

IN THE SUPREME COURT OF IOWA  
Supreme Court No. 18-1099

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STATE OF IOWA,  
Plaintiff-Appellee,

vs.

TERRENCE MARTEZ GORDON,  
Defendant-Appellant.

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APPEAL FROM THE IOWA DISTRICT COURT  
FOR BLACK HAWK COUNTY  
THE HONORABLE JOEL A. DALRYMPLE, JUDGE

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**APPELLEE'S BRIEF**

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**STATEMENT OF THE ISSUES PRESENTED FOR  
REVIEW**

**I. This Court should dismiss Gordon’s appeal because he absconded and Senate File 589 will demand it.**

**Authorities**

*Hannan v. State*, 732 N.W.2d 45 (Iowa 2007)  
*Smith v. Korf, Diehl, Clayton & Cleverly*, 302 N.W.2d 137  
(Iowa 1981)  
*State v. Dyer*, 551 N.W.2d 320 (Iowa 1996)  
Iowa Code § 814.7  
Iowa Code § 3.7(1)  
S.F. 589, 88th GA, § 31 (2019)

**II. Gordon’s claim is moot, and his counsel was not ineffective by getting him a favorable plea deal.**

**Authorities**

*Strickland v. Washington*, 466 U.S. 668 (1984)  
*State v. Hawkeye Bail Bonds, Sur.*, 565 N.W.2d 615  
(Iowa 1997)  
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*State v. Sage*, 162 N.W.2d 502 (Iowa 1968)  
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Iowa Code § 811.1, .2  
Iowa Code § 814.7(2)  
Iowa R. Crim. P. 2.8(2)(d)

## **ROUTING STATEMENT**

None of the retention criteria in Iowa Rule of Appellate Procedure 6.1101(2) apply to the issues raised in this case, so transfer to the Court of Appeals is appropriate. Iowa R. App. P. 6.1101(1).

## **STATEMENT OF THE CASE**

### **Nature of the Case**

Defendant Terrence Martez Gordon appeals his convictions following his guilty plea for assault on a peace officer with a dangerous weapon in violation of Iowa Code sections 708.3A(2) and 708.1, two counts of assault on a peace officer in violation of Iowa Code sections 708.3A(4) and 708.1, public intoxication as a third offense in violation of Iowa Code sections 123.46(2) and 123.91(2), and fifth degree criminal mischief in violation of Iowa Code sections 716.1 and 716.6. After sentencing Gordon, the district court delayed mittimus two days to provide Gordon a 48-hour furlough. Gordon failed to return from his furlough and has not been found.

### **Course of Proceedings and Facts**

Officers responded to a reported assault. Mins. of Test. (3/25/2018) at 1; C.App.4. Gordon threatened an officer with a snow shovel, spit on an officer, spit at an officer, and broke a window in the

police car. Tr. Plea Hr'g, 23:20 to 24:25. He did all this while drunk in public. *Id.*

As a condition to pleading guilty, Gordon demanded a 48-hour furlough from jail. Tr. Hr'g (5/29/2018) at 2:19–24, 10:14–17. After Judge Linda Fangman refused to take Gordon's plea with the furlough condition because she believed it violated the prohibition on bond for forcible felons, Gordon asked if he could try to find another judge. *Id.* at 1, 10:14 to 11:1, 13:10–21.

Judge Dalrymple agreed to take the plea and be bound by the agreement. Tr. Plea Hr'g, 38:3–9; J. & Sentence (6/5/2018) at 1; App.11. Gordon pleaded guilty to five crimes all via an *Alford*<sup>1</sup> plea. Tr. Plea Hr'g, 30:25 to 32:3. The Court sentenced Gordon to prison on all counts but ran his sentences concurrently for a 5-year total though Gordon's total sentencing exposure was 9 years 30 days. J. & Sentence (6/5/2018) at 1–2; App.11–12. The court also granted Gordon the 48-hour furlough. *Id.* at 2; App.12.

Gordon never returned from his furlough. *See* Bench Warrant (6/8/2018); App.16; Mot. Stay Appeal (11/14/2018) at 2–3. The district court issued an arrest warrant. Bench Warrant (6/8/2018);

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<sup>1</sup> *North Carolina v. Alford*, 400 U.S. 25 (1970).

