IN THE SUPREME COURT OF IOWA
Supreme Court No. 18-1292

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DARREON CORTA DRAINE,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR SCOTT COUNTY
THE HONS. MARK CLEVE & HENRY LATHAM II, JUDGES

APPELLEE'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

State Statutes

State Rules

Other Authorities

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. The Provisions of SF589 Affecting Guilty-Plea Appeals Apply to All Pending Cases.

Authorities

Assessors v. Osbornes, 76 U.S. 567 (1869)
Barthelemy v. J. Ray McDermott & Co., 537 F.2d 168 (5th Cir. 1976)
Bruner v. United States, 343 U.S. 112 (1952)
Ex parte McCardle, 74 U.S. 506 (1868)
Fernandez v. I.N.S., 113 F.3d 1151 (10th Cir. 1997)
Hallowell v. Commons, 239 U.S. 506 (1916)
Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939 (1997)
Landgraf v. USI Film Prod., 511 U.S. 244 (1994)
Merchants' Ins. Co. v. Ritchie, 72 U.S. 541 (1866)
Republic Nat. Bank of Miami, 506 U.S. 80 (1992)
Russello v. United States, 464 U.S. 16 (1983)
Santos v. Guam, 436 F.3d 1051 (9th Cir. 2006)
Christie v. Rolscreen Co., 448 N.W.2d 447 (Iowa 1989)
Crowe v. De Soto Consol. Sch. Dist., 66 N.W.2d 859 (Iowa 1954)
Frideres v. Schiltz, 540 N.W.2d 261 (Iowa 1995)
G.W. Mart & Son v. City of Grinnell, 187 N.W. 471 (Iowa 1922)
Hancock Sav. Bank v. McMahon, 208 N.W. 74 (Iowa 1926)
Hannan v. State, 732 N.W.2d 45 (Iowa 2007)
Home Sav. & Tr. Co. v. Dist. Court of Polk Cty., 95 N.W. 522 (Iowa 1903)
In re Marriage of Seyler, 559 N.W.2d 7 (Iowa 1997)
Iowa Beta Chapter of Phi Delta Theta Fraternity v. State, Univ. of Iowa, 763 N.W.2d 250 (Iowa 2009)
Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Shell Oil Co., 606 N.W.2d 370 (Iowa 2000)
Iowa Dep't of Revenue v. Iowa Merit Employment Comm'n, 243 N.W.2d 610 (Iowa 1976)
Iowa Dep't of Transp. v. Iowa Dist. Court for Scott Cty., 587 N.W.2d 781 (Iowa 1998)

James v. State, 479 N.W.2d 287 (Iowa 1991)
Lampson v. Platt, 1 Iowa 556 (1855)
Martin v. Beaver, 29 N.W.2d 555 (Iowa 1947)
Ontjes v. McNider, 275 N.W. 328 (Iowa 1937)
Schrier v. State, 573 N.W.2d 242 (Iowa 1997)
Shortridge v. State, 478 N.W.2d 613 (Iowa 1991)
State ex rel. Buechler v. Vinsand, 318 N.W.2d 208 (Iowa 1982)
State ex rel. Leas in re O'Neal, 303 N.W.2d 414 (Iowa 1981)
State ex rel. McPherson v. Rakey, 20 N.W.2d 43 (Iowa 1945)
State v. Barren, 279 P.3d 182 (Nev. 2012)
State v. Formaro, 638 N.W.2d 720 (Iowa 2002)
State v. Godfrey, 775 N.W.2d 723 (Iowa 2009)
State v. Hinners, 471 N.W.2d 841 (Iowa 1991)
State v. Johnson, 2 Iowa 549 (1856)
State v. Johnson, 135 N.W.2d 518 (Iowa 1965)
State v. Kellogg, 534 N.W.2d 431 (Iowa 1995)
State v. Mandicino, 509 N.W.2d 481 (Iowa 1993)
State v. Olsen, 162 N.W. 781 (Iowa 1917)
State v. Propps, 897 N.W.2d 91 (Iowa 2017)
United States ex rel James Davenport & Pet. for Mandamus to Cty. Commissioners of Dubuque Cty., Bradf. 5 (Iowa Terr. 1840), 1840 WL 4020
Weimer v. Lueck, 15 N.W.2d 291 (Iowa 1944)
Women Aware v. Reagen, 331 N.W.2d 88 (Iowa 1983)
1846 Const. Art. V, § 3
Iowa Code ch. 47, §§ 76–77 (Terr. 1843)
Iowa Code § 793.1 (1966)
Iowa Code § 762.51 (1966)
Iowa Code § 814.6
Iowa Code § 814.6(1)(a)(3)
Iowa Code § 814.6(2)(f)
Iowa Code § 814.7
Iowa Code § 822.9 (2019)
Iowa Code § 3088, 3090-91 (1851)
Iowa Code § 4520 (1873)
Iowa Code § 6936 (1919)
Iowa Code § 9559 (1919)
Iowa Code § 9241 (1919)
Iowa Code § 161 (1873
Iowa Const. art. V, § 4

Iowa Code ch. Courts, §§ 76–77, p. 124 (Terr. 1839)
Iowa Code ch. 658, § 13994 (1924)
Iowa Code ch. 627, § 13607 (1924)
Iowa R. Crim. P. 2.24(5)(a)
Applicable and Effect of Statutes Regarding Appeal and Error, 4 C.J.S. Appeal and Error § 2 (West 2019)
Applicability and Effect of Statutes Regarding Appeal and Error—Statutory Effective Date As Affecting Application of Statute, 4 C.J.S. Appeal and Error § 3 (West 2019)
Effect of Change in Governing Law on Appellate Determinations, Generally, 5 Am. Jur. 2d Appellate Review § 514 (West 2019)
Statutes Relating to Remedies and Procedures, 73 Am. Jur. 2d Statutes § 240 (West 2019)
SF589, §§ 28–29 (88th Gen. Assem.)
1972 Iowa Acts, ch. 1124 (64th Gen. Assem., 2nd Sess.)
2019 Iowa Acts ch. 140, § 28 (88th Gen. Assem.)
Charles F. Wennestrum, *Historical Development of the Iowa Judiciary*, 35 Annals of Iowa 491, at 506–521 (Winter 1961)

II. "Good Cause" Means the Defendant Has Raised an Extraordinary Legal Claim that Cannot Be Addressed Elsewhere in the Criminal Justice System. Preserved and Contested Competency Challenges, When Supported by Adequate Record, May Establish "Good Cause."

Authorities

Boykin v. Alabama, 395 U.S. 238 (1969)
Griffin v. Illinois, 351 U.S. 12 (1956)
Nat'l Coal. to Save Our Mall v. Norton, 269 F.3d 1092 (D.C. Cir. 2001)
Robertson v. Seattle Audubon Soc., 503 U.S. 429 (1992)
Burns v. State, 884 So. 2d 1010 (Fla. Dist. Ct. App. 2004)
Horner v. State Bd. of Eng'g Examiners, 110 N.W.2d 371 (Iowa 1961)
Kyle v. State, 322 N.W.2d 299 (Iowa 1982)
People v. Easton, 123 N.E.3d 1074 (Ill. 2018)

People v. Johnson, 218 P.3d 972 (Cal. 2009)
State v. Antenucci, 608 N.W.2d 19 (Iowa 2000)
State v. Doe, 903 N.W.2d 347 (Iowa 2017)
State v. LaRue, 619 N.W.2d 395 (Iowa 2000)
State v. Mann, 602 N.W.2d 785 (Iowa 1999)
State v. Olsen, 162 N.W. 781 (Iowa 1917)
State v. Ortiz, 905 N.W.2d 174 (Iowa 2017)
State v. Propps, 897 N.W.2d 91 (Iowa 2017)
State v. Solomon, 891 P.2d 407 (Kan. 1995)
Town of Mechanicsville v. State Appeal Bd., 111 N.W.2d 317 (Iowa 1961)
Venckus v. City of Iowa City, No. 18-1280, _____ N.W.2d ____, 2019 WL 2710807 (Iowa June 28, 2019)
Cal. Penal Code § 1237.5 (2019)
Iowa Code § 814.6(2)(f)
Kan. Stat. Ann. § 22-3602
Kan. Stat. Ann. § 60-1507(d)
Md. Code Ann., Cts. & Jud. Proc. § 12-302(e)(2)
Fla. R. App. P. 9.140(b)(2)
Ill. S.Ct. R. 604(d)
Iowa R. App. P. 6.106
Iowa R. App. P. 6.108
Iowa R. Crim. P. 2.24(5)(a)
Iowa R. Crim. P. 2.8(2)(b)
Iowa Rule of Appellate Procedure 6.1005
Okla. Ct. Crim. App. R. 4.2
Tex. R. App. P. 25.2(a)(2)
Kevin Yeary, *Appeals from Pleas of Guilty and Nolo Contendere: History and Procedural Considerations*, 33 St. Mary's L.J. 405 (2002)
SF589, §§ 28–29 (88th Gen. Assem.)
SF589, § 31 (88th Gen. Assem.)
https://www.legis.iowa.gov/dashboard?view=video&chamber=S&clip=s20190425031315902&dt=2019-04-25&offset=702&bill=SF%20589&status=r .
https://www.legis.iowa.gov/dashboard?view=video&chamber=S&clip=s20190401125340169&dt=2019-04-01&offset=14871&bill=SF%20589&status=i
Appeal, https://www.dictionary.com/browse/appeal (last accessed July 17, 2019).

