

IN THE SUPREME COURT OF IOWA  
Supreme Court No. 18-0839

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STATE OF IOWA,  
Plaintiff-Appellee,

vs.

ERIN MACKE,  
Defendant-Appellant.

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

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**APPELLEE'S BRIEF**

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FINAL

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## STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

### I. The Record is Insufficient to Resolve Macke's Claims on Direct Appeal.

*Santobello v. New York*, 404 U.S. 257 (1971)  
*United States v. Marcus*, 560 U.S. 258 (2010)  
*Barker v. Capotosto*, 875 N.W.2d 157 (Iowa 2016)  
*State v. Lopez*, 872 N.W.2d 159 (Iowa 2015)  
*State ex rel. Brewer v. Starcher*, 465 S.E. 185 (W.V. 1995)  
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*Trobaugh v. Sondag*, 668 N.W.2d 577 (Iowa 2003)  
Iowa Code §§ 814.11, 815.10(6)

### ROUTING STATEMENT

Erin Macke asks this Court to retain this case in order to adopt the “plain error” rule. Retention is inappropriate because the record is insufficient to resolve Macke’s claims on direct appeal. For that reason, transfer to the court of appeals is appropriate. Iowa R. App. P. 6.1101(3).

### STATEMENT OF THE CASE

#### Nature of the Case

This is a direct appeal from Macke’s judgment and sentence after she entered an *Alford* plea on four counts of child

endangerment. She argues that her counsel was ineffective for failing to object to the State's breach of the plea agreement at sentencing.

### **Course of Proceedings**

Macke was charged with four counts of child endangerment in violation of Iowa Code section 726.6(1)(a) and one count of transfer of a pistol to a person under 21 in violation of 724.22(2). Trial Information; App. 6-8. On February 26, 2018, Macke's counsel filed a document titled "Petition to Plead Guilty (Alford)" (herein "Petition"). The document recited the plea agreement as follows: "Alford plea to Counts 1-4 of TI; joint Recommendation of Deferred Judgment and Probation. State will dismiss Ct 5." Petition 02/26/18; App. 9. The document was signed by Macke and her counsel, but not by the State.

At the plea hearing, Macke's counsel described the plea agreement to the court:

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 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.

Plea Tr. P.4 Ls.8-18. The district court did not ask the State if defense counsel accurately described the agreement. In its order accepting the plea, the district court described the agreement as follows: “The Defendant will ask for a deferred judgment and probation. The State reserves its recommendations until it has an opportunity to review the PSI.” Order to Accept Plea 02/26/18; App. 10-12.

The presentence investigation was filed on April 10, 2018. At sentencing, the State recommended a suspended sentence and probation. Sent. Tr. P.3 L.7 – P.5 L.3. Immediately after the State made its recommendation, Macke’s counsel asked for a break and stepped out into the hall. Sent. Tr. P.5 Ls.7-12. The hearing then resumed without any objection to the State’s recommendation. The district court sentenced Macke to two years concurrent on each count and suspended the sentence. Sent. Tr. P.29 L.23 – P.30 L.4.

### **Facts**

Lengthy recitation of the facts of the crime is unnecessary for the resolution Macke’s claims on appeal. Suffice it to say that Macke left her four children unsupervised in her apartment while she vacationed in Germany. *See Minutes of Testimony P.8.*

## ARGUMENT

### I. **The Record is Insufficient to Resolve Macke’s Claims on Direct Appeal.**

#### **Preservation of Error**

Macke claims that her trial counsel was ineffective for failing to object to the State’s recommendation at sentencing, which would have preserved her claim that the State breached the agreement for appeal. She does not need to preserve the ineffective assistance claim. Macke also asks this Court to review consider whether the State breached the agreement under the “plain error” standard, which is an alternative to the error preservation requirement.

#### **Standard of Review**

Ineffective assistance of counsel claims are reviewed de novo. The plain error rule gives appellate courts discretion to correct errors not addressed below if the appellant can demonstrate:

(1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error “affected the appellant's substantial rights, which in the ordinary case means it affected the outcome of the district court proceedings; and (4) the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.

*United States v. Marcus*, 560 U.S. 258, 262 (2010) (citations and quotations omitted).

## **Merits**

The record is not sufficient to determine Macke's claim on appeal, whether under ineffective assistance of counsel or using the plain error rule.

