IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. DARREON CORTA DRAINE, Defendant-Appellant.	)	S.CT. NO. 18-1292

APPEAL FROM THE IOWA DISTRICT COURT
FOR SCOTT COUNTY
HONORABLE MARK CLEVE , JUDGE
HONORABLE HENRY LATHAM II, JUDGE

APPELLANT'S SUPPLEMENTAL BRIEF

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CERTIFICATE OF SERVICE

On the 9th day of July, 2019, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Darreon Corta Draine, No. 6028085, Iowa Medical & Classification Center, 2700 Coral Ridge Avenue, Coralville, IA 52241.

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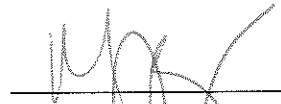

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1. *Draine was not advised that his right to appeal was limited if he entered a guilty plea.*

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2. *Draine has no other avenue to address the claims raised in this appeal.*

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3. *Draine's claims are non-frivolous.*

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Authorities

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STATEMENT OF THE CASE

Appellant Darreon Corta Draine submits this brief pursuant to the Supreme Court's order of June 18, 2019, requesting additional briefing on the applicability of SF 589 to his appeal.

Relevant proceedings: The State filed a trial information against Darreon Draine on March 2, 2018. (Trial Information) App. p. 6-7). Draine entered his guilty plea on May 16, 2018, and filed his motion in arrest of judgment on June 11, 2018. (Order for PSI; Motion in Arrest of Judgment) (App. pp. 15, 22). On July 18, 2018, the court denied Draine's motion and entered judgment against him. (Sentencing Order) (App. pp. 28-29). Draine filed his notice of appeal on July 30, 2018. (Notice of Appeal) (App. p. 31).

The bill that would become S.F. 589 was introduced roughly seven months later, on March 11, 2019. It passed both houses on April 25, 2019, and was signed by the Governor on May 16, 2019. See S.F. 589 Bill History, found at

https://www.legis.iowa.gov/legislation/billTracking/billHistory?billName=SF%20589&ga=88.

ARGUMENT

I. S.F. 589'S AMENDMENT TO IOWA CODE SECTION 814.6(1) DOES NOT AFFECT DRAINE'S APPEAL BECAUSE IT IS A SUBSTANTIVE CHANGE IN THE LAW AND APPLIES PROSPECTIVELY.

Under the Iowa Code, statutes are presumed to operate prospectively unless they are expressly made retroactive. Iowa Code § 4.5 (2019). All newly-enacted statutes take effect on July 1 unless the legislature has provided for an earlier effective date. Iowa Const. art. III § 26. Senate File 589 does not provide a specific effective date. S.F. 589, 88th G.A., (2019).

Further, the court will look to legislative intent to determine whether a statute should apply retrospectively or prospectively. Iowa Beta Chapter of Phi Delta Theta Fraternity v. State, 763 N.W.2d 250, 266 (Iowa 2009). The court will presume that statutes are applied prospectively but also recognize that a remedial or procedural rule may be applied both prospectively and retrospectively. Id. A statute that

impacts substantive rights, however, will be applied prospectively only. Id.

Because the legislature did not expressly provide for retrospective application, the court must consider whether the statute is procedural, remedial, or substantive.

> A substantive statute creates, defines and regulates rights. A substantive statute also takes away a vested right. A procedural statute affords the practice, method, procedure, or legal machinery by which a person may enforce the substantive law. A remedial statute gives an injured person a private remedy for a wrongful act. Generally, a remedial statute is designed to correct an existing law or redress an existing grievance

City of Waterloo v. Bainbridge, 749 N.W.2d 245, 249 (Iowa 2008) (internal citations omitted).

Section 28 of S.F. 589 purports to limit the right of a defendant to appeal his final judgment of sentence if he entered a guilty plea. The amendment provides an exception for cases in which the defendant pleads guilty to a class A felony or when the defendant "establishes good cause." S.F. 589 § 28, 88th GA, (2019). Because these changes are substantive and limit

the remedies available to criminal defendants, the law should be applied prospectively.

