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

IN THE
SUPREME COURT OF IOWA

STATE OF IOWA,

Plaintiff-Appellee

v.

ERIN MACKE,

Defendant-Appellant.

ON FURTHER REVIEW FROM THE COURT OF APPEALS OF IOWA
AND THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY
HONORABLE CAROL S. EGLY, DISTRICT COURT JUDGE

APPLICATION FOR FURTHER REVIEW OF THE COURT OF APPEALS OF IOWA FROM AN OPINION FILED MARCH 20, 2019

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PROOF OF SERVICE

On April 5, 2019, I filed this brief electronically through the EDMS system, which will serve the parties:

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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 April 5, 2019.

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QUESTIONS PRESENTED FOR REVIEW

Should the Iowa Supreme Court hold that a defense attorney's failure to object to a prosecutor's obvious breach of the plea agreement at the time of sentencing, resulting in a different sentence than one agreed to by the parties, be considered the type of ineffective assistance of counsel that can be decided on direct appeal?

Should Iowa adopt plain error review because Iowa's use of ineffective assistance of counsel as a substitute for plain error review is inadequate and burdensome in cases where there has been obvious error?

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STATEMENT SUPPORTING FURTHER REVIEW

Macke was charged with four counts of child endangerment and one count of transfer of a pistol or revolver to a person under 21. (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). A Petition to Plead Guilty was filed and read, "The plea agreement is Alford plea to Counts 1-4 of TI; joint Recommendation of Deferred Judgment and Probation. State will dismiss Ct 5." (COA Opinion, p. 2; App. 9). The Petition was signed by Macke and her counsel. (App 9). While the prosecutor did not sign the Petition, the form does not contain a space for a prosecutor's signature. (App. 9). No objection to the Petition was raised on the record at any hearing or filed by the prosecutor in the docket.

At the plea hearing, the following exchange occurred:

> 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*).

The court filed a written order after the plea, which differed from the Petition signed by Macke, and the plea transcript. (App. 11). This form stated that the "State reserves its recommendations until it has an

opportunity to review the PSI." (App. 11). The order was not read aloud in court, Macke was not questioned about it on the record, and no objections were filed by either party.

At sentencing, instead of requesting a deferred judgment as promised, the State instead requested 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 sentencing judge stated, "I will follow the State's recommendation in this circumstance…" and subsequently sentenced Macke to a total of two years on probation pursuant to a suspended sentence. (Sentencing Transcript p. 29, Line 23 through p. 30, Line 4). Macke timely filed her notice of appeal. (App. at 13).

On appeal, Macke claimed her attorney was clearly ineffective by failing to object when 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. Alternatively, she asked for the court to adopt plain error review so that she could be remanded for resentencing without going through the long, and expensive, postconviction process as a result of the prosecutor's misconduct. She requested resentencing in front of another judge and specific performance of the State's plea agreement.

The Court of Appeals, however, did not rely upon the record before it, and instead hypothesized that maybe the parties "discussed and mutually agreed to" a "different version of the plea agreement" or that maybe the "agreement simply changed over time." (COA Opinion p. 8). No such indications appeared anywhere in the record of the case. But, in so theorizing, the Court of Appeals determined that the "record before us is insufficient to determine the actual agreement between the parties" and preserved the issue of ineffective assistance of counsel for postconviction proceedings. (COA Opinion p. 8).

The Court of Appeals further held that even though the federal courts, and all but two states have adopted the plain-error doctrine, because the Iowa Supreme Court has refused to do so, the Court of Appeals would not consider Macke's plain error argument. (COA Opinion p. 9). The Court of Appeals noted that there "may be merit in adopting a plain error rule rather than continuing to stretch the doctrinal limits of the right to counsel to address unpreserved error." (COA Opinion p. 9, *quoting State v. Sahinovic*, No 15-0737, 2016 WL 1683039, at *2 (Iowa Ct. App. Apr. 27, 2016)(McDonald J., concurring). This application requests further review of this opinion.