App.16. Later, Gordon's trial counsel filed a notice of appeal. Notice of Appeal (6/25/2018); App.17.

Gordon's first appellate counsel moved to stay Gordon's appeal because counsel had not located or spoken with Gordon. Mot. Stay Appeal (11/14/2018) at 2–4. Counsel observed that the furlough may be an illegal sentence but by vacating Gordon's plea Gordon may get a longer sentence. *Id.* at 3–4.

The State moved to dismiss the appeal because Gordon absconded. Rest. Stay (11/27/2018). A Justice ordered the issue submitted with the appeal. Order (12/19/2018). After his first counsel withdrew, Gordon's second counsel filed an appellate brief. At the time the State filed its amended proof brief Gordon has not been found, and the warrant has not been returned.

## ARGUMENT

- I. **This Court should dismiss Gordon's appeal because he absconded and Senate File 589 will demand it.**
  - A. **Because Gordon is a fugitive, this Court should dismiss his appeal.**

This Court dismisses fugitives' appeals. *State v. Dyer*, 551 N.W.2d 320, 321 (Iowa 1996) (per curiam). Gordon is a fugitive: he failed to return to jail after the 48-hour furlough expired. Bench Warrant (6/8/2018); App.16; Mot. Stay Appeal (11/14/2018) at 2–3;



Gordon Br. at 21. The district court filed a bench warrant that has not been returned. Bench Warrant (6/8/2018); App.16. Indeed, he appears to still be at large. Mot. Stay Appeal (11/14/2018) at 3–4; *see also* Gordon Br. at 21. Because Gordon has fled justice, he forfeits his right to appeal and this Court should dismiss it. *Dyer*, 551 N.W.2d at 321.

**B. If this Court decides Gordon’s appeal after July 1, 2019,<sup>2</sup> under Senate File 589 it should decline to address the merits, allowing him to assert his claims in a post-conviction-relief action instead.**

Senate File 589 amends Iowa Code section 814.7 to specify that claims alleging ineffective assistance of counsel “shall not be decided on direct appeal from the criminal proceedings,” and shall be brought in postconviction actions instead. *See* S.F. 589, 88th GA, § 31 (2019). The bill applies to pending proceedings like Gordon’s because it is procedural. *See Smith v. Korf, Diehl, Clayton & Cleverly*, 302 N.W.2d 137, 138–39 (Iowa 1981) (“[I]f a procedural statute is amended, the rule is that the amendment applies to pending proceedings ....”). The Iowa Supreme Court applied section 814.7 retrospectively when it was first enacted because it was a procedural statute addressing a

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<sup>2</sup> Senate File 589 does not specify its effective date, which means that it will become effective on July 1, 2019. *See* Iowa Code § 3.7(1).

procedural problem. *Hannan v. State*, 732 N.W.2d 45, 51 (Iowa 2007). It held that section 814.7 was procedural because it “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.” *Id.* (cleaned up). That same analysis applies to this amendment because it prescribes a procedure for asserting and deciding ineffective-assistance claims. *See id.*; accord S.F. 589, 88th GA, § 31. Applying Senate File 589 does not deprive Gordon of his ability to raise these claims because he can assert them in a post-conviction relief action. S.F. 589, 88th GA, § 31.

**II. Gordon’s claim is moot, and his counsel was not ineffective by getting him a favorable plea deal.**

**Preservation of Error**

Gordon has not preserved his claim that his plea was conditioned on an illegal furlough for two reasons.

First, as it relates to his counsel’s ineffectiveness, he cannot get relief from an error he invited. *E.g.*, *State v. Sage*, 162 N.W.2d 502, 504 (Iowa 1968) (quoting *State v. Rasmus*, 90 N.W.2d 429, 430 (Iowa 1958)). Applying this rule here is just because Gordon insisted on the furlough. Tr. Hr’g (10/9/2018) at 2:19–24, 10:14–19. And this claim is not one for an illegal sentence because the district court

merely delayed mittimus, which is not part of the sentence. *See* Tr. Plea Hr'g, 8:5–11; J. & Sentence (6/5/2018) at 2; App.12. Rather, it is how a judgment is carried out. *State v. Hawkeye Bail Bonds, Sur.*, 565 N.W.2d 615, 617 (Iowa 1997) (quoting *State v. Orte*, 540 N.W.2d 435, 437 (Iowa 1995)).

