IN THE SUPREME COURT OF IOWA

STATE OF IOWA	)	
	)	
Appellee	)	
	)	
v.	)	S. CT. NO. 20–0156
	)	(Floyd)
SHANE MICHAEL DAVIS	)	
	)	
Defendant/Appellant.	)	

APPEAL FROM THE IOWA DISTRICT COURT
FOR FLOYD COUNTY
THE HONORABLE CHRISTOPHER FOY, JUDGE
THE HONORABLE DEDRA SCHROEDER, JUDGE

APPELLANT'S FINAL BRIEF AND ARGUMENT

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TMM/12/2/20

CERTIFICATE OF SERVICE

On 2nd day of Dec., 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 Shane M. Davis, Inmate #6204130, at IMCC, Coralville, Ia by U.S. Mail on Dec. 2, 2020.

/s/Thomas M. McIntee____
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ROUTING STATEMENT

The Court should transfer this case to the Court of Appeals because it raises issues that involve the application of existing legal principles. I R. App. P. 6.903(2)(d) & 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case: This is an appeal by the Defendant-Appellant, Shane M. Davis, from the judgment and sentence imposed 1-21-20 in the District Court for Floyd County Case No. FECR027926 following a guilty plea on 11-25-19 for Counts of Lascivious Acts with a Child, a Class D Felony in violation of Iowa 709.8(1)(e)(2011), 903B.2; and Indecent Contact with a Child, in violation of Iowa Code 709.12(1)(a), 903B.2, an Aggravated Misdemeanor.

Course of Proceedings in the District Court: On 11-4-19, the state filed a Trial Information in Floyd County Case No. FECR027926 charging Defendant, Shane M. Davis, with Counts of Lascivious Acts with a Child, a Class D Felony in violation of Iowa 709.8(1)(e)(2011), 903B.2; and Indecent Contact with a Child, in violation of Iowa Code 709.12(1)(a),

903B.2, an Aggravated Misdemeanor. (see Trial Information) (App. p. 7).

The Defendant executed a Plea Agreement, and a written guilty plea form on 11-25-19. Written Guilty Plea (App. p. 49) The Court entered an Order accepting the defendant's plea on 11-25-19, ordered a PSI, and released the defendant from jail to be under pre-trial services. (See Order 11-25-19) (App. p.53) On 1-15-20 a PSI was filed recommending consecutive prison terms of 5 and 2 years, both suspended with 5 years probation, sex registry for 10 years, 10 year special sentence, court costs, fines, and DNA sample.See PSI 1-15-20 (App.p.61)

On 1-21-20 the Court sentenced Davis to an indeterminate term of imprisonment not to exceed 5 years with a suspended $750 fine and 35% surcharge, on Count 1; an indeterminate term of imprisonment not to exceed 2 years on Count 2 with a suspended $625 fine, and 35% surcharge, court costs and fees, and a domestic violence surcharge of $100. and required a DNA sample. The court ordered the sentence in Count One to run consecutively with Count 2. Pursuant to Iowa Code

Chapter 903B, upon completion of the sentence imposed above the defendant is to be committed into the custody of the Director of the Iowa Department of Corrections for a special sentence 10 years, with eligibility for parole as provided in Iowa Code Chapter 906. (Judgment)(App. p. 89). The Defendant was ordered to register with the Sheriff for the Sex Offender Registry within 5 days of release.

Notice of Appeal was filed on 1-21-20. (Notice of Appeal) (App. p. 94). The State Appellate Defender withdrew and Thomas M. McIntee was appointed for Appeal on 2-1-20.

Facts:

On 11-4-19, the state filed a Trial Information in Scott County Case No. FECR027926 charging Defendant, Shane M. Davis, with Counts of Lascivious Acts with a Child, a Class C Felony in violation of Iowa 709.1, 709.8(1)(a), 709.8(2)(a)2011), 903B.2; and Indecent Contact with a Child, in violation of Iowa Code 709.12(1)(a), 903B.2, an Aggravated Misdemeanor. (see Trial Information) (App. p. 7).

The Defendant was accused of indecent and lascivious contact with the nieces of his fiancé, B.T. aged 10 (touching her groin/vaginal area) and K.T. age 11 (touching her breast), on the outside of their clothing. See Minutes of Testimony (App. p. 10); Trial Information (App. p. 7) The defendant denied these allegations at all times. See Minutes of Testimony (App. p.10)

The Defendant executed a Plea Agreement, and a written guilty plea form on 11-25-19. Guilty Plea Form (App. p. 49)

On 11-25-19 the Court (Judge Foy) accepted the guilty plea, to Count I of Lascivious Acts with a Child, a Class D Felony in violation of Iowa 709.1, 709.8(1)(e) (2011), 903B.2; and Indecent Contact with a Child, in violation of Iowa Code 709.12(1)(b), 903B.2, an Aggravated Misdemeanor. and ordered a PSI. On 1-15-20 a PSI (App. p. 61) was filed recommending consecutive prison terms of 5 and 2 years, both suspended with 5 years probation, sex registry for 10 years, 10 year special sentence, court costs, fines, and a DNA

sample. Sentencing was held on Jan. 21, 2020. The prosecutor read allegations contained in victim statements concerning alleged threats by the defendant to the parents of the alleged victims after his guilty plea, which had not been filed or proven in court, nor ever admitted by the defendant. The prosecutor also related to the Court their complaints about Davis' release pending the sentencing hearing.

