SUPREME COURT NO. 18-0839
POLK COUNTY NO. AGCR309787

IN THE
SUPREME COURT OF IOWA

STATE OF IOWA,

Plaintiff–Appellee,

v.

ERIN MACKE,

Defendant–Appellant.

ON APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
HONORABLE CAROL S. EGLY, DISTRICT COURT JUDGE

BRIEF FOR APPELLANT

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CERTIFICATE OF FILING

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ROUTING STATEMENT

This case presents a substantial question of enunciating or changing legal principles by urging the Iowa Supreme Court to adopt the plain error rule for appellate review, so retention would be appropriate. Iowa R. App. P. 6.1101.

STATEMENT OF THE CASE

This appeal requires the Court to decide whether Erin Macke received ineffective assistance of counsel when her attorney failed to object after the State breached its plea agreement during the sentencing hearing, or alternatively whether the breach of the plea agreement was plain error. Macke entered into a plea agreement to resolve the charges of four counts of child endangerment and one count of transfer of a pistol or revolver to a person under 21, first offense. (App. at 9). In exchange for a plea pursuant to *North Carolina v. Alford* to the four counts of child endangerment, the State agreed to drop the firearm transfer charge and to jointly recommend a deferred judgment. (App. at 9). The State nevertheless recommended at sentencing that Macke be punished with a suspended sentence, not a deferred sentence. (Sentencing Transcript p. 3, Line 10 through p. 5, Line 3). Macke's trial counsel did not object to the State's refusal to jointly

recommend a deferred judgment as promised in the plea agreement. (Sentencing Transcript *passim*; App. at 9).

The district court followed the State's recommendation, sentencing Macke to two years in prison on each count, to be suspended and to run concurrently. (Sentencing Transcript p. 28, Line 2 through p. 30, Line 4). Macke appeals her judgment and sentence on the basis that the State breached the terms of the plea agreement by arguing for a suspended sentence despite their promise in the plea agreement that they would request a deferred judgment. She requests this matter be remanded for resentencing in front of another judge and specific performance of the State's plea offer.

STATEMENT OF FACTS

The State charged Macke with four counts of child endangerment and one count of transfer of a pistol or revolver to a person under 21, first offense. (App. at 6). Prior to trial, Macke and the State reached a plea agreement. (App. at 9). The agreement provided that, in exchange for Macke's plea pursuant to *North Carolina v. Alford*, the State would agree to (1) dismiss the firearm transfer charge and (2) recommend deferred judgment and probation. (App. at 9). At the plea hearing, the parties explained the terms of their agreement to the court as follows:

> THE COURT: And I have reviewed the Minutes of Testimony. Mr. Oliver, would you, please, state the basis for the Alford plea.
>
> MR. OLIVER: Yes, Your Honor.
>
> Your Honor, a substantial assistance [sic] is being received by Ms. Macke in this case. That substantial benefit being dismissal of count -- I believe it's Count V, the gun charge, in this case, as well as the recommendation -- joint recommendation of a deferred judgment to the charges.
>
> THE COURT: And regarding the likelihood of conviction?
>
> MR. OLIVER: Your Honor, in regards to the likelihood of conviction, and based on the information provided in the Trial Information, we believe that, if tried, there is a substantial risk of conviction, at least to the four counts

of child endangerment, should a jury hear that case.

In addition, Your Honor, as an option of not trying to take the children through this avenue, we have also decided to ask the Court to accept a guilty plea.

THE COURT: So that is one of the benefits as well as the dropping of the fifth count.

MR. OLIVER: Correct, Your Honor.

***

THE COURT: I accept the plea pursuant to *North Carolina v. Alford*.

(Plea Transcript p. 4, Line 8 through p. 5, Line 16). The State did not object or in any way assert on the record that was not the agreement reached between the parties. (Plea Transcript *passim*).