III. Discretionary Review Is Permissible Because Both Jurisdiction-Stripping and Jurisdiction-Conferring Statutes Apply to All Pending Cases.

Authorities

Andrus v. Charlestone Stone Prod. Co., 436 U.S. 604 (1978)
*Bruner v. United State*s, 343 U.S. 112 (1952)
Hallowell v. Commons, 239 U.S. 506 (1916)
Landgraf v. USI Film Prod., 511 U.S. 244 (1994)
*Merchants' Ins. Co. v. Ritch*ie, 72 U.S. 541 (1866)
Stephens v. Cherokee Nation, 174 U.S. 445 (1899)
United States v. State of Ala., 362 U.S. 602 (1960)
SF589, § 29 (88th Gen. Assem.)
Iowa Code § 814.6(2)(f)

IV. Discretionary Review Is Not Warranted on the Motion-In-Arrest Issue.

Authorities

Arnold v. State, 540 N.W.2d 243 (Iowa 1995)
Buechel v. Five Star Quality Care, Inc., 745 N.W.2d 732 (Iowa 2008)
State v. Draine, No. 18-1292, 2019 WL 2144758 (Iowa Ct. App. March 15, 2019)
State v. Smith, 753 N.W.2d 562 (Iowa 2008)

STATEMENT OF THE CASE

Last session, the General Assembly passed and the Governor signed Senate File 589 ("SF589"), an omnibus bill relating to criminal law and procedure. *See* Bill History, SF589 (88th Gen. Assem.). Senate File 589 strips the appellate courts of jurisdiction to consider appeals following a plea of guilty unless the defendant obtains "good cause" review or otherwise invokes the Court's jurisdiction by discretionary review or extraordinary writ. *See* SF589, § 28 (amending Iowa Code § 814.6).

Senate File 589 also sets the standard a defendant must meet to obtain relief when "challeng[ing] a guilty plea based on an alleged defect in the plea proceedings." SF589, § 33 (new section 814.29). A "plea shall not be vacated unless the defendant demonstrates that the defendant more likely than not would not have pled guilty if the defect had not occurred," and the standard applies to challenges in both trial and appellate courts. *See id.* Any rules inconsistent with this standard were nullified by the legislation. *See id.*

The bill also strips this Court of jurisdiction to decide ineffective-assistance-of-counsel claims on direct appeal, whether those claims follow a guilty plea or a trial. *See* SF589, § 31 (amending

814.7); *see State v. Macke*, Sup. Ct. No. 18-0839; *State v. Trane*, Sup. Ct. No. 18-0825 (both also set for oral argument on August 8, 2019). Finally, the bill also strips Iowa courts of jurisdiction or authority to hear pro se claims raised by a criminal defendant or postconviction applicant who is currently represented by counsel. *See* SF589, § 30 (new section 814.6A); § 35 (new section 822.3B).

Senate File 589 was passed unanimously by the House (98–0) and the Senate (49–0) and signed by the Governor on May 16, 2019. For the reasons set forth in this brief, the provisions of SF589 at issue in this appeal apply to this case and all other pending cases. Because this defendant pled guilty in the district court, this Court lacks jurisdiction to consider the issues presented unless it exercises its discretionary docket to grant "good cause" review, discretionary review, or certiorari.

ARGUMENT

I. The Provisions of SF589 Affecting Guilty-Plea Appeals Apply to All Pending Cases.

The defendant invites this Court to engage in a retroactivity analysis and weigh whether the statute is procedural, remedial, or substantive. Defendant's Supp. Br. at 15. The Court should decline the invitation: "a retroactivity analysis is unnecessary" when

analyzing jurisdictional[1] statutes, as jurisdictional statutes apply to all pending cases. *See State v. Barren*, 279 P.3d 182, 185 (Nev. 2012). But if this Court does wade into analyzing presumptions and competing factors regarding retroactivity, the Court's precedent dictates that section 28 of SF589 is procedural, remedial, and applies to all pending cases.

A. The United States Supreme Court has repeatedly held that jurisdiction-stripping statutes apply to all pending cases.

The United States Supreme Court has "regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Landgraf v. USI Film Prod.*, 511 U.S. 244, 274 (1994). This is because jurisdictional statutes "speak to the power of the

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[1] The State acknowledges that this Court has attempted to distinguish between "jurisdiction" and "authority" in the past. *See, e.g.*, *In re Marriage of Seyler*, 559 N.W.2d 7, 11 n.2 (Iowa 1997); *State v. Mandicino*, 509 N.W.2d 481, 482 (Iowa 1993); *Christie v. Rolscreen Co.*, 448 N.W.2d 447, 450 (Iowa 1989); *but see State v. Johnson*, 2 Iowa 549, 549 (1856) ("The question is one simply as to the power and jurisdiction of this court.").

The language used by federal courts does not distinguish between authority and jurisdiction in this way. *E.g.*, *Landgraf*, 511 U.S. at 274.

At least for purposes of this case, the distinction does not matter, as the type of "jurisdiction" at issue is the power of the Court to hear a particular class of cases: review of convictions that result from a plea of guilty.

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 (1992) (Thomas, J., concurring)).

As Justice Scalia put it, "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 other words, a statute regulating jurisdiction is effective whenever a party asks a court to exercise the judicial power, including in pending actions. *See id.*

Earlier cases of the United States Supreme Court agree with this principle. As the Court said in 1866, "[W]hen the jurisdiction of a cause depends upon a statute[,] the repeal of the statute takes away the jurisdiction." *Merchants' Ins. Co. v. Ritchie*, 72 U.S. 541, 544 (1866). "This rule—that, when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law—has been adhered to consistently by [the United States Supreme] Court." *Bruner v. United States*, 343 U.S. 112, 116–17

(1952) (citing, among others, *Assessors v. Osbornes*, 76 U.S. 567, 575 (1869) and *Ex parte McCardle*, 74 U.S. 506, 514 (1868)).

There is one exception to the rule that jurisdiction-stripping statutes apply to all pending cases: if the statutory change destroys claims, such that the claims cannot be heard "at all" in any tribunal, it may not affect pending cases. *See Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 951 (1997). In other words, a jurisdictional statute may not apply to all pending cases when it fully extinguishes a substantive claim, such that it can never be heard anywhere. *See id.* But this concern is not present for statutes that "merely address[] *which* court shall have jurisdiction to entertain a particular cause of action," as these statutes "merely … regulate the secondary conduct of litigation and not the underlying primary conduct of the parties." *Id.* (emphasis original).

B. Section 28 of SF589 is a jurisdiction-stripping statute.

Because SF589 forbids the exercise of judicial power in guilty-plea appeals, other than Class A felonies, it is a "jurisdiction-stripping" statute as that term is used in the case law. The point at which this Court exercises its "power" is when it decides a case, meaning that the legislation applies to all appellate cases in which

procedendo had not issued as of July 1, 2019. *See Landgraf*, 511 U.S. at 275 (majority); *id.* at 293 (Scalia, J., specially concurring). Senate File 589 "takes away the jurisdiction" to decide all pending guilty-appeals because it functionally repealed the previous grant of jurisdiction in section 814.6. *See Ritchie*, 72 U.S. at 543.

While the General Assembly did not use the word "repeal" to describe what happened to this Court's appellate jurisdiction of criminal appeals in SF589, a repeal of jurisdiction is what resulted. "A statute providing for an appeal or writ of error to a specific court must be regarded as a repeal of any previous statute providing for a writ of error to another court." *Applicable and Effect of Statutes Regarding Appeal and Error*, 4 C.J.S. Appeal and Error § 2 (West 2019). Senate File 589 specifically limits when and how this Court exercises appellate review of convictions following a guilty plea (only for "good cause" or by discretionary review). *See* SF589, §§ 28–29 (88th Gen. Assem.). This contrasts with the broad grant of authority in section 814.6 before July 1, 2019, which gave this Court jurisdiction to review any "final judgment of sentence" following a plea of guilty. *See* Iowa Code § 814.6 (2017). Comparing the two provisions

establishes that SF589 repealed a significant mass of jurisdiction previously granted to this Court.