I. A DEFENSE ATTORNEY'S FAILURE TO OBJECT TO A PROSECUTOR'S OBVIOUS BREACH OF THE PLEA AGREEMENT AT SENTENCING, WHICH RESULTED IN A DIFFERENT SENTENCE THAN THE ONE AGREED TO BY THE PARTIES SHOULD BE THE TYPE OF INEFFECTIVE ASSISTANCE OF COUNSEL THAT CAN BE DECIDED ON DIRECT APPEAL.

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)). 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 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 *State v. Horness*, 600 N.W.2d 294, 300 (1999)). 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 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, or a colloquy with Macke on the record about the breach or change to the plea agreement. (Sentencing Transcript *passim*). The record, therefore, is adequate to decide this case on direct review. *Fannon*, 799 N.W.2d at 520.

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.

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.*

In *Horness*, 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 also explicit by the court's statement:

> 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.

The Court of Appeals' reliance on hypotheticals about how the plea agreement "might" have been changed does not comport with the

aforementioned case law, the record before it, common sense, the Iowa Rules of Criminal Procedure, or due process.

Iowa Rule of Criminal Procedure 2.8 requires that the court inquire of the defendant as to whether the defendant's willingness to plead guilty results from plea negotiations, and "[t]he terms of any plea agreement shall be disclosed of record as provided in rule 2.10(2)." Iowa Rule of Criminal Procedure 2.10 requires plea agreements be disclosed "in open court at the time the plea is offered." Iowa Code section 16.707 requires written plea agreements to be either electronically presented, or filed, with the court. So, if the plea agreement had been "changed," such amendment would have to have been made on the record, in front of the defendant, with a colloquy about whether or not she wished to proceed with her *Alford* plea under the changed terms of the plea agreement. Error in doing this alone would have warranted reversal of Macke's conviction. *State v. Barker*, 476 N.W2d 624 , 625-36 (Iowa Ct. App. 1991) (Once plea based on a plea bargain has been accepted by the trial court, the prosecutor cannot unilaterally withdraw the plea bargain without providing some sort of basis for its action or affording some sort of due process).

> The standard uniformly applied by the Iowa courts to "the prosecutor's conduct with respect to plea bargaining [is] measured by 'our time-honored fair play norm.' " [*State v.]Aschan*, 366 N.W.2d 912, 915 (Iowa 1985). As a separate

> and distinct consideration, the due process clause mandates "fundamental fairness and fair play." *Id.; see also State v. Ashley*, 462 N.W.2d 279, 281 (Iowa 1990) ("the [sentencing] hearing must measure up to the essentials of due process and fair treatment" and fundamental fairness). If the prosecutor breaches the plea agreement, the remedy is either specific performance or withdrawal of the guilty plea. *State v. Hinners*, 471 N.W.2d 841, at 845 (Iowa 1991). Thus, once the plea is entered, the defendant's due process rights attach to the plea agreement.

Barker, 476 N.W.2d at 626.

The record in this case is sufficient to determine that there was ineffective assistance of counsel in failing to object to the prosecutor's breach of the recorded plea agreement. "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 was to remand for resentencing before a different judge. Doing so would ensure Macke the benefit of the bargain by demanding specific performance of the plea agreement. *Fannon*, 799 N.W.2d at 524. As such,

Macke asks for further review and for her case to be remanded for a new sentencing hearing.

II. IOWA SHOULD ADOPT PLAIN ERROR REVIEW BECAUSE IOWA'S USE OF INEFFECTIVE ASSISTANCE OF COUNSEL AS A SUBSTITUTE FOR PLAIN ERROR REVIEW IS INADEQUATE AND BURDENSOME IN CASES WHERE THERE HAS BEEN OBVIOUS ERROR.

As the Iowa Court of Appeals noted, 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 the plain error doctrine.

Federal 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). 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, i.e. "clear" and "obvious. " *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 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.

Using ineffective assistance of counsel claims as a substitute for plain error ignores the differing goals of each doctrine and couches all errors be all parties within the 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]

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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

> *Errors of all parties to a criminal trial become attributable to 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

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counsel was ineffective for allowing the district court to accept the plea without a factual basis.").

[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.'").

> review unpreserved error, ignores the important responsibilities borne by the court and the prosecution.
>
> 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 criticizing 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 . . . .").