Approximately two months later, Macke appeared before the court for sentencing. The State requested the court impose a suspended sentence and probation:

THE COURT: Ms. Horvat, if you would state the State's recommendation and then present your impact statements.

MS. HORVAT: Thank you, Judge.

As you recall, this is the case where four children were left alone for a period of time while the defendant left the county and went to Germany. And although there was a

superintendent of the building where the children lived asked by the defendant to check on them, at the end of the day, they really had no supervision. They were required to make meals, get on the school bus, get dressed, and take care of themselves.

The hazard to the children is immense. Aside from the fact that it's a dangerous world, there was no adult living in the house that could have been available should there have been a medical emergency, a fire, or the possibility of an injury. It's just a dangerous situation for children.

The children have been removed from the defendant. They have dads who are protective. Two went to live in Texas. Two have lived in Cedar Rapids. And their dads are very protective of them. And it's the State's position that those children are in settings where their best interests will be watched, because of how precious they are, Your Honor.

Our position is that the defendant should receive a suspended sentence and probation, that as a condition of probation, and in accordance with what the PSI sets out, she should have whatever therapy and/or counseling is available to her through the Department of Corrections, and that she'd agree to do -- at least with the children in Cedar Rapids, that she and her ex-husband in Cedar Rapids have agreed to counseling for these children in a setting that would be best for them. But I think she needs counseling too. Her behavior was immature and reckless.

The State has agreed to dismiss Count V.

So, Your Honor, we're asking that she receive a suspended sentence and probation. I'm not arguing for consecutive sentences, Your Honor. I think it's okay for these counts to run concurrently. But to do something less than place her on probation and give a suspended sentence, I think, would diminish the nature of this crime.

(Sentencing Transcript p. 3, Line 7 through p. 5, Line 3). Macke's attorney requested the court to impose a deferred sentence with probation:

THE COURT: Mr. Oliver, on behalf of Ms. Macke?

MR. OLIVER: Thank you, Your Honor. May it please the Court, Counsel.

Your Honor, after having done this for 22 years, the PSI I read in this case is one of the most mild and capable PSIs for the Court to rely on in determining whether or not Ms. Macke is subject to or warrants a deferred judgment. We are asking the Court for a deferred judgment in this matter.

Despite the vitriol expressed by the parents through the -- by the fathers through the victim impact statements, the Court has had the opportunity to review the ruling of Judge Anderson out of Linn County regarding the modification of custody. And that was two days of trial with no cameras, and the court was able to make independent assessment there, which I would refer the Court to -- this Court to the last full paragraph of section 2 on page 6 where it expresses

concerns regarding the lack of respect between the parents and the fact that the parents seem to or tend to conflate this matter for the purpose of whatever they are trying to achieve.

All that set aside, Your Honor, without cameras in this case, we are standing here asking the Court for a deferred judgment, and it would be a fair assessment if the Court would be able to grant that.

The drama that has surrounded this case, as fanned by the fathers in this case, has created a situation where the Court is placed in a very odd position. If we look at the bare facts, if we look at the PSI, which fairly lays out those facts as well, simply put, Ms. Macke made a mistake. We ask the Court to allow her to rectify that.

In an effort not to drag the kids through this process, she has not done anything in the context of this case to exacerbate the problem. And despite their suggestions through these victim impact statements that she is the unfettered and untethered person that they suggest, other than the statement, there was no evidence to provide to this Court recordings that would indicate that she has been as untethered as they suggest. Your Honor, we're asking the Court to grant a deferred judgment. This is Ms. Macke's only criminal appearance. She's a professional. She works. She's done a very good job keeping the kids out of this process.

And I think as the court in the matter in Linn County adequately pointed out, there's some

> real concerns if the Court doesn't modify the no-contact order that at least Mr. Macke, and possibly Mr. McQuary, would be using that no-contact order as a weapon against the children to cut them out of their mother's life.
>
> I don't think anybody would be advocating that that is a good outcome for these kids. And if the concerns of the fathers are genuinely, let's take care of the kids, then they should be advocating for contact and advocating for counseling, as it appears that Mr. Macke did in the Linn County case.
>
> With that said, Your Honor, I have nothing further.