The Court (Judge Schroeder) sentenced the defendant as follows: to an indeterminate term of imprisonment not to exceed 5 years with a suspended $750 fine and 35% surcharge, on Count 1; an indeterminate term of imprisonment not to exceed 2 years on Count 2 with a suspended $625 fine, and 35% surcharge, court costs and fees, and a domestic violence surcharge of $100. and required a DNA sample. The court ordered the sentence in Count One to run consecutively with Count 2. Pursuant to Iowa Code Chapter 903B, upon completion of the sentence imposed above the defendant is committed into the custody of the Director of the Iowa

Department of Corrections for 10 years, with eligibility for parole as provided in Iowa Code Chapter 906. (Judgment/Sentencing Order)(App. p.89). The Court based the prison sentences and the decision to make them consecutive on a perceived 'eyeroll' by the defendant at some point during the sentencing proceedings, as well as unproven allegations by family members read to the Court by the prosecutor. (Sentencing Transcript p 18).

Notice of Appeal was filed on 1-21-20. (Notice of Appeal) (App. p. 94). The Appellate Defender, subsequently withdrew, and Counsel Thomas M. McIntee was appointed on appeal on 2-4-20.

Any additional relevant facts will be discussed below:

ARGUMENT

I. WHETHER THE PROSECUTOR UNDERMINED THE PLEA AGREEMENT DURING SENTENCING? WHETHER TRIAL COURT ERRED BY CONSIDERING IMPROPER FACTORS IN SENTENCING THE DEFENDANT TO CONSECUTIVE PRISON TERMS? WHETHER COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT?

A. Standard of Review and Preservation of Error.

In Iowa, appellate courts review a district court's sentencing procedure for correction of errors at law. State v. Formaro 638 NW2d 720 (Iowa 2002). A sentence will ordinarily not be upset on review unless the defendant shows an abuse of discretion by the trial court, or a defect in the sentencing procedure such as the court's consideration of an impermissible factor. State v. Witham 583 NW2d 677 (Iowa 1998).

A defendant may raise the issue of the sentencing Court's reliance upon improper factors and violation of the plea agreement on direct appeal despite the absence of an objection in the trial court. State v. Lopez 872 NW2d 159 (Iowa 2015); State v. Thomas 520 NW2d 311 (Iowa Ct of App. 1994)

In addition, when a claim of ineffective assistance of counsel is made, the Iowa Supreme Court allows an exception to the general rule of error preservation. State v. Lucas, 323 N.W.2d 228, 232 (Iowa 1982). The failure of counsel to make objections to preserve error constitutes a denial of effective assistance of counsel. State v. Hrbek, 336 N.W.2d 431, 435-436 (Iowa 1983); Washington v. Scurr, 304 N.W.2d 231, 235 (Iowa 1981).

Ineffective assistance of counsel claims involves the violation of a constitutional right. The totality of the circumstances relating to counsel's conduct must be reviewed de novo. State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987). A timely Notice of Appeal from the final ruling was filed. Notice of Appeal) (App. p. 94)

B. Discussion.

1. Sentencing Court consideration of impermissible factors

When sentencing a defendant, the Court may not consider facts or allegations that are not established by the evidence or admitted by the defendant. State v. Black. Facts that are not

admitted by the defendant or proven by the State amount to improper sentencing considerations. When a Court considers these factors in arriving at the sentence rendered it constitutes reversible error. State v. Ashley 462 NW2d 279 (Iowa 1990).

When the record reveal improper sentencing considerations, the reviewing Court cannot speculate about the weight a sentencing court assigned to the improper consideration. The defendant's sentence must be vacated and the case remanded for resentencing. State v. Gonzalez 582 NW2d 515 (Iowa 1998); State v. Black 324 NW2d 313 (Iowa 1982).

In State v. Lovell 857 NW2d 241 (Iowa 2014), the Iowa Supreme Court noted, the defendant was charged with two counts of sexual abuse in the third degree and pled guilty to two counts of incest, in violation of Iowa Code section 726.2 (2011). The district court sentenced Lovell to two consecutive terms of incarceration not to exceed five years, but during sentencing relied upon the unproven allegation that Lovell paid the victim money in exchange for sex. Lovell appealed. We granted a summary reversal and remanded the case for

resentencing before a different judge on the grounds the district court had relied upon an improper sentencing consideration. Upon resentencing, the district court again sentenced Lovell to two consecutive terms of incarceration not to exceed five years, but in doing so again referred to the impermissible sentencing factor stating,

> "Well, Mr. Lovell, the problem with your case is, although you have a lack of criminal history, this is extremely offensive, obviously, in the eyes of the law, and in the eyes of the Court because [the victim] was in a vulnerable position.... In reading the case, she is desperate for diapers for her baby, and then, for sex, you're giving her money."

Likewise, in the case at bar, the District Court relied on unproven allegations that the defendant had made physical threats against the alleged victims parents as set forth in the victim statements the county attorney read to the Court during sentencing proceedings. (See Victim Statements) (App. p. 73) (Sentencing Transcript (p. 2 L 24 to p. 14 L11) (See Minutes) (App. p.10) These statements were a part of the PSI, which the Court declared had been relied upon in

selecting the sentence imposed. See Sentencing Transcript p. 2 L 12 to L22, to-wit:

COURT: "This is the time and place set for sentencing. The Court has reviewed the presentence investigation report. Mr. Milder, have you had enough time to go through that report with your client?"