If this Court disagrees, ineffective assistance is an exception to error preservation that it can address if the record is adequate. *State v. Thorndike*, 860 N.W.2d 316, 319 (Iowa 2015) (citing Iowa Code § 814.7(2)).

Second, to the extent Gordon argues the prosecutor engaged in misconduct warranting relief by joining the request for an illegal furlough, he failed to file a motion in arrest of judgment attacking his plea. Combine General Docket (6/25/2018); App.19. But as the district court informed him, he could not contest the plea without filing a motion in arrest of judgment. Tr. Plea Hr'g, 32:10 to 33:1. His claim, therefore, is unpreserved. Iowa R. Crim. P. 2.8(2)(d).

### **Standard of Review**

This Court reviews ineffective-assistance claims de novo. *Thorndike*, 860 N.W.2d at 319. To prevail, Gordon must prove his counsel breached a duty and prejudice resulted. *Strickland v.*

*Washington*, 466 U.S. 668, 687 (1984); *see also State v. Ortiz*, 789 N.W.2d 761, 764 (Iowa 2010).

### **Merits**

As part of Gordon's plea, the district court granted him a 48-hour furlough. *J. & Sentence* (6/5/2018) at 2; App.12. Despite insisting on the furlough, Gordon now says it violated the law because he pleaded guilty to a forcible felony. *Gordon Br.* at 16 (citing Iowa Code § 811.1, .2)). He claims his counsel was ineffective for allowing him to enter a guilty plea that required the district court to illegally furlough him. *Id.* at 13, 19–24.

First, the claim is moot. Gordon's claim attacks the illegality of the two-day furlough. But he has already received that furlough. This Court cannot unwind time to un-furlough Gordon. Gordon, therefore, received the plea he bargained for even if the furlough was illegal. Indeed, Gordon used the furlough to abscond, which was likely his plan all along. This Court should decline to invalidate Gordon's plea because of an illegal condition he demanded and has benefited from.

Second, Gordon cannot prove a breach of duty on his ineffectiveness claim because his counsel achieved a remarkable result. Counsel secured Gordon a plea that included the illegal

furlough that Gordon wanted. J. & Sentence (6/5/2018) at 1–2; App.11–12. After Gordon’s counsel got this concession, Gordon used it to abscond. *See* Bench Warrant (6/8/2018); App.16; Mot. Stay Appeal (11/14/2018) at 2–4. Thus, counsel got Gordon the benefit he wanted: to flee justice. And he appears not to have been found. He has been free for months when he would otherwise have been in prison and he may never be found, in which case counsel will have gotten Gordon a plea deal that entirely avoids the consequences of his illegal acts. Moreover, Gordon’s appellate lawyers insist that because the furlough was illegal, he cannot be prosecuted for absconding. While that claim is not before the court, if they are right, Gordon’s trial counsel got him, at minimum, months of freedom without additional punishment via the furlough.

Plus, the plea was highly favorable to Gordon independent of the furlough. Counsel negotiated a 5-year sentence that the district court had to accept when Gordon faced up to 9 years and 30 days. J. & Sentence (6/5/2018) at 1, 2; App.11, 12; *see also* Mot. Stay Appeal (11/14/2018) at 4. That is a good outcome, not a breach of duty. Indeed, if Gordon’s appeal prevails and his plea is vacated, Gordon may have a winning ineffective-assistance claim against his current

appellate lawyer for losing Gordon his 5-year sentence to re-expose him to up to 9 years and 30 days.

### **CONCLUSION**

For the foregoing reasons, the State respectfully requests that this Court dismiss Gordon's appeal. Alternatively, the State requests that this Court affirm his convictions and sentence.

### **REQUEST FOR NONORAL SUBMISSION**

This case is appropriate for nonoral submission.

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:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **1,713** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: July 8, 2019



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