IN THE SUPREME COURT OF IOWA

No. 18-1099

STATE OF IOWA

Plaintiff-Appellee,

vs.

TERRENCE MARTEZ GORDON

Defendant-Appellant

APPEAL FROM THE BLACK HAWK COUNTY DISTRICT COURT

THE HONORABLE JOEL A. DALRYMPLE

APPELLANT'S BRIEF AND ARGUMENT AND REQUEST FOR ORAL ARGUMENT

Kent A. Simmons
P.O. Box 594
Bettendorf, Iowa 52722
(563) 322-7784
ttswlaw@gmail.com

Final Form

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

- this brief contains 5,257 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903.

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because:

- this brief has been prepared in a proportionally spaced typeface based on Word 14 in Times New Roman font.

/s/ Kent A. Simmons

KENT A. SIMMONS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Code of Iowa

Ethical Rules

STATEMENT OF ISSUES FOR REVIEW

DUE TO THE INEFFECTIVE ASSISTANCE OF COUNSEL AND PROSECUTORIAL MISCONDUCT, THE PLEA AGREEMENT AND THE PLEA PROCEEDINGS WERE EXECUTED ON AN AGREEMENT CALLING FOR THE STATE'S PERFORMANCE OF A CONDITION THAT IT KNEW WAS FORBIDDEN BY STATUTE, AND THE GUILTY PLEAS MUST BE VACATED.

State v. Weitzel, 905 N.W. 2d 397 (Iowa 2017)

Strickland v. Washington, 466 U.S. 668, 104 S. Ct 2052 (1984)

Taylor v. State, 362 NW 2d 683 (Iowa 1984)

State v. Lopez, 872 N.W. 2d 159 (2015).

Sections 811.1 and 811.2, the Code of Iowa

Attorney Disciplinary Board v. Howe, 706 N.W. 2d 360 (Iowa 2005)

Section 32:3.3(2), Iowa Code of Professional Responsibility

Section 51:1.1, Iowa Code of Judicial Conduct

Section 32:3.1, Iowa Code of Professional Responsibility

State v. Maxwell, 743 N.W. 2d 185 (Iowa 2008)

State v. Clay, 824 N.W. 2d 488 (Iowa 2012)

State v. Ary, 877 N.W. 2d 686 (Iowa 2016)

Krogmann v. State, 914 N.W. 2d 293 (Iowa 2018)

State v. Powell, 2018 WL 3912110

ROUTING STATEMENT

The Supreme Court should retain this appeal because it presents issues of first impression as to whether a plea agreement that calls for performance of an unlawful act creates a structural error in the criminal justice process and whether the results of that agreement are void.

STATEMENT OF THE CASE

NATURE OF THE CASE: This is a direct appeal from convictions after guilty pleas on multiple counts and probation revocations in the Black Hawk District Court.

PROCEEDINGS: Appellant Terrence Martez Gordon was charged by Trial Information filed March 25, 2018, under FECR 223947, with five counts. All references to code sections herein are to Code of Iowa (2017). The primary charge in Count One was Assault on a Peace Officer, a class "D" felony, in violation of Section 708.3A(2), the Code. Counts Two and Three were serious misdemeanors for Assault on a Peace Officer in violation of Section 708.3A(4), the Code. In Count Four, the State charged Public Intoxication, Third Offense, an aggravated misdemeanor, in violation of Sections 123.46(2) and 123.91(2), the Code. Count Five was a simple misdemeanor for Criminal Mischief in the Fifth Degree under 716.6, the Code. (Tr. Info. 3/25/18; App. 3) At the same time, the State filed a Supplemental Trial Information with all of the identical offenses in the same order

in five counts, except in Count Four the Public Intoxication charge was not enhanced for a third offense, and the charge was a simple misdemeanor. Both of the charging instruments were filed at the same time of 7:59 p.m. on March 25. (Supp. Tr. Info.; App. 7)