The analysis is not altered by the reality that this Court can eventually obtain jurisdiction of guilty-plea challenges by means other than a notice of appeal. "To invoke the appellate jurisdiction of this court, the [relevant] statute must be followed." *State v. Olsen*, 162 N.W. 781, 782 (Iowa 1917). Conversely, "[a] court lacks authority to hear a particular case where a party fails to follow the statutory procedures for invoking the court's authority." *Schrier v. State*, 573 N.W.2d 242, 244–45 (Iowa 1997). As of July 1, 2019, the statutory procedure for invoking this Court's jurisdiction to review guilty-plea challenges requires invoking "good cause" or discretionary review. *See* SF589, §§ 28–29 (88th Gen. Assem.). As this Court has recognized, the General Assembly is the arbiter of which "avenue of appellate review is deemed appropriate" for a particular class of cases. *Shortridge v. State*, 478 N.W.2d 613, 615 (Iowa 1991), *superseded by statute on other grounds*. The General Assembly has determined what is appropriate by stripping this Court of jurisdiction to review non-Class-A guilty pleas by appeal, leaving only applications for "good cause," discretionary review, and certiorari.

This case does not fall within the one narrow exception to the application of jurisdiction-stripping principles. Senate File 589 does not extinguish claims or prevent challenges from being heard "at all." *See Hughes Aircraft Co.*, 520 U.S. at 951. It instead regulates "which court shall have jurisdiction to entertain a particular cause of action." *See id.* Rather than extinguishing claims that challenge a guilty plea, SF589 modified the tribunal that hears the claims, shifting from automatic appellate jurisdiction to the Court's discretionary docket or postconviction relief.

The above principles, individually and in the aggregate, require the Court to apply the jurisdiction-stripping provisions of SF589 to all pending cases. Three additional factors buttress the conclusion that the General Assembly could and did alter this Court's jurisdiction with the passage of SF589. First, the Iowa Constitution and this Court's case law specify that the General Assembly is the source of the Court's appellate jurisdiction and that the General Assembly may add or subtract jurisdiction "by law." Second, the General Assembly has exercised its prerogative to limit or expand criminal appellate jurisdiction "by law" in the past, just as SF589 does today. And finally, under the scheme for review of guilty-plea challenges

provided by SF589, the General Assembly intended to regulate the tribunal that hears guilty-plea challenges, rather than extinguish the challenges outright.

1. Criminal appeals in Iowa are purely statutory, with no constitutional basis.

Throughout the state's history, appellate jurisdiction in Iowa has been "statutory and not constitutional." *State v. Hinners*, 471 N.W.2d 841, 843 (Iowa 1991). The Constitution, rather than granting appellate jurisdiction in law actions, provides for the regulation of appellate jurisdiction by legislation:

> The supreme court … shall constitute a court for the correction of errors at law, *under such restrictions as the general assembly may, by law, prescribe*[.]

Iowa Const. art. V, § 4 (emphasis added).[2] "[W]hen the Legislature prescribes the method for the exercise of the right of appeal or supervision, such method is exclusive, and neither court nor judge may modify these rules without express statutory authority, and then only to the extent specified." *Home Sav. & Tr. Co. v. Dist. Court of*

[2] The Constitution provides for appellate jurisdiction "in chancery," but that is not relevant here. Criminal actions do not sound in equity. *See, e.g., Martin v. Beaver*, 29 N.W.2d 555, 558 (Iowa 1947); *G.W. Mart & Son v. City of Grinnell*, 187 N.W. 471, 473 (Iowa 1922).

Polk Cty., 95 N.W. 522, 524 (Iowa 1903). As this Court said, interpreting virtually identical language from the 1846 Constitution:[3] "[T]he power is clearly given to the General Assembly to restrict this appellate jurisdiction." *Lampson v. Platt*, 1 Iowa 556, 560 (1855) (comma omitted).

Being "purely statutory," the grant of "appellate review is … subject to strict construction." *Iowa Dep't of Revenue v. Iowa Merit Employment Comm'n*, 243 N.W.2d 610, 614 (Iowa 1976). Absent a statute authorizing an appeal, this Court cannot acquire jurisdiction by means of appeal. *See Crowe v. De Soto Consol. Sch. Dist.*, 66 N.W.2d 859, 860 (Iowa 1954) ("It is our duty to reject an appeal not authorized by statute."). Such authorizing statutes can be modified, and the authority to hear a particular class of appellate cases "may be

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[3] The only relevant change between Article V, section 3 of the 1846 Constitution and Article V, section 4 of the 1857 Constitution is that the latter put commas around "by law," to wit: "shall constitute a court for the correction of errors at law, under such restrictions as the general assembly may, by law, prescribe." The commas did not change the meaning. And even if they did, there is no question that the method of restrictions prescribed here are "by law."

Although perhaps not directly probative on interpreting the 1857 Constitution, the appellate jurisdiction of this Court's territorial analogue was similarly "limited by law." *See United States ex rel James Davenport & Pet. for Mandamus to Cty. Commissioners of Dubuque Cty.*, Bradf. 5, 11 (Iowa Terr. 1840), 1840 WL 4020.

granted or denied by the legislature as it determines." *James v. State*, 479 N.W.2d 287, 290 (Iowa 1991). "[W]here a special statute excludes the right of appeal in certain proceedings it will control over a general statute authorizing appeals." *State ex rel. McPherson v. Rakey*, 20 N.W.2d 43, 45 (Iowa 1945).

These holdings show that the legislative branch in Iowa possesses nearly unbounded authority to regulate the taking of appeals at law. *See, e.g. James*, 479 N.W.2d at 290; *State v. Olsen*, 162 N.W. 781, 782 (Iowa 1917); *State v. Johnson*, 2 Iowa 549, 549 (1856). Given that the source of this Court's authority to decide criminal appeals is the General Assembly, not the Constitution, any statute that reduces the Court's authority to decide criminal appeals is necessarily jurisdiction-stripping. Because jurisdiction-stripping statutes apply to all pending cases, SF589 applies to this case. *See Landgraf*, 511 U.S. at 275 (majority); *id.* at 293 (Scalia, J., specially concurring); *Ritchie*, 72 U.S. at 543.

2. The criminal-appeal authority granted to the Iowa courts by the General Assembly has ebbed and flowed over time, confirming that the Legislature controls this Court's appellate jurisdiction.

This is not the first time the General Assembly has flexed its authority to grant or strip criminal appellate jurisdiction. A thumbnail sketch of statutory history highlights that the General Assembly has been active in this area, repeatedly granting or stripping the Court's authority and jurisdiction in criminal appeals:

- **From 1838 into the early years of statehood**, the Territorial Legislature and General Assembly authorized the Supreme Court to hear writs of error for non-capital criminal defendants "as a matter of course" (essentially authorizing appeals), whereas the Court only had authority to hear writs in capital cases upon "allowance" of a Judge of the Supreme Court (akin to modern discretionary review). *See* Iowa Code §§ 3088, 3090–91 (1851); Iowa Code ch. 47, §§ 76–77 (Terr. 1843); Iowa Code ch. Courts, §§ 76–77, p. 124 (Terr. 1839).

- **In the late 19th and into the 20th Century,** the General Assembly authorized a somewhat convoluted system of appellate review related to various incarnations of mayoral, police, justice of the peace, superior, municipal, circuit, and district courts.[4] As a general matter, the district court had authority to hear all appeals from inferior tribunals, often as a trial anew. *See, e.g.*, Iowa Code § 6936 (1919) (district court had original and appellate jurisdiction of criminal actions), § 9241 (1919)

[4] For a discussion of the these disparate and often-overlapping courts, see Charles F. Wennestrum, *Historical Development of the Iowa Judiciary*, 35 Annals of Iowa 491, at 506–521 (Winter 1961).

("trial anew" for appeals from justice court); § 161 (1873) (district court had original and appellate jurisdiction of criminal actions). The criminal decisions of the district court were then in turn reviewable by the Supreme Court. *E.g.*, Iowa Code § 9559 (1919); Iowa Code § 4520 (1873).

- **From approximately 1924 until 1971**, the General Assembly granted the Supreme Court authority to review "by appeal" "any judgment, action, or decision of the district court in a criminal case," for both indictable and non-indictable offenses. *See* Iowa Code § 793.1 (1966) (all criminal cases); § 762.51 (1966) (non-indictable); ch. 658, § 13994 (1924) (all criminal cases); ch. 627, § 13607 (1924) (non-indictable).

- **In 1972**, the General Assembly established the modern unified court system and stripped this Court of authority to review non-indictable criminal cases, other than by discretionary review. *See* 1972 Iowa Acts, ch. 1124 (64th Gen. Assem., 2nd Sess.); *id.* § 73.1 ("No judgment of conviction of a nonindictable misdemeanor ... shall be appealed to the supreme court except by discretionary review as provided herein."); *id.* § 275 (amending 793.1); *id.* § 282 (repealing 765.51). The General Assembly also entirely stripped the Court of authority to engage in appellate review of acquittals in non-indictable cases. *Id.* § 73.1.

