

No. 21-1146

IN THE

SUPREME COURT OF IOWA

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STATE OF IOWA,

*Plaintiff-Appellee,*

v.

JOHN EDDIE HANES, III,

*Defendant-Appellant.*

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APPEAL FROM THE DISTRICT COURT OF SCOTT COUNTY  
THE HONORABLE JEFFREY D. BERT, JUDGE

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**APPELLANT'S BRIEF**

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The undersigned certifies that on the 7<sup>th</sup> day of March, 2022, he did serve the Appellant's Brief through electronic filing, on the following respective parties:

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The undersigned further certifies that on the 7<sup>th</sup> day of March, 2022, he did mail the Appellant's Brief to John Eddie Hanes, III, appellant.

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## STATEMENT OF THE ISSUE

When the District Court fails in its duty to ensure there is a factual basis for a plea of guilty, or fails to arrest judgment pursuant to Rule 2.24(3)(c), the Defendant should not be barred from challenging that plea of guilty on direct appeal

## AUTHORITIES

### CASES

*State v. McCright*, 569 NW 2<sup>nd</sup> 605 (Iowa 1997)  
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*McCarthy v. United States*, 394 U.S. 459 (1969)  
*State v. Mitchell*, 650 N.W.2d 619 (Iowa 2002)  
*State v. Allen*, 708 N.W.2d 361 (Iowa 2006)

### CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. V  
U.S. Const. Amend. XIV  
Iowa Const. art. I, § 9  
Iowa Const. art. V, § 4

### CODES AND STATUTES

Iowa R. Cr. P. 2.24(3)(c)  
Iowa Code § 732A.2  
Iowa Code § 703.1  
Iowa Code § 814.7

## ROUTING STATEMENT

The Iowa Supreme Court should retain this case pursuant to Rule 6.1101(2) because it presents a substantial issue of first impression, namely whether a direct appeal challenging the District Court's failure in its duty to ensure a factual basis for a guilty plea should be an exception to the motion in arrest of judgment requirement of 2.24(3)(a).

## STATEMENT OF THE CASE

### NATURE OF THE CASE.

This is a direct appeal from Defendant's guilty plea to Iowa Code § 732A.2, criminal gang participation.

### FACTS AND PROCEEDINGS.

Because the facts and proceedings in this case are closely related, they will be discussed together.

The Minutes of Testimony set out the facts concerning the arrest of John Hanes, III:

On April 28, 2021, officers initiated a traffic stop on a vehicle being driven by Codefendant Fahsheed T. Rush and occupied by the Codefendant John E. Hanes III and Codefendant Devante L. Johnson. Upon law enforcement attempting to initiate a traffic stop, two of the codefendants fled from the vehicle, leaving behind two firearms, specifically a black

H&K HK22 AR .22 caliber pistol and/or a Springfield XD40 40 S&W caliber handgun. Those two codefendants, Hanes and Johnson, were quickly apprehended and taken into custody. Officers will testify that Codefendant John E. Hanes III is a convicted felon and prohibited from owning, possessing, or transporting any firearms. They will testify as to the location of the occupants of the vehicle and the proximity of the firearms located in the vehicle. They will testify as to DNA samples and any identifiable fingerprints lifted from the firearms. They will testify as to any NBIN testing on the firearms that will connect the firearms to any other crimes. Officers identified all three codefendants as known associates of the MMG hybrid street gang, otherwise known as the Mad Max Gang. They will testify as to previous dealings with the codefendant and personal knowledge as to their gang affiliations. Sergeant Ellerbach of the Davenport Police Department of the Gun Investigations Unit will testify that he knows Hanes, Rush and Johnson to be active Mad Max Gang (MMG) members. It is common for members in a gang to arm themselves with guns or other weapons. It is common for members of a gang to sell and buy weed from each other within the gang and/or outside the gang when weed is needed. It is also common for gang members to go out and look for "ops" (opposing gangs)(police) and shoot at them or try to engage with them in some manner. It is very common for gang members to arm themselves at all times when they are out on the street. Gangs commonly travel in stolen cars and commit other crimes commonly. They will testify that the codefendants were possessing and transporting firearms for the benefit of the MMG gang in their ongoing feud with a rival gang or gangs.