The felony charge of Assault on a Peace Officer under 708.3A(2) is a forcible felony, as defined by Section 702.11(1), falling under the category of "felonious assault". Under Sections 811.1(1) and 811.2(1), a defendant "awaiting judgment of conviction and sentencing" after a plea of guilty to a forcible felony is not eligible for release from detention. Under 811.1 and 811.2, a person appealing a conviction of a forcible felony "shall not be admitted to bail". Mr. Gordon appeared for a jury trial, but offered a proposed plea agreement on May 29, 2018, before the Honorable Linda M. Fangman. No written plea agreement was ever filed. The oral plea agreement brought before Judge Fangman proposed granting Mr. Gordon a release on a "48-hour furlough" after guilty pleas. The judge refused to take the pleas on that agreement, saying, " Well, the Court is not going to grant a 48-hour furlough when this is a forcible felony." The judge then engaged in extensive dialogue with defense counsel after counsel inquired whether Judge Fangman would have any objection to the defense taking the plea agreement to

another judge. The judge replied, "What you want to know is if you can find a judge who will violate the law. That's what you're asking me." (Hrg Trans., 5/29/18, pp. 10-11, L. 12-18) The hearing concluded when defense counsel asked the judge if she could go ask Judge Dalrymple if he would accept the plea agreement. (Tr., 5/29/18, p. 13, L. 7-21)

On June 5, 2018, the Honorable Joel Dalrymple accepted guilty pleas and accepted the plea agreement. The prosecutor recited the plea agreement on the record. Nothing was clarified in regard to the Public Intoxication charge. In addition to the forcible felony, the prosecutor referred to guilty pleas to one aggravated misdemeanor and one simple misdemeanor, as well as two serious misdemeanors. The defendant would be imprisoned on all counts, to be served concurrently for one five-year sentence. The prison sentence would then be enlarged with consecutive sentences for probation violations from two different cases for a total sentence of seven years imprisonment. (Tr., 6/5/18, pp. 2-5, L. 8-20) Finally, the prosecutor stated, "An additional condition of the plea agreement is that the defendant would receive a 48-hour furlough from the Black Hawk County Jail." (Tr. 6/5/18, p. 5, L. 18-20) Mr. Gordon entered *Alford* pleas to the five pending counts. The probation violations were founded on the *Alford*

pleas. The only basis the judge stated for the revocations of probation was the entry of the *Alford* pleas on the pending charges. Judge Dalrymple then proceeded straight to sentencing. (Tr. 6/5/18, pp. 3- 4, L. 15-18 p. 12, L. 1-15, p. 22, L. 1-22, pp. 33-36, L. 2-15) The judge orally set out conditions of the furlough prior to taking the pleas and again at the conclusion of the pronouncement of sentence. The two fundamental conditions were that Mr. Gordon return to the jail by 4:00 p.m. on June 7, and that he could not be inebriated at that time. The furlough conditions were also set out in the order of disposition filed on June 5. (Tr. 7-10. L. 8-11)(Order of Disposition, 6/5/18, p. 2; App. 12)

Mr. Gordon failed to return to the jail on June 7, and a warrant was issued for his arrest. (Order for Warrant, 6/8/18; App. 16) Counsel for the Defendant filed Notice of Appeal on June 25, 2018 (App. 17)

Statement of the Facts

Mr. Gordon was arrested by officers of the Waterloo Police Department on the night of March 2, 2018, after at least six officers responded to a call of a possible fight in a house in the city. When they arrived they found Mr. Gordon and