(Sentencing Transcript p. 19, Line 7 through p. 21, Line 22). Defense counsel did not object to the State's failure to adhere to the plea agreement recommendation. (Sentencing Transcript *passim*). Nor did counsel request to withdraw Macke's guilty pleas or request specific performance of the plea agreement before a different sentencing judge. (Sentencing Transcript *passim*).

The court, citing the State's recommendation, subsequently sentenced Macke to a total of two years on probation pursuant to a suspended sentence. (Sentencing Transcript p. 28, Line 2 through p. 30, Line 4). Macke timely filed her notice of appeal. (App. at 13).

ARGUMENT

I. MACKE'S TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTION'S BREACH OF THE PLEA AGREEMENT

Preservation of Error

Macke's trial counsel failed to object to the prosecution's breach of its plea agreement, which would normally preclude her from attempting to litigate the issue on appeal. The failure to object to the breach is the basis of Macke's claim of ineffective assistance of counsel, which does not fall within the normal rules of error preservation. *State v. Rodriguez*, 804 N.W.2d 844, 848 (Iowa 2011). Macke's claim of ineffective assistance of counsel, therefore, is properly before this Court on direct appeal.

Standard of Review

Claims of ineffective assistance of counsel are reviewed de novo. *State v. Horness*, 600 N.W.2d 294, 297 (1999). Likewise, the interpretation and enforcement of issues related to a plea agreement are reviewed de novo. *United States v. DeWitt*, 366 F.3d 667, 669 (8th Cir. 2004). Plea agreements should be interpreted using general contract principles. *Id.*

Merits

All persons accused of indictable crimes have the constitutional right to be represented at trial by effective counsel. U.S. Const. amend. VI; Iowa

Const. art. I, § 10. "A defendant receives ineffective assistance of counsel when (1) the defense attorney fails in an essential duty and (2) prejudice results." *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). To prove counsel failed in an essential duty, the defendant must prove the attorney's performance was outside the range of normal competency. *State v. McPhillips*, 580 N.W.2d 748, 754 (Iowa 1998) (quoting *State v. Spurgeon*, 533 N.W.2d 218, 219 (Iowa 1995)). Since a defendant is not entitled to perfect representation, but only that which is deemed as normally competent, courts avoid second-guessing and hindsight. *See Strickland*, 466 U.S. at 689; *State v. Rice*, 543 N.W.2d 884, 888 (Iowa 1996). This presumption may be overcome by a showing that counsel failed to raise a valid objection to a prosecutor's breach of a plea agreement. *State v. Bearse*, 748 N.W.2d 211, 215–17 (Iowa 2008).

Macke need not show that, "but for [her] counsel's failure to object, [s]he would have received a different sentence." *Bearse*, 748 N.W.2d at 217 (quoting *Horness*, 600 N.W.2d at 300). Instead, she "must simply show that the outcome of the sentencing proceeding would have been different." *Id.* (quoting *Horness*, 600 N.W.2d at 300–01).

A. Adequacy of the Record

A defendant requesting the court to decide an ineffective-assistance-of-counsel claim on direct appeal must establish "an adequate record to allow the appellate court to address the issue." *State v. Fannon*, 799 N.W.2d 515, 520 (Iowa 2011) (quoting *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010)). "It is for the court to determine whether the record is adequate and, if so, to resolve the claim." *Id*. (quoting *Johnson*, 784 N.W.2d at 198). In this case, the record reflects the terms of the plea agreement, the prosecutor's conduct that is alleged to have breached the plea agreement, and defense counsel's failure to object to the alleged breach. (App. at 9; Plea Transcript; Sentencing Transcript). Further, the record shows defense counsel did not consult with Macke before standing silent in the face of the prosecutor's breach. (Sentencing Transcript *passim*). The record, therefore, is adequate to decide this case on direct review. *Fannon*, 799 N.W.2d at 520.