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.

"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.

In Macke's case, it simply would not be fair to force her to expend her private resources to try to remedy a clear violation of her rights by the prosecutor. Instead, the court should let her correct the error now, on direct review. 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. And Macke meets all of the

requirements of plain error as set forth by *United States v. Olano*, 507 U.S. 725, 732–35 (1993).

1. There is undisputed error.

Prior to trial, Macke and the State reached a plea agreement, which was disclosed on the record at the time of the plea. (App. at 9). The State failed to honor that plea agreement, and no record was made regarding why, nor was Macke questioned regarding any change in the plea agreement. (Sentencing Transcript p. 3, Line 10 through p. 5, Line 3). 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). Regardless of the lens in which you view this case, error cannot be disputed: either the prosecutor breached the plea agreement and defense counsel did not object; or there was a hypothetical amendment to the plea agreement that appears nowhere in the record and the rules of criminal procedure and due process were violated. Either way, error cannot be disputed. *See Olano*, 507 U.S. at 732–33.

2. The error is plain.

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 trial 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, or otherwise put a hypothetical amendment to the plea agreement on the record was some sort of strategy. There was nothing to gain by failing to object or failing to follow the rules—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 as the court explicitly relied on the prosecutor's recommendation in sentencing Macke. (Sentencing Transcript p. 29, Line 23 through p. 30, Line 4).

CONCLUSION

For all of these reasons, Macke requests this Court grant further review, reverse for ineffective assistance of counsel or apply plain error review, and reverse her sentence.

REQUEST FOR ORAL ARGUMENT

Counsel requests oral argument.

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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IN THE COURT OF APPEALS OF IOWA

No. 18-0839
Filed March 20, 2019

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ERIN MACKE,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Carol S. Egly, District Associate Judge.

Erin Macke appeals the judgement and sentence entered following her plea to four counts of child endangerment. **AFFIRMED.**

Angela L. Campbell of Dickey & Campbell Law Firm, PLC, Des Moines, for appellant.

Thomas J. Miller, Attorney General, and Thomas J. Ogden, Assistant Attorney General, for appellee.

Considered by Vaitheswaran, P.J., and Doyle and Mullins, JJ.

DOYLE, Judge.

Erin Macke appeals her convictions and sentences for four counts of child endangerment. She contends that the State breached the parties' plea agreement and her attorney was ineffective in failing to object to the breach. Macke also urges this court to adopt the plain-error doctrine. Because the record is insufficient to resolve Macke's ineffective-assistance-of-counsel claim on the merits, we affirm her convictions and preserve the issue of ineffective assistance of counsel for potential postconviction-relief proceedings.

I. Background Facts and Proceedings.

The State charged Macke with four counts of child endangerment, in violation of Iowa Code section 726.6(1)(a) (2017), and one count of transfer of a pistol or revolver to a person under twenty-one, first offense, in violation of Iowa Code section 724.22(2). Macke filed a "Petition to Plead Guilty (Alford)."[1] The petition states: "The plea agreement is Alford plea to Counts 1-4 of TI; joint Recommendation of Deferred Judgment and Probation. State will dismiss Ct 5." (Underlining in original). Macke and her attorney both signed the petition. Although the prosecutor did not sign the petition, nothing in the record shows the State objected to the petition's statement that the recommendation of deferred judgement would be joint.

At the plea hearing, Macke's attorney described the plea agreement to the court as follows:

[1] An *Alford* plea is a variation of a guilty plea; a defendant, while maintaining innocence, acknowledges that the State has enough evidence to win a conviction, and consents to the imposition of a sentence. *See North Carolina v. Alford*, 400 U.S. 25, 37 (1970).

