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

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ERIN MACKE,
Defendant-Appellant.

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

APPELLEE'S SUPPLEMENTAL BRIEF

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STATEMENT OF THE CASE

This Court granted further review and requested supplemental briefing to address the applicability of certain provisions in Senate File 589 to this appeal. Specifically, section 28 of Senate File 589 amends Iowa Code section 814.6 by stripping the Court's authority to hear appeals from guilty pleas with a few narrow exceptions. Section 31 amends section 814.7 by stripping the Court's authority to decide ineffective assistance of counsel claims on direct appeal, instead preserving all such claims for postconviction relief. This brief will argue that both provisions apply to this case and other pending appeals.

ARGUMENT

I. The Changes to Iowa Code Sections 814.6(1) and 814.7 Apply to Pending Appeals.

Macke argues that the amendments to sections 814.6 and 814.7 apply prospectively for two reasons: a general presumption that statutes operate only prospectively and the general savings clause of Iowa Code section 4.13(2). But neither the presumption nor the savings clause applies to jurisdiction-stripping provisions. Appeals are creatures of statute in Iowa. *State v. Hinners*, 471 N.W.2d 841, 843 (Iowa 1991). The legislature controls who gets to appeal and on

what ground. When the legislature removes authority to decide a type of case (such as an appeal from a guilty plea) or claim (such as ineffective assistance of counsel on direct appeal), the change applies to pending cases. *See, e.g.*, *Landgraf v. USI Film Prod.*, 511 U.S. 244, 274 (1994); *Bruner v. United States*, 343 U.S. 112, 116 (1952); *Hallowell v. Commons*, 239 U.S. 506, 508 (1916); *Merchants' Ins. Co. v. Ritchie*, 72 U.S. 541, 543 (1866).

A. The presumption against retroactivity does not apply to jurisdiction-stripping statutes.

Macke first argues that "[c]ase law is clear that state statutes are prospective unless specifically made retroactive." Appellant's Supp. Br. P.8. She does not cite any such case law for that proposition, but she does cite *Giles v. State* for the proposition that "[u]nless otherwise indicated, statutes controlling appeals are those in effect at the time the judgment appealed from was entered." 511 N.W.2d 622, 624 (Iowa 1994). The *Giles* Court cited two prior cases for support, *James v. State*, 479 N.W.2d 287 (Iowa 1991), and *Ontjes v. McNider*, 275 N.W.2d 328 (Iowa 1937). But those cases predate *Landgraf* and do not confront the consistent body of law prior to *Landgraf* holding that jurisdiction-stripping statutes apply to pending cases. *Landgraf*

511 U.S. at 274; *Bruner*, 343 U.S. at 116; *Hallowell*, 239 U.S. at 508; *Ritchie*, 72 U.S. at 543.

Federal courts "regularly appl[y] intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Landgraf*, 511 U.S. at 274. They do so because jurisdictional statutes "speak to the power of the court," not "the rights or obligations of the parties." *Id.* at 274 (citing and quoting *Republic Nat. Bank of Miami*, 506 U.S 80, 100 (Thomas, J., concurring)). Justice Scalia elaborated on the point in a *Landgraf* concurrence: "The purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power—so that the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised." *Landgraf*, 511 U.S. at 293 (Scalia, J., specially concurring).

In Iowa, courts distinguish between subject matter jurisdiction and the authority of a court to hear a case. In *In re Estate of Falck*, this Court explained:

> [W]e distinguished subject matter jurisdiction from the court's "lack of authority to hear a particular case," also referred to as "lack of jurisdiction of the case." "Subject matter

> jurisdiction" refers to the power of a court to deal with a class of cases to which a particular case belongs. A constitution or a legislative enactment confers subject matter jurisdiction on the courts. Although a court may have subject matter jurisdiction, it may lack the authority to hear a particular case for one reason or another.

