

IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 19-0551

Black Hawk County No. AGCR 225149, FECR 225935, FECR 227264

STATE OF IOWA
Plaintiff-Appellee

vs.

CHRISTOPHER LEE ROBY, JR
Defendant-Appellant

APPEAL FROM THE DISTRICT COURT
IN AND FOR BLACK HAWK COUNTY
Honorable ALAN HEAVENS, District Court Judge
Honorable KELLYANN M LEKAR, Chief District Court Judge
First Judicial District

APPELLANT'S FINAL REPLY BRIEF

Marti D. Nerenstone
AT0005818
Park Building
500 Willow Avenue, Suite 212
Council Bluffs, Iowa 51503
(712) 328-2283 (phone)
(712) 322-1118 (fax)
nerenstonelaw@qwestoffice.net

Attorney for Christopher Roby

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.	3
I. <u>STATEMENT OF THE ISSUES PRESENTED FOR REVIEW.</u>	5
II. <u>ARGUMENT.</u>	6
A. CHRISTOPHER ROBY HAS A RIGHT TO A DIRECT APPEAL.. . . .	7
1. <u>The legislative changes to Iowa Code §814 are substantive in nature, and cannot be applied retroactively.</u>	7
2. <u>The legislative changes to Iowa Code Chapter 814 impose impermissible limits to Christopher Roby's constitutional rights.</u>	9
3. <u>Even if the legislative changes to Iowa Code Chapter 814 are determined to be permissible, Christopher Roby has established "good cause" for his right to appeal.</u>	10
III. <u>CONCLUSION.</u>	12
CERTIFICATE OF COMPLIANCE.. . . .	13
ATTORNEY'S CERTIFICATION REGARDING UNPUBLISHED OPINION.	13
CERTIFICATE OF COST.. . . .	13
PROOF OF SERVICE AND CERTIFICATE OF FILING.	14

TABLE OF AUTHORITIES		<u>Page</u>
<u>Constitutional Authority</u>		
Fifth Amendment of the US Constitution		5,10
Sixth Amendment of the US Constitution.		5,10
Fourteenth Amendment of the US Constitution		5,10
Article I, Section 9 of the US Constitution.. . . .		5,8
Article I, Section 21 of the US Constitution.		5,9
Twenty-third Amendment to the Iowa Constitution.. . . .		5,9
Article I, Section 9 of the Iowa Constitution		5,10
Article I, Section 10 of the Iowa Constitution		5,10
Article III, Section 26 of the Iowa Constitution.		5,9
Article V of the Iowa Constitution.		5,9
Article XII, Section 1 of the Iowa Constitution.. . . .		5,9
<u>Cases</u>		
<u>Arizona v Fulminante</u> , 499 US 279 (1991).		5,12
<u>Evitts v Lucey</u> , 469 US 387 (1985).. . . .		5,10
<u>Hannan v State</u> , 732 NW2d 45 (Iowa 2007).. . . .		5,8
<u>Iowa Beta Chapter of Phi Delta Theta Fraternity v State</u> , 763 NW2d 250 (Iowa 2009).. . . .		5,8
<u>Lado v State</u> , 804 NW2d 248 (Iowa 2011).		5,12
<u>Planned Parenthood of the Heartland v Reynolds ex rel State</u> , 915 NW2d 206 (Iowa 2018).. . . .		5,10
<u>State v Boone</u> , 298 NW2d 335 (Iowa 1980).. . . .		5,11
<u>State v Feregrino</u> , 756 NW2d 700 (Iowa 2008).. . . .		5,12
<u>State v Fisher</u> , 877 NW2d 676 (Iowa 2016).		5,11
<u>State v Loye</u> , 670 NW2d 141 (Iowa 2003).		6,11

