The “Criminal Omnibus” & Its Trending Issues

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Presentation Materials

THE "CRIMINAL OMNIBUS" & ITS TRENDING ISSUES

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Continuing Legal Education for Government Attorneys
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SF 589 – Criminal Omnibus

Misdemeanor Expungement

- New Section 901.C.3
- Application by Defendant in county of conviction.
- Court **shall** enter order expunging record of criminal case, if Defendant **proves** all the following:
  - More than 8 years has passed since date of conviction;
  - No pending criminal charges;
  - Defendant not previously been granted 2 deferred judgments;
  - Defendant paid all court costs, fines, fees, restitution or other financial obligations ordered or assessed by the court.

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Misdemeanor Expungement- Exceptions to Expungement

- **The following misdemeanors shall not be expunged**:
  - Simple misdemeanor 123.46 and 123.47(3) or similar local ordinance (Public Intox / PULA);
  - Dependent Adult Abuse under 235B.20;
  - Driver's license violations under 321.218; 321A.32; 321J.21;
  - OWI under 321J.2;
  - Sex Offense conviction as defined in 692A.101;
  - Involuntary Manslaughter as defined in 707.5;
  - Assault with a Dangerous Weapon as defined in 708.2(3);
  - DA Assault under 708.2A;
  - Harassment under 708.7;
  - Stalking under 708.11;
  - Removal of Officer's Communication or Control Device 708.12;
  - Trespass under 716.8(3) or (4);
  - Bestiality under 717C.1;
  - Chapter 719 convictions (obstructing justice);
  - Chapter 720 convictions (Interference with Judicial Process);
  - Convictions under 721.2 (Nonfelonious Misconduct in Office);

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Misdemeanor Expungement- Exceptions to Expungement

- **The following misdemeanors shall not be expunged**:
  - Convictions under 721.10 (Misuse of Public Records and Files);
  - Convictions under 723.1 (Riot);
  - Convictions under Chapter 724 (Weapons);
  - Convictions under Chapter 726 (Protection of Family/Dependent Person);
  - Convictions under Chapter 728 (Obscenity);
  - Convictions under Chapter 901A (Sexually Predatory Offenses);
  - Convictions for comparable offense listed in 49 C.F.R. 383.51(b) or (e) – Commercial Drivers Licenses; or
  - Any conviction under prior law of a comparable offense listed above.

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Misdemeanor Expungement – Limitations

- Person shall be granted **one (1)** expungement of record under Section 901C.3 in the persons lifetime.
- The one (1) application may request expungement of records relating to more than one misdemeanor offense if the misdemeanor offenses arose from same transaction or occurrence - application contains the misdemeanor offenses to be expunged.
- Expunged record is a confidential record exempt from public access (22.7), clerk shall make available upon court order.
- Record shall be removed from criminal history data files of DPS when clerk notifies the Department.
- Supreme Court may prescribe rules.
- Applies to misdemeanor conviction that occurred prior to, on, or after July 1, 2019.

SF 589 – Criminal Omnibus

Misdemeanor Expungement – Potential Challenges

- Contains same requirement as dismissal-acquittal expungements to repay court costs/fees. That provision was recently challenged in *State v. Doe*, 927 N.W.2d 656 (Iowa 2019)
- Doe made a facial challenge arguing that requiring defendants to pay all court appointed attorneys fees before the court could grant expungement violated equal protection because defendants that hired private counsel did not have to prove they paid their attorney in full.
  - Iowa Supreme Court applied rational basis review & rejected Doe's facial challenge.
- Doe has since filed cert. petition with U.S. Supreme Court. Three amicus briefs in support of Doe have been filed and the court has requested a response from the State. (U.S. Sup. Ct. Docket No. 19-169)

SF 589 – Criminal Omnibus

Robbery- Aggravated Theft

- **Repeals Robbery 3rd – 711.3A**!!!!!!
- Individuals serving a Robbery 1st sentence for a conviction after **July 1, 2018**, shall serve between 50-70% of sentence prior to parole or work release.
- At sentencing after conviction of Robbery 1st, court shall determine when person shall be first become eligible for parole or work release:
  - Based on all pertinent information, including criminal record, validated risk assessment, negative impact of crime on victim or others.
- Aggravated Theft is moved from 714.3A to 711.3B.

SF 589 – Criminal Omnibus

Robbery- Aggravated Theft

- Unresolved question: The legislature made the sentencing change for Robbery 1st retroactive to **July 1, 2018**, instead of starting it on July 1, **2019**. Was this an oversight or was it meant to say July 1, 2018????
- In any event, defendants who were sentenced after July 1, 2018, will likely try to take advantage of the apparent typo.
- Our office has already received at least one brief arguing they are entitled to resentencing in light of the legislative amendment. That case, however, dealt with a negotiated plea agreement from a first degree murder charge. (Sup. Ct. No. 19-0492)

SF 589 – Criminal Omnibus

Property Crimes - Value

- Increases the value of damaged or stolen property or services.
- **Theft**, **Fraudulent Practice**, **Criminal Mischief**, **Railroad Vandalism** : Simples – not exceed $300 ($200); Serious $300-$750 ($200-$500); Aggravated $750-$1,500($500-$1,000); D Felony $1,500-$10,000 ($1,000-$10,000).
- **Arson Second** : now needs to exceed $750 ($500).
- **Aggravated Theft** : is now property not exceeding $300 ($200).
- **Credit Card and Identity Theft** : D Felony $1,500- $10,000 ($1,000-$10,000); Aggravated is $1,500 or less ($1,000 or less).
- **Trespass** : Damage to property more than $300 ($200);hate crime more than $300 ($200).
- **Transmission of Unsolicited Bulk Mail** : D Felony - revenue exceeds $1,500 ($1000).

SF 589 – Criminal Omnibus

Property Crimes - Value

- Issue with Theft 3rd – Theft with 2 priors pursuant to 714.2(3) – language was not amended.
- "3. The theft of property exceeding seven hundred fifty dollars but not exceeding one thousand five hundred dollars in value, or the theft of any property not exceeding five hundred dollars in value by one who has before been twice convicted of theft, is theft in the third degree. Theft in the third degree is an aggravated misdemeanor."
- Should read "… or theft of any property not exceeding seven hundred fifty dollars in value by one who has before been twice convicted of theft, is theft in the third degree…".
- So, if the value of property is between $500 and $750 it is a Theft 4th, EVEN if the person has two prior theft convictions.

SF 589 – Criminal Omnibus

Public Intoxication – 123.46

- Amends Section 123.91 the sentencing enhancement provisions for second and subsequent convictions.
- Public Intoxication convictions under code section 123.46 are no longer subject to enhancement for 2nd and subsequent convictions.
- **NO MORE PUBLIC INTOX 2ND OR 3RD! All are SIMPLES !!!!**

SF 589 – Criminal Omnibus

Sentencing Impact

- *State v. Chrisman*, 514 N.W. 2nd 57, 62 (Iowa 1994) – revised penalties apply to all cases pending (not yet sentenced) as of the statute's effective date.
  - *Chrisman* based on Iowa Code § 4.13(2) ("[The] punishment if not already imposed shall be imposed according to the statute as amended.").
- July 1, 2019 effective date.
- SF 589 reduces punishment by changing elements of the offense.
- It doesn't matter if crime occurred prior to July 1st or if defendant plead/found guilty of offense before July 1st; **Court must use revised penalties for sentencing**.
- Still guilty of more serious offense (e.g., Theft 3rd – but sentenced as if Theft 4th).