B. Applicable Principles

The plea agreement process includes issues of constitutional significance, and the failure of the prosecution to abide by its promises made therein violates a defendant's right to due process. *United States v. Fowler*, 445 F.3d 1035, 1037 (8th Cir. 2006) (citing *United States v. Van Thournout*, 100 F.3d 590, 594 (8th Cir. 1996)). To satisfy due process, any promise by

the prosecution that is an inducement to the defendant to agree to a plea, must be kept. *Santobello v. New York*, 404 U.S. 257, 262 (1971). Apart from the due process violation, the improper use of a plea agreement also threatens "'the honor of the government' and 'public confidence in the fair administration of justice.'" *Bearse*, 748 N.W.2d at 215 (quoting *State v. Kuchenreuther*, 218 N.W.2d 621, 624 (Iowa 1974)). For this reason, Iowa courts are compelled to hold prosecutors "to the most meticulous standards of both promise and performance." *Id.* (quoting *Horness*, 600 N.W.2d at 298). Accordingly, "violations of either the terms or the spirit of the agreement" require a vacation of the sentence. *Horness*, 600 N.W.2d at 298.

C. Macke's Trial Counsel Was Ineffective for Failing to Object to the State's Noncompliance with the Plea Agreement

The Iowa Supreme Court has observed that when a prosecutor breaches a plea agreement during the sentencing hearing, "a reasonably competent attorney would make an objection on the record 'to ensure that the defendant receive[s] the benefit of the agreement.'" *Fannon*, 799 N.W.2d at 522 (quoting *Bearse*, 748 N.W.2d at 217). While strategic decisions are normally not second-guessed, "no possible advantage could flow to the defendant from counsel's failure to point out the State's noncompliance." *Horness*, 600 N.W.2d at 300. Consequently, Defense counsel's failure to object "simply cannot be attributed to improvident trial

strategy or misguided tactics." *Fannon*, 799 N.W.2d at 522 (quoting *Horness*, 600 N.W.2d at 300).

Here, the State promised the following: "The plea agreement is Alford plea to Counts 1–4 of TI; joint Recommendation of Deferred Judgment and Probation. State will dismiss Ct 5." (App. at 9). Yet, at sentencing, the prosecutor asked for a suspended sentence. (Sentencing Transcript p. 3, Line 7 through p. 5, Line 3). This clearly violated the terms and spirit of the plea agreement between the parties.

When the State breached the terms and spirit of the plea agreement, Macke's trial counsel had a clear duty to object. *Horness*, 600 N.W.2d at 294. Only by objecting could defense counsel ensure Macke obtained the benefit of his bargain. *Id.* In this regard, trial counsel failed to perform an essential duty. *Id.*

D. Macke Was Prejudiced by Trial Counsel's Failure to Object

In the *Horness* decision, the Iowa Supreme Court set forth the analytical framework to assess prejudice in the context of claims of ineffective assistance of counsel based on the failure to object to a breach of a plea agreement:

> A proper objection by the defendant's attorney would have alerted the sentencing court to the prosecutor's breach of the plea agreement. In that circumstance, the court would have allowed the defendant to withdraw his guilty pleas, or would

> have scheduled a new sentencing hearing at which time the prosecutor could make the promised recommendations. The outcome of the defendant's sentencing proceeding was different, however, because defense counsel did not make the necessary objection. Consequently, the defendant was sentenced by the court at a hearing tainted by the prosecutor's improper comments.

Fannon, 799 N.W.2d at 523 (quoting *Horness*, 600 N.W.2d at 301); *accord* *Bearse*, 748 N.W.2d at 217.