Varnum v Brien, 763 NW2d 862 (Iowa 2009). 5,9,10

United States v Chronic, 466 US 648 (1984). 6,12

Statutes

21 USC §851.. 6

Iowa Code §4.13(a) (a).. 5,8

Iowa Code §709.4(b) (2).. 11

Iowa Code §814. 5,7,8,9

Iowa Code §814.6(1).. 10

Iowa Code §814.7. 8

Iowa Code §903B.. 6

Court Rules

Iowa R. App. P. 6.903(1) (e).. 13

Iowa R. App. P. 6.903(1) (g) (2).. 13

Iowa R. App. P. 6.904(2).. 13

Iowa R. App. P. 6.1101(2) a. 7

Iowa R. App. P. 6.1101(2) c. 7

Iowa R. App. P. 6.1101(2) d. 7

Iowa R. App. P. 6.1101(2) f. 7

Iowa R. Crim P. 2.8(2) (b).. 6

Other Authorities

Blacks Law Dictionary (11th ed 2019). 6,10,11

Senate File (SF) 589. 5,6,7,10

USSG §4A1.2.. 6

2019 Iowa Acts Ch. 140. 5,6,7,8

I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. WHETHER CHRISTOPHER ROBY HAS A RIGHT TO A DIRECT APPEAL

Iowa Code §814

1. Whether the legislative changes to Iowa Code §814 are substantive in nature, and cannot be applied retroactively

Article I, Section 9 of the US Constitution
Article I, Section 21 of the Iowa Constitution
Article III, Section 26 of the Iowa Constitution
Twenty-third Amendment to the Iowa Constitution
Hannan v State, 732 NW2d 45 (Iowa 2007)
Iowa Beta Chapter of Phi Delta Theta Fraternity v State, 763 NW2d 250 (Iowa 2009)

Iowa Code §4.13(1) (a)

Iowa Code §814

Senate File 589

2019 Iowa Acts Ch. 140

2. Whether the legislative changes to Iowa Code Chapter 814 impose impermissible limits to Christopher Roby's constitutional rights

Fifth Amendment of the US Constitution
Sixth Amendment of the US Constitution
Fourteenth Amendment of the US Constitution
Article I, section 9 of the Iowa Constitution
Article I, section 10 of the Iowa Constitution
Article V of the Iowa Constitution
Article XII, Section 1 of the Iowa Constitution
Evitts v Lucey, 469 US 387(1985)
Planned Parenthood of the Heartland v Reynolds ex rel State, 915 NW2d 206(Iowa 2018)
Varnum v Brien, 763 NW2d 862(Iowa 2009)

3. Whether even if the legislative changes to Iowa Code Chapter 814 are determined to be permissible, Christopher Roby has established "good cause" for his right to appeal

Arizona v Fulminante, 499 US 279(1991)

Lado v State, 804 NW2d 248(Iowa 2011)

State v Boone, 298 NW2d 335(Iowa 1980)

State v Feregrino, 756 NW2d 700(Iowa 2008)

State v Fisher, 877 NW2d 676 (Iowa 2016)

State v Loye, 670 NW2d 141 (Iowa 2003)
United States v Chronic, 466 US 648(1984)
Iowa R Crim P 2.8(2)(b)
Black's Law Dictionary (11th ed 2019)

II. ARGUMENT

The state first argues that there are no issues new or interesting to this case to warrant retention by the Supreme Court. Even before the state's response, Christopher Roby raised issues, among others, that his pleas were not knowing or voluntary, given the dearth of information provided to him regarding the punishment consequences of his pleas as they relate to special sentence parole pursuant to Iowa Code §903B, and to the enhancement consequences under the federal sentencing guidelines pursuant to 21 USC §851 and USSG §4A1.2. It does not appear that the Iowa courts have addressed either of these ramifications.

Ironically, the state is now arguing that SF 589, now found at 2019 Iowa Acts Ch. 140, should be applicable to this case. That legislation, the state concedes, did not become effective until July 1, 2019, a week after the state filed its brief making the argument, and three months after the proceedings in this case took place and a timely appeal was filed. The state's position regarding the applicability of two-week old legislation, on its own, squarely puts this matter into the criteria of retention by the Supreme Court. The case presents "substantial constitutional questions as to the validity of a statute", Iowa R. App. P.

6.1101(2)a, the case presents a "substantial issue of first impression", Iowa R. App. P. 6.1101(2)c, the case presents "fundamental and urgent issues of broad public importance requiring prompt or ultimate determination by the supreme court", Iowa R. App. P. 6.1101(2)d, and the case presents "substantial questions of...changing legal principles." Iowa R. App. P. 6.1101(2)f.

A. CHRISTOPHER ROBY HAS A RIGHT TO A DIRECT APPEAL

Christopher Roby had a plea and sentencing hearing on March 28, 2019. (App. 55-58, 119-122, 181-184, 186-212). On that date, the trial judge advised him of his rights and timeline to file an appeal. (App. 208, line 17 - App. 209, line 15). Roby filed a *pro se* notice to rescind his plea several days later, on April 2, 2019. (App. 185). Notice of Appeal was then timely filed on April 4, 2019. (App. 13-14, 67-68, 131-132).

The legislative changes to Iowa Code §814 restricting Christopher Roby's appeal rights are unconstitutional. Even if deemed legitimate, they cannot be applied retroactively. Even if deemed legitimate, Christopher Roby has "good cause" to appeal.