- **In 1979,** following substantial revisions throughout the criminal portions of the Code, the General Assembly granted the appellate courts authority to hear appeals from all "final judgment[s] of sentence," but again denied the Supreme Court authority to decide appeals from simple-misdemeanor and ordinance-violation convictions absent discretionary review. Iowa Code § 814.6 (1979).

- **Now, in 2019**, the General Assembly has stripped the appellate courts of authority to decide most appeals following a guilty plea, other than for Class A felonies. *See* 2019 Iowa Acts ch. 140, § 28 (88th Gen. Assem.)

Senate File 589 is the latest in a long line of jurisdiction-stripping and jurisdiction-conferring statutes. Like the earlier legislation, SF589 variously strips and grants jurisdiction from the appellate courts, pursuant to the General Assembly's prerogative to regulate appellate jurisdiction. *See* Iowa Const. Art. V, § 4.

3. Senate File 589 does not altogether eliminate review of guilty pleas. Instead it regulates the machinery by which the appellate courts hear guilty-plea challenges.

Senate File 589 "simply changes the tribunal that is to hear the case" when a defendant challenges a guilty plea. *See Hallowell v. Commons*, 239 U.S. 506, 508 (1916); *see also Landgraf*, 511 U.S. at 274 (citing and quoting *Hallowell*, 239 U.S. at 508).

Every potential claim available to a defendant who pled guilty before July 1, 2019 remains viable after July 1, 2019. Senate File 589 permits review of:

- A preserved and contested competency challenge, through an application for "good cause" review. Iowa Code § 814.6(1)(a)(3) (*as amended* effective July 1, 2019); *see* Division II *infra*.
- The denial of a motion in arrest of judgment on grounds other than ineffective assistance, through an application for discretionary review. *See* Iowa Code § 814.6(2)(f) (*as amended* effective July 1, 2019).

- Alleged sentencing errors, through either a motion to correct an illegal sentence in the district court or a petition for writ of certiorari to this Court. Iowa R. Crim. P. 2.24(5)(a); *State v. Propps*, 897 N.W.2d 91, 97 (Iowa 2017).

- And claims of ineffective assistance through postconviction relief proceedings pursuant to Chapter 822. *See* Iowa Code Ch. 822 (2019); Iowa Code § 814.7 (*as amended* July 1, 2019). The final judgment in a postconviction action is then itself subject to review by this Court. *See* Iowa Code § 822.9 (2019).[5]

Senate File 589 did not extinguish any claims that were available to criminal defendants seeking review of guilty plea proceedings before July 1, 2019. Only the tribunal to hear the challenges has changed.

This analysis reinforces that SF589 does not involve the one limited circumstance in which a jurisdiction-stripping statute does not apply to all pending cases: when the stripping of jurisdiction means a claim cannot be heard "at all" in any tribunal. *See Hughes Aircraft Co.*, 520 U.S. at 951. Senate File 589 does not prevent claims from being heard. Instead, SF589 "merely address[es] *which* court shall have jurisdiction to entertain a particular cause of action." *Id.* It does not fall within the *Hughes* exception to jurisdiction-stripping.

[5] Parole and probation PCRs are subject to review by certiorari, but the type of errors related to the taking of guilty pleas are generally subject to review by appeal. Iowa Code § 822.9 (2019).

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Senate File 589 is a jurisdiction-stripping statute. Its effect is consistent with the statutory nature of appeals in this state, the General Assembly's historical regulation of criminal appeals, and the shifting of claims to different tribunals. The new statute applies to all pending cases. *See, e.g.*, *Landgraf*, 511 U.S. at 274; *Bruner*, 343 U.S. at 116; *Hallowell*, 239 U.S. at 508; *Ritchie*, 72 U.S. at 543,

C. If this Court engages in a substantive-versus-procedural retroactivity analysis, SF589 is procedural or remedial and retroactive.

This Court should not conduct a substantive-versus-procedural retroactivity analysis. The analysis is unnecessary because section 28 of SF589 is a jurisdiction-stripping statute. *See Barren*, 279 P.3d at 185. But, if this Court does conduct the analysis, SF589 should be applied retroactively. The statute is procedural or remedial.

Procedural statutes regulate "the practice, method, procedure, or legal machinery by which the substantive law is enforced or made effective." *Iowa Beta Chapter of Phi Delta Theta Fraternity v. State, Univ. of Iowa*, 763 N.W.2d 250, 266 (Iowa 2009) (internal citation and quotation marks omitted). A change in the tribunal to hear a case is a procedural change: the defendant can still vindicate his legal
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challenges, albeit in a different forum. Only the machinery of challenging a guilty plea has changed, not a defendant's ability to make a challenge. *See Hannan v. State*, 732 N.W.2d 45, 51 (Iowa 2007) (finding amendment to section 814.7 was procedural because it regulated the procedure of raising ineffective-assistance claims). Such changes are retroactive even when the change in machinery or procedure may indirectly affect the outcome of a matter. *E.g.*, *State ex rel. Buechler v. Vinsand*, 318 N.W.2d 208, 210 (Iowa 1982) (admissibility of certain blood tests).

Remedial legislation is that "which regulates conduct for the public good." *Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Shell Oil Co.*, 606 N.W.2d 370, 375 (Iowa 2000) (combating the evil of petroleum releases and lack of funds to address the problem). Remedial statues are often applied retroactively, based on an analysis of:

1. The language of the legislation;
2. The evil to be remedied;
3. And whether there was any previously existing statute governing or limiting the mischief which the new legislation was intended to remedy.

E.g. Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Shell Oil Co., 606 N.W.2d 370, 375 (Iowa 2000). This

Court finds statutes remedial and retroactive even when the first factor is silent, if the other two factors point toward the statute's remedial purpose. *Hannan*, 732 N.W.2d at 51. The language used by the General Assembly here is either neutral or weighs in favor of retroactivity, given its jurisdiction-stripping effect. *See* Division I.A–B. The statute reduces the excessive appellate case load, limits the waste of appellate resources on appeals following a plea of guilty, and more efficiently spends taxpayer dollars by shifting decisionmaking from the appellate courts to the district court when resolving most guilty-plea challenges in the first instance. *Cf. Hannan*, 732 N.W.2d at 51 (similarly describing the purpose of the amendment to section 814.7 as an attempt to "conserve judicial resources and place the defendant's claim in the court that is most informed to handle it"). The previous statute did not govern or limit the mischief in any fashion. If anything, the legislation was prompted in part by the Court's amendment of Rule 6.1005, which further suggests that the purpose of section 28 was remedial—to correct the procedural evil of wasted resources in deciding excessive, sometimes frivolous appeals. *See* Division II.B (discussing legislative intent).

In his brief, the defendant essentially advances three arguments for the legislation to be prospective-only: (1) he relies on the presumption that most legislation is prospective-only; (2) he thinks that the legislation takes away a substantive right; and (3) he falls back on the General Savings Provision, arguing it can resolve the question presented. *See* Defendant's Supp. Br. at 14–18. These claims are unpersuasive and conflict with existing case law.

First, the presumption of prospective application does not apply. When a legislature makes portions of a statute prospective only, but is silent as to other portions of the statute, there is no presumption of prospective-only operation. *See Fernandez v. I.N.S.*, 113 F.3d 1151, 1153 (10th Cir. 1997) (Congress rendering some provisions prospective-only suggested that other provisions, absent prospective-only language, were retroactive). Some provisions of SF589 include express dates for prospective-only or limited retroactive application. *See* SF589, § 8 (88th Gen. Assem.) (limiting changes to robbery penalty to "a conviction that occurs on or after July 1, 2018"); § 39 (limiting changes to arson penalty to conviction "that occurs on or after July 1, 2019"). The General Assembly thus expressly made some sections of the bill prospective-only, but not the

section that regulates review of guilty pleas. This eliminates any presumption in favor of prospective-only application. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal citation omitted, alteration original)). Based on the bill's language, the General Assembly did *not* intend section 28 to be applied prospectively only.

Second, the defendant contends that section 28 of SF589 takes away a substantive right—what he calls the "right of a defendant to appeal his final judgment of sentence if he entered a guilty plea." Defendant's Supp. Br. at 15. This is wrongheaded. "[E]very relevant case has made it clear that a change in the number of tribunals authorized to hear a litigant's arguments does not implicate the litigant's substantive rights." *Santos v. Guam*, 436 F.3d 1051, 1056 (9th Cir. 2006) (Wallace, J., concurring) (collecting cases); *see Bruner*, 343 U.S. at 117 (statute that "simply reduced the number of tribunals authorized to hear and determine such rights and liabilities" did not alter any substantive rights); *Hallowell*, 239 U.S. at 508

(holding jurisdiction-stripping statute "takes away no substantive right, but simply changes the tribunal that is to hear the case"). In other words, a litigant has no right to present a particular claim in a particular tribunal. *Santos*, 436 F.3d at 1056 (Wallace, J., concurring) (collecting cases). As discussed throughout this brief, the defendant can raise any claim after July 1, 2019 that he could before July 1, 2019—albeit he must now sometimes advance the claim before a different tribunal or through a different legal vehicle. Senate File 589 does not deprive criminal defendants of any substantive right.

