

IN THE SUPREME COURT OF IOWA

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STATE OF IOWA, )  
 )  
 Plaintiff-Appellee, )  
 )  
 v. ) SUPREME COURT 18-0437  
 )  
 KENNETH EDWARD PETTY, )  
 )  
 Defendant-Appellant. )

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APPEAL FROM THE IOWA DISTRICT COURT  
FOR POTTAWATTAMIE COUNTY  
HONORABLE JAMES S. HECKERMAN, JUDGE

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APPELLANT'S REPLY BRIEF AND ARGUMENT

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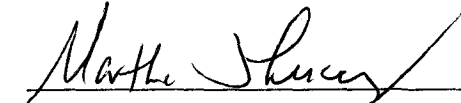
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**CERTIFICATE OF SERVICE**

On the 5<sup>th</sup> day of November, 2018, 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 Kenneth Petty, # 1019504, Anamosa State Prison, 406 North High Street, Anamosa, IA 52205.

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**STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

**I. DID THE DISTRICT COURT ERR IN DENYING PETTY'S MOTION IN ARREST OF JUDGMENT BECAUSE HE WAS NOT FULLY INFORMED OF THE CONSEQUENCES OF HIS GUILTY PLEAS?**

**Authorities**

Meier v. Senecaut, 641 N.W.2d 532, 537 (Iowa 2002)

Lamasters v. State, 821 N.W.2d 856, 864 (Iowa 2012)

**II. IF ERROR WAS NOT PRESERVED, DID TRIAL COUNSEL PROVIDE INEFFECTIVE ASSISTANCE IN FAILING TO ADEQUATELY ASSERT PETTY WAS NOT FULLY INFORMED OF THE CONSEQUENCES OF HIS GUILTY PLEAS WHICH RESULTED IN STRUCTURAL ERROR?**

**Authorities**

State v. Straw, 709 N.W.2d 128, 138 (Iowa 2006)

Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370 (1985)

State v. Alloway, 707 N.W.2d 582, 587 (Iowa 2006)

State v. Johnson, 784 N.W.2d 192, 197-198 (Iowa 2010)

**III. DID THE DISTRICT COURT ERR AND DENY PETTY THE RIGHT TO COUNSEL BY FAILING TO THOROUGHLY INQUIRE INTO THE BREAKDOWN IN THE ATTORNEY-CLIENT RELATIONSHIP?**

Not addressed in the reply brief

**IV. DID THE DISTRICT COURT ENTER AN ILLEGAL SENTENCE IN IMPOSING A SECTION 911.2B SEXUAL ABUSE VICTIM SURCHARGE?**

Not addressed in the reply brief

**V. DID THE DISTRICT COURT ERR IN FAILING TO DETERMINE PETTY'S REASONABLE ABILITY TO PAY THE COSTS OF HIS LEGAL REPRESENTATION AND COURT COST?**

Not addressed in the reply brief

## STATEMENT OF THE CASE

COMES NOW the defendant-appellant, pursuant to Iowa R. App. P. 6.903(4), and hereby submits the following argument in reply to the plaintiff-appellee's brief.

### ARGUMENT

#### **I. THE DISTRICT COURT ERRED IN DENYING PETTY'S MOTION IN ARREST OF JUDGMENT BECAUSE HE WAS NOT FULLY INFORMED OF THE CONSEQUENCES OF HIS GUILTY PLEAS.**

##### **Preservation of Error.**

“It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.” Meier v. Senecaut, 641 N.W.2d 532, 537 (Iowa 2002). Defense counsel filed a timely motion in arrest of judgment. The reasons urged to arrest judgment included that Petty “did not adequately understand the penal consequences of his plea”. The motion also provided “for whatever other reasons set out in the defendant’s Affidavit which is attached hereto.” (MAJ ¶¶ 3d, 3e)(App. pp. 38-39). The district court was aware of the issues

raised in the motion and in Petty's testimony. The court denied the motion in arrest of judgment. (Sent. Tr. p. 3L12-p. p. 24L5). The issue is preserved because Petty urged the same ground in the district court as he does on appeal.

Lamasters v. State, 821 N.W.2d 856, 864 (Iowa 2012).

**II. IF ERROR WAS NOT PRESERVED, TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN FAILING TO ADEQUATELY ASSERT PETTY WAS NOT FULLY INFORMED OF THE CONSEQUENCES OF HIS GUILTY PLEAS WHICH RESULTED IN STRUCTURAL ERROR.**

**Discussion.**

In claims of ineffective assistance of counsel in violation of the Sixth Amendment, the standard of prejudice in a guilty plea case is that a defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have plead guilty and would have insisted on going to trial.

State v. Straw, 709 N.W.2d 128, 138 (Iowa 2006); Hill v.

Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370 (1985). The

prejudice element in a guilty plea case "focuses on whether counsel's constitutionally ineffective performance affected the



outcome of the plea process.” Hill v. Lockhart, 474 U.S. at 59, 106 S.Ct. at 370. In Straw, this Court recognized that in most guilty plea cases there would be a need for a postconviction hearing to develop the record. State v. Straw, 709 N.W.2d at 138 (“Under the “reasonable probability” standard, it is abundantly clear that most claims of ineffective assistance of counsel in the context of a guilty plea will require a record more substantial than the one now before us.”).

In State v. Johnson, the Supreme Court overruled State v. Alloway, 707 N.W.2d 582, 587 (Iowa 2006) which required an appellant on direct appeal to make a minimal showing of the potential violability of an ineffective assistance of counsel claim to have it preserved for postconviction relief. State v. Johnson, 784 N.W.2d 192, 197-198 (Iowa 2010). The

Johnson Court held:

Moreover, section 814.7(3) clearly gives the appellate court only two choices when an ineffective-assistance claim is raised on direct appeal: (1) “decide the record is adequate to decide the claim,” or (2) “choose to preserve the claim for determination under chapter 822.” Iowa Code § 814.7(3). Based on the provisions of section 814.7, we hold defendants

are no longer required to raise ineffective-assistance claims on direct appeal, and when they choose to do so, they are not required to make any particular record in order to preserve the claim for postconviction relief.

Id. at 198. Therefore, if this Court determines trial counsel's performance does not amount to a structural error, this claim of ineffective assistance of counsel must be preserved for a postconviction relief action for further development of the record.

### **CONCLUSION**

Kenneth Petty respectfully requests this Court vacate his guilty pleas and remand to the district court to allow Petty to plead anew or stand trial. Alternatively, Petty requests this Court reverse the judgment and remand to the district court for a new hearing on his motion in arrest of judgment with new counsel. Otherwise, Petty respectfully requests the Court remand for hearing to determine whether defense counsel had an actual conflict and any other appropriate further proceedings. If the Court finds the record is inadequate to

resolve the claims of ineffective assistance, the claims should be preserved for a postconviction relief action.

Lastly, Petty respectfully request the Court vacate the district court's imposition of the section 911.2B sexual abuse victim surcharge and remand for entry of a corrected sentencing order omitting such surcharge. A remand is also necessary for the determination of Petty's reasonable ability to pay the cost of his legal assistance and court costs.

## **ATTORNEY'S COST CERTIFICATE**

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was \$ 1.41, and that amount has been paid in full by the Office of the Appellate Defender.

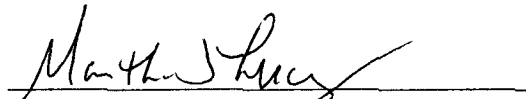
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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME  
LIMITATIONS, TYPEFACE REQUIREMENTS AND  
TYPE-STYLE REQUIREMENTS**

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:

[X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 762 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

  
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