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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 AMENDED REPLY BRIEF

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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 2,845 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903.

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- 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

CONTENTS

TABLE OF AUTHORITIES

Code of Iowa

State Constitution

Routing Statement

Because the State has now raised a motion to dismiss and has raised an issue of first impression as to whether the new provisions of Section 814.7 should be applied retroactively, as well as prospectively, Appellant must now add these

points to his recommendation on routing and again request the Supreme Court retain this appeal.

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.

A. Motion to Dismiss

PRESERVATION OF ERROR: The State raises in its brief the question of whether this Court can dismiss the appeal because Mr. Gordon did not return to the the county jail at the end of his 48-hour furlough that was illegally entered by the district court. A bench warrant for the Defendant's arrest is still pending. (St. Br. 8-9) Although the issue was not raised in the district court, the issue was preserved when this Court ordered the State to brief the issue, when it ruled on the State's

request for a dismissal that was part of its prayer in the Resistance to Stay filed November 27, 2018. (Order, 12/19/18)

STANDARD OF REVIEW: Because the State raises an argument invoking this Court's inherent power to dismiss, it would appear the proper standard of review is a *de novo* assessment of all facts and circumstances. The argument is based on the case of *State v. Byrd,* 448 N.W. 2d 29 (Iowa 1996). In that case, the State's Motion to Dismiss was also based on the fact the defendant had absconded. There had been no record of facts or ruling on the question in the district court, and this Court considered facts and circumstances occurring after the notice of appeal had been filed. There was no error of law in the district court to review. 448 N.W. 2d at 30-31

The State cites only *State v. Dyer,* 551 N.W. 2d 320 (Iowa 1996). *Dyer* was a per curiam decision that was based on the Court's holding on the question of first impression set out in *Byrd.* There, the Defendant had been released on appeal bond, but after a subsequent arrest, the district court ordered the amount of the appeal bond increased. The defendant failed to post the additional amount and fled the jurisdiction. This Court denied the State's Motion to Dismiss on two factors.

One was that Byrd was back in the State's custody by the time the Court ruled on the motion, and the other was that there was no statute or rule that authorized the dismissal of the appeal on the basis of the defendant absconding. *Byrd,* 448 N.W. 2d at 30-31.

The per curiam decision in *Dyer* does not provide facts that clearly establish that Mr. Dyer had fled the jurisdiction, but the Court treated the situation as if he had. The Court simply stated that appellate counsel for Mr. Dyer "notes he does not know Mr. Dyer's whereabouts". The decision does not say how that "note" came up, and does not cite any conditions of the appeal bond requiring counsel's knowledge of whereabouts, or how that lack of knowledge would support a conclusion of flight from the jurisdiction. There may have been other facts in the *Dyer* record establishing flight from the jurisdiction that are not in the opinion itself. That is always a danger in per curiam opinions. Subsequent to the submission of final form briefs in the instant case, Mr. Gordon was apprehended on September 16, 2019 in Urbana, Iowa. He is currently facing a contempt of court sentencing in connection with the instant case and is being held without bond in Black Hawk County. (District Court FECR 223957: Warrant Served, 9/17/19; Order to Show Cause, 9/30/19; and Order Setting Hearing 10/10/19)

The per curiam opinion stated: "The primary issue on appeal, however, is whether Dyer's appeal should be dismissed due to his flight from the jurisdiction and failure to return by the time the appeal was heard." *Dyer,* 551 N.W. 2d at 320. Counsel's simple statement that he did not know his client's whereabouts and the strangely stated deadline of "by the time the appeal was heard" did not establish a bond violation. It would not be unusual for a defendant to be out of touch with his lawyer, but still in compliance with appeal bond requirements. This Court is well aware that an appeal bond secures the defendant's freedom until the Procedeno is issued, which of course would have been after the per curiam decision was filed. In any case, the *Dyer* per curiam opinion simply distinguishes the situation from *Byrd,* where the defendant was back in custody after failing to post the increased bond amount before the Court filed its decision. The *Dyer* per curiam opinion makes no reference to the other factor. No statute or rule authorizes dismissal of the appeal on the basis of the defendant absconding. The appeal is a creature of statute. In any case, because Mr. Gordon is now back in the State's custody, the appeal cannot be dismissed on the ground that he absconded. That is the rule of *Byrd* on the flight question.