On June 10, 2021, Hanes was charged by Trial Information with Count I, Criminal Gang Participation; Count II, Dominion or Control of a Firearm by a Felon; and Count III, carrying weapons. App. 5-6. On July 9, 2021, Hanes entered a written plea of guilty. App. 11-21. On July 12, 2021, the District Court accepted Hanes' plea of guilty, finding a factual basis existed for the plea of guilty. App. 22.

On August 20, 2021, the District Court sentenced Hanes to a term of incarceration not to exceed five years. App. 26. On August 23, 2021, Hanes filed a timely notice of appeal. App 30.

#### ARGUMENT

When the District Court fails in its duty to ensure there is a factual basis for a plea of guilty, or fails to arrest judgment pursuant to Rule 2.24(3)(c), the Defendant should not be barred from challenging that plea of guilty on direct appeal.

##### A. ERROR PRESERVATION.

An issue is preserved for appeal when it is presented to a ruled upon by the District Court. *State v. McCright*, 569 N.W.2d 605, 607 (Iowa 1997). The District Court ruled a factual basis existed on July 12, 2021, preserving error.



App. 22. A Motion in Arrest of Judgment is not required to challenge the District Court's failure to ensure there is a factual basis for a plea of guilty. *State v. Williams*, 224 N.W.2d 17 (1974).

If this Court finds that error was not sufficiently preserved on this issue, Hanes urges the court to consider this issue excepted from the general rule of error preservation. Cf. *Earnest v. State*, 508 N.W.2d 630, 632 (Iowa 1993).

#### B. SCOPE AND STANDARD OF REVIEW.

This case involves a conviction without a factual basis, violating Hanes' due process rights. "When constitutional safeguards are involved, our method of review is to make an independent evaluation of the totality of the relevant circumstances shown by the entire record and thus review the evidence de novo." *State v. Boone*, 298 N.W.2d 335 (Iowa 1980) citing *Rinehart v. State*, 234 N.W.2d 649, 658 (Iowa 1975).

#### C. MERITS.

**The District Court's non-delegable duty to ensure a factual basis.** Before accepting a plea of guilty, the district court must satisfy itself that there is a factual basis for the plea. *Williams* at 17; *Brainard v. State*, 222 N.W.2d 711 (1974). The district court may not accept a guilty plea without first determining that the plea has a factual basis. *State v. Schminkey*, 597 N.W.2d

785, 788 (Iowa 1999); *see also State v. Givens*, 844 N.W.2d 437, 441 (Iowa 2014).

“A [district court] may not abrogate or delegate to anyone, including attorney for accused, the duty to determine [the] . . . existence of facts supporting [the guilty plea].” *State v. Sisco*, 169 N.W.2d 542, 548 (Iowa 1969).

In Iowa, the sources of the district court’s duty to ensure a factual basis exists for a guilty plea come from principles of due process and the American Bar Association Minimum Standards of Justice quoted in *Sisco*. *See* U.S. Const. Amends. 5 and 14; Iowa Const. article I, section 9.

As a failsafe, even a district court that fails to initially ensure a factual basis has the option to arrest judgment. Iowa Rule of Criminal Procedure 2.24(3)(c) provides that “the court may also, upon its own observation of any of these grounds, arrest the judgment on its own motion.”

In this case, the District Court failed to assure there was a factual basis for the plea. The District Court further failed to arrest judgment despite a lack of factual basis for the plea.