672 N.W.2d 785, 789–90 (Iowa 2003) (citation omitted) (quoting *Christie v. Rolscreen Co.*, 448 N.W.2d 447, 450 (Iowa 1989)). In this case, whether the amendment of sections 814.6 and 814.7 defeat the appellate courts' subject matter jurisdiction to deal with a class of cases (appeals from guilty pleas to non-class A felonies) or authority to hear a particular claim (ineffective assistance of counsel on direct appeal), the result is the same. The changes affect the exercise of judicial power. As such, they are jurisdiction-stripping provisions that apply to pending cases. They apply regardless of a retroactivity analysis because in pending cases the exercise of judicial power has not happened yet. *See Landgraf*, 511 U.S. at 293 (Scalia, J., specially concurring).

The federal approach better serves the intent of the legislature when they enact statutes affecting jurisdiction of the appellate courts. Especially where, as here, the legislature designed the amendment to address the proliferation of frivolous appeals and to ensure that

claims are litigated in the best possible forum. Because jurisdiction-stripping statutes regulate the exercise of judicial power, they are not technically retroactive when applied to pending cases. On the contrary, refusing to apply jurisdiction-stripping statutes to pending cases has the effect of suspending the legislature's intended effective date until a decision is reached in each case.

The *Ontjes* decision did not involve a jurisdiction-stripping statute and is not necessarily inconsistent with application of such statutes to pending cases. The phrase that the *Giles* and *James* decisions quote—"[u]nless authorized by statute, no appeal can be taken to this court from judgments or orders of inferior courts, and the statutes controlling appeals are those that were in effect at the time the judgment or order appealed from was rendered"—addressed an appeal in an estate battle that spanned nearly ten years. *See Ontjes*, 275 N.W. at 330. The purpose of the statement was to anchor the appeal in the Code of 1935. The Court could have added, without any inconsistency, "*unless the legislature amends the jurisdiction of the appellate courts during the pendency of the case*." The Court in *James* saw more meaning in the phrase than it carried when it was originally used.

The flaw in the *James* decision is further revealed by the reasoning of this Court's later decision in *Hannan v. State*, 732 N.W.2d 45 (Iowa 2007). In that case, the Court found that the 2004 amendment to section 814.7 (which eliminated the need to raise ineffective-assistance claims first on direct appeal) applied to all pending appellate cases as a remedial or procedural rule. *See Hannan*, 732 N.W.2d at 51 & n.2. The *Hannan* decision and the federal approach better effect legislative intent and do not require a retroactivity analysis. To the extent that *Giles* or *James* are inconsistent, they should be overruled.

B. The general savings clause of Iowa Code section 4.13(1) does not apply to jurisdiction-stripping statutes.

Macke also argues that application of the new sections 814.6 and 814.7 to her pending case violates Iowa Code section 4.13(1). That section states that the revision or amendment of a statute does not affect any right previously "acquired, accrued, accorded, or incurred" under the statute. Iowa Code § 4.13(1)(b). She argues that her direct appeal to this Court is a vested right that cannot be removed by the amendment to section 814.6. The law does not support this position. *Bruner*, 343 U.S. at 117 ("This case is not

affected by the so-called general savings statute…"). When the legislature modifies appellate jurisdiction, it "has not altered the nature or validity of [one party's] rights or the [other party's] liability but has simply reduced the number of tribunals authorized to hear and determine such rights and liabilities." *Id.*

In *Iowa Dept. of Transp. v. Iowa Dist. Court for Scott County*, this Court considered the application of the general savings clause to the repeal of Iowa Code section 321J.4(3)(b) (1995), which provided an opportunity for criminal defendants who suffered a six-year license revocation to have their eligibility for a driver's license restored after two years. 587 N.W.2d 781 (Iowa 1998). The case involved defendants for whom the two year period had expired prior to the repeal of the statute. They argued that they had acquired a right to a hearing to seek restoration of their eligibility and that such right could not be taken away by the repeal of the statute. *Id.* at 783.