MR. MILDER: Yes, Your Honor.

THE COURT: Any changes, objections, or corrections?

MR. MILDER: No, Your Honor.

THE COURT: May the Court rely upon that for sentencing purposes?

MR. MILDER: Yes, Your Honor.

In this case the parties had agreed to join in the actual recommendation of the Pre-Sentence Investigator, which accordi8ng to the PSI was for suspended sentences on both offenses with 6 months in the residential facility, 5 years supervised probation, 10 year sex registry and a 10 year special sentence.

During the sentencing proceedings, the prosecutor never stated specifically that she was recommending suspended sentences, 6 months in the RFC, 5 years probation, and 10 year special sentence, 10 year sex registry. She only concurred

with the PSI, with no advocacy embracing the recommendation and agreeing it was worthy for the Court to impose.

Instead the prosecutor insisted upon personally reading to the Judge from the victims' and their parents' statements which were part of the PSI, and which the Court had already reviewed and declared her intent to rely upon for selection of sentence. At the conclusion of her argument/narration the prosecutor merely stated her concurrence with the PSI report's recommendation. See Sentencing Transcript (p. 2 L 19 to p. 14 L 11).

Additionally, in State v. Messer 306 NW2d 731(Iowa 1981), the Iowa Supreme Court held,

> "We will set aside a sentence and remand a case to the district court for resentencing if the sentencing court relied upon charges of an unprosecuted offense that was neither admitted to by the defendant nor otherwise proved. As we recently stated in State v. Messer, 306 N.W.2d 731 (Iowa 1981) The circumstances considered at the sentencing hearing related to the alleged illegal entry into the victim's home. We have stated that such consideration is improper. If there were additional factual circumstances considered, the district court has left us to speculate what these could be. As in Messer, we cannot speculate about the weight the sentencing court gave to these unknown circumstances. Since we cannot evaluate their influence, we must strike down the sentence. Messer, 306 N.W.2d at 733."

In Lovell, the District Court's consideration of more serious conduct, an allegation that Lovell paid the victim money in exchange for sex which was never proven, never charged, or admitted to by the defendant required the Court to remand for resentencing by the district court before a different judge on the grounds the district court had relied upon an improper sentencing consideration in sentencing Lovell to two consecutive terms of incarceration not to exceed five years.

In the case at bar, the prosecutor's narration was a de facto argument for maximum prison sentences, contrary to the parties' plea agreement. The prosecutor made virtually no effort to comply with the spirit and intent of the plea agreement, and in essence sought to undermine it by interjecting articulation of unproven allegations, which affected the Court's disposition.

In Lovell, the Iowa Supreme Court stated,

> "[i]f a court in determining a sentence uses any improper consideration, resentencing of the defendant is required," even if it was "merely a 'secondary consideration.' " *State v. Grandberry,* 619 N.W.2d 399, 401 (Iowa 2000) (quoting *State v. Messer,* 306 N.W.2d 731, 733 (Iowa 1981)). Information contained in the minutes of testimony is not a permissible sentencing consideration if unproven. ("Where portions of the minutes [of

testimony] are not necessary to establish a factual basis for a plea, they are deemed denied by the defendant and are otherwise unproved and a sentencing court cannot consider or rely on them.").

Here, although the district court attempted to disclaim the reference to the impermissible sentencing factor, "we cannot speculate about the weight the sentencing court gave to these unknown circumstances. Since we cannot evaluate their influence, we must strike down the sentence." *Black,* 324 N.W.2d at 316. In order to protect the integrity of our judicial system from the appearance of impropriety, we vacate the defendant's sentence and remand the case to the district court for resentencing before a different judge."

In State v. Spiker, Iowa Sup. Ct. No. 16-2090 (Ia App. 2017)

the Iowa Court of Appeals declared,

"Spiker claims the district court relied on uncharged and unproven facts contained in the minutes of testimony and that this reliance resulted in a violation of his due-process rights. The district court relied heavily on sections of the minutes of testimony, alleging another child, E.R., was forced to perform oral sex on Spiker. "A sentencing court may consider unprosecuted offenses in imposing sentences only if admitted by the defendant or adequate facts are presented at the sentencing hearing to show the defendant committed the crimes." *See State v. Delaney*, 526 N.W.2d 170, 179 (Iowa Ct. App. 1994) (citing *State v. Black*, 324 N.W.2d 313, 316 (Iowa 1982)).

The district court properly admitted that it considered improper factors and had the foresight to make a full and accurate record of its decision. The district court stated, "After the sentencing hearing, counsel for the State and your attorney advised the Court that the Court had made a mistake in stating that the act which was mentioned in the minutes wasn't the act you participated in."

However, the district court failed to resentence Spiker. Even when "the district court attempt[s] to disclaim the reference to the impermissible sentencing factor, 'we cannot speculate about the weight the sentencing court gave to these unknown circumstances. Since we cannot evaluate their influence, we must strike down the sentence.'" *State v. Lovell*, 857 N.W.2d 241, 243 (Iowa 2014) (citing *Black*, 324 N.W.2d at 316). We applaud the district court's candid admission but are required to "vacate the defendant's sentence and remand the case to the district court for resentencing before a different judge." *Id.*

In stating its reasons for rejecting the unanimous recommendations of the professionals involved in this case, including the prosecutor, defense attorney and pre-sentence investigator, the Court stated at Sentencing Transcript p. 18 L 10 as follows:

> THE COURT: "The laws of Iowa require that a sentence be imposed that provides for your rehabilitation, protects the community, and deters others from committing this type of offense, and deters your future actions, unlawful actions.
>
> The Court looks at several different factors in determining what an appropriate sentence is. I look at your age. I look at your employment circumstances, your family circumstances, your record, the nature of the offense, your attitude, which included some eye rolling, some huffing and guess I wouldn't call it appropriate courtroom behavior, but -- It also includes everything I've learned through the presentence investigation report."