As in *Fannon* and *Horness*, defense counsel's failure to object to the breach prevented Macke from having the opportunity to demand specific performance, request a new sentencing judge, or withdraw her pleas. *Fannon*, 799 N.W.2d at 523 (quoting *Horness*, 600 N.W.2d at 301); *accord* *Bearse*, 748 N.W.2d at 217. Here, the prejudice is even more evident by virtue of the sentencing court's direct reference to the State's recommendations in deciding on what sentence to impose:

> With that, *I will follow the State's recommendation* in this circumstance and sentence you to two years in prison on each count, make those sentences concurrent with each other, and place you on probation.

(Sentencing Transcript p. 29, Line 23 through p. 30, Line 2) (emphasis added). Counsel's failure to object to the State's breach, therefore, caused prejudice by depriving Macke of the benefit of her bargain. *Fannon*, 799 N.W.2d at 523.

E. The Proper Remedy Is to Remand for Resentencing Before a Different Judge

"An appropriate remedy for a breached plea agreement is one that 'ensures the interests of justice are served.'" *Id.* (quoting *Bearse*, 748 N.W.2d at 218). Generally, that is either allowing the defendant to withdraw her guilty plea or remanding for resentencing before a new judge. *Id.* The latter is available regardless of whether the district court would have arrived at the same sentence notwithstanding the prosecution's breach. *See United States v. Mosley*, 505 F.3d 804, 809 (8th Cir. 2007) (holding that a breach of a plea agreement is not subject to harmless error analysis). The appropriate remedy in this instance is to remand for resentencing before a different judge. Doing so will ensure Macke the benefit of the bargain by demanding specific performance of the plea agreement. *Fannon*, 799 N.W.2d at 524.

II. IOWA SHOULD ADOPT PLAIN ERROR REVIEW BECAUSE IOWA'S USE OF INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IS AN INADEQUATE SUBSTITUTE.

Preservation of Error

Macke's trial counsel failed to object to the prosecution's breach of its plea agreement, which would normally preclude Macke from attempting to litigate the issue on appeal. The failure to object to the breach is the basis of Macke's claim of plain error, which does not fall within the normal rules of

error preservation. Macke's claim of plain error, therefore, is properly before this Court on direct appeal.

Standard of Review

Plain errors are reviewed under the plain error standard. *United States v. Melton*, 738 F.3d 903, 905 (8th Cir. 2013).

Merits

Iowa is one of two states that still does not recognize the plain error doctrine, though it has been suggested in concurring opinions of the Iowa Supreme Court. *See, e.g.*, *Rhoades v. State*, 848 N.W.2d 22, 33–34 (Iowa 2014) (Mansfield, J., concurring specially) ("In some respects, we are using ineffective assistance as a substitute for a plain error rule, which we do not have in Iowa. . . . Even as we use the terminology 'ineffective assistance' as a tool to review criminal convictions, I think is especially important that we do not appear to be criticizing counsel when we are talking about a legal construct of this court . . . ."); *see also State v. Clay*, 824 N.W.2d 488, 504 (Iowa 2012) (Mansfield, J., concurring specially). This case should be the vehicle to adopt plain error doctrine.

A. *United States v. Olano* and the Elements of the Federal Plain Error Rule Should Be Adopted by the State of Iowa.

Federal of Rule of Criminal Procedure 52(b) provides "[a] plain error that affects substantial rights may be considered even though it was not

brought to the court's attention." Fed. R. Crim. P. 52(b). Instead of introducing a new guideline, Rule 52(b) codified existing law. Fed. R. Crim. P. 52(b) advisory committee's note to 1944 adoption ("This rule is a restatement of existing law. Rule 27 of the Rules of the Supreme Court, 28 U.S.C., formerly following § 354, provides that errors are not specified will be disregarded, 'save as the court, at its option, may notice a plain error not assigned or specified.'" (citations omitted)). The Supreme Court clarified the rule's application in *United States v. Olano*, creating a three-part test to determine if a particular circumstance called for plain error review. 507 U.S. 725, 732–35 (1993).

