 Acts, ch. 1104, § 8). The chart is in the Criminal Law Overview, Legislative Guide, Legal Services Division, table 2 (Dec. 2016)(found at legis.iowa.gov/docs/publications/LG/801741.pdf). It should be noted the publication was not available for defense counsel leading up to October 2016.

A summary chart published by the Board of Parole in December 2016 shows that for "other violent" class B felonies a person serves on average 86.7 months, or 7.225 years. (Iowa Board of Parole Annual Report Fiscal Year 2016, App. B (found at bop.iowa.gov/sites/default/files/documents/2017/12/fy16_bop_annual_report.pdf)). Again, this chart was not available to trial counsel.

was led to believe such early release was a realistic expectation. Given the misinformation as to the true or realistic eligibility for parole and the realistic time served for child endangerment convictions, Sothman did not make a knowing and voluntary plea. Trial counsel was ineffective for misinforming Sothman of the true consequences of a plea of guilty.

B. Prejudice.

"To demonstrate prejudice in the plea-bargaining process a [claimant] must show the outcome of the plea process would have been different with competent advice.' " Dempsy v. State, 860 N.W.2d 860, 869 (Iowa 2015)(quoting Lafler v. Cooper, 566 U.S. 156, 163 (2012)); see Hill v. Lockhart, 474 U.S. 52, 60 (1985)(holding two-part Strickland v. Washington test applies to challenges to guilty pleas based on ineffective assistance of counsel). This court does not speculate as to the outcome of the trial waived by the guilty plea. State v. Kress, 636 N.W.2d 12, 22 (Iowa 2001).

Sothman clearly testified at the postconviction hearing that she would not have pled guilty to child endangerment had she realized that she was not eligible for quick release due to the delays in support for her parole requests. (PCR tr. p.33 L.10-18). Based upon the information she received she believed she would be actually considered for parole within six to 12 months. (PCR tr. p.13 L.16-21, p.15 L.19-23, p.17 L.2-8, p.22 L.16-p.23 L.10). Based on the plea agreement she believed that she would be home within a year and the plea was the fastest way to reunite her family. (PCR tr. p.13 L.16-24). Trial counsel's misinformation as to the consequences of her plea has been completely wrong. Sothman will not be supported for parole for several years. (PCR tr. p.59 L.3-4). After her third annual review, she was told she could serve "as little time as 30%" of her 50 year sentence before being paroled. (Ex.24 (9/18/19 letter))(Ex. App. pp. 18-23). That equates to 16.6 years and is well beyond the time stated by trial counsel.

Sothman was clearly prejudiced by counsel's misinformation. Therefore, her plea should be vacated and the matter remanded for her to plead anew.

II. Trial counsel was ineffective for not asserting Sothman's right to have her plea proceedings in open court or having her waive that right.

Preservation of Error: Error was preserved by Sothman's application for postconviction relief [PCR] and the trial court's dismissal thereof. (PCR, 4/16/19; Applicant's Trial Brief, 9/3/19; Findings of Facts, Conclusions of Law and Order, pp.8-14, 10/22/19)(App. pp. 13-16, 62-68).

Scope of Review: Sothman alleges she was denied her right to counsel under the federal and state constitutions. This court reviews claims of ineffective assistance of counsel de novo. State v. Clay, 824 N.W.2d 488, 494 (Iowa 2012).

Merits: The problem in the present case is that Sothman was denied her right to public criminal proceeding. Trial counsel had a duty to ensure her right or determine that she wanted to waive it.

A. Background.

Prior to sentencing, the court asked the parties to meet in chambers to review the guilty plea as amended by the county attorney's realization that Sothman could not have her sentence reconsidered, would be sentenced to a prison term, and early release would have to occurred through parole. (PCR tr. p.88 L.19-25). The proceeding was to confirm Sothman still wanted to plead guilty, (PCR tr. p.93 L.16-24). Counsel did not ask Sothman if she wanted to proceed outside the view of the public. (PCR tr. p.25 L.10-13, p.89 L.1-16). The proceeding in chambers was a continuation of the plea proceeding, in that plea agreement was modified and Sothman agreed to continue with the plea by not filing a motion in arrest of judgment. So the court needed to determine that her decision to continue with the plea as modified was knowing and voluntary.