The improper statements and unproven allegations were contained as part of the PSI. See PSI (App. p. 61). They had also been verbally narrated verbatim by the prosecutor during the sentencing proceeding. This reviewing appellate Court may not speculate about the weight the District Court assigned to the improper considerations. The defendant's sentence must be vacated and the case remanded for resentencing. State v.

Lovell 857 NW2d 241(Iowa 2014); State v. Gonzalez 582 NW2d 515 (Iowa 1998); State v. Black 324 NW2d 313 (Iowa 1982).

2. Breach of Plea Agreement by Prosecutor

In this case the parties had agreed to join in the actual recommendation of the Pre-Sentence Investigator, which according to the PSI was for suspended sentences on both offenses with 6 months in the residential facility, 5 years supervised probation, sex registry and a 10 year special sentence. See Plea Agreement (App.p.49); See PSI (App. p. 61).

During the sentencing proceedings, the prosecutor never stated specifically that she was recommending suspended sentences, 6 months in the RFC, 5 years probation, and 10 year special sentence. Instead the prosecutor insisted upon personally reading to the Judge from the victims' and their parents' statements which were part of the PSI. The Court reviewed and declared her intent to rely upon the PSI for selection of sentence. At the conclusion of her argument the County Attorney merely stated her concurrence with the PSI

report's recommendation. See Sentencing Transcript (p. 2 L 19 to p. 14 L 11).

The prosecutor's narration was a de facto argument for the victims' requests for maximum prison sentences, contrary to the parties' plea agreement. The prosecutor made virtually no effort to comply with the spirit and intent of the plea agreement, and in essence sought to undermine it by interjecting articulation of unproven allegations, which affected the Court's disposition.

In State v. Delaney, 526 NW2d 170 (Iowa App. 1994) the Iowa Court declared,

> "[T]he remedy for the State's breach of a plea agreement as to a sentencing recommendation is to remand the case for resentencing by a different judge, with the prosecutor obligated to honor the plea agreement and sentencing recommendation." *State v. Lopez*, 872 N.W.2d 159, 181 (Iowa 2015)
>
> The remedy is the same when defense counsel fails to object to such a breach by the State. *See State v. Fannon*, 799 N.W.2d 515, 523–24 (Iowa 2011); *State v. Bergmann*, 600 N.W.2d 311, 315 (Iowa 1999). Ineffective-assistance-of-counsel claims are not subject to ordinary error- preservation rules. *Nguyen v. State*, 878 N.W.2d 744, 750 (Iowa 2016). Our review of such claims is de novo. *See State v. Harris*, 919 N.W.2d 753, 754 (Iowa 2018). In order to prevail on his ineffective-assistance-of-counsel claim, Hanna must show by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Harrison*, 914 N.W.2d 178, 188 (Iowa 2018)."

In State v. Lopez, the Iowa Supreme Court stated,

"Lopez's appellate brief asked that he be permitted to withdraw his guilty plea or, alternatively, that the case be remanded for resentencing by a different judge. His application for further review narrowed his requested relief to resentencing by a different judge. That was the relief sought by his appellate counsel at oral argument.[9]

We have repeatedly held that the remedy for the State's breach of a plea agreement as to a sentencing recommendation is to remand the case for resentencing by a different judge, with the prosecutor obligated to honor the plea agreement and sentencing recommendation. *Fannon,* 799 N.W.2d at 524 ("Doing so ensures Fannon receives the benefit of the bargain by demanding specific performance of the plea agreement."); *Bearse,* 748 N.W.2d at 219–20 ; *Horness,* 600 N.W.2d at 301."

In the Davis' case the parties had agreed to follow the PSI recommendation. The spirit and intent of this agreement, which is commonplace in many Iowa courts, contemplates the prosecutor articulating that specific recommendation set forth in the PSI to the Court in detail, and embracing it as worthy of the Court's acceptance. The County Attorney was duty bound to explain to the Judge she was recommending NO prison time, with a one 5 year suspended sentence on Count 2, an additional 2 year suspended sentence on Count 2, and probation for 5 years, 6 months in the RFC, 10 yr. sex registry, and a 10 year special sentence with supervision under Section 906. The prosecutor utterly failed to specifically articulate the

agreed upon terms of the recommendation despite receiving the PSI a week before the hearing.

Instead the prosecutor spent 15 minutes personally reading victim statements directly to the Judge, with no objection from learned defense counsel. Their words became the prosecutor's words recited for dramatic effect, repeatedly calling for maximum prison terms, contrary to the bargained for plea deal. The County Attorney clearly undermined that deal with prejudicial effect.