SF 589 – Criminal Omnibus

Fraud and Forgery Provisions

- Amends Forgery 715A.2(2)(a)(5) – a person commits forgery when person possesses a writing that purports to be a DL, nonoperator ID card, birth certificate; occupational license or certification issued by department, agency, board or commission – Class D felony.
  - *State v. Martinez*, 896 N.W.2d 737 (Iowa 2017), had rejected as preempted prior forgery provision that defined forgery as possessing fake IDs for immigration purposes
  - *Side note: it is now a felony to have a fake ID to buy tobacco/alcohol/etc.*
- By amending definition of forgery – Amends 715A.2A Accommodation Forgery- changes circumstances under which employer is subject to civil penalty for hiring person who commits forgery above.
- Extends Statute of Limitation under 802.5 – where statute of limitations has expired, prosecution for offense where fraud or breach of fiduciary duty is a material element within one year after discovery, but not extend limitation by more than **5 years** (3).
- Also amends 802.5 – Prosecution can go forward as long as law enforcement has not delayed investigation in bad faith. Law enforcement not required to pursue unknown offender with due diligence.

SF 589 – Criminal Omnibus

Arson in First Degree

- Amends Section 902.12 to include the offense of Arson 1st Degree.
- Convictions that occur on or after July 1, 2019 shall serve – 50-70% of sentence.
  - *Note that the legislature used 2019 and not 2018 here…*
- Amends 901.11 to include Arson First – Sentencing court shall consider all pertinent information in determining (50-70%) which includes the person's criminal record, a validated risk assessment and negative impact of the offense on the victim or other persons.

SF 589 – Criminal Omnibus

Sentencing – Presentence Determinations and Statements

- New Section 901.4B – Sets forth the sequence of events and what court shall do at sentencing:
  - Verify that Defendant and their attorney read the PSI and any addendum.
  - Provides Defendant's attorney an opportunity to speak on behalf of defendant.
  - Address defendant personally – permit Defendant to make a statement or present information in mitigation of sentence.
  - Provide prosecutor an opportunity to speak.
- After the statements above and before imposing sentence, court shall address victim(s) present (Victim as defined in 915.10) and allow the victim to be reasonably heard, including by presenting a victim impact statement in a manner as set forth in 915.21.
  - Statute states "After hearing any statements presented pursuant to subsection 1," but is it error to hear from victim before the defendant?

SF 589 – Criminal Omnibus

Statute of Limitations – Certain Sex Offenses

- Amends Section 802.2 – Statute of Limitations for Sexual Abuse First, Second and Third from within 10 years after person turns eighteen years old to within **15** years.
- Amends Section 802.2A – Statute of Limitations for Incest (726.2) and Sexual Exploitation by counselor, therapist or school employee (709.15) from within 10 years after person turns eighteen years old to within **15** years.

SF 589 – Criminal Omnibus

Criminal Proceedings – Right to Appeal

- Amends 814.6 (Defendant's Right to Appeal) – Precludes the Defendant from appealing a conviction where the Defendant pled guilty.
- Exceptions: Guilty Plea to a Class "A" felony or a case where the Defendant establishes good cause.
- Unintended consequences?????
- Amends 814.6 (2) Discretionary Appeal – New Ground – Order denying Motion in Arrest of Judgment (except ineffective assistance of counsel claim).

SF 589 – Criminal Omnibus

Criminal Proceedings – Right to Appeal

- Does this change apply to cases pending prior to July 1st?
- NOT Retroactive because 589 did not explicitly make it retroactive.
  - *State v. Macke*, Sup. Ct. No. 18-0839, 2019 WL 4382985
- Because change was not retroactive, court did not address constitutional challenges raised:
  - Separation of powers
  - Equal protection
  - Due process

SF 589 – Criminal Omnibus

Criminal Proceedings – Right to Appeal

- Court ordered parties to brief what "good cause" meant, but because statute was found not retroactive, court did not decide the issue.
- Current arguments on what constitutes "good cause":
  - Defense bar: Any non-frivolous claim & claims that cannot be addressed elsewhere
  - State: Extraordinary legal claim that cannot be addressed elsewhere (e.g., PCR)
- When and how to argue good cause to appeal?
  - Procedure not established yet. Unclear if must be addressed by motion or in briefing
  - Majority of post-July 1st guilty plea appeals have simply filed a notice of appeal
  - So far only a couple of instances where attorney did not file notice of appeal:
    - Application to supreme court requesting permission to appeal
    - Defendant received an order finding "good cause" to appeal from district court

SF 589 – Criminal Omnibus

Criminal Proceedings – Ineffective Assistance Claims on Direct Appeal

- Amends 814.7 relating to ineffective claims on direct appeal.
- Now prohibits an ineffective claim from being decided on direct appeal.
- Ineffective Assistance claims shall determined by filing a PCR pursuant to chapter 822.
- More PCR's????

SF 589 – Criminal Omnibus

Criminal Proceedings – Ineffective Assistance Claims on Direct Appeal

- Does this change apply to cases pending prior to July 1st?
  - Also NOT retroactive. (*Macke*)
- Constitutional challenges being raised:
  - Separation of powers
  - Equal protection
  - Due process
  - Right to effective appellate counsel

SF 589 – Criminal Omnibus

Criminal Proceedings – Ineffective Assistance Claims on Direct Appeal

- Common argument being raised: This change is grounds for adopting **plain error** review
- What is plain error review?
  - Permits appellate court to correct an unpreserved error if:
  - Error clear or obvious, prejudicial, and not affirmatively waived
- Arguments about plain error:
  - Defense bar: If appellate court can no longer fix an obvious but unpreserved error through IAC, it should adopt plain error or there is no remedy (or a lengthy delay)
  - State: Court has already repeatedly declined to adopt plain error. Can still raise IAC claims in PCR & court already preferred PCR for such claims. PCR does not have to be slow. Would subvert legislature's intent to move such claims to PCR.

SF 589 – Criminal Omnibus

Criminal Proceedings – Pro Se Filings

- New Code Section 814.6A
- Provides that the Defendant who is currently represented by counsel **shall not** file any pro se document, brief, reply brief or motion **in any Iowa court.**
- Provides that the court **shall not consider** and **counsel shall not respond** to those pro se filings.
- Doesn't prohibit defendant from proceeding without assistance of counsel.
- Defendant may file a pro se motion seeking disqualification of counsel- court may grant upon showing of good cause.