> Although, we do allow a statute to apply retrospectively when the statute provides an additional remedy to an already existing remedy or provides a remedy for an already existing loss, we have refused to apply a statute retrospectively when the statute eliminates or limits a remedy. In the latter situation, we have found the statute to be substantive rather than procedural or remedial.

Iowa Beta Chapter of Phi Delta Theta Fraternity v. State, 763 N.W.2d 250, 267 (Iowa 2009) (internal citations omitted).

Because S.F. 589's amendment to section 814.6(1), prohibiting appeals after guilty pleas except in limited circumstances, eliminates or limits a remedy that was available to Draine when he entered his guilty plea, the statute is substantive and should be applied prospectively.

The availability of postconviction relief proceedings does not render the loss of the automatic right of appeal nonsubstantive. PCR is not equivalent to a direct appeal. Postconviction relief is only available under limited circumstances for specifically identified claims. See Iowa Code

§ 822.2 (2019) (identifying claims that may support an application for postconviction relief). For instance, the claims Draine raises in his appeal cannot be raised in PCR. Neither may a defendant challenge the district court's imposition of a discretionary sentence.

Further, bond is not available during the pendency of postconviction proceedings. See Emery v. Fenton, 266 N.W.2d 6, 10 (Iowa 1978) (postconviction applicants are not bailable). PCR proceedings are civil proceedings and take significantly longer to resolve than a direct appeal. Thus, defendants are forced to begin serving a sentence that may ultimately be deemed invalid when challenging a conviction in PCR. Thus, S.F.589's limitation on the right to appeal removes a remedy previously available and should be applied prospectively.

As well, the Iowa Code's general savings provision renders the amendment to Iowa Code section 814.6(1) inapplicable to defendants such as Draine who have pled guilty, been sentenced, and filed a notice of appeal before the law went into effect.

> 1. 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 (2019). Before the enactment of S.F. 589, Draine had the right to appeal his plea, judgment, and sentence on direct appeal and had exercised his right. Thus, Draine's right to appeal had vested and cannot be retroactively removed by a statutory amendment.

II. EVEN IF THE AMENDMENT TO IOWA CODE SECTION 814.6(1) IS RETROACTIVE, DRAINE HAS ESTABLISHED GOOD CAUSE TO PURSUE HIS APPEAL.

The amendment to section 814.6(1) provides that a defendant who has pled guilty may only appeal when he "establishes good cause." Iowa Code § 814.6(1)(a)(3) (2019).

"Good cause" is not defined in the statute, and the statute does not prescribe the procedure to be used by a defendant to establish good cause. Id. Thus, the determination of both is left to the discretion of the court. See Iowa Civil Liberties Union v. Critelli, 244 N.W.2d 564, 568–69 (Iowa 1976) (Iowa courts maintain an "inherent common-law power . . . to adopt rules for the management of cases on their dockets in the absence of statute.").

A. *The court should interpret "good cause" broadly and implement an adequate procedure to avoid due process and equal protection violations.* Because "good cause" is not defined or limited in the statute, the court will give the term its common meaning. State v. Tesch, 704 N.W.2d 440, 452 (Iowa 2005). "Good cause" is commonly defined as "[a] legally sufficient reason." CAUSE, Black's Law Dictionary (11th ed. 2019). It is a broad and flexible term, found throughout Iowa law where its definition is situational and varies depending on the context in which it is being applied. See, e.g, Iowa R. Crim. P. 2.33 (violations of speedy indictment

and speedy trial warrant dismissal unless "good cause to the contrary is shown."); Iowa R. Civ. P. 1.977 (court may set aside default upon showing of "good cause"); Iowa Code §§ 322A.2 & .15 (2019) (providing motor vehicle franchise may not be terminated unless "good cause" is shown and identifying factors to evaluate in that determination); Iowa Code § 915.84(1) (allowing for waiver of time limitation to file for crime victim compensation if "good cause" is shown); State v. Winters, 690 N.W.2d 903, 907-08 (Iowa 2005) (discussing that grounds for "good cause" to grant trial continuance is narrower in a criminal case where speedy trial rights are at stake than in a civil case); Wilson v. Ribbens, 678 N.W.2d 417, 420-21 (Iowa 2004) (discussing factors to be considered when determining if "good cause" has been shown to excuse failure of service pursuant to rule 1.302).