**There is no factual basis for the plea because Hanes could not “aid and abet” himself in possessing a firearm as a felon.** Hanes plead to a violation of Iowa Code § 732A.2, criminal gang participation. A necessary element of the crime was “*willfully aids and abets any criminal act.*” The record reveals no

criminal act that Hanes aided and abetted. As a matter of due process, and pursuant to the American Bar Association Minimum Standards of Justice quoted in *Sisco*, the District Court had a duty to ensure a factual basis existed for the plea. The District Court further had a duty to arrest judgment for lack of factual basis. The District Court failed to meet those duties.

The Plea of Guilty, itself, does not contain a factual basis for the charge. Concerning a factual basis, the Defendant admitted that: “I was an active participant in a criminal street gang and I possessed a firearm unlawfully as a felon and did so for the benefit and in association with that same criminal street gang on April 28, 2021 in Scott County, Iowa.” This factual basis is lacking. There is no mention whatsoever of a necessary element of the offense: “the defendant willfully aided and abetted a criminal act.”

The only clue as to what criminal act the defendant “aided and abetted” in the plea is in ¶7(2). There, the Defendant claims to have “aided and abetted a criminal act, that is, felon in possession of a firearm.” The obvious problem with that statement is that the Defendant could not have aided and abetted himself in possessing a firearm as a felon.

The Minutes of Testimony were also considered by the District Court. *See* Order Accepting Guilty Plea at 1. The Minutes also do not reveal a crime that

the Defendant “aided and abetted,” other than possession of firearms as a felon, by the Defendant. Again, the obvious problem is that the Defendant could not have aided and abetted himself in possessing a firearm as a felon.

Aiding and abetting is a theory of criminal responsibility involving an individual assisting or encouraging the commission of a crime by the principal. *See State v. Browne*, 494 N.W.2d 241 (Iowa 1992). The distinction between a principal and an aider and abettor is codified in Iowa Code § 703.1.

There is nothing in the record indicating Hanes aided and abetted any crime. The only crime referenced was Hanes’ own possession of a firearm as a felon. It would be a new and novel theory of criminal responsibility in Iowa to allow Hanes to be guilty of aiding and abetting his own crime.

Upon receipt of the Guilty Plea, the District Court should have looked at the Plea of Guilty, the Minutes of Evidence, and Iowa Code § 732A.2, and recognized there was no factual basis for the plea. The District Court should have rejected the plea, or should have arrested judgment under Rule 2.24(3)(c).

**State v. Treptow.** Recently, in *State v. Treptow*, an appellant challenged the factual basis for his plea. *State v. Treptow*, \_\_\_ N.W.2d \_\_\_ (Iowa 2021).

The Iowa Supreme Court dismissed the appeal. Treptow did not posit a “legally sufficient reason” for his appeal from a guilty plea because he had failed to file a motion in arrest of judgment, so Rule 2.24(3)(a) cut off his right to an appeal.

The *Treptow* Court identified two exceptions to the motion in arrest of judgment requirement. First, the motion in arrest of judgment requirement is not applied where the Defendant has not been adequately advised concerning his duty to file a motion in arrest of judgment. Second, if the failure to file a motion in arrest of judgment motion is due to ineffective assistance of counsel. The *Treptow* Court found that, since the enactment of Iowa Code § 814.7, the Court no longer has authority to determine ineffective assistance of counsel on direct appeal.

**A request for a new exception.** Hanes requests the Court recognize a third exception to the bar on appellate challenges to plea proceedings without first making motion to arrest judgment: If the district court fails in its duty to ensure there is a factual basis for a plea of guilty, or fails to arrest judgment pursuant to Rule 2.24(3)(c), the Defendant should not be barred from challenging that plea of guilty on direct appeal by Rule 2.24(3)(a).

There are a multitude of reasons supporting this exception.

First, the due process duty of the District Court to ensure a factual basis exists for a plea of guilty is a substantive constitutional protection. It should not be subsumed by a rule of criminal procedure.

Second, the District Court's due process duty to ensure a factual basis exists for a plea of guilty cannot be delegated. *See Sisco* at 548. Yet delegation of that duty to the Defendant is the effect of Rule 2.24(3)(a). When, as in this case, a district court makes a mistake concerning the factual basis for the plea, the responsibility for correcting that mistake is delegated to the defendant, and the defendant only.