SF 589 – Criminal Omnibus

Criminal Proceedings – Pro Se Filings

- Does this change apply to cases pending prior to July 1st?
- Possibly. Supreme Court ordered supplemental briefing on the issue. (Sup. Ct. Nos. 18-1471 & 18-1549). BUT then transferred both cases to the court of appeals.
  - Defense bar: Not explicitly retroactive (same as *Macke*). Substantive change. General savings provision applies (Iowa Code § 4.13(1))
  - State: Intent clear: "court shall not consider." Only changes procedure of presenting issues. Remedies judicial inefficiencies caused by pro se filings.
- Constitutional challenges being raised:
  - Separation of powers
  - Due process

SF 589 – Criminal Omnibus

Criminal Proceedings – General Verdicts

- New Section 814.28 – General Verdicts
- When prosecution relies on multiple theories to prove an offense, jury can return a general verdict.
- Appellate courts shall not set aside or reverse verdict on basis of a defective or insufficient theory, if one or more of theories presented in information or jury instruction is sufficient to sustain the verdict on at least one count.
- Overrules *Schlitter, Tyler and Hogrefe.*
- Practice Tips: Charge and instruct on those theories where there is substantial evidence. Consider providing interrogatories for the jury.

SF 589 – Criminal Omnibus

Criminal Proceedings – General Verdicts

- Retroactive?
  - Briefed but not yet resolved (Sup. Ct. No. 18-1487)
- Constitutional challenges being raised:
  - Separation of powers
  - Equal protection (applies to only criminal cases, not equally to civil)
  - Due process
- Defense bar: 589 did not overrule ability for **district court** to grant new trial based on general verdict, only the appellate court's ability to set aside or reverse verdict.
  - *But* bill provides "a jury may return a general verdict."

SF 589 – Criminal Omnibus

Criminal Proceedings – Guilty Pleas

- New Section 814.29 – Challenges to Guilty Pleas - Alleged defect in plea.
- Defendant challenging a guilty plea made by a motion in arrest of judgment or on appeal has burden.
- Pleas shall not be vacated unless Defendant demonstrates that they more likely than not would not have pled guilty if the defect had not occurred.
- Similar to proving prejudice for ineffective-assistance-of-counsel claim
- Any provisions with the I.R.Cr.P. that are inconsistent with this section have no legal effect.

SF 589 – Criminal Omnibus

Criminal Proceedings – PCR's

- Amends Section 822.3 – "Allison" fix or clarification.
- Provides new language that the allegation of ineffective assistance of counsel in prior PCR does not toll or extend the statute of limitations in 822 nor does the claim relate back to a prior PCR to avoid the statute of limitations.
- New Section 822.3B – Pro Se filing restriction – Applicant represented by counsel **not file** any pro se document **in any** Iowa court.
- Not restrict applicant proceeding without counsel or filing a pro se motion to disqualify counsel.
- Amends 822.6 – Strikes section requiring applicant/respondent from filing with their answer portions of record that are material to questions raised in application.

SF 158 – PCR Record

Postconviction Relief Records

- Upon filing of a PCR application, the "underlying trial court record" and "any previous application filed by the applicant relating to the same conviction, shall automatically become part of the record"
- Clerk is required to make underlying record "accessible" and convert it into an electronic format. Same if an attorney requests access to prior PCR files.
- Clerk's advice: If you are attorney in a PCR in district court OR on appeal, make it clear to the district court clerk **ASAP** what file(s) will need to be converted because conversion is extremely time consuming!
  - Talk to the local clerk to see how they want notified (call, email, filing, etc.)

SF 589—Criminal Omnibus

RELATING TO CRIMINAL LAW AND PROCEDURE INCLUDING CERTAIN RELATED ADMINISTRATIVE PROCEEDINGS, PROVIDING PENALTIES, AND INCLUDING EFFECTIVE DATE AND APPLICABILITY PROVISIONS.

DIVISION I
EXPUNGEMENTS

Section 1. Section 123.46, subsection 6, Code 2019, is amended to read as follows:

6. Upon the expiration of two years following conviction for a violation of this section ~~and a violation~~ or of a similar local ordinance ~~that arose from the same transaction or occurrence~~, a person may petition the court to expunge the conviction ~~including the conviction for a violation of a local ordinance that arose from the same transaction or occurrence~~, and if the person has had no other criminal convictions, other than local traffic violations or simple misdemeanor violations of chapter 321 during the two-year period, the conviction ~~and the conviction for a violation of a local ordinance that arose from the same transaction or occurrence~~ shall be expunged as a matter of law. The court shall enter an order that the record of the conviction ~~and the conviction for a violation of a local ordinance that arose from the same transaction or occurrence~~ be expunged by the clerk of the district court. Notwithstanding section 692.2, after receipt of notice from the clerk of the district court that a record of conviction ~~and the conviction for a violation of a local ordinance that arose from the same transaction or occurrence~~ has been expunged, the record of conviction ~~and the conviction for a violation of a local ordinance that arose from the same transaction or occurrence~~ shall be removed from the criminal history data files maintained by the department of public safety if such a record was maintained in the criminal history data files.

Sec. 2. NEW SECTION. **901C.3 Misdemeanor —— expungement.**

1. Upon application of a defendant convicted of a misdemeanor offense in the county where the conviction occurred, the court shall enter an order expunging the record of such a criminal case, as a matter of law, if the defendant has proven all of the following:

a. More than eight years have passed since the date of the conviction.

b. The defendant has no pending criminal charges.

c. The defendant has not previously been granted two deferred judgments.

d. The defendant has paid all court costs, fees, fines, restitution, and any other financial obligations ordered by the court or assessed by the clerk of the district court.

2. The following misdemeanors shall not be expunged:

a. A conviction under section 123.46.

b. A simple misdemeanor conviction under section 123.47, subsection 3, or similar local ordinance.

c. A conviction for dependent adult abuse under section 235B.20.

d. A conviction under section 321.218, 321A.32, or 321J.21.

e. A conviction under section 321J.2.

f. A conviction for a sex offense as defined in section 692A.101.

g. A conviction for involuntary manslaughter under section 707.5.

h. A conviction for assault under section 708.2, subsection 3.

i. A conviction under section 708.2A.

j. A conviction for harassment under section 708.7.

k. A conviction for stalking under section 708.11.

l. A conviction for removal of an officer's communication or control device under section 708.12.

m. A conviction for trespass under section 716.8, subsection 3 or 4.

n. A conviction under chapter 717C.

o. A conviction under chapter 719.

p. A conviction under chapter 720.

q. A conviction under section 721.2.

r. A conviction under section 721.10.

s. A conviction under section 723.1.

t. A conviction under chapter 724.

u. A conviction under chapter 726.

v. A conviction under chapter 728.

w. A conviction under chapter 901A.

x. A conviction for a comparable offense listed in 49 C.F.R. §383.51(b) (table 1) or 49 C.F.R. §383.51(e) (table 4).

y. A conviction under prior law of an offense comparable to an offense enumerated in this subsection.

3. A person shall be granted an expungement of a record under this section one time in the person's lifetime. However, the one application may request the expungement of records relating to more than one misdemeanor offense if the misdemeanor offenses arose from the same transaction or occurrence, and the application contains the misdemeanor offenses to be expunged.