The court will usually interpret statutes in a way that avoids a constitutional problem. Simmons v. State Pub. Def., 791 N.W.2d 69, 74 (Iowa 2010). The legislature's assignment of discretion to the court to define "good cause" and implement

the procedure utilized to establish such cause ensures both can be accomplished in a manner consistent with constitutional dictates. An interpretation effectively prohibiting the right of appeal for defendants who plead guilty would raise concerns about due process and equal protection under both the Iowa and the federal constitutions. U.S. Const. amend. V; amend. XIV § 1; Iowa Const. art. I, §§ 6, 9.

Article V, section 4 provides the supreme court shall have appellate jurisdiction, "under such restrictions as the general assembly may, by law, prescribe." Iowa Const. art. V, § 4. This court has long acknowledged the ability of the legislature to place limitations on the right to appeal. See In re Durant Comm. Sch. Dist., 252 Iowa 237, 245, 106 N.W.2d 670, 676 (1960) ("We have repeatedly held the right of appeal is a creature of statute. It was unknown at common law. It is not an inherent or constitutional right and the legislature may grant or deny it at pleasure."). See also Wissenberg v. Bradley, 209 Iowa 813, 229 N.W. 205, 209 (Iowa 1929). The United States Supreme Court has held similarly. McKane v. Durston, 153

U.S. 684, 687-88 (1894) ("A review by an appellate court of the final judgment in a criminal case, however grave the offence of which the accused is convicted, . . . is not now a necessary element of due process of law."). However, these holdings are subject to criticism. See Cassandra Burke Robinson, The Right to Appeal, 91 N.C.L.Rev. 1219, 1221 (2013) (arguing U.S. Supreme Court has relied on "nineteenth century dicta" for the proposition that due process does not require a right of appeal and expressing concerns that states will attempt to eliminate appeals as of right "in order to save fiscal and administrative resources."); Marc M. Arkin, Rethinking the Constitutional Right to an Appeal, 39 UCLA L. Rev. 503 (1992); Jones v. Barnes, 463 U.S. 745, 756 n. 1 (1983) (Brennan, J. dissenting) (predicting that if the court were squarely faced with the issue, it would hold that due process requires a right to appeal a criminal conviction).

However, assuming the legislature can grant or deny the right to appeal at its pleasure, equal protection guarantees dictate that "[o]nce the right to appeal has been granted . . . it

must apply equally to all. It may not be extended to some and denied to others." Waldon v. District Court of Lee County, 256 Iowa 1311, 1316, 130 N.W.2d 728, 731 (1964).

> There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance. It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. *Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations.*

Griffin v. Illinois, 351 U.S. 12, 18, 76 S. Ct. 585, 590, 100 L. Ed. 891 (1956) (internal citations omitted) (emphasis added). See also Rinaldi v. Yeager, 384 U.S. 305, 310, 86 S.Ct. 1497, 1500, 16 L.Ed.2d 577, 581 (1966) (once right of appeal is established "these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.");

Shortridge v. State, 478 N.W.2d 613, 615 (Iowa 1991) (superseded by statute, 1990 Iowa Acts ch. 1043, § 1, as recognized in James v. State, 541 N.W.2d 864, 868 (Iowa 1995)) (finding statute limiting right of appeal by inmate from denial of postconviction relief unconstitutional on equal protection grounds because State was not similarly limited). State v. Hinners, 471 N.W.2d 841, 843 (Iowa 1991) (defendant may waive right to appeal, but must do so voluntarily, knowingly, and intelligently to meet due process requirements).

As well, the procedure by which the appeal is considered must also comport with due process. See Evitts v. Lucey, 469 U.S. 387, 400–01, 105 S. Ct. 830, 838–39, 83 L. Ed. 2d 821 (1985) ("The right to appeal would be unique among state actions if it could be withdrawn without consideration of applicable due process norms. . . . In short, when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution-and, in particular, in accord with the Due Process Clause."): Billotti v. Legursky, 975 F.2d 113, 115 (4th

Cir. 1992) (West Virginia's discretionary right of appeal did not violate due process because procedure for seeking appeal included right to court-appointed counsel, preparation of transcripts, opportunity to present oral argument, and submission of written petition to the appellate court including statement of facts, procedure, assignments of error, and legal authority).[1]

B. ***Draine has established good cause justifying his appeal.*** Because Draine was never advised that his right to appeal was limited, because he has no other avenue by which to raise his claims and because his claims are non-frivolous, Draine has established good cause to appeal.