Elizabeth Hampton arguing about the fact that they were ending their relationship. The officers determined no crime had occurred, and they had intended to leave the scene. Officers claimed that at that point Mr. Gordon became verbally abusive and threatening toward them. He picked up a broom, but then exchanged that for a snow shovel. As officers moved toward him, Mr. Gordon allegedly said he would swing the shovel on Officer Everett, if he came any closer. Gordon was intoxicated. The officers moved in and subdued Gordon with tasers. No one was injured. During the arrest, Mr. Gordon allegedly spit on officers. On the way to the station, he kicked out a back window in the squad car. Mr. Gordon refused to submit to a PBT. From the Minutes and narrative police reports, it appears that the snow shovel was considered the weapon providing the factual basis for the element of the primary charge of Assaulting a Peace Officer While Displaying a Dangerous Weapon in Count 1. (Tr. Info., p. 1; App. 3) Judge Dalrymple referred to the same "weapon" in the plea hearing. (Plea Tr., p. 18, L. 6-19) (Minutes of Evidence and Narrative Reports of Officers Everett and Moore, 3/25/18; Additional Minutes and Narrative of Officer Albers, 3/27/18; Confid. App. 12-15, 39)

Mr. Gordon was held in the county jail after a magistrate set his bail at $25,000.00, cash only. A request for bail reduction was denied on March 23, 2018.

(Record of Initial Appearance, 3/5/18, Order Denying Bond Reduction, 3/23/18)

At the attempted plea proceeding on May 29, the prosecutor said he had the trial set for that week because he had problems with other cases the following two weeks. Speedy trial demand required a trial to start by June 23, 2018. Mr. Gordon was refusing to waive speedy trial. He had also asked that Judge Fangman be recused from the trial because her husband was the police officer who had conducted an internal affairs investigation regarding Mr. Gordon's arrest. No other judge was available on May 29. Judge Fangman proposed picking the jury under her supervision, and Judge Dalrymple would preside over the trial starting the next morning. That did not happen. Everything came to a head with Judge Dalrymple at the plea and sentencing on June 5. The State agreed to the furlough, and it was granted. (Tr. 5/29/18, pp. 2- 10 L. 18-3)

ARGUMENT

DUE TO THE INEFFECTIVE ASSISTANCE OF COUNSEL AND PROSECUTORIAL MISCONDUCT, THE PLEA AGREEMENT AND THE PLEA PROCEEDINGS WERE EXECUTED ON AN AGREEMENT CALLING FOR THE STATE'S PERFORMANCE OF A CONDITION THAT IT KNEW WAS FORBIDDEN BY STATUTE, AND THE GUILTY PLEAS MUST BE VACATED.

PRESERVATION OF ERROR: Generally, where a defendant challenges a guilty plea, preservation of error is required by filing a Motion in Arrest of Judgment. Mr. Gordon did not file that motion, and in fact he waived his right to do so on the record. (Plea Hrg. pp. 32-33, L. 4-13) Where the defendant claims the guilty plea resulted from the ineffective assistance of counsel, the defendant can challenge the guilty plea without the necessity of a challenge in the lower court. *State v. Weitzel,* 905 N.W. 2d 397, 401 (Iowa 2017)

STANDARD OF REVIEW: In *Strickland v. Washington*, 466 U.S. 668, 690, 695 104 S. Ct 2052 (1984), the Supreme Court held the reviewing court must judge the "reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." The claim of ineffective counsel is then reduced to a determination as to whether the conduct was "the result of reasonable professional judgment." The Court must keep in mind there is a strong presumption of competence and reasonable professional judgment. 466 U.S. at 690. In *Taylor v. State*, 362 NW 2d 683 (Iowa 1984), the Court clarified Strickland and set out the necessary elements for proof of ineffective assistance of counsel:

> The person claiming his trial counsel was ineffective, depriving him of his Sixth Amendment right to counsel, must show that, (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom. 352 NW 2d at 685

To prove prejudice, the defendant need not prove to a certainty that effective assistance would have resulted in a different outcome. The proposition need only be proven as a reasonable probability. The standard of reasonable probability is met when the Court's confidence in the outcome is undermined. *Strickland,* 466 US at 694. When challenging a guilty plea under the rubric of ineffective

assistance of counsel, a defendant must demonstrate there is a reasonable probability that, "but for counsel's errors", the defendant would not have pleaded guilty, but would have insisted on going to trial. *Weitzel,* 905 N.W. 2d at 402.