Sothman asserts that had she had a public proceeding, she would not have continued with the guilty plea. She

testified her father would have counseled her not to continue with the plea. (PCR tr. p.26 L.2-15).

B. Sothman did not voluntarily waive her right to a public plea proceeding so counsel should have objected.

A criminal defendant has a constitutional right to a public guilty plea proceeding. "Of uncertain origin, but nevertheless deeply rooted in the common law, the right to public trial has long been regarded as a fundamental right of the defendant in a criminal prosecution." State v. Lawrence, 167 N.W.2d 912, 913 (Iowa 1969). The United States and the Iowa Constitution's guarantee the right to a public trial. U.S. Const. amend VI, XIV; Iowa Const. art. I, §10. See also Lawrence, 167 N.W.2d at 913-914 ("we have recognized that the right to public trial is guaranteed by Article I, Section 10, of the Iowa constitution"). "This provision reflects the tradition of our system of criminal justice that a trial is a "public event" and that "[w]hat transpires in the court room is public property."" Gannett Co. v. DePasquale, 443 U.S. 368, 411-412, 99 S.Ct. 2898, 2922 (1979)(Blackman, J., dissenting

in part)(quoting Craig v. Harney, 331 U.S. 367, 374, 67 S.Ct. 1249, 1254 (1947)).

> More importantly, the requirement that a trial of a criminal case be public embodies our belief that secret judicial proceedings would be a menace to liberty. The public trial is rooted in the "principle that justice cannot survive behind walls of silence," and in the "traditional Anglo-American distrust for secret trials[]"

Gannett Co. v. DePasquale, 443 U.S. at 412, 99 S.Ct. at 2922 (Blackman, J., dissenting in part)(other citations omitted).

A "presumption of openness inheres in the very nature of a criminal trial under our system of justice." Richmond Newspaper, Inc. v. Virginia, 448 U.S. 555, 573, 100 S.Ct. 2814, 2825 (1980). An open trial assures that the proceedings are conducted fairly and discourages perjury, misconduct, and decisions based on secret bias or partiality. Id. at 569, 100 S.Ct. at 2823. "[T]he concept of public trial includes the entire trial from the impaneling of the jury to the rendering of its verdict." Lawrence, 167 N.W.2d at 915. The right to a public trial extends to other aspects of criminal

proceedings. See Waller v. Georgia, 467 U.S. 39, 43, 104 S.Ct. 2210, 2214 (1984)(6th Amendment right to public trial applies to suppression hearings); Presley v. Georgia, 558 U.S. 209, 213, 130 S.Ct. 721, 724 (2010)(6th Amendment right to a public trial extends to the voir dire of prospective jurors).

The right to a public trial applies to guilty plea proceedings. United States v. Haller, 837 F.2d 84, 86-87 (2nd Cir. 1988). See also Des Moines Register & Tribune Co v. Iowa District Court, 426 N.W.2d 142, 145 (Iowa 1988)(citing Haller). "Plea hearings have typically been open to the public, and such access, as in the case of criminal trials, serves to allow public scrutiny of the conduct of courts and prosecutors." Haller, 837 F.2d at 86-87 (other citations omitted). The majority "of the criminal convictions in this country rest on pleas of guilty." Brady v. United States, 397 U.S. 742, 752, 90 S.Ct. 1463, 1471 (1970). See also Lafler v. Cooper, 566 U.S. 156, 170, 132 S.Ct. 1376, 1388 (2012) ("criminal justice today is for the most part a system of pleas,

not a system of trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."); Missouri v. Frye, 566 U.S. 134, 144, 133 S.Ct. 1399, 1407 (2012)(plea bargaining "is not some adjunct to the criminal justice system; it is the criminal justice system.").

The United States Supreme Court "has made clear that the right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." Waller v. Georgia, 467 U.S. at 45, 104 S.Ct. at 2215. Closure of trials should be rare. Id. The Waller Court provided criteria for courts to apply before excluding the public from any stage of a criminal trial:

> [T]he party seeking to close the hearing [1] must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the trial court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure.

Id. at 48, 104 S.Ct. at 2216 (numbers added).

The Iowa Supreme Court applied the Waller standard in Schultzen which addressed screening of three family members during the victim's testimony - a partial closure. State v. Schultzen, 522 N.W.2d 833, 836 (Iowa 1994).