There is also some suggestion in the defendant's brief that, because postconviction proceedings are not bailable, the statute is substantive rather than procedural. Defendant's Supp. Br. at 17. Bail is not, as the defendant claims, "a remedy." Defendant's Supp. Br. at 17. Bail is a collateral procedural privilege to which not all defendants are entitled. *Cf. State v. Formaro*, 638 N.W.2d 720, 726 (Iowa 2002) (bail is collateral to final judgment of sentence). And even if one were to construe the ability to post appeal bond as a kind of right, it is frequently and permissibly limited by legislation. *See State v. Kellogg*, 534 N.W.2d 431, 434 (Iowa 1995) ("[The] common law did not recognize an absolute right to bond on appeal after a conviction,

and neither the federal nor Iowa constitution guarantees such a right."). The right is "strictly statutory" and "the statute contemplates that a defendant is admitted to bail only after taking an appeal." *Formaro*, 638 N.W.2d at 720. The purpose of bail is to "maintain the status quo pending appellate review." *Id.* It necessarily follows that, if there is no appellate review, bond is unavailable under the General Assembly's legislative scheme, and the Legislature knew that when it passed SF589. The collateral bail issue does not inform the retroactivity analysis. Nor is it properly considered here, as this defendant did not post an appeal bond.

As the third and final salvo in his retroactivity argument, the defendant cites the General Savings Provision codified at section 4.13. Defendants' Supp. Br. at 18. Although the defendant claims the General Savings Provision renders section 28 of SF589 retroactive, the United States Supreme Court has expressly rejected this view. *Bruner*, 343 U.S. at 117 ("This case is not affected by the so-called general savings statute…"). When a legislature modifies appellate jurisdiction, the legislature "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 other words, while a Savings Provision may "preserve" a certain type of claim, "it 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); *cf. Iowa Dep't of Transp. v. Iowa Dist. Court for Scott Cty.*, 587 N.W.2d 781, 784 (Iowa 1998) ("[S]avings statutes do not apply to changes made in the procedure accorded a litigant."). The same reasoning applies here. Section 28 of SF589 does not affect the parties' rights or liabilities, but instead modifies the tribunal that hears and determines those rights and liabilities.

Moreover, as this Court has recognized, even in cases where the General Savings Provision is otherwise applicable, the Savings Provision "does not apply where invocation would be inconsistent with legislative intent or repugnant to the statutory context." *Women Aware v. Reagen*, 331 N.W.2d 88, 91 (Iowa 1983). In particular, the Savings Provision does "not apply where a repealing statute expressly or by clear implication provides the contrary." *Id.* at 92. Senate File 589 amended section 814.6 and repealed the portion that granted this Court unrestricted jurisdiction to hear appeals following a plea of guilty. This trumps any general presumption that might otherwise

flow from section 4.13. The Savings Provision cannot save this appeal from the application of SF589.

For these reasons, if the Court chooses to analyze whether section 28 of SF589 is substantive, procedural, or remedial, the case law demonstrates it is *not* substantive, but is either procedural or remedial. Regardless of label, the statute applies to all pending cases, including this one.

D. *James v. State* is wrongly decided in light of jurisdiction-stripping case law.

A shallow reading of *James v. State*, 479 N.W.2d 287, 290 (Iowa 1991), might cast doubt on the State's argument. But *James* cannot withstand any serious scrutiny. In that decision, this Court said (with little analysis) that a statute limiting review of prison-discipline decisions did not apply to pending cases when the district court judgment pre-dated the statute. *James*, 479 N.W.2d at 289–90. There was no discussion of jurisdiction-stripping in the decision. *See id.* Instead, the decision rested on a "general rule" that "statutes controlling appeals are those that were in effect at the time the judgment or order appealed from was rendered." *Id.* (internal citation and quotation marks omitted). The Court applied that

"general rule" to a statute shifting prison-discipline cases from appeal to certiorari review. *See id.*

This Court can deal with *James* in either of two ways: (1) by revisiting the holding and finding it incomplete, as it did not address jurisdiction-stripping; or (2) by formally overruling *James*, as the analysis is clearly erroneous and unsupported by the authority it purports to rely on.

Because the parties did not brief the issue in *James*,[6] it is perhaps understandable that the *James* Court did not discuss jurisdiction-stripping. The issue may have been overlooked by all. In any event, the State presses the jurisdiction-stripping issue today, and this Court can revisit *James* and find that the jurisdiction-stripping nature of SF589 overpowers any "general rule" to the contrary. *See James,* 479 N.W.2d at 290.

Whether one calls it re-visiting or overruling, *James* was wrongly decided in light of the consistent body of law holding that jurisdiction-stripping statutes apply to all pending cases. *See, e.g.*, *Landgraf*, 511 U.S. at 274; *Bruner*, 343 U.S. at 116; *Hallowell*, 239

[6] The appellate briefs are available at the State Law Library and do not discuss jurisdiction-stripping. *See* Appellate Brs. in Sup. Ct. Nos. 90-1130, 90-1137.

U.S. at 508; *Ritchie*, 72 U.S. at 543. *James*' conclusion otherwise rests on a "general rule" ostensibly supported by five legal authorities. These five authorities cannot bear the weight the Court placed on them.

The only authority the *James* Court cited as direct support was *Ontjes v. McNider*, 275 N.W. 328, 330 (Iowa 1937). The *Ontjes* Court asserted, without citation to authority, that "statutes controlling appeals are those that were in effect at the time the judgment or order appealed from was rendered." *Id.* at 330. The Court made this observation in deciding a question about which statute applied (so as to invoke review of a final judgment in law or equity), not in the context of determining whether appellate jurisdiction existed in the first place. *See id.* at 330–39. The observation about "statutes controlling appeals" was dicta, at best. Also, more recent case law, such as this Court's decision in *Hannan*, casts serious doubt on that passing language from *Ontjes*. In *Hannan*, this Court found that the 2004 amendment to section 814.7 (which eliminated the requirement that ineffective-assistance claims first be raised 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. *Hannan* dealt with a version of the question presented here, while *Ontjes* did not.

James also cited two cases for indirect support, both of which are of questionable vitality:

- *Hancock* involved an appeal taken within six months of judgment, when a superseding statute shortened the appeal window to four months. *See Hancock Sav. Bank v. McMahon*, 208 N.W. 74, 77 (Iowa 1926). *Hancock* cites no authority supporting its conclusion about the notice-of-appeal deadline, which itself undermines any value as precedent. *Id.* But more importantly, the reliance interest on deadlines is more akin to regulation of a statute of limitations (which cannot be shortened for pending actions), than it is to jurisdiction-stripping. *See Frideres v. Schiltz*, 540 N.W.2d 261, 266 (Iowa 1995) (on statutes of limitation). This is particularly true for the guilty-plea review issue here, as SF589 does not foreclose review altogether (like a lapsed notice-of-appeal deadline would), but instead alters the tribunal to hear a challenge.

- *Weimer*, on the other hand, has been overruled *sub silentio*: *Weimer* concluded that changes to procedural rules do not apply to pending cases, which is the precise opposite of this Court's modern holdings. *Compare Weimer v. Lueck*, 15 N.W.2d 291, 295 (Iowa 1944) (disposing of appeal "under the old rules"), *with State v. Godfrey*, 775 N.W.2d 723, 724 (Iowa 2009) (holding change in rules of criminal procedure applied retrospectively to all pending cases, including one on further review); *see also State ex rel. Leas in re O'Neal*, 303 N.W.2d 414, 419-20 (Iowa 1981) (procedural changes in the law apply to pending cases).

Neither of these cases suggests *James* was rightly decided.

Finally, *James* includes "see generally" cites to American Jurisprudence and Corpus Juris Secundum. *James*, 479 N.W.2d at 290. Although the State does not have access to the 1962 and 1957 (respective) versions of those authorities, their modern incarnations suggest *James* ought to be disavowed:

- American Jurisprudence's current appellate volume notes that "[t]he general rule is that an appellate court must apply the law in effect at the time it renders its decision, whether the change [in the law] is constitutional, statutory, regulatory, or judicial[.]" *Effect of Change in Governing Law on Appellate Determinations, Generally,* 5 Am. Jur. 2d Appellate Review § 514 (West 2019). Another volume also expressly cautions that the presumption against retroactivity "does not apply to jurisdiction-conferring or jurisdiction-stripping statutes." *Statutes Relating to Remedies and Procedures*, 73 Am. Jur. 2d Statutes § 240 (West 2019). This supports the State's position in this appeal and undercuts *James*.