The foundation of *Byrd* is a two-pronged inquiry. On the first prong, there still is no rule or statute that authorizes dismissal of the instant case. The second prong is something of a policy or equity determination. The *Byrd* court denied dismissal on the basis of both prongs. On the policy-equity prong the Court said: "Because he is now within the reach of our authority, no element of futility frustrates the force of our judgment. Moreover, we think Byrd's recapture and incarceration for failure to appear should deter those similarly inclined to flee while an appeal is pending." 448 N.W. 2d at 30-31. Because Mr. Gordon is now facing additional imprisonment on the contempt of court finding for failure to appear, both prongs of *Byrd* are satisfied to require a denial of the State's Motion to Dismiss. (District Court Order Setting Hearing, 10/10/19)

There is also an additional dynamic that must control the Court's consideration of the policy-equity prong in the instant case. Mr. Gordon was released on an illegal order from the district court. It was an order the attorneys for both parties and the judge knew was illegal before it was issued. It was the offer of the illegal release that induced Mr. Gordon to waive his trial rights and plead guilty. This Court's decision to vacate the guilty pleas would vacate an illegal process. The Court's decision in this case must establish that the guilty pleas and

the order of release are null and void. They have no legal effect. The State and the district court will have to face the consequence of knowingly taking illegal action. The motion to dismiss must be denied.

B. Prospective Effect of Sections 814.6 and 814.7

All newly enacted statutory provisions are presumed to be prospective in operation, unless expressly made retroactive. Section 4.5, the Code. Also, unless specifically designated by the legislature to be effective immediately, all new legislation becomes effective on the date of July 1 following enactment. Article III, Section 26, Iowa Constitution.

The State argues the new provisions in Section 814.7, the Code, should be applied retroactively, as well as prospectively. The new section prohibits raising a claim of ineffective assistance of counsel on direct appeal. The argument relies on *Hannan v. State,* 732 N.W. 2d 45, 51 (Iowa 2007), the case that ruled the original section under 814.7 enacted in 2004 was retroactive as well as prospective. The State misses the point on the critical limitation that *Hannan* and other cases place upon retroactive application of a new statutory provision. In *Hannan,* the State was actually arguing that Section 814.7 should have been applied only

prospectively from July 1, 2004, according to the general rule of prospective application of a new statute. The *Hannan* court disagreed and held:

> Section 814.7 governs the methods by which a defendant may assert a claim of ineffective assistance of counsel. *See* Iowa Code § 814.7. As such, it "prescribes a method of enforcing rights or obtaining redress for their invasion." *Dolezal v. Bockes*, 602 N.W.2d 348, 351 (Iowa 1999). Moreover, section 814.7 does not affect the substantive rights of parties, but rather "governs the practice, method, procedure, or legal machinery by which the substantive law is enforced or made effective." *Bd. of Trs. v. City of W. Des Moines*,587 N.W.2d 227, 231 (Iowa 1998). This indicates section 814.7 is procedural and may be applied retroactively.

Hannan, 732 N.W. 2d at 51

The key to holding the original 814.7 was strictly procedural was that the original section was not taking away or abrogating any rights or remedies of appellants or postconviction applicants. In fact, it was expanding the remedy because the defendant on appeal would no longer be required to raise an ineffective assistance issue on direct appeal in order to preserve the issue for postconviction relief. The section was removing a procedural hurdle to those seeking PCR. The restriction that precludes retroactive application on the new provisions in 814.7 was very clearly stated in *Iowa Beta Chapter vs. State,* 763 N.W. 2d 250, 267 (Iowa 2009): "Although, we do allow a statute to apply retrospectively when the

statute provides an additional remedy to an already existing remedy or provides a remedy for an already existing loss, we have refused to apply a statute retrospectively when the statute eliminates or limits a remedy." The rule is crystal clear, and it is consistent with the holding in *Hannan.* When a new statutory provision will eliminate or limit a remedy, it will not be applied retroactively. The new provisions of 814.7 eliminate the right of a defendant to seek relief for the violation of his constitutional rights to the effective assistance of counsel by raising the issue on direct appeal. The remedy is now limited to PCR proceedings.