1. *Draine was not advised that his right to appeal was limited if he entered a guilty plea.* At the time he entered his guilty plea, was sentenced, and filed his notice of appeal, the

1 In this case, because the issue of the applicability of S.F. 589 emerged after Draine's appeal had been fully briefed, there is no concern about the sufficiency of the procedure afforded Draine. However, future application of the statute should accommodate the preparation of transcripts and an opportunity for appellate counsel to review the record and present legal and factual argument to the court to review when determining if good cause exists.

amendment to section 814.6(1) had not been enacted. As a result, Draine was never informed that his right to appeal was limited if he entered a guilty plea. In fact, he was advised to the contrary. He was told he did have the right to appeal and that he could challenge defects in his plea proceeding on appeal if he filed a timely motion in arrest of judgment. (Plea Tr. p. 12 L. 25 – p. 13 L. 8; Sent. Tr. p. 17 L. 15-23). Thus, in this situation, where a defendant has not been advised that his appeal rights are limited, the court should recognize that "good cause" exists to pursue an appeal. Cf. State v. Weitzel, 905 N.W.2d 397, 402 (Iowa 2017) ("when the court does not fully advise the defendant of his or her right to file a motion in arrest of judgment, the defendant may file a direct appeal challenging his or her guilty plea."). See also Utah R. Crim. P. 11(e)(8) (2019) (court may not accept a guilty plea until court has found, among other things, the defendant has been advised that his right to appeal is limited). Recognizing good cause in such a situation ensures the defendant's guilty plea is voluntary and complies with due process.

2. *Draine has no other avenue to address the claims raised in this appeal.* Additionally, the claims Draine raises in his appeal—that the district court improperly denied his request for a competency hearing and his motion in arrest of judgment—are claims that cannot be addressed in any other forum. Specifically, they are not cognizable in postconviction proceedings.[2]

The issues Draine raises are related to his competency. The conviction of an incompetent criminal defendant violates federal and state due process guarantees. State v. Einfeldt, 914 N.W.2d 733, 778 (Iowa 2018). This is true whether Draine was convicted pursuant to a guilty plea or a jury trial. The due process right to competency cannot be waived. Id. at 779. Draine raised his competency issue weeks before he entered a guilty plea. If Draine had proceeded to trial, he would have an

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2 Draine could arguably seek relief in postconviction proceedings on the ground that his conviction violates the Iowa and U.S. constitutions because he was actually incompetent when he entered his plea. Iowa Code section 822.2(1)(a). But the claim raised in this appeal, that the district court committed legal error by not ordering a competency evaluation upon his motion, is distinct.

automatic right to appeal and a right to have an appellate court review the district court's action in denying his motion for a competency hearing. Thus, under these circumstances, finding that Draine has established "good cause" for his appeal avoids equal protection problems.

3. *Draine's claims are non-frivolous*. To satisfy a "good cause" standard, the defendant should not have to show that he would definitively win on the merits of the claim he seeks to raise in the appeal. Instead, the court's consideration of whether good cause has been established should include whether the defendant has a colorable or non-frivolous claim. In other discretionary review situations, a petitioner does not have a burden to show he will ultimately prevail on the merits of the claim to get review granted. See Gibb v. Hansen, 286 N.W.2d 180, 188 (Iowa 1979) (Supreme Court considered claims raised in petition for writ of certiorari and ultimately ruled against petitioner and annulled writ); Farrell v. Iowa Dist. Court, 747 N.W.2d 789, 790-792 (Iowa Ct. App. 2008) (Supreme

Court granted petition for writ of certiorari but petitioner ultimately lost on one issue and prevailed on others).