This Court rejected that claim, holding that "a litigant's interest in a certain procedure is not an accrued right or privilege in the context of a savings statute." *Id.* at 783-84. Other cases agree. *See, e.g.*, *State ex rel. Buechler v. Vinsand*, 318 N.W.2d 208, 209–10 (Iowa 1982) (stating that savings statutes do not apply to procedural

statutes; procedural statutes do not "create or take away vested rights"); *Denton v. Moser*, 241 N.W.2d 28, 31 (Iowa 1976) ("No one can claim to have a vested right in any particular mode of procedure for an enforcement or defense of his rights."); *Bascom v. District Ct.*, 231 Iowa 360, 362–63, 1 N.W.2d 220, 221 (1941) (same); *see also* 14 Uniform Laws Annotated *Model Statutory Construction Act* § 14 commentary at 405 (1990) (In commenting on prospective versus retrospective application of a statute, the commissioners state, "If a procedural statute is amended, the rule is that the amendment applies to pending proceedings as well as those instituted after the amendment.").

Senate File 589 does not affect Macke's ability to pursue her ineffective assistance of counsel or plain error claims; it merely changes the tribunal authorized to hear them in the first instance. She can proceed with her claims in postconviction relief under chapter 822. The savings clause does not "preserve the right to have a claim heard by any particular tribunal." *Barthelemy v. J. Ray McDermott & Co.*, 537 F.2d 168, 172 (5th Cir. 1976).

Macke cites *State v. Stoen*, 596 N.W.2d 504, 508 (Iowa 1999), for the proposition that this Court "has applied § 4.13 in the criminal

context." Appellant's Supp. Br. P.9. Maybe so, but *Stoen* is inapposite to this case. *Stoen* involved a defendant who challenged the classification of a conviction for operating while intoxicated as a third offense based on convictions that were more than six years old following an amendment that expanded the window for considering prior convictions from six to twelve years. *Stoen*, 596 N.W.2d at 507.

The defendant in *Stoen* relied on this Court's decision in *State v. Soppe*, 374 N.W.2d 649 (Iowa 1985). The *Stoen* Court explained that decision as follows:

> In *Soppe*, the defendant was charged with second-offense OWI based on a prior OWI charge that had resulted in a deferred judgment pursuant to Iowa Code section 907.3. 374 N.W.2d at 650. Prior to commission of the pending OWI violation, the applicable statute had been amended to specifically include deferred judgments in determining whether a violation charged is a first, second, or subsequent offense. *Id.* at 652. The dispute focused on whether the legislature intended to include deferred judgments granted prior to the amendment. *Id.* Based on the unique nature of a deferred judgment, we held that the legislature did not intend to retroactively count such proceedings in determining whether punishment for the current offense should be enhanced. *Id.* at 652-53. Our decision rested on our conclusion that the defendant had acquired a vested right when he consented to the deferred judgment. *Id.* at 653. 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. *Id.* 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.

Stoen, 596 N.W.2d at 508. That the specific promise accompanying a deferred judgment is considered a vested right says nothing about the procedural changes involved in this case. Indeed, even Stoen lost on his claim that convictions older than six years constituted the same right. *Id.* at 509 ("Stoen has not been deprived of a vested right by the legislative expansion of the window for prior offenses from six years to twelve years."). Because Macke's interest in a specific procedure (direct appeal versus postconviction relief) is not an accrued right or privilege for purposes of section 4.13(1), that section does not apply in this case. *See Iowa Dist. Court for Scott County*, 587 N.W.2d at 783-84.

II. Application of Senate File 589 to this Case Does Not Render Macke's Plea Involuntary.

Macke argues that she should be allowed to withdraw her plea if the changes to Iowa Code section 814.6 and 814.7 are applied to this appeal. She argues that at the time she entered her plea, February of 2018, "[t]here 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." Appellant's Supp. Br. P.10. She also argues that to enter a knowing and voluntary plea, "a defendant has to be accurately informed of her rights to appeal." Appellant's Supp. Br. P.11.

Beginning with the latter, nothing in Iowa Rule of Criminal Procedure 2.8 or case law requires that the defendant be informed of appeal options prior to entering a plea. Rule 2.8(2)(d) requires that a defendant be informed of the necessity of filing a motion in arrest of judgment to preserve a defect in the plea for appeal, but failure to so inform affects only the validity of the appeal waiver, not the plea itself. *See State v. Fisher*, 877 N.W.2d 676, 682 (2016). Many defendants, Macke included, are not given the rule 2.8(2)(d) colloquy until after the district court has already accepted the plea. *See* Plea Tr. P.5 Ls.15-23.