4. The expunged record under this section is a confidential record exempt from public access under section 22.7 but shall be made available by the clerk of the district court upon court order.

5. Notwithstanding section 692.2, after receipt of notice from the clerk of the district court that a record of conviction has been expunged under subsection 1, the record of conviction shall be removed from the criminal history data files maintained by the department of public safety if such a record was maintained in the criminal history data files.

6. The supreme court may prescribe rules governing the procedures applicable to the expungement of a criminal case under this section.

7. This section applies to a misdemeanor conviction that occurred prior to, on, or after July 1, 2019.

DIVISION II
ROBBERY —— AGGRAVATED THEFT

Sec. 3. Section 711.3, Code 2019, is amended to read as follows:

711.3 Robbery in the second degree.

All robbery which is not robbery in the first degree is robbery in the second degree~~, except as provided in section 711.3A~~. Robbery in the second degree is a class "C" felony.

Sec. 4. NEW SECTION. **711.3B Aggravated theft.**

1. A person commits aggravated theft when the person commits an assault as defined in section 708.1, subsection 2, paragraph *"a"*, that is punishable as a simple misdemeanor under section 708.2, subsection 6, after the person has removed or attempted to remove property not exceeding three hundred dollars in value which has not been purchased from a store or mercantile establishment, or has concealed such property of the store or mercantile establishment, either on the premises or outside the premises of the store or mercantile establishment.

2. *a.* A person who commits aggravated theft is guilty of an aggravated misdemeanor.

b. A person who commits aggravated theft, and who has previously been convicted of an aggravated theft, robbery in the first degree in violation of section 711.2, robbery in the second degree in violation of section 711.3, or extortion in violation of section 711.4, is guilty of a class "D" felony.

3. In determining if a violation is a class "D" felony offense the following shall apply:

a. A deferred judgment entered pursuant to section 907.3 for a violation of any offense specified in subsection 2 shall be counted as a previous offense.

b. A conviction or the equivalent of a deferred judgment for a violation in any other states under statutes substantially corresponding to an offense specified in subsection 2 shall be counted as a previous offense. The courts shall judicially notice the statutes of other states which define offenses substantially equivalent to the offenses specified in this section and can therefore be considered corresponding statutes.

4. Aggravated theft is not an included offense of robbery in the first or second degree.

Sec. 5. Section 808.12, subsections 1 and 3, Code 2019, are amended to read as follows:

1. Persons concealing property as set forth in section ~~714.3A~~ 711.3B or 714.5, may be detained and searched by a peace officer, person employed in a facility containing library materials, merchant, or merchant's employee, provided that the detention is for a reasonable length of time and that the search is conducted in a reasonable manner by a person of the same sex and according to subsection 2 of this section.

3. The detention or search under this section by a peace officer, person employed in a facility containing library materials, merchant, or merchant's employee does not render the person liable, in a criminal or civil action, for false arrest or false imprisonment provided the person conducting the search or detention had reasonable grounds to believe the person detained or searched had concealed or was attempting to conceal property as set forth in section ~~714.3A~~ 711.3B or 714.5.

Sec. 6. Section 901.11, Code 2019, is amended by adding the following new subsection:

NEW SUBSECTION. 2A. At the time of sentencing, the court shall determine when a person convicted of robbery in the first degree as described in section 902.12, subsection 2A, shall first become eligible for parole or work release within the parameters specified in section 902.12, subsection 2A, based upon all pertinent information including the person's criminal record, a validated risk assessment, and the negative impact the offense has had on the victim or other persons.

Sec. 7. Section 902.12, subsection 1, paragraph e, Code 2019, is amended to read as follows:

e. Robbery in the ~~first or~~ second degree in violation of section ~~711.2 or~~ 711.3, except as determined in subsection 3.

Sec. 8. Section 902.12, Code 2019, is amended by adding the following new subsection:

NEW SUBSECTION. 2A. A person serving a sentence for a conviction for robbery in the first degree in violation of section 711.2 for a conviction that occurs on or after July 1, 2018, shall be denied parole or work release until the person has served between one-half and seven-tenths of the maximum term of the person's sentence as determined under section 901.11, subsection 2A.

Sec. 9. REPEAL. Sections 711.3A, 711.5, and 714.3A, Code 2019, are repealed.

DIVISION III
PROPERTY CRIMES —— VALUE

Sec. 10. Section 712.3, Code 2019, is amended to read as follows:

712.3 Arson in the second degree.

Arson which is not arson in the first degree is arson in the second degree when the property which is the subject of the arson is a building or a structure, or real property of any kind, or standing crops, or is personal property the value of which exceeds ~~five~~ seven hundred fifty dollars. Arson in the second degree is a class "C" felony.

Sec. 11. Section 714.2, Code 2019, is amended to read as follows:

714.2 Degrees of theft.

1. The theft of property exceeding ten thousand dollars in value, or the theft of property from the person of another, or from a building which has been destroyed or left unoccupied because of physical disaster, riot, bombing, or the proximity of battle, or the theft of property which has been removed from a building because of a physical disaster, riot, bombing, or the proximity of battle, is theft in the first degree. Theft in the first degree is a class "C" felony.

2. The theft of property exceeding one thousand five hundred dollars but not exceeding ten thousand dollars in value or theft of a motor vehicle as defined in chapter 321 not exceeding ten thousand dollars in value, is theft in the second degree. Theft in the second degree is a class "D" felony. However, for purposes of this subsection, *"motor vehicle"* does not include a motorized bicycle as defined in section 321.1, subsection 40, paragraph *"b"*.

3. The theft of property exceeding ~~five~~ seven hundred fifty dollars but not exceeding one thousand five hundred dollars in value, or the theft of any property not exceeding five hundred dollars in value by one who has before been twice convicted of theft, is theft in the third degree. Theft in the third degree is an aggravated misdemeanor.

4. The theft of property exceeding ~~two~~ three hundred dollars in value but not exceeding ~~five~~ seven hundred fifty dollars in value is theft in the fourth degree. Theft in the fourth degree is a serious misdemeanor.

5. The theft of property not exceeding ~~two~~ three hundred dollars in value is theft in the fifth degree. Theft in the fifth degree is a simple misdemeanor.

Sec. 12. Section 714.7B, subsection 6, paragraphs a and b, Code 2019, are amended to read as follows:

a. A simple misdemeanor if the value of the goods, wares, or merchandise does not exceed ~~two~~ three hundred dollars.

b. A serious misdemeanor if the value of the goods, wares, or merchandise exceeds ~~two~~ three hundred dollars.

Sec. 13. Section 714.10, subsection 1, Code 2019, is amended to read as follows:

1. Fraudulent practice in the second degree is the following:

a. A fraudulent practice where the amount of money or value of property or services involved exceeds one thousand five hundred dollars but does not exceed ten thousand dollars.

b. A fraudulent practice where the amount of money or value of property or services involved does not exceed one thousand five hundred dollars by one who has been convicted of a fraudulent practice twice before.