First, there must be an error at the trial level, which the Court defined as a "deviation from a legal rule" that was not waived. *Id.* at 732–33. "If a legal rule was violated during the district court proceedings, and if the defendant did not waive the rule, then there has been an 'error' within the meaning of Rule 52(b) despite the absence of a timely objection." *Id.* at 733–34.

Second, the error must be plain, although aside from noting some synonyms of "plain," such as "clear" and "obvious," the Court did not further elaborate. *Id.* at 734.

Third, the plain error must "affect substantial rights," and "in most cases [that] means that the error must have been prejudicial: It must have affected the outcome of the district court proceedings." *Id.* at 735.

The defendant bears the burden of proving the error's prejudicial effect. *Id.* at 734. The *Olano* Court emphasized the discretionary nature of Rule 52(b), noting Rule 52(b) "is permissive, not mandatory" and should only be invoked "if the error 'seriously affects the fairness, integrity or public reputation of judicial proceedings.'" *Id.* at 736 (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)); *cf. Bearse*, 748 N.W.2d at 215 (noting that apart from the due process violation, the improper use of a plea agreement threatens "'the honor of the government' and 'public confidence in the fair administration of justice.'" (quoting *State v. Kuchenreuther*, 218 N.W.2d 621, 624 (Iowa 1974))). The *Olano* Court reiterated that it "ha[s] never held that a Rule 52(b) remedy is *only* warranted in cases of actual innocence." *Olano*, 507 U.S. at 736.

B. Using Ineffective Assistance of Counsel Claims as a Substitute for Plain Error Ignores the Differing Goals of Each Doctrine and Couches Errors by Various Parties within Defense Counsel's Failures to Object or Otherwise Preserve Error.

This point is aptly explained in the May 2017 issue of the Iowa Law Review:

> Ineffective assistance of counsel claims are intended to ensure that those who are entitled to effective representation by the Sixth Amendment are not denied that right. The plain error rule has a broader purpose—to prevent the toleration of trial error, regardless of its source, of a severity that would undermine "the fairness, integrity or public reputation of judicial proceedings." Thus, it is clear that while many claims of ineffective assistance of counsel that denied a defendant his or her Sixth Amendment rights would fall within the scope of issues reviewable under the plain error rule, due to the plain error rule's broader purpose, there are a number of conceivable errors arising from attorney or judicial conduct that would (or should) be difficult to shoehorn into an ineffective assistance of counsel appeal, because they do not implicate a defendant's Sixth Amendment right to counsel.
>
> *In effect, the course currently pursued by the Iowa Supreme Court makes defense counsel the ultimate gatekeeper of all error at the trial level. Prosecutorial misconduct becomes the defense counsel's failure to object to prosecutorial misconduct.*[1] *A court's acceptance of a guilty plea without a factual basis becomes the defense's failure to object to a court's acceptance of a guilty plea without a factual basis.*[2] *Errors of all parties to a criminal trial become attributable to*

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[1] *See State v. Graves*, 668 N.W.2d 860, 883 (Iowa 2003) ("The prosecutor engaged in misconduct when he asked the defendant whether the police officer had 'made up' his testimony. Additional misconduct occurred in the prosecutor's closing argument when he accused the defendant of calling the officer a liar and again in the prosecutor's rebuttal argument when he repeatedly characterized the defendant as lying. This misconduct permeated the entire trial . . . ."). Despite the Graves court's finding that prosecutorial misconduct "permeated the entire trial," it ultimately held that defense counsel was responsible for the trial errors.