> [DEFENSE COUNSEL]: . . . Your Honor, a substantial [benefit] is being received by Ms. Macke in this case. That substantial benefit being dismissal of . . . Count V, the gun charge, in this case, as well as the . . . joint recommendation of a deferred judgment to the charges.
>
> THE COURT: And regarding the likelihood of conviction?
>
> [DEFENSE COUNSEL]: 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.
>
> [DEFENSE COUNSEL]: Correct, Your Honor.
>
> THE COURT: The Court has now reviewed the minutes of testimony, and I do find that it's substantially likely that if this matter went to trial before a jury that the defendant would be found guilty of the four counts of child endangerment. I accept the plea pursuant to *North Carolina vs. Alford*. . . . The discussion between your counsel and the State's attorney was regarding whether the Court would order a presentence investigation report. All parties agree that is warranted in this case, and I will order that you submit to a presentence investigation.

The court did not ask the prosecutor if defense counsel accurately described the plea agreement nor did the prosecutor offer her opinion on the matter.

The court followed up with a written order. With regard to sentencing recommendations, the order describes the plea agreement as follows:

> Barring any new criminal activity or violation of this order, at sentencing the parties will recommend: ***The Defendant will ask for a deferred judgement and probation. The State reserves its recommendations until it has an opportunity to review the PSI.*** The State will recommend dismissal of ***Count V***. On any new criminal charge or violation of this order, established by a preponderance of evidence, the State is not bound by this agreement.

(Emphasis in original). Neither party objected to the sentencing recommendations as set out in the court's order.

At the sentencing hearing, when asked to state the State's position regarding the sentence, the prosecutor responded:

> 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.

Immediately after the prosecutor finished reciting the State's sentencing recommendation, defense counsel asked for a break. The sentencing resumed one minute later without any objection to the State's recommendation. After the victim impact statements were presented, defense counsel presented Macke's position regarding sentencing as follows:

> [W]e 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 genuine, 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.

After Macke's allocution, the court asked if she was requesting a deferred judgment, to which Macke responded, "Yes, ma'am." The court then stated its sentencing decision as follows:

> [T]he Court concludes that a deferred judgment is not appropriate in this circumstance. I'll speak to the reasons for that specifically.
>
> And I was just reviewing again the victim statement that she filed on the presentence investigation report. I rarely give deferred judgments when there's been an *Alford* plea. I believe that an *Alford* plea was a vehicle that was agreeable based on both the prosecutor and the defense attorney's representation to me that it was appropriate under the circumstances.
>
> I accept that both the prosecution and defense and the victims in this circumstance that made statements were trying to avoid having the children drug through additional proceedings, and that's appreciated. But it's still an *Alford* plea, and there's a certain acceptance of responsibility when someone is willing to stand in front of the Court and specifically outline what they did that they're pleading guilty to, and that did not occur in this circumstance.
>
> The enhancing factor in this case . . . is that there was a gun. It was unloaded, but it was certainly accessible by the four children, particularly the two older children. They knew about it. There was a magazine or ammunition right there by it, and to leave children with that type of gun in the house is an enhancing factor. And I don't understand that Ms. Macke has ever really accepted the possibility of what kind of specific danger this could add to the circumstances.
>
> I do note there's mitigation. I believe that the judge that heard the original case to the two younger children and decided just ten days ago made some findings of fact that would certainly mitigate some of . . . what I believe has been publicized, although I certainly have not heard most of it. The children did have care arranged past

> the period of time when they were picked up. It was basically a 48-hour period. Again, . . . it does minimize the total circumstances of what their mother did. It does not minimize the danger to them.
>
> 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.

The court filed a sentencing order memorializing its decision to suspend the sentence as stated above. Macke filed a timely notice of appeal.

II. Scope and Standards of Review.

On appeal, Macke contends her trial counsel was ineffective by failing to object to the State's recommendation at the sentencing hearing for a suspended sentence instead of a deferred judgement, as it constituted a breach of the parties' plea agreement. Claims of ineffective assistance of counsel are reviewed de novo. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). In addition, "[w]e review de novo claims of ineffective assistance of counsel arising from the failure to object to the alleged breach of a plea agreement." *State v. Lopez*, 872 N.W.2d 159, 168 (Iowa 2015).