In Lopez, the Iowa Court declared,

"we reiterated the prosecutor's obligation under Iowa law is to not only recite the recommended sentence but also indicate that it is " 'worthy of the court's acceptance.' " *Bearse,* 748 N.W.2d at 216 (quoting *Horness,* 600 N.W.2d at 299–300 (recognizing prosecutor's "implicit obligation to refrain from suggesting more severe sentencing alternatives")). The Iowa Rule of Criminal Procedure governing plea-bargaining differs materially from the Federal Rule applied in *Benchimol. Compare* Fed.R.Crim.P. 11(c), *with* Iowa R.Crim. P. 2.10(1). In any event, the problem in this case is not merely the prosecutor's failure to enthusiastically endorse the recommended sentence but rather her conduct affirmatively undermining the recommendation.*See United States v. Cachucha,* 484 F.3d 1266, 1270–71 (10th Cir.2007) ("While a prosecutor normally need not present promised recommendations to the court with any particular degree of enthusiasm, it is improper for the prosecutor to inject material reservations about the agreement to which the government has committed itself.")…. Of course, on remand the prosecutor is required to honor the plea agreement and sentencing recommendation consistent with this opinion."

In State v. Black 324 NW2d 313(Iowa 1982), the Iowa

Supreme Court held,

"Donald Eugene Black pleaded guilty to a charge of indecent exposure in violation of section 709.9, The Code, a serious misdemeanor, and was sentenced to the maximum term of incarceration. Black now contends that the district court erred in determining his sentence by giving consideration to a burglary charge that had been dismissed pursuant to a plea bargain. We find that the district court may have improperly based Black's sentence on allegations arising from the unprosecuted burglary charge that were neither admitted by the defendant nor proved independently. We therefore remand the case to the district court for resentencing."

In the case at bar, the prosecutor read allegations contained in victim statements concerning defendant's actions potentially violative of the No Contact Order. No complaint had been filed or proven in court, nor ever admitted by the defendant. There was no opportunity for cross-examination of the hearsay statements submitted by the state concerning post-guilty plea allegations. (p. 2 L 19 to p. 14 L 11). (See Sentencing Transcript p. 2 L 19 to p. 14 L 11).

Furthermore, in State v. Lovell 857 NW2d 241(Iowa 2014), the Iowa Supreme Court held,

"[i]f a court in determining a sentence uses any improper consideration, resentencing of the defendant is required," even if it was "merely a 'secondary consideration.' " *State v. Grandberry,* 619 N.W.2d 399 (Iowa 2001) Information contained in the minutes of testimony is not a permissible sentencing consideration if unproven. "The sentencing court should only consider those facts necessary to establish a factual basis for a plea,(otherwise) they are deemed denied by the defendant and are

otherwise unproved and a sentencing court cannot consider or rely on them.")."

In this case, the prosecutor read allegations contained in victim statements concerning alleged threats to the parents of the alleged victims after his guilty plea, which had not been filed or proven in court, and never admitted by the defendant. The prosecutor also indicated to the Court the victims' complaints about Davis' release pending the sentencing hearing.

In addition, after imposing consecutive prison sentences, the Judge stated there were 2 separate incidents involving 2 alleged victims but she also noted the defendant rolled his eye at some point during the proceeding. The Judge failed to inquire for clarification from the defendant about this perceived 'eye roll' prior to imposition of sentence, leaving the cause an ambiguous uncertainty that requires undue speculation. The Court's reliance on such an illusory factor is problematic as an impermissible consideration.

3. Ineffective Assistance of Counsel during Sentencing

Finally, the defense counsel did not tender any objections to the improper sentencing considerations the prosecutor put forth to the Judge. In addition, he failed to object to the prosecutor's abject failure to advocate for the plea deal, and to her efforts to actually undermine the recommendation.

In State v. Lopez, citing State v. Bearse 748 NW2d 217 failures to make these objections were deemed ineffective assistance of counsel, and prejudice was presumed, requiring remand to the district court for resentencing. The Court noted

"we have modified the prejudice prong when the defendant alleges his counsel has been ineffective by failing to object to a breach of a plea agreement. *Bearse,* 748 N.W.2d at 217 (declining to speculate what sentence the district court would have imposed). The defendant "need not establish that, ' "but for his counsel's failure to object, he would have received a different sentence." ' " *State v. Fannon,* 799 N.W.2d 515, 523 (Iowa 2011) (quoting *Bearse,* 748 N.W.2d at 217)."

This Court must vacate his consecutive sentences and remand to the district court for resentencing.

II. WHETHER TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL, DENYING THE DEFENDANT HIS RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AND DUE PROCESS UNDER THE 5th, 6th, AND 14TH AMENDMENTS TO THE US CONSTITUTION AND ARTICLE I SECTIONS 9 AND 10 THEREBY RENDERING DEFENDANT'S GUILTY PLEA INVOLUNTARY?

A. Standard of Review and Preservation of Error.

An appellate court generally reviews a challenge to a guilty plea for corrections of error of law. State v. Ortiz , 798 N.W.2d 761, 764 (Iowa 2010). See also State v. Fisher, 877 N.W.2d 676, 680 (citing State v. Velez , 829 N.W.2d 572, 575 (Iowa 2013).When, as in this case, a claim amounts to a constitutional claim, review is de novo. See State v. Utter , 803 N.W.2d 647, 649 (Iowa 2011).

The State has the burden to show that a defendant's plea of guilty is made voluntarily and intelligently. State v. Reaves , 254 N.W.2d. 488, 493 (Iowa 1977) (holding it is the State's burden to show an accused's awareness of the rights being waived by a plea of guilty). The State must make the required showing by a preponderance of the evidence. See, e.g., State v.