[2] *See Rhoades v. State*, 848 N.W.2d 22, 33 (Iowa 2014) ("There was not a sufficient factual basis for the district court to accept the pela. Therefore trial counsel was ineffective for allowing the district court to accept the plea without a factual basis.").

defense counsel, and where they are not attributed to the defense, they cannot be reviewed.[3]

One significant problem with Iowa's use of ineffective assistance of counsel claims to challenge the validity of guilty pleas in particular, is that the "prevailing norms of practice" cited by Strickland to determine "reasonably effective assistance" place responsibility for ensuring that a guilty plea is supported by a sufficient factual basis squarely in the hands of the trial judge. Placing the ultimate responsibility for the sufficiency of the factual basis supporting a guilty plea in the hands of defense counsel ignores the "prevailing norms" set forth by the Iowa Legislature and the ABA, which emphasize the primary role of the court. Furthermore, the ABA Standards for Criminal Justice specify a number of "responsibilities of defense counsel" in the plea process, which include notifying the defendant of plea offers, adequately investigating the case before recommending a plea, and advising the defendant of his or her options and any collateral consequences of accepting a plea, but do not assign any responsibility for the adequacy of the factual basis to defense counsel. Iowa's current approach, making ineffective assistance of counsel the sole avenue to review unpreserved error, ignores the important responsibilities borne by the court and the prosecution.

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[3] *See State v. Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999). In State v. Rutledge, prosecutorial conduct that was labeled "plainly out of bounds" by the court was not reviewable when the unpreserved error had not been couched in the framework of ineffective assistance of counsel. *See id.* ("The prosecutor . . . mounted an attack on Rutledge's alibi witnesses that was plainly out of bounds."). The specific conduct that concerned the court in Rutledge was cited in support of a holding that counsel was ineffective for failing to object to prosecutorial misconduct in *State v. Graves*. *Graves*, 668 N.W.2d at 876 ("More recently, . . . we condemned similar statements by a prosecutor, finding them 'clearly improper.' . . . In Rutledge, the prosecutor not only characterized the defense witnesses as 'liars' and 'druggees,' but also stated that these witnesses 'can't tell the truth,' 'couldn't be candid with you if they tried,' 'outright lied . . . through their teeth,' and 'would lie to save their own hides.'").

> The fact that the right to counsel does not extend to all criminal defendants presents another important argument against the suitability of ineffective assistance of counsel claims to substitute for plain error review. In Iowa, the right to counsel in misdemeanor cases extends to cases in which the accused may face incarceration. As a result, there is a class of criminal defendants in Iowa for which an ineffective assistance of counsel claim is not available, and who thus face the possibility of serious errors during trial that simply cannot be addressed on appeal if error is not preserved at trial. Furthermore, the unavailability of plain error review in Iowa means that a pro se defendant will be expected to preserve error at trial, and that unpreserved error in such trials will not be reviewable on appeal regardless of its prejudicial effect on the outcome.

Jon M. Woodruff, Note, *Plain Error by Another Name: Are Ineffective Assistance of Counsel Claims a Suitable Alternative to Plain Error Review in Iowa?*, 102 Iowa L. Rev. 1811, 1834–36 (2017) (emphasis added) (citations omitted from all but emphasized paragraph).

Ultimately, rather than analyzing errors such as those in this case under a framework of ineffective assistance of counsel, if the Iowa Supreme Court were to adopt plain error review, the Court would avoid the unfortunate image that it appears to criticize counsel in which there really is no fault of defense counsel but of another party to the case. *See Rhoades*, 848 N.W.2d at 33 (Mansfield, J., concurring specially) ("I think it is especially important that we not appear to be criticizing counsel . . . .").

C. Plain Error Review Should Be a Judicially Created Exception to the Judicially Created Doctrine of Error Preservation in Order to Protect Iowans' Appellate Rights.

Error preservation is a judicially created doctrine that can be set aside by the court outside of the framework of the rules process. Though federal courts have adopted the plain error as a rule, it need not be a rule for the State of Iowa. It can be a judicially created exception to the judicially created doctrine of error preservation.