III. Ineffective Assistance of Counsel.

A claim of ineffective assistance of counsel in a criminal case "need not be raised on direct appeal from the criminal proceedings in order to preserve the claim for postconviction relief purposes." Iowa Code § 814.7(1). Generally, ineffective-assistance-of-counsel claims are preserved for postconviction-relief proceedings, unless the record is sufficient to address the claim on direct appeal. *State v. Tate*, 710 N.W.2d 237, 240 (Iowa 2006). The trial record alone is rarely sufficient to resolve claims of ineffective assistance of counsel on direct appeal. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). We often prefer to preserve such claims for

postconviction-relief proceedings in order to develop a record of the trial counsel's performance. *Washington v. Scurr*, 304 N.W.2d 231, 235 (Iowa 1981). Indeed, lawyers, just like any other accused, are entitled to their day in court, especially when their professional reputation is at stake. *See State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). For the reasons that follow, we deem the record insufficient and preserve Macke's claim for potential postconviction-relief proceedings.

In order to establish a claim of ineffective assistance of counsel, a defendant must prove by a preponderance of the evidence: (1) counsel failed to perform an essential duty; and (2) prejudice resulted. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2009). If a defendant is unable to prove either prong, the ineffective-assistance-of-counsel claim will be defeated. *State v. Scalise*, 660 N.W.2d 58, 62 (Iowa 2003). It is well established law 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." *State v. Horness*, 600 N.W.2d 294, 298 (Iowa 1999) (alteration in original) (quoting *Santobello v. New York*, 404 U.S. 257, 262 (1971)). "The State's promise to make a sentencing recommendation . . . [carries] with it the implicit obligation to refrain from suggesting more severe sentencing alternatives." *Id.* at 299.

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. *See State v. Harris*, 919 N.W.2d 753, 754 (Iowa 2018) ("If the development of the ineffective-assistance claim in the appellate brief was insufficient to allow its consideration, the court of appeals should not consider the claim, but it should not outright reject it."); *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010) (requiring the court to preserve a the claim for a postconviction-relief proceedings if it cannot be addressed on appeal).

IV. Plain-Error Doctrine.

On appeal, Macke also urges this court to adopt the plain-error doctrine.[2] Although Iowa is one of only two states that have not adopted the plain-error doctrine, our supreme court has repeatedly and expressly declined to adopt it. *See, e.g.*, *State v. Martin*, 877 N.W.2d 859, 866 (Iowa 2016), *In re K.C.*, 660 N.W.2d 29, 38 (Iowa 2003); *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."); *State v. McCright*, 569 N.W.2d 605, 607 (Iowa 1997) ("[W]e do not recognize a "plain error" rule which allows appellate review of constitutional challenges not preserved at the district court level in a proper and timely manner."); *State v. Johnson*, 476 N.W.2d 330, 333 (Iowa 1991); *State v. Miles*, 344 N.W.2d 231, 233 (Iowa 1984); *State v. Hutchinson*, 341 N.W.2d 33, 38 (Iowa 1983) ("We do not now choose to abandon our preservation of error rules in favor of a discretionary plain error rule."); *State v. Rinehart*, 283 N.W.2d 319, 324 (Iowa 1979); *State v. Johnson*, 272 N.W.2d 480, 484 (Iowa 1978).

This court has noted before that "there may be merit in adopting a plain error rule rather than continuing to stretch the doctrinal limits of the right to counsel to address unpreserved error." *State v. Sahinovic*, No. 15-0737, 2016 WL 1683039, at *2 (Iowa Ct. App. Apr. 27, 2016) (McDonald, J., concurring). However, we are not at liberty to overturn Iowa Supreme Court precedent. *See Figley v.*

[2] Federal Rule of Criminal Procedure 52(b) allows an appellate court to consider a "plain error that affects substantial rights . . . even though it was not brought to the [district] court's attention."

W.S. Indus., 801 N.W.2d 602, 608 (Iowa Ct. App. 2011); *State v. Hastings*, 466 N.W.2d 697, 700 (Iowa Ct. App. 1990). Therefore, we decline to adopt the plain-error doctrine.

V. Conclusion.

For the foregoing reasons, we affirm Macke's convictions and sentences, and we preserve her ineffective-assistance-of-counsel claim for postconviction relief.

AFFIRMED.

IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	**Case Title**
18-0839	State v. Macke

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