Bowers, 656 N.W.2d 349, 353 (Iowa 2002) (holding that the State has the burden to prove by a preponderance of the evidence that defendant voluntarily waived constitutional rights).

When a claim of ineffective assistance of counsel is made, the Iowa Supreme Court allows an exception to the general rule of error preservation. State v. Lucas, 323 N.W.2d 228, 232 (Iowa 1982). The failure of counsel to preserve error may constitute a denial of effective assistance of counsel. State v. Hrbek, 336 N.W.2d 431, 435-436 (Iowa 1983); Washington v. Scurr, 304 N.W.2d 231, 235 (Iowa 1981).

This Court reviews ineffective assistance of counsel claims for errors at law. *Castro v. State,* 795 N.W.2d 789, 792 (Ia. 2011). Claims of ineffective assistance of counsel raise a Constitutional claim and are reviewed de novo. The claim of ineffective assistance must be establish by a preponderance of the evidence that counsel's performance was under the normal range of competency for an attorney. *Snethen v. State,* 308 N.W.2d 11, 14 (Ia. 1981)

B. Discussion.

Generally, a criminal defendant waives all defenses and objections to the criminal proceedings by pleading guilty, including claims of ineffective assistance of counsel. *Castro,* p. 792. One exception to this rule involves irregularities intrinsic to the plea – irregularities that bear on the knowing and voluntary nature of the plea. *Id.* In *State v. Carroll,* 767 N.W.2d 638 (Ia. 2009), the Iowa Supreme Court clarified this issue. In *Carroll,* the Court explained that ineffective assistance of counsel claims survive the guilty plea when a post-conviction relief applicant can show trial counsel breached a duty in advance of the guilty plea that rendered his plea involuntary or unintelligent. *Carroll,* p. 644. Criminal defendants who seek post-conviction relief after pleading guilty must establish the guilty plea would not have been entered but for the breach of duty by counsel. *Castro,* p. 793. Thus, when a post-conviction relief claim following a guilty plea is properly alleged, a case-by-case analysis is necessary to determine whether counsel in a particular case, breached a duty in advance of a guilty plea

and whether any such breach rendered the defendant's plea unintelligent or involuntary. *Id.*

The Appellant asserts his guilty pleas were involuntary due to counsel's ineffective assistance, and undue inducement pressuring the defendant to take the plea deal. Counsel did not have a separate hearing for bond reduction, but prevailed upon the defendant to accept the plea deal, thereby securing the state's agreement for his release from jail under pre-trial services supervision.

At the plea hearing Counsel failed to request the Court be bound by the plea deal under Rule 2.10, or allow defendant to withdraw his plea prior to sentencing.

In Ledezma, the court stated:

> "Considering the standard of reasonableness utilized in determining ineffective assistance claims, ineffective assistance is more likely to be established when the alleged actions or inactions of counsel are attributed to a lack of diligence as opposed to the exercise of judgment. *Id.* Clearly, there is a greater tendency for courts to find ineffective assistance when there has been "an abdication_not an exercise_of ... professional [responsibility]." *McQueen v. Swenson,* 498 F.2d 207, 216 (8th Cir.1974). Miscalculated trial strategies and mere mistakes in judgment normally do not rise to the level of ineffective assistance of

counsel. *Wissing,* 528 N.W.2d at 564; *Caldwell,* 494 N.W.2d at 214. Thus, claims of ineffective assistance involving tactical or strategic decisions of counsel must be examined in light of all the circumstances to ascertain whether the actions were a product of tactics or inattention to the responsibilities of an attorney guaranteed a defendant under the Sixth Amendment. 3 LaFave _ 11.10(c), at 716."

Where the merit of a particular issue is in dispute under Iowa law, the test is whether a normally competent attorney would have concluded the question was not worth raising. Millam v. State, 745 N.W.2d 719 (Iowa 2008).

Trial counsel's failure to raise this critical issue regarding binding the Court to the plea deal caused clear prejudice and a structural error as discussed in Lado. The Defendant's convictions, pleas, and sentence should be vacated and a new trial ordered.

III. WHETHER DEFENDANT'S TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO BIND THE COURT TO FOLLOW THE RECOMMENDATIONS OF BOTH COUNSEL AND THE PSI, THEREBY DENYING THE DEFENDANT HIS RIGHTS UNDER THE 5th 6TH AND 14TH AMENDMENTS TO THE US CONSTITUTION AND ARTICLE I SECTIONS 9 AND 10 OF THE IOWA CONSTITUTION? WHETHER DEFENDANT'S GUILTY PLEA SHOULD BE SET ASIDE BECAUSE IT WAS NOT VOLUNTARILY MADE AS A CONSTITUTIONAL MATTER, AND WAS NOT ENTERED WITH A FULL UNDERSTANDING OF THE CONSEQUENCES OF THE PLEA?

Standard of Review: An appellate court generally reviews a challenge to a guilty plea for corrections of error of law. State v. Ortiz , 798 N.W.2d 761, 764 (Iowa 2010). See also State v. Fisher, 877 N.W.2d 676, 680 (citing State v. Velez , 829 N.W.2d 572, 575 (Iowa 2013).When, as in this case, a claim amounts to a constitutional claim, review is de novo. See State v. Utter, 803 N.W.2d 647, 649 (Iowa 2011).