In addition, a narrow exception to the error preservation rules for plain error review in criminal cases is essential—it is not fair, particularly for incarcerated defendants, to have to waits for months or years for resolution to an error preservation dispute through a postconviction relief proceeding if the error is obvious and prejudicial on direct appeal.

> Without the plain error rule, wronged Iowans often must rely on filing applications for post-conviction relief to overcome the failures of counsel to preserve error, rather than simply addressing those issues on direct appeal. Adopting the additional tool of plain error will also buoy judicial economy. Post-conviction relief proceedings often take years in district court alone, and petitioners frequently sit in jails or prisons . . . while justice slowly grinds out a result. [Dr. Martin Luther King, Jr.] said that justice delayed is justice denied, and the plain error rule can bring justice more swiftly, with less rigid adherence to form.

Final Brief for Appellant at 18, *State v. Sahinovic*, No. 15-0737, 2016 Iowa App. LEXIS 393 (Apr. 26, 2016).

"The simplest and most straightforward way to address Iowa's increasingly broad application of ineffective assistance of counsel doctrine would be for the Iowa Supreme Court to reverse course and decide to adopt plain error review." Woodruff, *supra*, at 1837.

D. Plain Error Review Offers Macke Relief Without Marring Defense Counsel's Professional Reputation.

Plain error review can alleviate the harm done to Macke without the unnecessary step of finding ineffective assistance of counsel. It was plain error when the plea document and the plea transcript showed a plea to a joint recommendation for a deferred judgment and the prosecution instead recommended a suspended sentence—in clear violation of the plea agreement. This is not entirely ineffective counsel.

1. There is undisputed error.

Prior to trial, Macke and the State reached a plea agreement. (App. at 9). The agreement provided that, in exchange for Macke's plea pursuant to *North Carolina v. Alford*, the State would agree to (1) dismiss the firearm transfer charge and (2) recommend deferred judgment and probation. (App. at 9). The State nevertheless recommended at sentencing that Macke be punished with a suspended sentence, not a deferred sentence. (Sentencing Transcript p. 3, Line 10 through p. 5, Line 3). Macke's trial counsel did not object to the State's refusal to jointly recommend a deferred judgment as

promised in the plea agreement. (Sentencing Transcript *passim*; App. at 9). The district court followed the State's recommendation, sentencing Macke to two years in prison on each count, to be suspended and to run concurrently. (Sentencing Transcript p. 28, Line 2 through p. 30, Line 4). Deviation from a legal rule qualifies as an error. *Olano*, 507 U.S. at 732–33. In failing to jointly recommend a deferred judgment pursuant to the plea agreement, the prosecution deviated from a legal rule, and defense counsel clearly erred in failing to object to the prosecution's actions.

2. The error is obvious.

Next, the error was plain. In order for the error to be "plain," it must have been "clear" or "obvious" under the law that existed at that time. *Id.* at 733. The second element is satisfied. This is not a situation "where the error was unclear at the time of trail but becomes clear on appeal because the applicable law has been clarified." *Id.* at 734. Furthermore, there is no conceivable trial strategy that may call into question whether trial counsel's failure to object to the prosecution's deviation from the plea agreement complied with the case law was clearly in error. There was nothing to gain by failing to object—the second prong is satisfied.

3. The error affected Macke's substantial rights to reap the benefit of a bargained-for plea agreement.

The plain error affected Macke's substantial rights. *See id.* An error affects substantial rights if it is prejudicial. *Id.* Macke was prejudiced by the prosecution's breach of the plea agreement. Macke never would have accepted the plea agreement knowing it would lead to a criminal record.

CONCLUSION

For the reasons articulated herein, Erin Macke asks the Court to vacate her sentences and remand the matter to the district court for resentencing in front of a different judge.

REQUEST FOR ORAL ARGUMENT

Counsel for Appellant requests to be heard in oral argument before the court in this matter.

COST CERTIFICATE

I hereby certify the costs of printing this brief was $0.00 because it was filed electronically.

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1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

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