1. The legislative changes to Iowa Code §814 are substantive in nature, and cannot be applied retroactively

Without conceding that the legislative amendments are proper, the effective date of SF 589, now found at 2019 Iowa Acts Ch. 140, was July 1, 2019. The state argues that the

prohibitions should apply retroactively. Such a position must be ruled untenable.

The state argues that under the court's ruling in Hannan v State, 732 NW2d 45 (Iowa 2007), prior provisions of Iowa Code §814.7 was retrospective because it was a procedural, not substantive, rule. The previous version of §814.7 gave defendants a remedy they otherwise did not have, and helped judicial economy. SF 589 takes a remedy away and wastes judicial resources.

A remedial or procedural rule can be applied both prospectively and retrospectively, but a statute that impacts substantive rights may only be applied prospectively. Iowa Beta Chapter of Phi Delta Theta Fraternity v State, 763 NW2d 250 (Iowa 2009) (citations omitted). Even with procedural statutes, the courts have "refused to apply a statute retrospectively when the statute eliminates or limits a remedy. Id at 267. Furthermore, any revision of a statute does not affect "any prior action taken under the statute." Iowa Code §4.13(1)(a).

Finally, it is appropriate to consider the unconstitutionality of applying any changes to Iowa Code §814 retroactively. Ex post facto laws are unequivocally unconstitutional under both the United States and Iowa Constitution. "No Bill of Attainder or ex post facto Law shall be passed." Article 1, Section 9 of the US Constitution. "No

bill of attainder, ex post fact law, or law impairing the obligation of contracts, shall ever be passed." Article I, Section 21 of the Iowa Constitution. Furthermore, the Iowa Constitution specifically sets out the effective date of new laws: "No law of the General Assembly, passed at a regular session, of a public nature, shall take effect until the fourth day of July next after the passage thereof." Article III, Section 26 of the Iowa Constitution. The effective date was changed from July 4 to July 1 in 1966. Twenty-third Amendment to the Iowa Constitution.

The legislative changes to Iowa Code §814 are clearly substantive in nature, purporting to take away defendants' rights. Even if deemed proper, the changes did not go into effect until July 1, 2019. It would be improper to apply those changes retroactively to this pending appeal.

2. The legislative changes to Iowa Code Chapter 814 impose impermissible limits to Christopher Roby's constitutional rights

The establishment of Iowa's appellate court system is imbedded in the state constitution. Article V of the Iowa Constitution. No law that is contrary to the constitution may stand. Article XII, Section 1 of the Iowa Constitution.

"[C]ourts must, under all circumstances, protect the supremacy of the constitution as a means of protecting our republican form of government and our freedoms." Varnum v Brien, 763 NW2d 862, 875

(Iowa 2009). "Our framers vested this court with the ultimate authority, and obligation, to ensure no law passed by the legislature impermissibly invades an interest protected by the constitution." Planned Parenthood of the Heartland v Reynolds ex rel State, 915 NW2d 206, 213 (Iowa 2018).

Since the appellate court in Iowa is an integral part of the judicial system, "the procedures used in deciding appeals must comport with the demand of the Due Process and Equal Protection Clauses of the Constitution." Evitts v Lucey, 469 US 387, 393 (1985). Denying Christopher Roby the right to appeal a defect in plea proceedings unless he somehow meets an undefined burden of proof, violates his right to due process and equal protection under the Fifth, Sixth and Fourteen Amendments of the US Constitution, and Article I, sections 9 and 10 of the Iowa Constitution. Furthermore, denying his right to raise a claim of ineffective assistance of counsel on direct appeal unduly interferes with his rights pursuant to the Sixth and Fourteenth amendments to the US Constitution, and Article I, Section 10 of the Iowa Constitution.

3. Even if the legislative changes to Iowa Code Chapter 814 are determined to be permissible, Christopher Roby has established "good cause" for his right to appeal

Senate File 589 changes Iowa Code §814.6(1) to require that in order to file an appeal from a guilty plea, a defendant must have "good cause." Blacks Law Dictionary defines "good cause" as

"a legally sufficient reason." Black's Law Dictionary (11th ed 2019). Christopher Roby has presented in his main brief multiple errors and omissions that occurred during the trial court proceedings. These include, but are not limited to, the errors of the trial court and of trial counsel, in their failure to ensure that the guilty pleas were knowing and voluntary.

If a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of constitutional guarantees of due process and is therefore void...The defendant must have a full understanding of the consequences of a plea before constitutional rights can be waived knowingly and intelligently.