The State has the burden to show that a defendant's plea of guilty is made voluntarily and intelligently. State v. Reaves , 254 N.W.2d. 488, 493 (Iowa 1977) (holding it is the State's burden to show an accused's awareness of the rights being waived by a plea of guilty). The State must make the required showing by a preponderance of the evidence. See, e.g., State v. Bowers, 656 N.W.2d 349, 353 (Iowa 2002) (holding that the State has the burden to prove by a preponderance of the evidence that defendant voluntarily waived constitutional rights). Iowa R. Crim P. 2.8(2)(b) codifies the due process mandate for acceptance of a guilty plea. Reviewing courts apply a "substantial compliance " standard in assessing

whether the trial court has adequately informed defendant of the items listed in the rule. State v. Loye , 670 N.W.2d 141 (Iowa 2003). See also State v. Straw , 709 N.W.2d 128, 132 (Iowa 2006).

The standard of review on an ineffective assistance of counsel claim is de novo. State v. Brubaker , 805 N.W.2d 164, 171 (Iowa 2011). The defendant must show his attorney failed to perform an essential duty and that he suffered prejudice. State v. Clay , 824 N.W.2d 488 (Iowa 2012).

Preservation of Error: This claim was not raised before the district court. Davis did not file a Motion in Arrest of Judgment. Generally, "a defendant's failure to challenge the adequacy of a guilty plea proceeding by motion in arrest of judgment shall preclude the defendant's right to assert such challenge on appeal." Iowa R. Crim. P. 2.24(3)(a). In State v. Barnes , 652 N.W.2d 466, 468 (Iowa 2002), the court held that the defendant failed to preserve error when he failed to file a motion in arrest of judgment when his written guilty plea

clearly stated that a failure to file such a motion would bar any challenge to his plea on appeal. Iowa Rule of Criminal Procedure 2.8(2)(d) states, in pertinent part: "The court shall inform the defendant that any challenges to a plea of guilty based on alleged defects in the plea proceedings must be raised in a motion in arrest of judgment and that failure to so raise such challenges shall preclude the right to assert them on appeal." I.R.Crim.P. 2.8(2)(d).

Ordinarily, this issue would not be preserved for appeal because Davis failed to file a Motion in Arrest of Judgment. However, Davis asserts that he should be able to challenge guilty plea on appeal because the failure to file a Motion in Arrest of Judgment was due to Ineffective assistance of counsel. Davis asserts that his counsel secured his release from jail as part of the plea deal, and that he would get probation as recommended by the PSI. He also asserts counsel was ineffective in failing to request binding the Court to the deal under Rule 2.10 and allow that he could withdraw his guilty plea if the Court was not going to accept the PSI

recommendation.

Therefore, Davis argues that if the court finds the error was not preserved, the appeal may still be pursued. An exception to the preservation of error requirements is effective assistance of counsel. State v. LaRue 619 N.W.2d 395, 397 (Iowa 2000). Ineffective Assistance of Counsel is an exception to Error Preservation.

Because a criminal defendant' s right to have reasonably effective assistance of trial counsel is derived from the Sixth Amendment of the United States Constitution, the Court reviews ineffective assistance claims de novo. State v. Wills , 696 N.W.2d 20 , 22 (Iowa 2005). See Also State v. Finney, 834 N.W.2d 46, 49 (Iowa 2013).

To establish an ineffective-assistance-of-counsel claim, a claimant must demonstrate (1) his trial counsel failed to perform an essential duty, and (2) this failure resulted in prejudice. *State v. Straw,* 709 N.W.2d 128, 133 (Iowa 2006) (citing *Strickland v. Washington,* 466 U.S. 668, 687-88, 104

S.Ct. 2052, 2064ñ65, 80 L.Ed.2d 674, 693 (1984) The claimant must prove both elements by a preponderance of the evidence. Ledezma v. State, 626 N.W.2d 134, 142 (Iowa 2001).

To prove the first prong the Applicant must overcome the presumption of competency and show that counsel's performance was not within the range of normal competency. State v. Buck, 510 N.W.2d 850, 853 (Iowa 1994).

The right to effective assistance of counsel means conscientious, meaningful representation, not merely a perfunctory appearance by counsel. Birk v. Bennett, 141 N.W.2d 576, 578 (Iowa 1966). "Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." State v. Clay, 824 N.W.2d 488, 496 (Iowa 2012) (quoting Iowa R. of Prof'l Conduct 32:1.1). "Competent representation requires counsel to be familiar with the current state of the law."

Mr. Davis must also establish prejudice by a preponderance of the evidence. King, supra, 797 N.W.2d 571.

In order to establish the prejudice prong of the Strickland test, an applicant must show that there is a reasonable probability that the result would have been different. The likelihood of a different result need not be more probable than not, but it must be substantial, not just conceivable.

In State v. Straw, the Iowa Court found that in the context of a guilty plea, the defendant must show it is probable that but for counsel's improper actions or inaction, that the defendant would not have plead guilty.

The defense counsel's error was due to counsel's serious lack of diligence in failing to carefully review the case record, interview and depose witnesses, and properly advise the defendant regarding consequences of a guilty plea.

Each claim of ineffective assistance of counsel is examined in light of the totality of the circumstances and the inquiry into the performance of the attorney is ultimately a fact based analysis. Strickland, 466 U.S. at 688; Williams v. Taylor, 529 U.S. 362, 391 (2000).