Third, now that § 814.7 no longer allows an ineffective assistance challenge on direct appeal, Defendants must often wait in prison while litigating a post-conviction action. It is bad that Rule 2.24(3)(a) delegates the district court's due process duty to the Defendant. It is worse that the Defendant may be denied relief for a plea without a factual basis for months or years while sitting in prison because the faster avenue of a direct appeal has been foreclosed.

Fourth, article V, section 4 provides the "Supreme Court shall \*\*\* exercise a supervisory and administrative control over all inferior Judicial tribunals throughout the State." As part of its supervisory authority over the district

courts, the Iowa Supreme Court should not allow any plea of guilty to stand when it is apparent no factual basis exists for the plea. Cf. *McCarthy v. United States*, 394 U.S. 459 (1969). “As a matter of upholding the integrity of the judicial system, we simply do not tolerate convictions where there is no substantial evidence on the record to support them, regardless of whether a constitutional violation is present.” *Treptow* at \_\_ (Appel dissenting).

Fifth, it is apparent in this case that the District Court, Defendant’s Counsel, and the Prosecutor all just made a mistake. *State v. Williams* makes it clear that all three, the District Court, Plea Counsel, and the Prosecutor shared a duty to ensure there is a factual basis for the plea of guilty. *Williams* at 18-19. Just because § 814.7 prohibits looking at the performance of Plea Counsel does not mean this Court is without the power to review the performance of the District Court and the Prosecutor.

Sixth, *Williams* further stands for the proposition that a direct appeal of a plea of guilty without an adequate factual basis recitation on the record is allowed, even without a motion in arrest of judgment. *Williams* did not address any requirement of a motion in arrest of judgment before addressing the lack of factual basis on the record by way of a direct appeal. Hanes should be allowed to challenge his plea of guilty without a factual basis in

this direct appeal.

Seventh, and most importantly, *Sisco* makes it clear that the Court has a duty to ensure a factual basis is apparent for a plea of guilty. That constitutional and judicial duty does not disappear just because Hanes, Hanes' Plea Counsel, the Prosecutor, and the District Court failed to arrest judgment. This Court has the very same duty spelled out in *Sisco*. This Court has a duty to ensure Hanes' plea has a factual basis.

This Court cannot delegate that duty to anyone else, not by procedural rule or by ruling. "Under no circumstances may a conviction upon plea of guilty stand if it appears that the facts of the charge do not state a violation of the statute under which the charge is made." *State v. Mitchell*, 650 N.W.2d 619 (Iowa 2002). Neither rules of criminal procedure nor changes in the law should prevent this Court from making sure no conviction stands without a factual basis.

**"Good cause" for appeal.** That leaves the question of "good cause for appeal." It is apparent that being incarcerated and convicted on a plea of guilty for which there is no factual basis is good cause for appeal. Lack of a factual basis for the plea of guilty is a "legally sufficient reason" for a direct appeal. It was always legally sufficient in the context of ineffective assistance



of counsel prior to § 814.7. *See State v. Allen*, 708 N.W.2d 361 (Iowa 2006).

#### CONCLUSION

Hanes did not “aid and abet” himself in possessing a firearm as a felon. Hanes’ plea of guilty does not have a factual basis. The District Court failed in its duty to ensure there was a factual basis for the plea of guilty. This Court should adopt an exception to the motion in arrest of judgment requirement concerning lack of factual basis for a plea, and find good cause for appeal. Defendant requests his plea and conviction be vacated. *See Mitchell* at 621.

#### REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests oral argument.

Respectfully submitted,

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ATTORNEY'S COST CERTIFICATE

I hereby certify that the actual cost of printing the necessary copies of the foregoing Appellant's Brief is \$0.00, due to the cost savings of using the Iowa Appellate Court's Electronic Filing system.

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