Trial counsel breached his duty to Sothman. Counsel should have determined whether Sothman was willing to waiver her right to a public proceeding. First, it is well-settled that a criminal defendant may knowingly and voluntarily waive a constitutional right. See e.g. Boykin v. Alabama, 395 U.S. 238, 243, 89 S.Ct. 1709, 1713 (1969)("the record does not disclose that the defendant voluntarily and understandingly entered his pleas of guilty"); Faretta v. California, 422 U.S. 806, 835, 95 S.Ct. 2525, 2541 (1975)("in order to represent himself, the accused must 'knowingly and intelligently' forgo those relinquished benefits."). The United States Supreme Court stated in Johnson v. Zerbst:

> It has been pointed out that 'courts indulge every reasonable presumption against waiver' of

> fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023 (1938).

Sothman did not voluntarily waive a public guilty plea or any other type of public proceeding. The judge moved the parties into chambers. (Sent. tr. p.4 L.5-13; PCR tr. p.88 L.19-25). Neither the court nor trial counsel asked Sothman if she was willing to waive her right to a public proceeding. There was no advisory of her right to a public proceeding. There was no objection by counsel. (PCR tr. p.89 L.1-3). Counsel stated that he "viewed this proceeding in chambers as being confirmation for the judge that this decision had been made by Ms. Sothman knowingly, intelligently, and voluntarily, et cetera." (PCR tr. p.89 L.8-11). In other words,

the court was redoing the determination of a knowing and voluntary guilty plea since the terms and consequences of her plea had changed.

Sothman was denied her right to public guilty plea. Trial counsel should have informed her of her right and determined whether she want to proceed in the public courtroom. Counsel's failure to protect Sothman's right to a public guilty plea proceeding was a breach of an essential duty.

Trial counsel's failure to inform Sothman of her right and to ensure the trial court obtain a voluntary waiver resulted in the court's failure to follow the Waller test. A criminal defendant does not have a right to a closed proceeding. Additionally, the right to an open courtroom is not limited to a criminal defendant. The public has a constitutional right to observe judicial proceedings. State v. Knox, 464 N.W.2d 445, 447 (Iowa 1990). The public has an interest in observing judicial proceedings which "assures that the proceedings are

conducted fairly and discourages perjury, misconduct, and decisions based on secret bias or partiality." Richmond Newspaper, Inc. v. Virginia, 448 U.S. at 569, 100 S.Ct. at 2823. It further assures that guilty pleas are not obtained by coercion and are indeed voluntary. In re Washington Post Co., 807 F.2d 383, 389 (4th Cir. 1986)("The presence of the public operates to check any temptation that might be felt by either the prosecutor or the court to obtain a guilty plea by coercion or trick, or to seek or impose an arbitrary or disproportionate sentence.").

The court's lack of colloquy with Sothman to obtain a valid voluntary waiver of her right to a public proceeding foreclosed any finding that there was an "overriding interest that was likely to be prejudiced" by conducting a public hearing. Waller, 467 U.S. at 48, 104 S.Ct. at 2216. The United States "Supreme Court has noted a special concern for accommodating the attendance at trial of an accused's family members." In re Oliver, 333 U.S . 257, 271-272, 272 n.29, 68

S.Ct. 499, 507, 507 n.29 (1948). Trial counsel's reason for requesting a closed hearing is antithetical to the purposes of the right. Id. at 270, 68 S.Ct. at 506 ("the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution."). The United States Supreme Court quoted Jeremy Bentham:

> suppose the proceedings to be completely secret, and the court, on the occasion, to consist of no more than a single judge,—that judge will be at once indolent and arbitrary: how corrupt so ever his inclination may be, it will find no check, at any rate no tolerably efficient check, to oppose it. Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance.'

In re Oliver, 333 U.S. at 270-271, 68 S.Ct. at 506 (quoting 1 Bentham, Rationale of Judicial Evidence 524 (1827)).