The Merits

> Most criminal cases are resolved through guilty pleas resulting from plea bargains negotiated by defense counsel and the prosecution. Our precedent makes clear that prosecutors are required to scrupulously honor the letter and spirit of plea agreements to maintain the integrity of the plea-bargaining process. *State v. Lopez,* 872 N.W. 2d 159, 161 (2015).

The instant question posed in this appeal is whether the State is required to scrupulously honor the letter and spirit of the statutory law in its promise and performance in plea agreements. The first judge who considered the plea agreement in the instant case summarily concluded the State and the Court could not agree to performance of a condition in a process that is forbidden by statute. In rejecting the plea agreement, Judge Fangman said, "Well, the Court is not going to grant a 48-hour furlough when this is a forcible felony." When defense counsel asked for permission to take the plea agreement before another judge, the answer

from Judge Fangman was succinct: "What you want to know is if you can find a judge who will violate the law. That's what you're asking me." (Hrg. Tr., 5/29/18, pp. 10-11, L. 12-18)

There is no question that the grant of the furlough was a condition to the plea agreement and the entry of the guilty pleas. The prosecutor stated on the record that it was a "condition of the plea agreement." (Plea Hrg. 6/15/18, p. 5, L. 18-20) Judge Dalrymple set out the furlough as a condition of the plea and imposed special conditions upon the furlough. The judge told Mr. Gordon he would have to agree to the judge's conditions or the plea agreement would not be accepted and executed. (Plea Hrg. Tr. pp. 7-10, L. 8-11).

Chapter 811 prohibits any release from detention for a person who has pled guilty to a forcible felony and that prohibition continues after the defendant has been convicted of the forcible felony. Sections 811.1 and 811.2, the Code. There is no exception in the chapter or anywhere else in the Code that would allow a furlough after a guilty plea to a forcible felony. There is no question that the State knowingly offered Mr. Gordon a concession that is forbidden by statute. The prosecutor who heard Judge Fangman call the condition a violation of the law is

the same prosecutor who asked Judge Dalrymple to execute upon that illegal condition.

Ethical Violations

Counsel has been unable to find a criminal case in Iowa caselaw wherein a prosecutor and a defense attorney knowingly entered into a plea agreement that required the State to perform a condition that is forbidden by statute. An analogous situation is found in *Attorney Disciplinary Board v. Howe,* 706 N.W. 2d 360 (Iowa 2005). In that case, an assistant city attorney routinely allowed defendants to plead guilty to equipment violations for which there was no factual basis in order to avoid convictions for moving traffic violations. This Court found the attorney violated a disciplinary rule that prohibits prosecutors from filing charges for which they know there is no factual basis. The Court suspended the prosecutor's license. In doing so, the Court explained that the ruling should not be applied too broadly: "This court's conclusion that the respondent's conduct was improper should not be applied too broadly. Certainly prosecutors have the authority to negotiate plea bargains, and may ethically reduce a charge in exchange for a defendant's guilty plea to the reduced charge." The violation was in filing the

charge for which there was no probable cause. *Howe,* 706 N.W. 2d at 371. In discussing the sanction imposed on the prosecutor, the Court stated an important rationale:

> Admittedly, plea bargains are a common and useful tool for resolving criminal cases. But when charges are filed that are known to all to be bogus and guilty pleas to those charges are accepted in order to allow defendants to escape the adverse consequences of the offenses they actually committed, there can be only one result: respect for the court system is diminished, and the public's confidence in the integrity of the criminal justice system is seriously undermined. 706 N.W. 2d at 379