Sec. 14. Section 714.11, subsection 1, paragraph a, Code 2019, is amended to read as follows:

a. A fraudulent practice where the amount of money or value of property or services involved exceeds ~~five~~ seven hundred fifty dollars but does not exceed one thousand five hundred dollars.

Sec. 15. Section 714.12, Code 2019, is amended to read as follows:

714.12 Fraudulent practice in the fourth degree.

1. Fraudulent practice in the fourth degree is a fraudulent practice where the amount of money or value of property or services involved exceeds ~~two~~ three hundred dollars but does not exceed ~~five~~ seven hundred fifty dollars.

2. Fraudulent practice in the fourth degree is a serious misdemeanor.

Sec. 16. Section 714.13, Code 2019, is amended to read as follows:

714.13 Fraudulent practice in the fifth degree.

1. Fraudulent practice in the fifth degree is a fraudulent practice where the amount of money or value of property or services involved does not exceed ~~two~~ three hundred dollars.

2. Fraudulent practice in the fifth degree is a simple misdemeanor.

Sec. 17. Section 715A.6, subsection 2, paragraphs b and c, Code 2019, are amended to read as follows:

b. If the value of the property or services secured or sought to be secured by means of the credit card is greater than one thousand five hundred dollars but not more than ten thousand dollars, an offense under this section is a class "D" felony.

c. If the value of the property or services secured or sought to be secured by means of the credit card is one thousand five hundred dollars or less, an offense under this section is an aggravated misdemeanor.

Sec. 18. Section 715A.8, subsection 3, paragraphs b and c, Code 2019, are amended to read as follows:

b. If the value of the credit, property, services, or other benefit exceeds one thousand five hundred dollars but does not exceed ten thousand dollars, the person commits a class "D" felony.

c. If the value of the credit, property, services, or other benefit does not exceed one thousand five hundred dollars, the person commits an aggravated misdemeanor.

Sec. 19. Section 716.4, subsection 1, Code 2019, is amended to read as follows:

1. Criminal mischief is criminal mischief in the second degree if the cost of replacing, repairing, or restoring the property that is damaged, defaced, altered, or destroyed exceeds one thousand five hundred dollars but does not exceed ten thousand dollars.

Sec. 20. Section 716.5, subsection 1, paragraph a, Code 2019, is amended to read as follows:

a. The cost of replacing, repairing, or restoring the property that is damaged, defaced, altered, or destroyed exceeds ~~five~~ seven hundred fifty dollars, but does not exceed one thousand five hundred dollars.

Sec. 21. Section 716.6, subsection 1, paragraph a, subparagraph (1), Code 2019, is amended to read as follows:

(1) The cost of replacing, repairing, or restoring the property that is damaged, defaced, altered, or destroyed exceeds ~~two~~ three hundred dollars, but does not exceed ~~five~~ seven hundred fifty dollars.

Sec. 22. Section 716.8, subsections 2 and 4, Code 2019, are amended to read as follows:

2. Any person committing a trespass as defined in section 716.7, other than a trespass as defined in section 716.7, subsection 2, paragraph *"a"*, subparagraph (6), which results in injury to any person or damage in an amount more than ~~two~~ three hundred dollars to anything, animate or inanimate, located thereon or therein commits a serious misdemeanor.

4. A person committing a trespass as defined in section 716.7 with the intent to commit a hate crime which results in injury to any person or damage in an amount more than ~~two~~ three hundred dollars to anything, animate or inanimate, located thereon or therein commits an aggravated misdemeanor.

Sec. 23. Section 716.10, subsection 2, paragraphs d, e, f, and g, Code 2019, are amended to read as follows:

d. A person commits railroad vandalism in the fourth degree if the person intentionally commits railroad vandalism which results in property damage which costs ten thousand dollars or less but more than one thousand five hundred dollars to replace, repair, or restore. Railroad vandalism in the fourth degree is a

class “D” felony.

e. A person commits railroad vandalism in the fifth degree if the person intentionally commits railroad vandalism which results in property damage which costs more than ~~five~~ seven hundred fifty dollars but does not exceed one thousand five hundred dollars to replace, repair, or restore. Railroad vandalism in the fifth degree is an aggravated misdemeanor.

f. A person commits railroad vandalism in the sixth degree if the person intentionally commits railroad vandalism which results in property damage which costs more than ~~one~~ three hundred dollars but does not exceed ~~five~~ seven hundred fifty dollars to replace, repair, or restore. Railroad vandalism in the sixth degree is a serious misdemeanor.

g. A person commits railroad vandalism in the seventh degree if the person intentionally commits railroad vandalism which results in property damage which costs ~~one~~ three hundred dollars or less to replace, repair, or restore. Railroad vandalism in the seventh degree is a simple misdemeanor.

Sec. 24. Section 716A.2, subsection 2, paragraph b, Code 2019, is amended to read as follows:

b. The revenue generated from a specific unsolicited bulk electronic mail transmission exceeds one thousand five hundred dollars or the total revenue generated from all unsolicited bulk electronic mail transmitted to any electronic mail service provider by the person exceeds fifty thousand dollars.

DIVISION IV
FRAUD AND FORGERY REVISIONS

Sec. 25. Section 715A.2, subsection 2, paragraph a, Code 2019, is amended by adding the following new subparagraph:

NEW SUBPARAGRAPH. (5) A driver’s license, nonoperator’s identification card, birth certificate, or occupational license or certificate in support of an occupational license issued by a department, agency, board, or commission in this state.

Sec. 26. Section 715A.2A, subsection 1, paragraphs a and b, Code 2019, are amended to read as follows:

a. Hires a person when the employer or an agent or employee of the employer knows that the document evidencing the person’s authorized stay or employment in the United States is in violation of section 715A.2, subsection 2, paragraph *“a”*, subparagraph (4) or (5), or knows that the person is not authorized to be employed in the United States.

b. Continues to employ a person when the employer or an agent or employee of the employer knows that the document evidencing the person’s authorized stay or employment in the United States is in violation of section 715A.2, subsection 2, paragraph *“a”*, subparagraph (4) or (5), or knows that the person is not authorized to be employed in the United States.

Sec. 27. Section 802.5, Code 2019, is amended to read as follows:

802.5 Extension for fraud, fiduciary breach.

1. If the periods prescribed in sections 802.3 and 802.4 have expired, prosecution may nevertheless be commenced for any offense a material element of which is either fraud or a breach of fiduciary obligation within one year after discovery of the offense by an aggrieved party or by a person who has a legal duty to represent an aggrieved party and who is not a party to the offense, but in no case shall this provision extend the period of limitation otherwise applicable by more than ~~three~~ five years.

2. A prosecution may be commenced under this section as long as the appropriate law enforcement agency has not delayed the investigation in bad faith. This subsection shall not be construed to require a law enforcement agency to pursue an unknown offender with due diligence.

