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

SUPPLEMENTAL BRIEF FOR APPELLANT

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PROOF OF SERVICE

On July 9, 2019, I served this brief on all other parties by mailing one copy thereof to their respective counsel:

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CERTIFICATE OF FILING

I, Angela Campbell, certify I did file the attached brief with the Clerk of the Iowa Supreme Court by electronically filing the brief through the EDMS system on July 9, 2019.

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ARGUMENT

I. THE CHANGES TO IOWA CODE SECTIONS 814.6(1) AND 814.7 ARE NOT RETROACTIVE TO MACKE'S CASE.

Macke submits that Iowa Code sections 814.6(1) and 814.7 are not retroactive to her case because her right to appeal had vested by the time the statutes were amended. Nothing within the act states that these revisions are retroactive. Case law is clear that state statutes are prospective unless specifically made retroactive. As this Court has noted,

> Unless otherwise indicated, statutes controlling appeals are those in effect at the time the judgment appealed from was entered. *James v. State,* 479 N.W.2d 287, 290 (Iowa 1991); *Ontjes v. McNider,* 224 Iowa 115, 118, 275 N.W. 328, 330 (1937).

Giles v. State, 511 N.W.2d 622, 624 (Iowa 1994). The judgment in Macke's case was entered on April 19, 2018, long before these revisions went into effect. (Sentencing Order, 4/19/18).

Even if there was retroactive language within the Senate file, or if this or another court of this State tried to apply the statutory changes retroactively, such an action would violate the savings clause section of Iowa Code section 4.13(1). *Thorp v. Casey's General Stores, Inc.*, 446 N.W.2d 457 (Iowa 1989); *In re Estate of Hoover*, 251 N.W.2d 529 (Iowa 1977). Section 4.13(1) reads:

> The reenactment, revision, amendment, or repeal of a statute does not affect any of the following:
>
> a. The prior operation of the statute or any prior action taken under the statute.
>
> b. Any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred under the statute.
>
> c. Any violation of the statute or penalty, forfeiture, or punishment incurred in respect to the statute, prior to the amendment or repeal.
>
> d. Any investigation, proceeding, or remedy in respect of any privilege, obligation, liability, penalty, forfeiture, or punishment; and the investigation, proceeding, or remedy may be instituted, continued, or enforced, and the penalty, forfeiture, or punishment imposed, as if the statute had not been repealed or amended.

Iowa Code § 4.13(1).

This Court has applied § 4.13 in the criminal context by holding that if a defendant has acquired a vested right, it cannot be removed by statutory amendment. *State v. Stoen*, 596 N.W.2d 504, 508 (Iowa 1999).

> Our decision rested on our conclusion that the defendant had acquired a vested right when he consented to the deferred judgment. [*State v.*] *Soppe*, 374 N.W.2d, [649], 653 [Iowa 1985]. At that time, the defendant was promised that upon completion of the requirements for this sentencing option, the offense would be removed from his records. *Soppe*, 374 N.W.2d at 652. Deprivation of this right, we held, would violate Iowa Code section 4.13, which preserves any previously acquired rights from extinguishment by a statutory amendment. *Soppe*, 374 N.W.2d at 653.

Stoen, 596 N.W.2d at 508.

Macke's right to appeal had already vested by the time that the statutory amendments went into effect on July 1, 2019. As such, the amendments are not retroactive to her case.

II. IF MACKE'S RIGHTS TO APPEAL HER SENTENCE OR FILE A DIRECT APPEAL FOR INEFFECTIVE ASSISTANCE OF COUNSEL ARE ELIMINATED, THEN HER PLEA IS UNKNOWING, UNINTELLIGENT AND INVOLUNTARY AND SHOULD BE SET ASIDE.

If this Court does find that the changes to Iowa Code sections 814.6(1) and 814.7 are retroactive to appeals pending at the time of the effective date of the statute, then each of these defendants, including Macke, will need to be allowed to withdraw their pleas as unknowing, unintelligent, and involuntary.