The defense attorney and the prosecutor in the instant case both may have been in violation of Section 32:3.3(2), Iowa Code of Professional Responsibility. That rule requires an attorney to "disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position the client is taking and not disclosed by opposing counsel." Of course, because it was an agreement, both parties were taking the same position on the unlawful furlough. It was the duty of both attorneys to inform Judge Dalrymple that under

the authority of Chapter 811, the judge was being asked to issue an order that is forbidden by the statute. If the attorneys did not realize the furlough would be illegal before they presented the agreement to Judge Fangman, they certainly were required to find out why after the judge told them it was illegal. There is no mention in the plea and sentencing transcript of the adverse statutory authority against the grant of a furlough. It is possible the attorneys discussed the unlawful nature of the furlough with Judge Dalrymple at some point before the plea proceeding. If that were the case, the ethical violation is even more troubling. The very first of the judicial canons provides: "A judge shall comply with the law…" Section 51:1.1, Iowa Code of Judicial Conduct.

Even if the judge and counsel for both parties were aware of the unlawful use of the furlough before the plea and sentencing proceeding, the attorneys were still in violation of 32:3.1. They were asserting a position that they knew had no basis in law, and they were not making "a good faith argument for an extension, modification, or reversal of existing law."

Failure of Essential Duty

The State might argue that Mr. Gordon's attorney simply sought the disposition her client was requesting and that gaining the 48-hour furlough was

actually a remarkable result, considering that the relief was not even authorized by law. The attorney's conduct in effecting the plea agreement must be examined through both a legal and a practical analysis, however. In determining whether defense counsel has failed in an essential duty, this Court will consider the conduct in the context of the Code of Professional Responsibility. In determining whether trial counsel was deficient on the performance prong, the Court evaluates counsel's conduct on an "objective standard of reasonableness," which is guided "under prevailing professional norms." *State v. Maxwell*, 743 N.W. 2d 185, 195 (Iowa 2008). The evaluation of performance considers all circumstances. The U.S. Supreme Court recognizes the American Bar Association (ABA) standards, "and similar documents that reflect the prevailing norms of the legal profession." *State v. Clay*, 824 N.W. 2d 488, 495 (Iowa 2012). The Iowa Supreme Court followed suit: "In deciding whether counsel failed to perform an essential duty, we measure counsel's performance against prevailing professional norms, including those reflected in standards set by the American Bar Association and our ethical rules." *State v. Ary*, 877 N.W. 2d 686, 704-705 (Iowa 2016). It would be a dangerous precedent that concluded unethical conduct could satisfy the duty to provide reasonably competent representation.

From a practical standpoint, the attorney's allegiance to the law and ethical rules of conduct can often serve as a means for protecting a client from his own poor judgment. For example, in another context, the attorney can use 32:3.3(b) to prevent a client from committing perjury and opening himself up to additional criminal punishment. In the instant case, what did the Defendant have to gain from making a deal for 48 hours of freedom? He was entering *Alford* pleas of guilty to a forcible felony and other offenses and agreeing to pile that punishment of imprisonment up higher with sentences imposed on probation violations. As is discussed below, Mr. Gordon clearly would not have pled guilty if the furlough were not part of the deal. The exposure to a new charge for violating the terms of the furlough, again on top of all the guilty pleas, would appear to have been a highly substantial risk. Indeed, Mr. Gordon did violate the furlough, and the consequences await him. It was a situation where the defense attorney needed to put her foot down to save the client from himself. The answer would have been simple. A furlough is impossible because it is forbidden by statute.

Strickland Prejudice

Fortunately, a record was made when Judge Fangman rejected the plea agreement. That record made it clear that Mr. Gordon would not be pleading