DIVISION V
CRIMINAL PROCEEDINGS

Sec. 28. Section 814.6, subsection 1, paragraph a, Code 2019, is amended to read as follows:

a. A final judgment of sentence, except in ~~case of~~ the following cases:

(1) A simple misdemeanor ~~and ordinance violation convictions~~ conviction.

(2) An ordinance violation.

(3) A conviction where the defendant has pled guilty. This subparagraph does not apply to a guilty plea for a class “A” felony or in a case where the defendant establishes good cause.

Sec. 29. Section 814.6, subsection 2, Code 2019, is amended by adding the following new paragraph:

NEW PARAGRAPH. *f.* An order denying a motion in arrest of judgment on grounds other than an ineffective assistance of counsel claim.

Sec. 30. NEW SECTION. **814.6A Pro se filings by defendant currently represented by counsel.**

1. A defendant who is currently represented by counsel shall not file any pro se document, including a brief, reply brief, or motion, in any Iowa court. The court shall not consider, and opposing counsel shall not respond to, such pro se filings.

2. This section does not prohibit a defendant from proceeding without the assistance of counsel.

3. A defendant currently represented by counsel may file a pro se motion seeking disqualification of the counsel, which a court may grant upon a showing of good cause.

Sec. 31. Section 814.7, Code 2019, is amended to read as follows:

814.7 Ineffective assistance claim on appeal in a criminal case.

~~1.~~ An ineffective assistance of counsel claim in a criminal case shall be determined by filing an application for postconviction relief pursuant to chapter 822~~, except as otherwise provided in this section~~. The claim need not be raised on direct appeal from the criminal proceedings in order to preserve the claim for postconviction relief purposes, and the claim shall not be decided on direct appeal from the criminal proceedings.

~~2. A party may, but is not required to, raise an ineffective assistance claim on direct appeal from the criminal proceedings if the party has reasonable grounds to believe that the record is adequate to address the claim on direct appeal.~~

~~3. If an ineffective assistance of counsel claim is raised on direct appeal from the criminal proceedings, the court may decide the record is adequate to decide the claim or may choose to preserve the claim for determination under chapter 822.~~

Sec. 32. NEW SECTION. **814.28 General verdicts.**

When the prosecution relies on multiple or alternative theories to prove the commission of a public offense, a jury may return a general verdict. If the jury returns a general verdict, an appellate court shall not set aside or reverse such a verdict on the basis of a defective or insufficient theory if one or more of the theories presented and described in the complaint, information, indictment, or jury instruction is sufficient to sustain the verdict on at least one count.

Sec. 33. NEW SECTION. **814.29 Guilty pleas —— challenges.**

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. The burden applies whether the challenge is made through a motion in arrest of judgment or on appeal. Any provision in the Iowa rules of criminal procedure that are inconsistent with this section shall have no legal effect.

Sec. 34. Section 822.3, Code 2019, is amended to read as follows:

822.3 How to commence proceeding —— limitation.

A proceeding is commenced by filing an application verified by the applicant with the clerk of the district court in which the conviction or sentence took place. However, if the applicant is seeking relief under section 822.2, subsection 1, paragraph *"f"*, the application shall be filed with the clerk of the district court of the county in which the applicant is being confined within ninety days from the date the disciplinary decision is final. All other applications must be filed within three years from the date the conviction or decision is final or, in the event of an appeal, from the date the writ of procedendo is issued. However, this limitation does not apply to a ground of fact or law that could not have been raised within the applicable time period. An allegation of ineffective assistance of counsel in a prior case under this chapter shall not toll or extend the limitation periods in this section nor shall such claim relate back to a prior filing to avoid the application of the limitation periods. Facts within the personal knowledge of the applicant and the authenticity of all documents and exhibits included in or attached to the application must be sworn to affirmatively as true and correct. The supreme court may prescribe the form of the application and verification. The clerk shall docket the application upon its receipt and promptly bring it to the attention of the court and deliver a copy to the county attorney and the attorney general.

Sec. 35. NEW SECTION. **822.3B Pro se filings by applicants currently represented by counsel.**

1. An applicant seeking relief under section 822.2 who is currently represented by counsel shall not file any pro se document, including an application, brief, reply brief, or motion, in any Iowa court. The court shall not consider, and opposing counsel shall not respond to, such pro se filings.

2. This section does not prohibit an applicant for postconviction relief from proceeding without the

assistance of counsel.

3. A represented applicant for postconviction relief may file a pro se motion seeking disqualification of counsel, which a court may grant upon a showing of good cause.

Sec. 36. Section 822.6, subsection 1, Code 2019, is amended to read as follows:

1. Within thirty days after the docketing of the application, or within any further time the court may fix, the state shall respond by answer or by motion which may be supported by affidavits. At any time prior to entry of judgment the court may grant leave to withdraw the application. The court may make appropriate orders for amendment of the application or any pleading or motion, for pleading over, for filing further pleadings or motions, or for extending the time of the filing of any pleading. In considering the application the court shall take account of substance regardless of defects of form. ~~If the application is not accompanied by the record of the proceedings challenged therein, the respondent shall file with its answer the record or portions thereof that are material to the questions raised in the application.~~

Sec. 37. NEW SECTION. **901.4B Presentence determinations and statements.**

1. Before imposing sentence, the court shall do all of the following:

a. Verify that the defendant and the defendant's attorney have read and discussed the presentence investigation report and any addendum to the report.

b. Provide the defendant's attorney an opportunity to speak on the defendant's behalf.

c. Address the defendant personally in order to permit the defendant to make a statement or present any information to mitigate the defendant's sentence.

d. Provide the prosecuting attorney an opportunity to speak.

2. After hearing any statements presented pursuant to subsection 1, and before imposing sentence, the court shall address any victim of the crime who is present at the sentencing and shall allow any victim to be reasonably heard, including, but not limited to, by presenting a victim impact statement in the manner described in section 915.21.

3. For purposes of this section *"victim"* means the same as defined in section 915.10.

DIVISION VI
ARSON

Sec. 38. Section 901.11, Code 2019, is amended by adding the following new subsection:

NEW SUBSECTION. 4. At the time of sentencing, the court shall determine when a person convicted of arson in the first degree as described in section 902.12, subsection 4, shall first become eligible for parole or work release within the parameters specified in section 902.12, subsection 3, based upon all pertinent information including the person's criminal record, a validated risk assessment, and the negative impact the offense has had on the victim or other persons.

Sec. 39. Section 902.12, Code 2019, is amended by adding the following new subsection:

NEW SUBSECTION. 4. A person serving a sentence for a conviction for arson in the first degree in violation of section 712.2 that occurs on or after July 1, 2019, shall be denied parole or work release until the person has served between one-half and seven-tenths of the maximum term of the person's sentence as determined under section 901.11, subsection 4.

DIVISION VII
LIMITATION OF CRIMINAL ACTIONS

Sec. 40. Section 802.2, subsection 1, Code 2019, is amended to read as follows:

1. An information or indictment for sexual abuse in the first, second, or third degree committed on or with a person who is under the age of eighteen years shall be found within ~~ten~~ fifteen years after the person upon whom the offense is committed attains eighteen years of age, or if the person against whom the information or indictment is sought is identified through the use of a DNA profile, an information or indictment shall be found within three years from the date the person is identified by the person's DNA profile, whichever is later.