Incorrect decisions of counsel which do not arise from a valid strategy constitute ineffective assistance. State v. Clay, 824 N.W.2d 488, 496 (Iowa 2012) ("Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.") Millam v. State, 745 N.W.2d 719, 721 (Iowa 2008) (quoting Ledezma, 626 N.W.2d at 143) ("[S]trategic decisions made after a 'less than complete investigation' must be based on reasonable professional judgments which support the particular level of investigation conducted."). Ineffectiveness can occur during any stage of proceedings and can involve any action or inaction of counsel. Ledezma v. State, 626 N.W.2d 134, 142 (Iowa 2001). Ineffective claims can center on the failure to investigate. Id.

Ineffective assistance is more likely to be established when the actions or inactions of counsel are due to a lack of diligence as opposed to the exercise of judgment. Id. Counsel breaches a duty more often when counsel has abdicated their professional responsibility to exercise professional decisions,

not when they have exercised it. Id. Decisions of counsel made after a "less than complete investigation" are only acceptable if the accompanying investigation was reasonable under the circumstances. Id. (quoting Strickland v. Washington, 466 U.S. 668, 690-91 (1984)). Where the merit of a particular issue is unclear from Iowa law, the test is whether a normally competent attorney would have concluded the question was not worth raising. Millam v. State, 745 N.W.2d 719 (Iowa 2008).

With respect to establishing “prejudice” in an ineffective assistance of counsel claim, an applicant must prove by a preponderance of the evidence that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Strickland, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” The likelihood of a different result need not be more probable than not, but it must be substantial, not just conceivable. King v. State. But for Counsel’s errors the

defendant likely would not have been sentenced to prison.

Davis also asserts that his plea was involuntary due to ineffective assistance of plea counsel. Davis argues that his plea counsel should have made a due process objection to the court's acceptance of Davis' guilty plea on the grounds that Davis was not informed of the full consequences of his guilty plea prior to the court's acceptance of said plea. Had plea counsel made the objection to the court's acceptance of the guilty plea, the court by following the existing law would have rejected Davis' guilty plea.

But for counsel's ineffectiveness and inactions, Davis would have then insisted on exercising his right to have a trial. The defendant must show that there was a reasonable probability that but for counsel's failure to perform an essential duty, he would not have pled guilty and would have insisted on going to trial. State v. Straw 709 N.W.2d 128, 136-37 (Iowa 2006).

Surely, the outcome of the proceeding would have been

different since he would not have conceded his guilt with an Alford plea, but maintained his innocence. He would have proceeded to trial on the merits. Davis was certainly prejudiced by his trial counsel's inaction because he unknowingly and involuntarily waived his right to challenge his guilty plea on appeal without knowing the full consequences of his plea.

Even defendants who plead guilty are entitled to effective assistance of counsel. Iowa v. Tovar , 541 U.S. 77 (2004). Defendant has burden of showing that attorney failed to perform an essential function and that defendant was prejudiced. Taylor v. State , 352 N.W.2d 683, 685 (Iowa 1984)

Otherwise, when an attorney fails to object to the court's defective colloquy and fails to file a motion in arrest of judgment his or her failures do constitute a failure to perform an essential function. However, defendant must show that there was a reasonable probability that if defendant had been told whatever it was the court missed he would not have pled guilty and would have insisted on going to trial. State v. Straw

709 N.W.2d 128, 136-37 (Iowa 2006).

Trial counsel has no duty to raise an issue that has no merit. State v. Rice, 543 N.W.2d 884, 888 (1996). The issue is whether a normally competent attorney would have determined that an issue was worth raising. State v. Schoelerman , 315 N.W.2d 67 (Iowa 1982).

Although the appellate court normally preserves ineffective-assistance claims for post-conviction relief actions, "we will address such claims on direct appeal when the record is sufficient to permit a ruling." State v. Wills , 696 N.W.2d 20, 22 (Iowa 2005). The record in this case is sufficient to allow us to address Davis' ineffective-assistance claim on direct appeal.

In situations where counsel failed to perform an essential duty in not challenging a district court's failure to make the required determinations

To prevail on an ineffective assistance of counsel claim, a defendant must show (1) counsel breached an essential duty and (2) prejudice resulted. See Strickland v. Washington , 466

U.S. 668, 687 (1984).

The Defendant must prove the following two elements to show he was provided ineffective assistance of counsel: (1) trial counsel failed to perform an essential duty, and (2) the omission resulted in prejudice. Essentially a defendant must show that but for the Defense counsel's failure to object, the trial result would have been different. State v. Buck, 510 N.W.2d 850, 853 (Iowa 1994) Each of the aforementioned issues deprived Davis from having a full understanding of the true implications of his decision to enter a plea of guilty.

If the record is sufficient to proceed on a claim of ineffective assistance of counsel for good cause, the appellate court may decide the matter on direct appeal. However, if the record is insufficient to rule upon ineffective assistance of counsel, the court may preserve the issue for post conviction relief. State v. Johnson, 784 N.W.2d 192, (Iowa 2010)

CONCLUSION

The Defendant/Appellant respectfully requests this Court vacate his guilty pleas, reverse his convictions and remand for a new Trial. In the alterative, Mr. Davis respectfully requests this Court vacate his consecutive sentences and remand for resentencing. As a further alterative, Mr. Davis respectfully requests this Court preserve his issues for a PCR. proceeding.

REQUEST FOR NONORAL SUBMISSION

Counsel requests this case be submitted without oral argument.

Respectfully submitted,

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ATTORNEY'S COST CERTIFICATE

The undersigned certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $4.70, which has been fully paid by the undersigned counsel.

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

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

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