guilty, unless the 48-hour furlough were granted as part of the plea agreement. The parties actually appeared in front Judge Fangman that morning for the commencement of the jury trial on the charges. At first, the prosecutor was not agreeing to the furlough. When it was clear there would be no guilty pleas on the disposition he recommended, the prosecutor then agreed to the furlough. When the judge made it clear she would not agree to the unlawful furlough, Mr. Gordon again made no indication he would accept the plea offer without the furlough. It was clear that if Mr. Gordon did not waive speedy trial, jury selection was going to begin with Judge Fangman. The judge inquired as to whether Mr. Gordon would be willing to waive speedy trial in order to get a continuance on the trial. Mr. Gordon refused and noted there was still a few more weeks before the speedy trial date. The prosecutor explained that he was running up against other speedy trial deadlines and could not continue Mr. Gordon's trial for even one week. To that, Mr. Gordon replied, "Not my problem." The hearing that proceeded the morning of trial ended when defense counsel was given permission to go speak with Judge Dalrymple. (Hrg. 5/29/18, pp. 7-13; L. 22-22) Apparently, Judge Dalrymple agreed to take the plea and grant the furlough. The plea and sentencing proceeded

before him a week later on June 6. The transcript is indisputable, Mr. Gordon would go to trial if he did not get the furlough.

Structural Error and Presumed Prejudice

As mentioned, Defendant has found no Iowa criminal case where counsel for both parties had knowingly agreed to an unlawful concession as a condition to a plea agreement. In the *Howe* decision, the Court noted that a prosecutor can wield a great deal of pressure to secure a guilty plea with the ability "to bestow extraordinarily important benefits upon persons who are thereby coerced into cooperation with the prosecutor." 706 N.W. 2d at 370. In some circumstances, a defendant is not required to show *Strickland* prejudice. A process that shows the attorneys for the parties and the trial judge have resorted to taking action forbidden by statute in order to reach resolution of a criminal case must be viewed as presumptively unreliable. The proposition that a lawful resolution may be reached through unlawful action is a grave threat to a defendant's right to due process and the integrity of the criminal justice system. If a plea bargaining process in a particular case sinks to the necessity of having to take an unlawful path, the Court must presume a guilty plea could not be effected through legal means. The guilty plea proceeding is so vital to the criminal justice process that the institutional

employment of illegal means to effect a guilty plea must be considered structural error. The appearance of impropriety in such situations will be unavoidable. Prejudice must be presumed. *Krogmann v. State,* 914 N.W. 2d 293, 313, 324-325 (Iowa 2018)

Remedy in Contract Law

The State can be expected to argue that Mr. Gordon made a deal, the State complied with the deal in recommending the furlough, and Gordon then failed to hold up his end when he failed to return to the jail. The argument will be that Mr. Gordon should not be allowed to benefit from his failure to perform by gaining a disposition vacating the guilty pleas and convictions and probation violation dispositions. The disposition of returning to square one would be characterized as a windfall for a party who failed to honor his agreement. The argument sounds in contract.

In a recent unreported decision, an Iowa Court of Appeals panel noted that this Court does not provide a history in caselaw for applying contract law to plea agreements. The panel relied on Eighth Circuit caselaw to determine a plea agreement is akin to a contract, and contract analysis is helpful. The panel then used contract law to analyze whether the plea agreement in that case was "void", or

simply "voidable". In that case, the defendant had violated the terms of the plea agreement by violating a no-contact order after entering his guilty pleas. The district court then imposed sentences more harsh than those recommended in the agreement. On appeal, the defendant argued that his attorney was ineffective in failing to argue that his violation of the plea agreement voided the guilty pleas. The defendant asked the appellate court to vacate the convictions and remand the action to place him in the position he was in prior to entering guilty pleas in three different cases. The panel relied on contract law from the Third Circuit federal appeals court for the rule that a party should not be allowed to benefit from his own breach of a contract. The convictions and sentences were affirmed. *State v. Powell,* 2018 WL 3912110, pp. 2-5.