Sec. 41. Section 802.2A, Code 2019, is amended to read as follows:

802.2A Incest —— sexual exploitation by a counselor, therapist, or school employee.

1. An information or indictment for incest under section 726.2 committed on or with a person who is under the age of eighteen shall be found within ~~ten~~ fifteen years after the person upon whom the offense is committed attains eighteen years of age. An information or indictment for any other incest shall be

found within ten years after its commission.

2. An indictment or information for sexual exploitation by a counselor, therapist, or school employee under section 709.15 committed on or with a person who is under the age of eighteen shall be found within ~~ten~~ fifteen years after the person upon whom the offense is committed attains eighteen years of age. An information or indictment for any other sexual exploitation shall be found within ten years of the date the victim was last treated by the counselor or therapist, or within ten years of the date the victim was enrolled in or attended the school.

DIVISION VIII
SECOND AND SUBSEQUENT ALCOHOLIC BEVERAGE CONVICTIONS

Sec. 42. Section 123.91, Code 2019, is amended to read as follows:

123.91 Second and subsequent conviction.

Any person who has been convicted, in a criminal action, in any court of record, of a violation of a provision of this chapter except for a violation of section 123.46, a provision of the prior laws of this state relating to alcoholic liquors, wine, or beer which was in force prior to the enactment of this chapter, or a provision of the laws of the United States or of any other state relating to alcoholic liquors, wine, or beer, and who is thereafter convicted of a subsequent criminal offense against any provision of this chapter is guilty of the following offenses:

1. For the second conviction, a serious misdemeanor.
2. For the third and each subsequent conviction, an aggravated misdemeanor.

Dollar Amount Changes in the Omnibus Bill

Theft Offenses	Old Amount Range	New Amount Range
Theft in the First Degree (714.2(1))	More than $10,000	No Change
Theft in the Second Degree (714.2(2))	More than $1,000 to $10,000	More than $1,500 to $10,000
Theft in the Third Degree (714.2(3))	More than $500 to $1,000	More than $750 to $1,500
Theft in the Fourth Degree (714.2(4))	More than $200 to $500	More than $300 to $750
Theft in the Fifth Degree (714.2(5))	$200 or less	$300 or less

Fraudulent Practice Offenses	Old Amount Range	New Amount Range
Fraudulent Practice in the First Degree (714.9(1))	More than $10,000	No Change
Fraudulent Practice in the Second Degree (714.10(1)(a))	More than $1,000 to $10,000	More than 1,500 to $10,000
Fraudulent Practice in the Second Degree with Two Previous Convictions (714.10(a)(b))	$1,000 or less	$1,500 or less
Fraudulent Practice in the Third Degree (714.11(1)(a))	More than $500 to $1,000	More than $750 to $1,500
Fraudulent Practice in the Fourth Degree (714.12(1))	More than $200 to $500	More than $300 to $750
Fraudulent Practice in the Fifth Degree (714.13(1))	$200 or less	$300 or less

Criminal Mischief Offenses	Old Amount Range	New Amount Range
Criminal Mischief in the First Degree (716.3(1)(a))	More than $10,000	No Change
Criminal Mischief in the Second Degree (716.4(1)(a))	More than $1,000 to $10,000	More than $1,500 to $10,000
Criminal Mischief in the Third Degree (716.5(1)(a))	More than $500 to $1,000	More than $750 to $1,500
Criminal Mischief in the Fourth Degree (716.6(1)(a)(1))	More than $200 to $500	More than $300 to $750
Criminal Mischief in the Fifth Degree (716.6(2))	Less than Fourth Degree in Amount	No Change

Railroad Vandalism Offenses	Old Amount Range	New Amount Range
Railroad Vandalism in the Third Degree (716.10(2)(c))	More than $10,000	No Change
Railroad Vandalism in the Fourth Degree (716.10(2)(d))	More than $1,000 to $10,000	More than $1,500 to $10,000
Railroad Vandalism in the Fifth Degree (716.10(2)(e))	More than $500 to $1,000	More than $750 to $1,500
Railroad Vandalism in the Sixth Degree (716.10(2)(f))	More than $100 to $500	More than $300 to $750
Railroad Vandalism in the Seventh Degree(716.10(2)(g))	$100 or less	$300 or less

Credit Card Fraud Offenses	Old Amount Range	New Amount Range
Credit Card Fraud, Class "C" Felony (715A.6(2)(a))	More than $10,000	No Change
Credit Card Fraud, Class "D" Felony (715A.6(2)(b))	More than $1,000 to $10,000	More than $1,500 to $10,000
Credit Card Fraud, Aggravated Misdemeanor (715A.6(2)(c))	$1,000 or less	$1,500 or less

Other Offenses	Old Amount Range	New Amount Range
Removal of Theft Detection Device, Simple Misdemeanor (714.7B(6)(a))	$200 or less	$300 or less
Removal of Theft Detection Device, Serious Misdemeanor (714.7B(6)(b))	More than $200	`More than $300
Identity Theft, Class "D" Felony (715A.8(3)(b))	More than $1,000 to $10,000	More than $1,500 to $10,000
Identity Theft, Aggravated Misdemeanor (715A.8(3)(c))	$1,000 or less	$1,500 or less
Trespass, Serious Misdemeanor (716.8(2))	$200 or more	$300 or more
Trespass with Intent to Commit a Hate Crime, Aggravated Misdemeanor (716.8(4))	$200 or more	$300 or more
Transmission of Unsolicited Bulk Electronic Mail, Class "D" Felony (716A.2(2)(b))	Revenue More than $1,000	Revenue More than $1,500

SF 158—Postconviction Relief Procedure

RELATING TO POSTCONVICTION RELIEF PROCEDURE AND THE UNDERLYING TRIAL COURT RECORD OF THE PROCEEDINGS CHALLENGED.

Section 1. Section 822.6, subsection 1, Code 2019, is amended to read as follows:

1. Within thirty days after the docketing of the application, or within any further time the court may fix, the state shall respond by answer or by motion which may be supported by affidavits. At any time prior to entry of judgment the court may grant leave to withdraw the application. The court may make appropriate orders for amendment of the application or any pleading or motion, for pleading over, for filing further pleadings or motions, or for extending the time of the filing of any pleading. In considering the application the court shall take account of substance regardless of defects of form. ~~If the application is not accompanied by the record of the proceedings challenged therein, the respondent shall file with its answer the record or portions thereof that are material to the questions raised in the application.~~

Sec. 2. NEW SECTION. 822.6A Underlying trial court record part of application.

The underlying trial court record containing the conviction for which an applicant seeks postconviction relief, as well as the court file containing any previous application filed by the applicant relating to the same conviction, shall automatically become part of the record in a claim for postconviction relief under this chapter.

Sec. 3. NEW SECTION. 822.6B Electronic access to trial court records.