In this case, the district court had a legal obligation to ensure Draine was competent to enter a guilty plea or go to trial when Draine's attorney requested a competency evaluation and hearing. The district court's duty to seek a competency evaluation ensures Draine's constitutional rights are protected. The record supports Draine's claim, and Draine has established good cause for his appeal.

III. THE AMENDMENT TO IOWA CODE SECTION 814.6(2) ADDS A REMEDY AND CAN BE APPLIED RETROACTIVELY AND PROSPECTIVELY.

S.F. 589, section 29 amends Iowa Code § 814.6(2) by adding subparagraph (f) allowing for a defendant to seek discretionary review following the denial of a motion in arrest of judgment. S.F. 589 § 29, 88th GA, (2019). This provision adds a remedy not previously available to seek review of the denial of a motion in arrest of judgment.

As discussed above, the court will apply a procedural statute that adds a remedy not previously available both

prospectively and retroactively. See Iowa Beta Chapter of Phi Delta Theta Fraternity, 763 N.W.2d at 267 ("[w]e do allow a statute to apply retrospectively when the statute provides an additional remedy to an already existing remedy or provides a remedy for an already existing loss. . .").

Because a motion in arrest of judgment may be filed following a trial or other finding of guilt, not just following a plea of guilty, the amendment providing a defendant may seek discretionary review of a denial of a motion in arrest of judgment is not limited to defendants who have pled guilty. Thus, a defendant who has filed a motion in arrest of judgment (not based on ineffective assistance of counsel) now has two options to seek review—he can either seek discretionary review when the district court denies his motion in arrest of judgment or he can wait until final judgment is entered and seek an appeal based upon good cause.[3]

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3 This is similar to the right of a criminal defendant to seek discretionary review of a denial of a motion to suppress. If the discretionary review is denied, the defendant may still challenge the denial of a motion to suppress in direct appeal. See Iowa Code § 814.6(2)(a).

IV. IF IOWA CODE SECTION 814.6(2)(F) APPLIES TO DRAINE'S CASE, DISCRETIONARY REVIEW SHOULD BE GRANTED.

The court may grant discretionary review "upon a determination that (1) substantial justice has not been accorded the applicant, (2) the grounds set forth in rule 6.104(1)(d) for an interlocutory appeal exist, or (3) the grounds set forth in any statute allowing discretionary review exist." Iowa R. Civ. P. 6.106(2). The only grounds identified to warrant discretionary review in section 814.6(2)(f) is the requirement that the motion in arrest of judgment not be based on an ineffective assistance of counsel claim. The claim raised by Draine in his motion in arrest of judgment is not based on ineffective assistance of counsel. Thus, he satisfies section 814.6(2)(f) and qualifies for discretionary review under rule 6.106(2)(3).

As well, the grounds Draine relied on in his motion in arrest of judgment demonstrate that "substantial justice has not been accorded" to him, satisfying rule 6.106(2)(1). As described in his brief, and recounted in the opinion of the court

of appeals, Draine's motion in arrest of judgment was based on his lack of understanding the guilty plea proceedings. His claim was supported by his youth and his attorney's testimony that he often felt Draine did not understand what he told him and that he estimated his attention span to be about twenty minutes. It was supported by the extensive medical records in the court record indicating he possessed "extremely low" verbal comprehension skills in the bottom .1 percentile and demonstrating his long history of mental health and behavioral problems and his struggles to find adequate medical treatment. It was supported by his early motion for a competency hearing and his attorney's description of Draine's erratic and threatening behavior. Under these circumstances, Draine has established that discretionary review should be granted.

CONCLUSION

The amendment to Iowa Code § 814.6(1) limiting the right to appeal should be applied prospectively, and thus, does not apply to Draine's appeal. Instead his appeal, initiated long before S.F. 589 was became effective, should be allowed to

proceed as allowed under previous law. If the court concludes the amendment is retroactive, Draine has established good cause for his appeal.

In the alternative, this court should apply the amendment to Iowa Code § 814.6(2) permitting discretionary review from the denial of a motion in arrest of judgment and permit his appeal to proceed under that provision.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $ 2.72, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR BRIEFS

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) because:

> [X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 3,795 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: 7-9-19

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