### **A. Ineffective assistance of counsel.**

For most ineffective assistance claims, a defendant must show that his trial counsel breached an essential duty, and that he was prejudiced as a result of counsel's error. *See Lopez*, 872 N.W.2d at 169. When a defendant alleges that his trial counsel provided ineffective assistance by failing to object to a breach of his plea agreement, the analysis is different. While "defense counsel has a duty to object to [a] breach of a plea agreement," *Id.* (quoting *State v. Bearse*, 748 N.W.2d 211, 217 (Iowa 2008)), a defendant need not establish that "but for his counsel's failure to object, he would have received a different sentence." *Lopez*, 872 N.W.2d at 169 (quotations omitted). This Court explained the rationale for applying a different analysis as follows:

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 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.

*State v. Horness*, 600 N.W.2d 294, 301 (Iowa 1999) (citation omitted). In other words, prejudice is presumed when counsel fails to object to a breach of a plea agreement at sentencing. *Lopez*, 872 N.W.2d at 170.

It is well settled that “when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration [for the plea], such promise must be fulfilled.” *Santobello v. New York*, 404 U.S. 257, 262 (1971). Prosecutors are held “to the most meticulous standards of both promise and performance.” *Horness*, 600 N.W.2d at 298 (quoting *State ex rel. Brewer v. Starcher*, 465 S.E. 185, 192 (W.V. 1995)). “Strict, not substantial, compliance with the terms of plea agreements” is demanded. *State v. Fannon*, 799 N.W.2d 515, 522 (Iowa 2011) (citing *Bearse*, 748 N.W.2d at 215).

If Macke is correct that the parties agreed to jointly recommend a deferred judgment, as her counsel described the agreement at the plea hearing and in the written plea document, then the State concedes that the agreement was breached. If, however, the State reserved its right to make a different recommendation after having an opportunity to review the presentence investigation, as the order accepting the plea described the agreement, there was no breach at sentencing and thus no need to object.

Ineffective assistance of counsel should ordinarily be raised as part of a postconviction relief proceeding. *State v. Bennett*, 503 N.W.2d 42, 47 (Iowa Ct. App. 1993). Postconviction relief allows the defendant to develop a record that supports the claim. *Id.* It also afford the allegedly ineffective attorney to explain his or her conduct. *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). “Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned.” *Id.* That is important, because the stakes for defense counsel are significant—a finding of ineffective assistance of counsel opens the door to a malpractice claim. Iowa Code §§ 814.11, 815.10(6); *Barker v. Capotosto*, 875 N.W.2d 157, 161, 167-68

(Iowa 2016); *Trobaugh v. Sondag*, 668 N.W.2d 577, 582-83 (Iowa 2003).

In this case, there are two versions of the plea agreement: the version recited by Macke’s counsel and the version described in the district court’s order. The fate of Macke’s ineffective assistance of counsel claim rests on whether the first or second version is correct. It is impossible for a reviewing court to make that determination on this record. Preservation for possible postconviction relief, where Macke will have an opportunity to prove that her counsel’s version of the agreement was correct, is appropriate.

**B. Plain error.**

It is unnecessary to decide whether to adopt the plain error rule in this case, because the record is insufficient to show a “clear and obvious” error. For the same reason that this case cannot be resolved on ineffective assistance of counsel—the Court does not know which version of the agreement is correct—Macke cannot satisfy the burden of proof demanded by the plain error standard. There is a “reasonable dispute” about the terms of the agreement. As a result, Macke’s plain error claim would fail even if the Court considered it.

## CONCLUSION

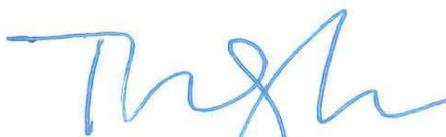
For the foregoing reasons, Macke's conviction and sentence should be affirmed. Her ineffective assistance claim should be preserved for postconviction relief.

## REQUEST FOR NONORAL SUBMISSION

Nonoral submission is appropriate for this case.

Respectfully submitted,

THOMAS J. MILLER  
Attorney General of Iowa



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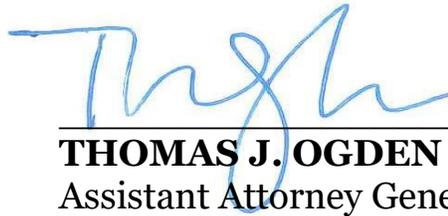
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## CERTIFICATE OF COMPLIANCE

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) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **1,469** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: November 26, 2018



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