Macke entered her plea on February 6, 2018 and was sentenced on April 19, 2018. The Senate did not even approve the pending bill in Senate File 589 until April 25, 2019, more than a year after Macke's sentencing, and the governor signed the bill into law on May 16, 2019. There was no possible way that Macke would have been aware that she might not have the right to appeal her sentence or challenge ineffective assistance of counsel on direct appeal at the time she entered her guilty plea.

If then those rights are now removed from her, her plea in February of 2018 could not have been knowing, intelligent, and voluntary, and her plea should be vacated for not complying with her due process rights under the Fifth and Fourteenth Amendments to the U.S. Constitution, and article I, section 9 of the Iowa Constitution, or the requirements of Iowa R. Crim. P. 2.24. In order for a plea to be knowing, intelligent and voluntary, and in order to comply with Rule 2.24, a defendant has to be accurately informed of her rights to appeal. Macke was never informed that she would not be able to appeal if the state breached the plea agreement, or that she could not appeal the sentence she was given after she entered her plea. Failure to accurately inform a defendant of her appellate rights renders her plea unconstitutional and invalid under Rule 2.24. *See State v. Meron*, 675 N.W.2d 537, 542-43 (Iowa 2004).

III. THE CHANGES TO IOWA CODE SECTION 814.7 FURTHER DEMONSTRATE WHY THIS COURT SHOULD ADOPT PLAIN ERROR REVIEW.

As mentioned in Macke's principle briefing, 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 Court has instead used ineffective assistance of counsel rubric to replace plain error review. Now that the legislature has eliminated much of the ability for defendants to challenge their pleas and obtain relief on direct appeal for clear violations of their rights to effective counsel, this Court should change course and join the rest of the country in allowing for plain error review.

This is the exact sort of case in which this Court could adopt such plain error review. While defense counsel did err in failing to object to the prosecutorial misconduct in breaching the plea agreement – the plain error is in the prosecutor's actions, not the defense lawyer's actions. As such, this court should recognize its authority to review a case for plain error and find that the clear violation of her plea agreement by the prosecutor warrants appellate relief. There is no need to evaluate this case as an ineffective

assistance of counsel case. It is a clear breach of a plea agreement by a prosecutor, warranting reversal.

For these reasons, and for the reasons set forth in Macke's principal brief, this Court should reverse Macke's conviction because of the plain error in the breach of her plea agreement by the State.

IV. IF THIS COURT DOES FIND THAT THE CHANGES TO IOWA CODE SECTIONS 814.6(1) AND 814.7 ARE RETROACTIVE, THERE IS GOOD CAUSE TO GRANT AN APPEAL FROM THIS GUILTY PLEA BECAUSE MACKE'S CONSTITUTIONAL RIGHTS TO DUE PROCESS WERE VIOLATED.

As argued in Macke's principal briefing, 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)). Improper use of a plea agreement also threatens "'the honor of the government' and 'public confidence in the fair administration of justice.'" *State v. Bearse*, 748 N.W.2d 211, 215 (Iowa 2008) (quoting *State v. Kuchenreuther*, 218 N.W.2d 621, 624 (Iowa 1974)).

Because Macke's constitutional rights to due process have been violated in this case by the breach of the plea agreement by the prosecutor, Macke has demonstrated "good cause" to grant an appeal from her guilty plea, as anticipated by Iowa Code § 814.6(1)(a)(3).

In addition, this is not a challenge to the plea itself, as is contemplated by the spirit of the changes to Iowa Code 814.6(1). Instead, it is a challenge to the breach of the plea agreement by the prosecutor, and a challenge to the resulting sentence that is based on that breach. As such, Iowa Code 814.6(1) should not be read to exclude all appeals of every issue arising in a case where there is a plea of guilty. Surely a defendant can still appeal her sentence, or errors in the sentencing process, or violations of her constitutional rights through prosecutorial misconduct, despite the overbroad language of Iowa Code 814.6. To that extent, any appeal of a sentence, or prosecutorial misconduct, should be held to be "good cause" to allow a defendant, like Macke, to appeal.

CONCLUSION

For all of these reasons, and for the reasons set forth in her principal briefing, Macke requests that her case be reversed and remanded to the district court.

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.

CERTIFICATE OF COMPLIANCE

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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