- Corpus Juris Secundum, on the other hand, still contains portions of the general rule it was cited for in *James*, but the latter half of the sentence containing that rule expressly notes "there is authority holding that the law in force at the time the appeal is taken or granted, and not that at the time the judgment or order is rendered or entered, controls the right." *See Applicability and Effect of Statutes Regarding Appeal and Error—Statutory Effective Date As Affecting Application of Statute*, 4 C.J.S. Appeal and Error § 3 (West 2019). Another portion of C.J.S.'s appellate primer also recognizes that "[a] statute providing for an appeal or writ of error to a specific court must be regarded as a repeal of any previous statute providing for a writ of error to another court." *Applicable and Effect of Statutes Regarding Appeal and*

Error, 4 C.J.S. Appeal and Error § 2 (West 2019). C.J.S. thus supports overruling, rather than re-affirming, *James*.

The bottom line is that none of the authorities relied on by *James* continue to support its conclusion. And a wealth of authority to the contrary compels treating SF589 as a jurisdiction-stripping statute. *See, e.g.*, *Landgraf*, 511 U.S. at 274; *Bruner*, 343 U.S. at 116; *Hallowell*, 239 U.S. at 508; *Ritchie*, 72 U.S. at 543.

This Court has "not only the right but the duty to change a past decision if it is erroneous." *State v. Johnson*, 135 N.W.2d 518, 521 (Iowa 1965). *James* is wrong and this Court should say so.

II. "Good Cause" Means the Defendant Has Raised an Extraordinary Legal Claim that Cannot Be Addressed Elsewhere in the Criminal Justice System. Preserved and Contested Competency Challenges, When Supported by Adequate Record, May Establish "Good Cause."

The defendant urges that, if this Court finds section 28 of SF589 applies to pending cases, the Court should find "good cause" to grant review. Defendant's Supp. Br. at 25. The defendant further urges this Court to craft a standard that interprets the "good cause" provision "broadly" to incorporate all "non-frivolous" claims. Defendant's Supp. Br. at 19, 28.

The State tends to agree that a preserved and contested[7] competency challenge supported by an adequate record provides "good cause" for appellate review, because it is a claim that cannot be raised before another tribunal. Any issue that cannot be raised before another Iowa tribunal generally warrants "good cause" review, as the intent of SF589 was not to eliminate the right of review, but rather to regulate it. However, the defendant's request that this Court interpret "good cause" "broadly" to incorporate all "non-frivolous" claims is not supported by legislative intent, nor is such an interpretation compelled by any constitutional provision.

A. The claim here—a preserved and contested competency challenge—likely warrants "good cause" review because there is no other avenue for relief.

The State does not contest that, as of July 1, 2019, a preserved and contested competency challenge can only be raised through an application for "good cause" review. None of the conditions for

[7] At least one other state court that restricts appellate review of guilty pleas holds an unpreserved competency challenge cannot automatically be reviewed on appeal. *See Burns v. State*, 884 So. 2d 1010, 1013 (Fla. Dist. Ct. App. 2004). However, this Court need not decide whether an *un*preserved competency challenge constitutes "good cause," as this defendant did preserve his competency challenge. *See* Appellee's Br. at 6 (error preservation).

discretionary review directly address this circumstance, no authority directly supports use of a petition for writ of certiorari to challenge denial of a competency hearing,[8] and it is unclear whether Chapter 822 would permit litigation of such a claim. It is this type of unusual, extraordinary circumstance—when direct review of a guilty plea is the only mechanism to reach a claim—that a defendant may appropriately apply for "good cause" review. Given the potential constitutional problems with an incompetent person pleading guilty, particularly if that person is then unable to raise that claim before an Iowa tribunal, this Court can grant the defendant's application for "good cause" review and decide the competency question on direct review of the guilty-plea proceedings.

B. The statutory scheme for criminal appeals provided by SF589 demonstrates legislative intent to provide a relief valve for extraordinary claims that cannot be heard elsewhere, not routine guilty-plea challenges.

Senate File 589 sets out to reduce congestion in the appellate courts and encourage efficient use of appellate resources by limiting

[8] The State does not necessarily advocate that a petition for certiorari is an impermissible means to test a district court's handling of a competency question, but the case law has not yet addressed the question.

the Court's jurisdiction to only those guilty-plea challenges that are likely meritorious and cannot be resolved before other tribunals. The bill provides that direct appellate review is available if a criminal defendant can show "good cause" or if he seeks discretionary review of a denied motion in arrest of judgment. *See* SF589, §§ 28–29 (88th Gen. Assem.). The bill shifts all ineffective-assistance claims, including those related to a guilty plea, from the appellate courts to postconviction litigation. *See* SF589, § 31 (88th Gen. Assem.). And existing law permits litigation of illegal-sentence challenges in the district court "at any time," and in the appellate courts by certiorari. Iowa R. Crim. P. 2.24(5)(a); *State v. Propps*, 897 N.W.2d 91, 97 (Iowa 2017).

This legislative scheme is incompatible with the defendant's proposal that "good cause" means "non-frivolous." Interpreting "good cause" to mean "non-frivolous" would undermine all other appellate changes in SF589, directly conflicting with the intent of the legislation. *See Horner v. State Bd. of Eng'g Examiners*, 110 N.W.2d 371, 374 (Iowa 1961) ("[I]n determining the meaning of a statute all provisions of the act of which it is a part, and other pertinent statutes, must be considered."). Finding "good cause" encompasses all "non-

frivolous" claims would also render the addition of section 814.6(2)(f) superfluous—there would be no reason to establish discretionary review for denial of a motion in arrest of judgment if the appellate courts automatically acquired jurisdiction of every "non-frivolous" guilty-plea challenge. *See Town of Mechanicsville v. State Appeal Bd.*, 111 N.W.2d 317, 320 (Iowa 1961) ("A cardinal rule of statutory construction is that, if reasonably possible, effect should be given every part of a statute.").

The State maintains here, as it has in other cases, that considering statements by legislators during floor debate is generally inappropriate and unhelpful in deciding disputes over legislative intent. After all, the statement of an individual legislator is just that—the statement of an individual legislator. Nonetheless, the State recognizes that this Court has recently looked to the recorded videos of floor debates when attempting to determine legislative intent. *See State v. Ortiz*, 905 N.W.2d 174, 180 (Iowa 2017); *State v. Doe*, 903 N.W.2d 347, 354 (Iowa 2017), *as amended* (Nov. 15, 2017). If the Court looks to floor debates here, this strengthens the State's argument, and undercuts the defendant's claim that "good cause" means "non-frivolous."

The Senate floor manager of SF589 was Senator Dan Dawson of Pottawattamie County. According to Senator Dawson's floor remarks, "good cause" means "extraordinary circumstances where the system has failed the defendant, for example where there was a complete failure of the defense counsel, [or the] court interfered with the plea process or improperly induced a plea of actual innocence." Senate Floor Debate, SF589 (Amendment S-3212), April 25, 2019, 3:25:30–3:26:00 P.M.[9] Senator Dawson further explained that this provision, in tandem with other changes related to guilty-plea appeals in SF589, "limits frivolous appeals, saves the state resources, and also *resolves cases at the district court level*…." *Id.* During floor debate on a previous version of the bill, Senator Dawson also referred to the Legislature's intent to reduce the "bloated appeals system … in the Iowa courts" and "knock down on the excessive caseload … in the appeals courts." Senate Floor Debate, SF589, April 1, 2019, 5:43:10–5:43:55 P.M.; *see also id.* at 5:47:45–5:48:15 (criticizing the Court's

[9] Available at https://www.legis.iowa.gov/dashboard?view=video&chamber=S&clip=s20190425031315902&dt=2019-04-25&offset=702&bill=SF%20589&status=r .

2013 revision of Iowa Rule of Appellate Procedure 6.1005, which has—in practice—halted the dismissal of frivolous appeals).[10]

If the Court considers these remarks, they demonstrate the General Assembly's intent to define "good cause" narrowly rather than broadly—"good cause" means "extraordinary circumstances," not routine non-frivolous challenges.

C. No constitutional provisions require the "good cause" standard to be interpreted "broadly" to permit all "non-frivolous" claims.

In his brief, the defendant makes vague allusions to what he calls "concerns" about the constitutionality of SF589, if "good cause" is interpreted narrowly and consistent with legislative intent. Defendant's Supp. Br. at 21. Rather than saying what any of these concerns are, the defendant parenthetically cites two law review articles and a dissent before making nebulous assertions related to equal protection and due process. Defendant's Supp. Br. at 21–25. The Court should find these contentions so underdeveloped that they are waived; this Court is not a pig hunting for truffles in appellate

[10] Available at https://www.legis.iowa.gov/dashboard?view=video&chamber=S&clip=s20190401125340169&dt=2019-04-01&offset=14871&bill=SF%20589&status=i.

briefing. *See Venckus v. City of Iowa City*, No. 18-1280, _____ N.W.2d ___, 2019 WL 2710807, at *8 (Iowa June 28, 2019).