While counsel may have truly believed that the plea was in Sothman's best interest, it is not her choice whether to proceed to trial or enter a plea. Iowa R. of Prof'l Conduct

32:1.2(a)("In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify."). It is counsel's duty to protect his client's interests no matter how misguided he may believe the choice to be. Iowa R. of Prof'l Conduct 32:1.3, cmt. 1 ("A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor."). Whatever pressures put upon a defendant, whether by family or her attorney, a searching colloquy with the court should reveal a knowing and voluntary decision. Counsel failed to provide Sothman that process, thereby, breaching an essential duty.

Trial counsel's actions in prompting the violations of Sothman's right to a public guilty plea fell below the standard of reasonably competent attorneys. Cf. Krogmann v. State, 914 N.W.2d 293, 308 (Iowa 2018)(Counsel's failure to bring

the matter to the attention of the district court fell below the standard of reasonably competent lawyers).

C. Prejudice.

Generally, in claims of ineffective-assistance-of-counsel in violation of the Sixth Amendment, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. at 2068. "This is because "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial."" Lado v. State, 804 N.W.2d 248, 251 (Iowa 2011) (quoting United States v. Cronic, 466 U.S. 648, 658, 104 S.Ct. 2039, 2046 (1984)). "[A] person's right to counsel is only implicated when attorney error undermines the reliability and fairness of the criminal process." Lado, 804 N.W.2d at 251.

Defense counsel may also commit "structural errors." Structural errors are not merely errors in a legal proceeding,

but errors "affecting the framework within which the trial proceeds." Arizona v. Fulminante, 499 U.S. 279, 310, 111 S.Ct. 1246, 1265 (1991).

1. Structural Error

The United States Supreme Court has concluded some constitutional errors are harmless and do not require the automatic reversal of the conviction. Chapman v. California, 386 U.S. 18, 22, 87 S.Ct. 824, 827 (1967). However, the Court recognized that some errors should not be deemed harmless beyond a reasonable doubt. Id. at 23, n.8, 87 S.Ct. at 827-828, n.8. This type of error is known as a structural error. Arizona v. Fulminante, 499 U.S. at 309–310, 111 S.Ct. at 1264-1265. In Weaver, the Court explained:

> The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial. Thus, the defining feature of a structural error is that it "affect[s] the framework within which the trial proceeds," rather than being "simply an error in the trial process itself." For the same reason, a structural error "def[ies] analysis by harmless error standards."

Weaver v. Massachusetts, 137 S.Ct. 1899, 1907 (2017)(other citations omitted).

In Waller, the Supreme Court agreed with the lower federal courts that "the defendant should not be required to prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee." Waller, 467 U.S. at 49-50, 104 S.Ct. at 2217. The Court noted that the general view was "that a requirement that prejudice be shown "would in most cases deprive [the defendant] of the [public-trial] guarantee, for it would be difficult to envisage a case in which he would have evidence available of specific injury." " Id. at 50 n.9, 104 S.Ct. at 2217 n.9 (citing Bennett v. Rundle, 419 F.2d 599, 608 (3rd Cir. 1969)).

In Weaver, the Court addressed whether prejudice is presumed when a violation of a public trial right is raised for the first time in an ineffective-assistance-of-counsel claim on collateral review. Petitioner's counsel did not object to the closure doing voir dire because he believed it was

constitutional. Weaver, 137 S.Ct. at 1906. The Massachusetts Supreme Judicial Court denied Weaver a new trial finding he failed to prove counsel's conduct caused him prejudice. Id. at 1907.

The Weaver Court majority determined

> when a defendant raises a public-trial violation via an ineffective-assistance-of-counsel claim, *Strickland* prejudice is not shown automatically. Instead, the burden is on the defendant to show either a reasonable probability of a different outcome in his or her case or, as the Court has assumed for these purposes, [], to show that the particular public-trial violation was so serious as to render his or her trial fundamentally unfair.

Id. at 1911 (other citation omitted). The Court stated the reason for placing the burden on the petitioner derived both from the nature of the error and the difference between a public trial violation preserved and then raised on direct review and one raised as ineffective-assistance-of-counsel on collateral review. Id. at 1912. When an ineffective-assistance-of-counsel claim is raised in postconviction proceedings the costs and uncertainties of a new trial are

greater because more time has passed in most cases. The Court is more concerned about finality in a postconviction proceeding. Direct review often has given at least one opportunity for an appellate review of the trial proceedings. "These differences justify a different standard for evaluating a structural error depending on whether it is raised on direct review or raised instead in a claim alleging ineffective assistance of counsel." Id. at 1912.