Moreover, Macke's colloquy was accurate even applying Senate File 589's changes to this Court's jurisdiction. At the plea hearing, Macke was told that a motion in arrest of judgment is the "legal vehicle" to attack the plea proceeding and preserve an appeal. Plea Tr. P.5 Ls.17-23. That is as true—if not more so—after July 1, 2019, as

it was before. In Macke's written plea she asked for immediate sentencing and told the court, "I understand that by seeking immediate sentencing I give up [the right to file a motion in arrest of judgment] and *forever waive my right to challenge this plea and to appeal my plea*." Written Plea (emphasis added); App. P.9.

Macke's argument hinges not on a rule violation, but on her claim that she was not informed that she would not in the future be able to raise an alleged breach of the plea agreement, sentencing error, or ineffective assistance of counsel claim on direct appeal. But neither the rules nor the *Sisco* factors require that the district court inform Macke that she *could* raise any of those claims on direct appeal. *See State v. Sisco*, 169 N.W.2d 542, 547-48 (Iowa 1969) (four basic due process requirements prior to entry of a guilty plea are: the defendant must (1) understand the charge, (2) be aware of the penal consequences of the plea, (3) enter the plea voluntarily, and (4) the district court must determine whether a factual basis exists for the plea.). The record contains no evidence that Macke was in fact informed of any of those possible claims. Macke's argument that she could not have known that Senate File 589 would affect her future appeal at the time she pleaded guilty only plausibly implicates due

process if she relied on general knowledge or a statement from the district court that she could challenge her sentence or her counsel's effectiveness on direct appeal at the time. The record does not contain any such evidence.

In any event, Senate File 589 did not "remove" Macke's ability to challenge her counsel's effectiveness for failing to object to an alleged breach of the plea agreement. She is still able to raise that claim in an application for postconviction relief. It strains credulity to argue that Macke would have chosen trial and a possible prison sentence over a guilty plea had she known that she would have to file an application for postconviction relief rather than a direct appeal to raise an ineffective assistance of counsel claim that did not exist at the time she entered her plea.

III. This Court Need Not Address Macke's Plain Error Argument Because the Record is Not Sufficient to Discern Any Error.

Macke once again asks this Court to embrace the "plain error" doctrine. It has in the past unequivocally held that it will not. *See, e.g.*, *State v. Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999) ("We do not subscribe to the plain error rule in Iowa, have been persistent and resolute in rejecting it, and are not at all inclined to yield on the

point.") (citing *State v. McCright*, 569 N.W.2d 605, 607 (Iowa 1997)); *see also State v. Hernandez-Lopez*, 639 N.W.2d 226, 234 (Iowa 2002) ("We reject the defendants' suggestion that the importance and gravity of an unpreserved constitutional issue creates an exception to our error preservation rules.").

Macke argues that the change to Iowa Code section 814.7 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." Appellant's Supp. Br. P.12 (emphasis added). But the change to section 814.7 does not support adopting a plain error rule. The statutory change itself addresses a problem this Court has recognized—that addressing claims of unpreserved error on direct appeal is nearly always premature. *See State v. Straw*, 709 N.W.2d 128, 138 (Iowa 2006) ("In only rare cases will the defendant be able to muster enough evidence to prove prejudice without a postconviction relief hearing."). Moreover, Macke and other defendants are precluded from challenging most guilty pleas on direct appeal even if this Court did recognize plain error. *See* Iowa Code § 814.6(1)(a)(3) (2019).

This case is emblematic of the desirability of postconviction relief proceedings to address ineffective assistance of counsel claims. Macke was charged with four counts of child endangerment and a gun charge. 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." Written Plea; App. 9. It also waived appearance and sought immediate sentencing. Written Plea; 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. The Court also referenced a discussion between Macke's counsel and the State wherein "[a]ll parties agree that [a presentence investigation] is warranted in this case," despite that Macke waived one in the written plea. Plea Tr. P.5 L.24 – P.6 L.4. The discussion does not appear in the record. 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.