The State has not raised an argument under the new Section 814.6. That section now would generally not allow a direct appeal in a case like the instant, a class "D" felony or misdemeanor where the defendant pled guilty. Again, this statute is eliminating and limiting a remedy. It can only be applied in a prospective fashion. Even if the new provisions of 814.6 were applied here, the Court would have to reach the merits. A direct appeal is still allowed from a guilty plea "in a case where the defendant establishes good cause." The statute does not define "good cause", but in light of the new 814.7, the good cause would not be ineffective assistance of counsel. In the instant case, the attorneys and the judge knowingly engaging in a violation of statutory law would have to be good cause

for raising a defective plea proceeding. If that is not good cause, what possibly could be?

The new provisions of Section 814.6 and 814.7 can only be applied prospectively. Mr. Gordon asserted those rights in the instant appeal before July 1, 2019. The Court must now decide the issue of ineffective assistance on its merits.

C. The Merits

PRESERVATION OF ERROR: The theme that runs all through the State's argument on the merits is that the Court should adopt the rationale that the ends justify the means. On error preservation, the State assigns the illegal procedure the district court knowingly and willingly engaged as Mr. Gordon's fault for two reasons. First, the district court was not at fault for following the illegal release procedure because Mr. Gordon invited the error when his lawyer asked the judge to do it. (St. Br. 10) Second, when the judge followed the illegal procedure that Mr. Gordon requested, it was not the judge's fault because Mr. Gordon did not

tell him it was illegal by filing a Motion in Arrest of Judgment. (St. Br. 11) Neither of these excuses apply to this peculiar instance of ineffective assistance of counsel.

The State's position that Mr. Gordon invited the error relies on two cases from 1968 and 1958. Those cases predate *Strickland* by 16 and 26 years respectively, and not surprisingly, neither case involves a claim of ineffective assistance of counsel. Neither of those cases involved a situation where the attorneys for both parties and the trial judge all cooperated in violating the law. The violation in the instant case was not a mere waiver of a rule of procedure. It was a violation of statutes in The Code. A lawyer is not relieved from the duty to follow and uphold the law simply because her client asks her to seek an illegal result. By the same token, the State and the judge are not relieved from that duty simply because the defense attorney *asks* them to implement an illegal procedure. Judge Fangman was correct in refusing the request, and that refusal temporarily prevented defense counsel from being ineffective. Counsel persisted to find a forum where the illegal plea agreement could be implemented. The guilty plea was illegally induced and executed, and everyone involved knew it. It was defense counsel's failure to advance a Motion in Arrest of Judgment in the process, not Mr.

Gordon's failure. Where counsel is ineffective in failing to file the motion, the Court will adjudicate the defect in the plea on direct appeal. *State v. Weitzel,* 905 N.W. 2d 397, 401 (Iowa 2017) Mr. Gordon cited this authority for preservation of error in his opening brief at page 13. The State failed to address it.

Essential Duty: On the merits, the State's advocacy for the ends justifying the means goes into high gear. Defense counsel's initiation of illegal acts is justified in the State's eyes because Mr. Gordon "received the plea he bargained for even if the furlough was illegal". Secondly, the State maintains defense counsel was not ineffective because "his counsel achieved a remarkable result". (St. Br. 12-13) The bottom line is that when a defense lawyer knowingly urges a violation of the law, the Court must conclude she failed in an essential duty.

Prejudice: Finally, the State maintains counsel was not ineffective because the Defendant got a favorable bargain on the charges he was facing. (St. Br. 13) The favorability of the deal is not the criterion for assessing prejudice. The question is whether the defendant would have insisted on going to trial if counsel had not been ineffective by inducing a defective guilty plea procedure. Mr. Gordon explained this application of the *Strickland* prejudice standard to the

instant case at length in his opening brief at pages 21-23. The State failed to address it. Additionally, Mr. Gordon advanced the argument that because the attorneys and district court knowingly engaged in a violation of The Code, the error should be deemed structural, and prejudice must be presumed. (Open Br. 23-24) The State failed to address the argument.

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