The difference between the *Powell* case and the instant is that in *Powell* there was no dispute that the plea agreement was fully lawful. The question in the instant case under contract law is whether a plea bargain the State knowingly enters with a promise to perform an unlawful act is "void" or simply "voidable". The depth of the roots to the answer for this question are clearly shown in an Iowa Supreme Court decision from over 140 years ago. In *Dillon and Palmer vs. Allen,* 46 Iowa 299 (Iowa 1877), the question was whether a contract tending to promote

or requiring the performance of acts forbidden by statute are void. The plaintiffs sued on a contract where they had agreed to thresh grain for the defendant in return for payment. When defendant failed to pay for the service, plaintiffs sued on the contract. The defense claimed the contract was void because plaintiffs had contracted to perform an act prohibited by statute. Judgment was entered against defendant, and he appealed. The contract called for the threshing to be performed by use of a machine with rods and knuckles that "were wholly unboxed." A statute prohibited running a threshing machine with that equipment unboxed. The statute also provided a fine for such prohibited operation. 46 Iowa at 299-300.

The defendant prevailed on appeal. The Court held: "We think it is a settled doctrine of common law, that contracts intended to promote, or requiring the performance of acts prohibited by statute are void . . ." The plaintiffs did not "question the correctness of this rule, but claim that this case is within certain admitted exceptions to the rule." The first exception the plaintiffs claimed was that the defendant was *in pari delicto*. He should not be "protected" from his own contract and "permitted to take advantage of his own wrong." The other exception plaintiffs posited was: "The contract was in its inception legal. The act, advantage of which is sought to be taken by appellant, was merely an incident of the

execution." The Court rejected the application of both exceptions. 46 Iowa at 300-302. In the instant case, the State can be expected to rely on similar claims as exceptions that excuse its conduct in entering a plea agreement requiring its "performance of acts forbidden by statute."

The complaint that the defendant in *Dillon* should not "be permitted to take advantage of his own wrong," was quickly dispatched by the Court back in 1877:

> The effects of statutes which make unlawful specified acts, upon persons violating them or aiding in their violation, are not considered in their enforcement by the courts. If one offender suffers thereby and the other gains an apparent benefit, no argument can be drawn therefrom or suspending the operation of the law. This is an incident in the administration of justice against which neither legislatures nor the courts can provide. The party suffering, being *in delicto,* cannot complain of the operation of the law, for he merits the punishment prescribed for its violation. It cannot be said that the law confers upon the other a benefit because of his violation of its provisions. What he gains comes to him as a punishment of the other party, not as a reward to himself. *Dillon,* 46 Iowa at 301.

The *Dillon* court dismissed the claim that the contract was legal "in its inception", but there was simply a violation of law in the "execution" of the contract. Plaintiffs were denied the benefit of this exception because they had not disputed the fact that the contract specifically provided the threshing would be done with a machine with unboxed parts. The contract was plainly "illegal" in its inception. "Here, the parties are *in pari delicto,* and as the act required by the contract in question is the *corpus delicto* contemplated by the statute, it was the legislative intent to hold it for nought." 46 Iowa at 302.

In *Powell,* the Court cited various authorities to explain that a contract that is void lacks any force or effect from its inception. It never attains any legal effect and cannot be enforced. A void contract is wholly ineffective from the outset. On the other hand, a contract that is merely voidable was effective at its inception and proceeded to have full effect until a party takes steps to disaffirm it. *Powell,* 2018 WL 3912110, p. 4. The *Dillon* case makes clear that an agreement calling for the performance of an unlawful act is void. The plea agreement and the guilty pleas in the instant case never had any legal effect, and the case must be remanded to place the Defendant in the position he was in prior to the guilty plea proceeding.

CONCLUSION

Whether the Court analyzes defense counsel's failure of duty for *Strickland* prejudice or presumed prejudice under structural error, the record is indisputable. There is a very clear and reasonable probability that Mr. Gordon would not have pled guilty to anything had he not been offered the unlawful furlough. Under *Strickland,* or by analysis of contract law, the only disposition available to this Court is a reversal and remand vacating the sentences, guilty pleas and probation violations.

REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 6.908(1), Appellant requests to be heard in oral argument.

/s/ Kent A. Simmons

Kent A. Simmons
Attorney at Law
PO Box 594
Bettendorf, IA 52722
(563) 322-7784
ttswlaw@gmail.com