If this Court chooses to address the undeveloped constitutional remarks in the defendant's brief, the Court should hold that the General Assembly's regulation of appellate review for guilty pleas passes constitutional muster. The distinction the statute draws is between persons who have pled guilty and persons who have asserted their innocence and demanded trial. This is a reasonable distinction, for a guilty plea waives all defenses that are not intrinsic to the voluntariness of the plea. *State v. Antenucci*, 608 N.W.2d 19, 19 (Iowa 2000); *see also Kyle v. State*, 322 N.W.2d 299, 304 (Iowa 1982) ("A guilty plea is normally understood as a lid on the box, whatever is in it, not a platform from which to explore further possibilities." (internal citation and quotation marks omitted). Moreover, "[a] plea of guilty … is itself a conviction." *State v. LaRue*, 619 N.W.2d 395, 397 (Iowa 2000) (quoting *Boykin v. Alabama,* 395 U.S. 238, 242 (1969)). The General Assembly could rationally limit appellate review following a plea of guilty because, as this Court has said, "the State is entitled to expect finality in the conviction" once a defendant pleads guilty. *State v. Mann*, 602 N.W.2d 785, 789 (Iowa

1999). The expectation of finality is further reinforced by the extensive safeguards this Court has developed to ensure pleas are knowing, voluntary, and intelligent. *See* Iowa R. Crim. P. 2.8(2)(b). It is rational, if not self-explanatory, that a guilty plea should be less susceptible to appellate reversal than a trial verdict, as a "a guilty plea implicitly eliminates any question of the defendant's guilt." *Mann*, 602 N.W.2d at 789. In short, all lines drawn by section 28 of SF589 satisfy equal protection.

Although the nature of the defendant's due-process complaint cannot readily be discerned from scrying his brief, any due-process claim would be meritless. Neither this Court nor the United States Supreme Court have found any constitutional provision compels appeal for a criminal conviction, let alone a conviction obtained by guilty plea. *See Griffin v. Illinois*, 351 U.S. 12, 18 (1956) ("[A] State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all."); *e.g.*, *State v. Olsen*, 162 N.W. 781, 782 (Iowa 1917) ("The right of appeal is purely statutory."). Moreover, the defendant still has the opportunity to obtain post-judgment review of a guilty-plea, although potentially in a forum other than the appellate courts: he can apply for "good cause"

appellate review or discretionary review, move to correct an illegal sentence in the district court or petition for certiorari in the appellate courts, and he can file a postconviction relief action, which is itself appealable to the appellate courts. This scheme of post-plea review is more than sufficient to satisfy any concerns about constitutional due process.

The defendant's brief omits any discussion of how similar limitations on appellate review of guilty pleas exist in other states. Though none of the states appear to limit appellate review of guilty pleas in exactly the same fashion as one another, or exactly as SF589 directs, other states have similarly restricted appellate review of guilty pleas to the courts' discretionary dockets and narrowed the scope of issues that can be reviewed:

- **California**'s statute provides that "[n]o appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere" unless the trial court has issued a probable-cause certificate that there are "constitutional, jurisdictional, or other grounds going to the legality of the proceedings." Cal. Penal Code § 1237.5 (2019).[11] This is similar to the system provided by SF589, except that California puts the onus for conferring

[11] California defendants who believe they are entitled to appellate review, but are denied a certificate by the trial court, can seek review by means of an extraordinary writ to the appellate courts. *See People v. Johnson*, 218 P.3d 972, 976 (Cal. 2009). This appears to be akin to certiorari.

appellate jurisdiction on trial courts, while SF589 reserves that power to this Court.

- **Florida** restricts guilty-plea appeals to a small subset of issues—essentially jurisdictional defects and preserved error regarding an attempt to withdraw the plea or preserved error regarding sentencing. Fla. R. App. P. 9.140(b)(2). This is generally similar to SF589, which would permit discretionary review of denied motions in arrest of judgment (akin to motions to withdraw a plea) and petitions for certiorari to challenge a sentence.

- **Kansas** law prohibits guilty-plea appeals, except for "jurisdictional" defects or other grounds that "go[] to the legality of the proceedings." Kan. Stat. Ann. § 22-3602 (2019). The Kansas courts permit limited review of denied motions to withdraw a guilty plea, but only if that issue was timely raised below. *See State v. Solomon*, 891 P.2d 407, 412 (Kan. 1995). This is akin to the provisions of SF589 that permit discretionary review from denied motions in arrest of judgment. Kansas courts also permit some review of denied motions to correct an illegal sentence. *See* Kan. Stat. Ann. § 60-1507(d) (2019). This procedure is comparable to how, even after SF589, Iowa criminal defendants can file a motion to correct an illegal sentence in the district court and then petition this Court to issue a writ of certiorari. *See State v. Propps*, 897 N.W.2d 91, 97 (Iowa 2017).

- **Illinois** law provides that "[n]o appeal from a judgment entered upon a plea of guilty shall be taken unless the defendant" has raised the claim first in the trial court, by either filing a motion to correct an illegal sentence or filing a motion to withdraw the plea. Ill. S.Ct. R. 604(d). Defense counsel must then file a "certificate" of appeal proving that the trial-court motion has been adequately prepared, and appellate review is strictly limited to the issue presented in the post-plea trial-court motion. Ill. S.Ct. R. 604(d); *see People v. Easton*, 123 N.E.3d 1074, 1081 (Ill. 2018). This is somewhat similar to the guilty-

plea-appeals scheme created by SF589, which generally requires defects in plea proceedings to be addressed in the district court, rather than on appeal, and provides for appellate review in limited circumstances.

- **Maryland** "does not permit an appeal from a final judgment entered following a plea of guilty," but does permit "[r]eview of such a judgment … by application for leave to appeal." *See* Md. Code Ann., Cts. & Jud. Proc. § 12-302(e)(2). This is equivalent to the "good cause" or discretionary review provisions of SF589.

- **Oklahoma** only permits guilty pleas to be reviewed on appeal via writ of certiorari, and even then only if the defendant filed a motion to withdraw the plea and the district court held an evidentiary hearing. *See* Okla. Ct. Crim. App. R. 4.2. Like SF589, Oklahoma limits appellate review of guilty pleas to the court's discretionary docket; but unlike SF589, it imposes additional hurdles to appeal in the district court.

- **Texas** prohibits guilty-plea appeals except for (a) certain issues on which a defendant has obtained a ruling before pleading guilty; (b) when the defendant has obtained the trial court's permission to appeal; or (c) where a specific appeal is authorized by statute. Tex. R. App. P. 25.2(a)(2). Texas' system is somewhat different from SF589, but both promote the same purposes of restricting appellate review of guilty pleas in favor of having the district court decide issues before appellate jurisdiction is warranted. *See generally* Kevin Yeary, *Appeals from Pleas of Guilty and Nolo Contendere: History and Procedural Considerations*, 33 St. Mary's L.J. 405 (2002) (discussing, among other things, Texas' history of narrowing the scope of appellate review following pleas of guilty).

The guilty-plea review systems in these states and others comply with all relevant constitutional provisions. The defendant has not advanced any coherent argument to the contrary.

Finally, the defendant appears to suggest that "good cause" review is required for any defendant who was given the standard advisory regarding the right to appeal.[12] Defendant's Supp. Br. at 25–26. The defendant's argument is essentially that the word "appeal" was used when he was advised below, so he should get an appeal now. This claim has two problems. First, it turns on a hypertechnicality. And second, if the guilty-plea-appeal advisory was defective, the defendant should be required to satisfy the new, more searching standard of SF589's section 33 to obtain appellate review or relief.

The defendant's complaint—that he should get an appeal because the court below told him he could "appeal"—is hypertechnical because lay persons of ordinarily intelligence do not know or care about the difference between appeal as a matter of right, "good cause" review, discretionary review, certiorari, and postconviction relief.

[12] To the best of the State's knowledge, as of the date this brief was filed, no formal guidance has been provided to district court judges regarding what changes, if any, should be made to the appeal advisory as a result of SF589.

The relevant dictionary definition for "appeal" in the legal context is entirely consistent with the scheme established by SF589: an "appeal" is "an application or proceeding for review by a higher tribunal." *Appeal*, https://www.dictionary.com/browse/appeal (last accessed July 17, 2019). A defendant can still apply for or initiate proceedings for review by a higher tribunal after July 1, 2019. In fact, "application" is the operative noun for seeking discretionary review, which means "apply" is the correct verb. *See* Iowa R. App. P. 6.106. The colloquy thus did not mislead the defendant: it told him he could try to get review if he complied with jurisdictional deadlines, and that is still the case, particularly given that this Court's rules permit the Court to "treat the documents upon which the action was initiated as seeking the proper form of review." Iowa R. App. P. 6.108.