However, in dissenting from the majority holding, Justice Breyer stated:

> The Court notes that *Strickland*' s "prejudice inquiry is not meant to be applied in a 'mechanical' fashion," [], and I agree. But, in my view, it follows from this principle that a defendant who shows that his attorney's constitutionally deficient performance produced a structural error should not face the additional—and often insurmountable—*Strickland* hurdle of demonstrating that the error changed the outcome of his proceeding.

Weaver, 137 S.Ct. at 1916 (Breyer, J., dissenting)(other citations omitted). Justice Breyer noted that the Court's "precedent does not try to parse which structural errors are

truly egregious ones." "It simply views *all* structural errors as "intrinsically harmful" and holds that any structural error warrants "automatic reversal" on direct appeal "without regard to [its] effect on the outcome" of a trial." Id. (Breyer, J., dissenting). Justice Breyer continued:

> I do not see how we can read *Strickland* as requiring defendants to prove what this Court has held cannot be proved. If courts do not presume prejudice when counsel's deficient performance leads to a structural error, then defendants may well be unable to obtain relief for incompetence that deprived them "of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." This would be precisely the sort of "mechanical" application that *Strickland* tells us to avoid.

Id. at 1917 (Breyer, J., dissenting).

2. Sixth Amendment right to a public trial

The present case has a similar procedural posture to Weaver. Sothman's challenge is raised in a postconviction relief action. However, the process for bringing an ineffective-assistance-of-counsel claim regarding the courtroom closure in Iowa is different than in Massachusetts. Sothman's

complaint must be raised through an ineffective-assistance-of-counsel claim and Iowa law permits appellants to raise such claims for the first time in postconviction relief. Iowa Code § 814.7 (2015). Massachusetts has a "well-established principle that the preferred method for raising a claim of ineffective assistance of counsel is through a motion for a new trial." Commonwealth v. Zinser, 847 N.E.2d 1095, 1098 (Mass. 2006). Additionally, Sothman filed her petition petition for postconviction relief two and a half years after her conviction. (Judgment Entry, 9/28/16; PCR, 4/16/19)(App. pp. 8-10, 13-15). If Sothman had had a direct appeal, she could not have raised this issue because there were insufficient records for appeal. Essentially, the postconviction relief action was Sothman's first appeal-of-right for the issue. Therefore, Weaver does not control the prejudice requirement in the present case. But see Goods v. State, No. 18-1986, 2020 WL 1548483, at *4 (Iowa Ct. App. Apr. 1, 2020)(Weaver applied to a partially closed hearing where the issue raise via

ineffective assistance of counsel)(further review application pending); State v. Levy, No. 18-0511, 2020 WL 567696 (Iowa Ct. App. Feb. 2, 2020)(declining to recognize structural err where raised via ineffective assistance).

The record demonstrates trial counsel's deficient performance resulted in a structural error. Sothman's guilty pleas must be vacated and remanded for further proceedings. Waller, 467 U.S. at 49-50, 104 S.Ct. at 2217 ("the remedy should be appropriate to the violation."); State v. Levy, No. 18-0511, 2020 WL 567696 (same).

3. Article I, section 10 right to a public trial

Counsel's error in the present case resulted in Sothman being denied her right to a public guilty plea. The denial of Sothman's constitutional right to a public trial would ordinarily be considered a structural error not subject to a harmless error analysis. However, because defense counsel failed to protect the right guaranteed by Article I, section 10 which is also a violation of same constitutional provision, this

court must decide whether she must show Strickland prejudice. This court should determine counsel's error resulted in structural error which is not amenable to either a harmless error or Strickland prejudice analysis.

The Iowa Supreme Court has recognized structural error occurs when: (1) counsel is completely denied, actually or constructively, at a crucial stage of the proceeding; (2) where counsel does not place the prosecution's case against meaningful adversarial testing; or (3) where surrounding circumstances justify a presumption of ineffectiveness, such as where counsel has an actual conflict of interest in jointly representing multiple defendants. Lado, 804 N.W.2d at 252. However, the court noted Iowa's case law provides few applications of structural error. Id. at 252 n.1.