State v Boone, 298 NW2d 335, 337 (Iowa 1980) (citations omitted).

[A] defendant must be aware of not only of the constitutional protections that he gives up by pleading guilty, but he must also be conscious of 'the nature of the crime with which he is charged' and the potential penalties

State v Loye, 670 NW2d 141, 151 (Iowa 2003); see also Iowa R Crim P 2.8(2)(b). A guilty plea is involuntary if a defendant is not informed of mandatory consequences of his plea. State v Fisher, 877 NW2d 676 (Iowa 2016). As indicated in his main brief, Christopher Roby did not have a full understanding of the consequences of his plea. The ramifications of a plea and sentence to Iowa Code §709.4(b)(2), a class "C" sex offense, were presented as discretionary. (App. 188). As the state observed in its brief, Christopher Roby did not even know he had federal charges, much less know the implication of his plea on those proceedings. (App. 196). These constitute profound failure of

the trial court and defense counsel. These are structural errors.

If an attorney's performance is so deficient as to cause structural error, it renders the proceeding presumptively unreliable.

Structural errors are not merely errors in a legal proceeding, but errors "affecting the framework within which the trial proceeds...structural error occurs when "(1) counsel is completely denied, actually or constructively, at a crucial stage of the proceeding; (2) where counsel does not place the prosecution's case against meaningful adversarial testing...[n]o specific showing of prejudice [is] required" as the criminal adversary process itself is "presumptively unreliable."

Lado v State, 804 NW2d 248, 252 (Iowa 2011), *citing* State v Feregrino, 756 NW2d 700, 707 (Iowa 2008), Arizona v Fulminante, 499 US 279, 310 (1991), United States v Chronic, 466 US 648, 659 (1984). Such structural errors certainly are legally sufficient reasons, meeting the requirement of "good cause" for a direct appeal in this case, and for the right to claim ineffective assistance of counsel.

III. CONCLUSION

Christopher Roby was significantly prejudiced, and has a right to proceed with this appeal. His constitutional rights under both the US and Iowa constitutions were flagrantly violated. The proper course of action in this case is to vacate the guilty pleas, reverse the convictions and remand these cases to district court for further proceedings.

Respectfully submitted this 27th day of July 2019.

/Marti D Nerenstone/

Marti D. Nerenstone
Park Building
500 Willow Avenue, Suite 212
Council Bluffs, Iowa 51503
(712) 328-2283 (phone)
(712) 322-1118 (fax)
nerenstonelaw@qwestoffice.net
Attorney for Christopher Roby

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Proof Brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and 6.903(1)(g)(2). This brief has been prepared in a monospaced typeface, and created in WordPerfectX5 in font Courier New 12. It contains 188 lines of text, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(2).

/Marti D Nerenstone/
Marti D Nerenstone

July 27, 2019
Date

ATTORNEY'S CERTIFICATION REGARDING UNPUBLISHED OPINION

I, the undersigned hereby certify that on July 14th, 2019, I have conducted a diligent search for, and fully disclosed, any subsequent disposition of unpublished opinions cited in this brief, as required by Iowa R. App. P. 6.904(2).

/Marti D Nerenstone/
Marti D Nerenstone AT0005818

CERTIFICATE OF COST

The undersigned certifies that, pursuant to the cost amounts allowed by the State Public Defender, the cost of printing this

Brief was \$1.40.

/Marti D Nerenstone/
Marti D Nerenstone AT0005818

PROOF OF SERVICE AND CERTIFICATE OF FILING

I certify that on the 27th day of July 2019, I served this document on the attorneys by efileing in EDMS.

I further certify that on the 27th day of July 2019, I will submit this document for filing by EDMS with the Iowa Supreme Court.

I further certify that on the 27th day of July 2019, I will serve the Defendant-Appellant by first-class mail.

/Marti D Nerenstone/
Marti D Nerenstone
Park Building
500 Willow Avenue, Suite 212
Council Bluffs, Iowa 51503
(712) 328-2283 (phone)
(712) 322-1118 (fax)
nerenstonelaw@qwestoffice.net

Attorney for Christopher Roby

Persons served:

Christopher Lee Roby, ICON # 6437054, c/o Linn County
Correctional Center, 53 3rd Avenue Bridge, Cedar Rapids,
Iowa 52401

Louis Sloven, Assistant Attorney General

Brian Williams, Black Hawk County Attorney

Elizabeth O'Donnell, Assistant Black Hawk County Attorney

Yeshimebet Abebe, Assistant Black Hawk County Attorney