To the extent the defendant indirectly asserts some kind of reliance interest on the advisory, this claim is misplaced. A guilty plea is intended as a "lid on the box" that prevents review of nearly all errors. *See Kyle*, 322 N.W.2d at 304. It is not rational to believe that this defendant, or any defendant, pled guilty with a certainty that he could obtain appellate review and reversal. A defendant who does so under our procedural system would demand a trial on the minutes,

not enter a guilty plea. The advisory here had no effect on the decision to plead.

As to the second problem with the defendant's claim of a defective advisory, the General Assembly also amended the legal standard for a criminal defendant who seeks relief from a guilty plea. Section 33 of SF589 provides:

> If a defendant challenges a guilty plea based on an alleged defect in the plea proceedings, the plea shall not be vacated unless the defendant demonstrates that the defendant more likely than not would not have pled guilty if the defect had not occurred.

SF589, § 33 (88th Gen. Assem.) (new section 814.29). This "burden applies whether the challenge is made through a motion in arrest of judgment or on appeal." *Id.* And the legislation nullified "[a]ny provision in the Iowa rules of criminal procedure that [is] inconsistent with this section." *Id.* This legislation applies to this case, as it is permissible for the legislative branch to "replace[] legal standards" in pending lawsuits, so long as the legislation does not direct specific results or factual findings. *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 438 (1992). This is true even if the effect of the new legal standards is that some litigants who would have prevailed before will now lose. *See id.; see also Nat'l Coal. to*

Save Our Mall v. Norton, 269 F.3d 1092, 1096 (D.C. Cir. 2001) (no constitutional provision prohibits the Legislature from "changing the rule of decision in a pending case, or (more narrowly) changing the rule to assure a pro-government outcome"). This change weighs against the defendant's belief that a defective advisory establishes "good cause," as the General Assembly would not have prohibited relief for defects that did not materially affect the defendant's plea calculus, while simultaneously encouraging the appeal of immaterial errors. The situation might be different if the defendant levied colorable arguments for why he "more likely than not would not have pled guilty if the defect had not occurred," but he has not attempted to do so in his filings—nor could he on this record.

The defendant does not make out a viable claim, to the extent that he urges his plea might not have been voluntary due to alleged misadvice regarding his "appeal" rights. *See* Defendant's Supp. Br. at 26. A voluntariness challenge is necessarily limited to the information the defendant was provided at the guilty-plea hearing (rather than sentencing), because it concerns whether the decision to

plead was voluntary.[13] This is the relevant advisory from the plea proceedings:

> Mr. Draine, I must advise you that any challenges to a plea of guilty such as you have just entered based on alleged defects in these plea proceedings, must be raised in a Motion in Arrest of Judgment. If you do not raise any such challenges in a Motion in Arrest of Judgment, you will be precluded or barred from asserting them later on appeal.

Plea tr. p. 12, line 25 — p. 13, line 5. Nothing about this misinformed the defendant. He indeed must file a motion in arrest of judgment, and failure to do so constitutes waiver if he later chooses to seek appellate review. Nothing about the nature of the so-called "appeal" was promised to the defendant and, as discussed above, the ordinary meaning of the term suggests subsequent review—which is still permitted, whether by means of "good cause" application, discretionary review, certiorari, or postconviction relief. There is no viable voluntariness claim here, based on the advisory or otherwise.

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[13] The defendant was also informed of how to file a notice of appeal at sentencing. Sent. tr. p. 17, lines 15–23. By definition, this information could not have affected voluntariness, as it post-dates acceptance of the plea.
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The defendant is likely entitled to "good cause" review on the narrow preserved and contested competency challenge. But this Court should reject the defendant's argument that "good cause" means "non-frivolous," as such a standard defies the intent of the General Assembly and is not supported by the structure of SF589 or any legal authority.

III. Discretionary Review Is Permissible Because Both Jurisdiction-Stripping and Jurisdiction-Conferring Statutes Apply to All Pending Cases.

The defendant is permitted to apply for discretionary review to address the motion-in-arrest-of-judgment issue presented in his merits brief. Section 29 of SF589 permits discretionary review of "[a]n order denying a motion in arrest of judgment on grounds other than an ineffective assistance of counsel claim." SF589, § 29 (88th Gen. Assem.) (new section 814.6(2)(f)). This provision applies to all pending cases because it confers jurisdiction upon this Court to grant discretionary review.

Notably, on this point, the State's position is consistent, and the defendant's is inconsistent. As explained in Division I, "statutes conferring or ousting jurisdiction" apply to all pending cases. *Landgraf v. USI Film Prod.*, 511 U.S. 244, 274 (1994). Thus, under

the United States Supreme Court's case law, the jurisdiction-stripping provision of section 28 (stripping jurisdiction for guilty-plea appeals) applies to this case, as does the jurisdiction-conferring provision of section 29 (granting jurisdiction for discretionary review following denials of certain motions in arrest). *See id.*[14] The defendant advances a view that is not supported by any case law when he urges this Court to hold that section 28 should not apply to pending cases, but section 29 should. *See* Defendant's Supp. Br. (Divisions I & III). This Court should reject the defendant's pick-and-choose approach in favor of the principled United States Supreme Court case law interpreting jurisdiction-conferring and jurisdiction-stripping statutes. *See, e.g., Landgraf*, 511 U.S. at 274; *Bruner*, 343 U.S. at 116; *Hallowell*, 239 U.S. at 508; *Ritchie*, 72 U.S. at 543.

[14] *See also Andrus v. Charlestone Stone Prod. Co.*, 436 U.S. 604, 608 (1978) (amended statute conferring "federal question" jurisdiction cured jurisdictional defect); *United States v. State of Ala.*, 362 U.S. 602, 604 (1960) (Civil Rights Act of 1960 conferred jurisdiction, resolving jurisdictional question from courts below); *Stephens v. Cherokee Nation*, 174 U.S. 445, 478 (1899) (extension of original appeal deadline for tribal matter held retroactive).

IV. Discretionary Review Is Not Warranted on the Motion-In-Arrest Issue.

Just because the defendant can apply for discretionary review, however, does not mean this Court should grant it. For interlocutory appeals, this Court has said that it exercises its discretionary docket "sparingly." *Buechel v. Five Star Quality Care, Inc.*, 745 N.W.2d 732, 735 (Iowa 2008). The same should hold true here. To conclude otherwise would squander judicial resources and run counter to the intent of the General Assembly, which passed SF589 in order to encourage efficient use of appellate resource.

The issue presented regarding the motion in arrest of judgment does not warrant the expenditure of limited judicial resources. The defendant's claim essentially requires this Court to disbelieve the reported transcript of a lengthy guilty-plea colloquy and instead believe his unsupported assertion that he didn't know he was pleading guilty. *See* Appellant's Br. at 22–27.

In order to succeed on his claim regarding the motion in arrest of judgment, the defendant would have to show that the district court abused its discretion in denying his motion. *See State v. Smith*, 753 N.W.2d 562, 564 (Iowa 2008). This plea proceeding included "clear indicia of Draine's knowing and intelligent guilty plea." *State v.*

Draine, No. 18-1292, 2019 WL 2144758, at *4 (Iowa Ct. App. March 15, 2019). Given the "special burden" required of a defendant to refute the reported transcript of plea proceedings, it would take truly extraordinary circumstances to justify this Court's exercise of its discretionary docket to evaluate the merits of a ruling on a motion in arrest. *See Arnold v. State*, 540 N.W.2d 243, 246 (Iowa 1995). The defendant has not nearly carried his burden.

In fact, the record refutes the claim. The on-the-record guilty-plea colloquy includes the following exchanges:

> **THE COURT:** Do you understand that if you plead guilty at this time, you give up all of the rights I have just listed for you?
>
> **THE DEFENDANT:** Yeah.

Plea tr. p. 7, lines 20–23.

> **THE COURT:** After being informed of all of these rights, what is your plea to the charge of Willful Injury Resulting in Serious Injury, guilty or not guilty?
>
> **THE DEFENDANT:** Guilty.

Plea tr. p. 8, lines 2–5.

> **THE COURT:** All right. After asking you those questions, I must again ask you what is your plea to the charge of Willful Injury Resulting in Serious Injury, guilty or not guilty?
>
> **THE DEFENDANT:** Guilty.

Plea tr. p. 11, lines 4–8. The defendant knew he was pleading guilty.

This Court should hold that discretionary review is only warranted for claims that show a reasonable probability of reversible error in the motion-in-arrest proceedings. A routine abuse-of-discretion challenge will rarely meet that threshold. There is no probability of a reversal on the motion-in-arrest question here and discretionary review is not warranted.

CONCLUSION

The relevant provisions of SF589 strip this Court of jurisdiction to hear most criminal appeals following a plea of guilty in all pending and future cases. While a "good cause" appeal is warranted for the competency issue presented here, the Court should not grant discretionary review of the motion-in-arrest question.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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