In Krogmann, an appeal from denial of postconviction relief, this court determined that a pretrial order freezing the petitioner's assets violated his right to be the master of his defense. 914 N.W.2d at 308. The court examined whether

Krogmann was required to prove Strickland prejudice. The court believed prejudice should be presumed in a postconviction-relief proceeding for the type of structural error presented in the case. Id. at 324. The court, therefore, held under Article I, section 10, Krogmann was not required to show actual prejudice. Id. at 325.

It appears no other states, in consideration of its own state constitution, have declined to follow Weaver in a denial of a public trial where error was not preserved. The Weaver dissent is persuasive and should be adopted when considering the violation of Article I, section 10's guarantee to a public trial. Justice Breyer stated:

> … errors—such as the public-trial error at issue in this case—have been labeled "structural" because they have effects that "are simply too hard to measure." But how could any error whose effects are inherently indeterminate prove susceptible to actual-prejudice analysis under *Strickland*? Just as the "difficulty of assessing the effect" of such an error would turn harmless-error analysis into "a speculative inquiry into what might have occurred in an alternate universe," so too would it undermine a defendant's ability to make an actual-prejudice showing to establish an ineffective-assistance claim.

> The problem is evident with regard to public-trial violations. This Court has recognized that "the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance." As a result, "a requirement that prejudice be shown 'would in most cases deprive [the defendant] of the [public-trial] guarantee, for it would be difficult to envisage a case in which he would have evidence available of specific injury.' " In order to establish actual prejudice from an attorney's failure to object to a public-trial violation, a defendant would face the nearly impossible burden of establishing how his trial might have gone differently had it been open to the public.

Weaver, 137 S.Ct. at 1917 (Breyer, J., dissenting)(other citations omitted).

To require Sothman to prove Strickland prejudice for the courtroom closure for her guilty plea would essentially provide no remedy for violating this important right. Additionally, it would not provide for any checks on the district court's actions in closing the courtroom to the public which allowed for secret proceedings.

Sothman's counsel's actions led to structural error. Sothman's guilty pleas must be vacated and remanded for further proceedings.

4. Strickland Prejudice

Alternatively, if this court determines Strickland prejudice must be show, the record demonstrates Sothman was prejudiced by her counsel's failure to protect her right to a public guilty plea. The Weaver Court held that a defendant must demonstrate either a reasonable probability of a different outcome in his or her case or that the structural error was so serious as to render his or her trial fundamentally unfair. Weaver, 137 S.Ct. at 1911 (emphasis added).

The PCR court found that Sothman failed to prove that a public proceeding would have had a reasonably different outcome, that it was so serious as to render the proceeding fundamentally unfair, nor that Sothman would have insisted on going to trial. (Findings of Facts, Conclusions of Law and Order, pp.13-14, 10/22/19)(App. pp. 67-68).

Sothman testified she wanted her father to be present for the determination of her guilty plea being knowing and voluntary. (PCR p.26 L.26 L.2-7). His presence could have

changed the outcome of the proceeding because he has greater insight and "able to pick up on things" that she misses. (PCR p.26 L.8-15). Sothman was in chambers without the support of her father, without her husband, and without her extended family. It was fundamentally unfair for defendant not to have a guilty plea without her family present. The right to a public trial protects defendants against unjust convictions. Weaver, 137 S.Ct. at 1920. Or in this case, protects against entering a plea that is not knowing and voluntary. Had the court held a public guilty plea, Sothman would not have pled guilty.

D. Conclusion.

Trial counsel breached an essential duty to ensure Sothman her right to a public guilty plea. A finding of prejudice is not required under the circumstances of this case as the matter involved a structural error. However, should the court rule that Strickland is applicable, the defendant submits that there is a reasonable probability that the outcome would have been different had defendant's family

been able to observe the proceedings or their absence was fundamentally unfair. This court should vacate Sothman's plea of guilty and remand to plead anew.

CONCLUSION

For the reasons stated above, the defendant respectfully requests this court to vacate her plea of guilty and remand for further proceedings.

NONORAL SUBMISSION

Counsel does not request to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $4.61, 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

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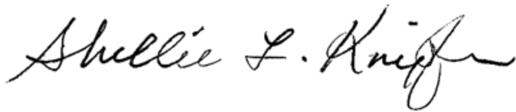

_______________________________ Dated: *7/9/20*

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