The Court of Appeals correctly concluded that the record was insufficient to determine whether Macke's counsel should have objected to the State's sentencing recommendation because it is unclear what the actual agreement was:

> Macke claims that her attorney was ineffective by failing to object to the State's recommendation for a suspended sentence instead of a deferred judgement, as the State's recommendation at sentencing was a breach of the parties' plea agreement. The record is unclear as to just what the agreement was. On the one hand, the written "Petition to Plead Guilty (Alford)" provides both parties would recommend a deferred judgment. Although the State did not sign the petition, it made no objection to the petition prior to or during the plea hearing. Nor did the State object when defense counsel represented to the court at the plea hearing that both parties would recommend a deferred judgment. On the other hand, defense counsel did not object at any time to the court's written order accepting the plea that stated the State reserved its recommendation until it had the opportunity to review the presentence investigation report (PSI). Nor did defense counsel object when, at the sentencing hearing, the State recommended a suspended sentence.
>
> It is likewise unclear from the record if the parties ever discussed and mutually agreed to any version of the plea agreement or if the agreement simply changed over time. While the parties had ample opportunity to alert the court that the agreement was misrepresented, neither party raised those concerns or objected

> when the agreement differed from their understanding of it. Because we conclude that the record before us is insufficient to determine the actual agreement between the parties, we must affirm Macke's convictions and preserve the issue of ineffective assistance of counsel for future postconviction-relief proceedings.

State v. Macke¸ No. 18-0839, 2019 WL 1300432, at *4 (Iowa Ct. App. March 20, 2019). Macke may well be correct that her counsel should have objected, but given the different expressions of the agreement and the record evidence of off-the-record discussions between Macke's counsel and the State, it is impossible to say so with the certainty that plain error review requires. *See Puckett v. United States*, 556 U.S. 129, 135 (2009) (legal error must be "clear or obvious, rather than subject to reasonable dispute.").

IV. "Good Cause" Means the Defendant Has Raised an Extraordinary Legal Claim that Cannot Be Addressed Elsewhere in the Criminal Justice System.

Macke argues that the "good cause" requirement of section 814.6(1)(a)(3) should be read to include "any appeal of a sentence, or prosecutorial misconduct, despite the overbroad language of Iowa Code 814.6." Appellant's Supp. Br. P.14. But Macke's proposed interpretation is not supported by legislative intent—hence her use of

the phrase "despite" the language of the provision—, nor is such an interpretation compelled by any constitutional provision.

The State's position is that "good cause" to appeal exists where direct appeal is the only mechanism to review a claim. A possible example is a preserved challenge to a defendant's competency to plead guilty. Macke's claim, by contrast, can be readily reviewed through an application for postconviction relief. Indeed, her ineffective assistance claim can be reviewed only through postconviction relief. Iowa Code § 814.7 (2019). She also mentions sentencing errors and "prosecutorial misconduct." But both of those claims are reviewable. Discretionary review is available for a preserved prosecutorial misconduct claim. An unpreserved claim can be litigated as ineffective assistance of counsel in postconviction relief. Sentencing errors can be reviewed by filing a motion to correct an illegal sentence in the district court or by a petition for a writ of certiorari. *See State v. Propps*, 897 N.W.2d 91, 97 (Iowa 2017). Because Macke does not raise either of those claims, however, it is unnecessary to decide whether the "good cause" language is broad enough to encompass them in this case.

CONCLUSION

For the foregoing reasons, Macke's conviction and sentence should be affirmed.

Respectfully submitted,

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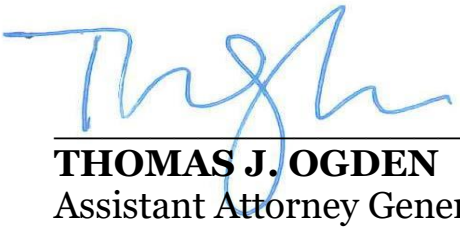

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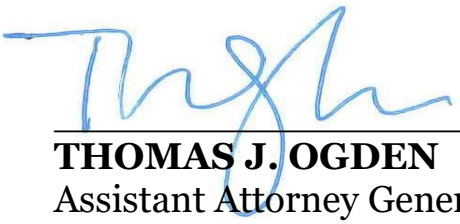

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