1. Upon the filing of an application, the clerk of the district court shall make the underlying trial court record accessible to the applicant's attorney, the county attorney, and the attorney general, without the necessity of a court order. If the underlying trial court record is not available in electronic format, the clerk of the district court shall convert the record to an electronic format and make the record available to the applicant's attorney, the county attorney, and the attorney general, without the necessity of a court order.

2. Upon request by an attorney of record, the clerk of the district court shall make the court file containing any previous application filed by the applicant relating to the same conviction accessible to the applicant's attorney, the county attorney, and the attorney general, without the necessity of a court order. If the court file containing any previous application is not available in an electronic format, the clerk of the district court shall convert the court file containing any previous application to an electronic format and make the court file containing any previous application available to the applicant's attorney, the county attorney, and the attorney general, without the necessity of a court order.

Sec. 4. NEW SECTION. 822.6C Associated costs.

Costs shall not be charged to the applicant, the applicant's attorney, the county attorney, or the attorney general for converting a court file to an electronic format or for otherwise providing access to a court file under this chapter.

IN THE SUPREME COURT OF IOWA

No. 18–0839

Filed September 13, 2019

STATE OF IOWA,

Appellee,

vs.

ERIN MACKE,

Appellant.

On review from the Iowa Court of Appeals.

Appeal from the Iowa District Court for Polk County, Carol S. Egly, District Associate Judge.

Defendant alleging State breached plea agreement seeks further review of court of appeals decision affirming her conviction and sentence for child endangerment. **DECISION OF COURT OF APPEALS VACATED; DISTRICT COURT CONVICTION AFFIRMED, SENTENCE VACATED, AND CASE REMANDED FOR RESENTENCING WITH INSTRUCTIONS.**

Angela L. Campbell of Dickey & Campbell Law Firm, PLC, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas J. Ogden, Assistant Attorney General, John P. Sarcone, County Attorney, and Nan Horvat, Assistant County Attorney, for appellee.

WATERMAN, Justice.

This case is among dozens of pending appeals presenting the question whether amendments to Iowa Code sections 814.6 and 814.7 enacted in Senate File 589 (the Omnibus Crime Bill) govern our review of an appeal from a final judgment and sentence entered before the new statute's effective date of July 1, 2019. Amended section 814.6 limits direct appeals from guilty pleas, and amended section 814.7 requires ineffective-assistance claims to be brought in postconviction proceedings rather than by direct appeal.

In 2018, defendant, Erin Macke, entered an *Alford* plea to four counts of child endangerment pursuant to an alleged plea agreement she contends obligated the State to jointly recommend a deferred judgment. At the sentencing hearing, the State instead recommended, and the court imposed, a two-year suspended prison sentence without objection from defense counsel. The defendant appealed with new counsel, claiming the State had breached the plea agreement and her defense counsel was ineffective for failing to object. On March 20, 2019, the court of appeals affirmed her conviction and sentence while preserving her ineffective-assistance claim for postconviction proceedings. Senate File 589 subsequently was signed into law and became effective July 1 of this year. We granted Macke's application for further review and directed the parties to file supplemental briefs on whether the new law applies. The State argues Senate File 589 forecloses relief in this direct appeal while Macke argues the amendments are inapplicable.

On our review, we hold Iowa Code sections 814.6 and 814.7, as amended, do not apply to a direct appeal from a judgment and sentence entered before July 1, 2019. We have long held that "unless the legislature clearly indicates otherwise, 'statutes controlling appeals are those that

were in effect at the time the judgment or order appealed from was rendered.' " *James v. State*, 479 N.W.2d 287, 290 (Iowa 1991) (quoting *Ontjes v. McNider*, 224 Iowa 115, 118, 275 N.W. 328, 330 (1937)). Senate File 589 lacks language indicating the legislature intended the amendments to sections 814.6 or 814.7 to apply to appeals from judgments entered before its effective date. We decline the State's invitation to overrule *James* or follow arguably contrary federal authority. On the merits, we determine the State breached the plea agreement and Macke's original counsel was ineffective for failing to object. We vacate her sentence and remand the case for the State's specific performance of the plea agreement and resentencing by a different judge.

I. Background Facts and Proceedings.

In 2017, Erin Macke, age thirty-one, lived with her four children, ages six, seven, and twelve (twins), in their Johnston apartment. On September 20, Macke departed for Germany. Macke had arranged for her building's maintenance technician to check on the children at bedtime. The next day, Matt McQuary, Erin's ex-husband and father of the twins, called Johnston police from his home in Texas and requested a welfare check, reporting to the dispatcher that the children "were left alone by their mother with an unsecured firearm in the residence" after she left for Germany without arranging for adult supervision. The responding police officer found the four children alone in the apartment that evening. They said their mother was in Germany, and when asked about guns, the oldest boy led the officer "to his mother's bedroom and pointed to a pink pistol case sitting on a shelf" containing an unloaded Glock pistol next to two magazines holding "9 mm Speer hollow point bullets." A department of human services child protective assessment worker placed the children in

temporary custody with nearby relatives and later with their respective fathers.

On October 31, the State charged Erin Macke by trial information with four counts of child endangerment in violation of Iowa Code section 726.6(1)(*a*) (2018) and one count of violating section 724.22(2) (transfer of pistol to a minor). On February 26, 2018, Macke's defense attorney filed a "Petition to Plead Guilty (Alford)," which recited a plea agreement with the State as follows: "Alford plea to Counts 1–4 of TI; joint Recommendation of Deferred Judgment and Probation. State will dismiss Ct. 5." The document was signed by Macke and her counsel but lacked a signature line for the State and was not signed by the prosecutor. The district court conducted a plea hearing the same morning. Defense counsel stated on the record that the plea agreement included dismissal of "the gun charge, in this case, as well as the recommendation—joint recommendation of a deferred judgment to the charges" of child endangerment. The State did not object to that description of the plea agreement or assert different terms. The court did not ask the State to confirm the terms of the plea agreement recited by defense counsel. The court on the record accepted Macke's *Alford* plea to the four counts of child endangerment and ordered a PSI (presentence investigation). Within minutes, the court entered a written order accepting the *Alford* plea, which set forth an inconsistent plea agreement.

> Barring any new criminal activity or violation of this order, at sentencing the parties will recommend: ***The Defendant will ask for a deferred judgement and probation. The State reserves its recommendations until it has an opportunity to review the PSI.*** The State will recommend dismissal of ***Count V***. On any new criminal charge or violation of this order, established by a preponderance of evidence, the State is not bound by this agreement.

This order, on a form apparently provided by the Polk County Attorney's Office, was not read aloud in court, nor was Macke questioned about its terms during the plea hearing. Macke's counsel filed no objection.

The department of correctional services completed the PSI on April 10 and included a sentencing recommendation of "supervised probation." The same judge who accepted Macke's *Alford* plea conducted the sentencing hearing on April 19. Macke attended with her counsel, and the same prosecutor represented the State. Macke's counsel requested a deferred judgment. When the court asked for the State's sentencing recommendation, the prosecutor responded by criticizing Macke's conduct and recommending a suspended sentence and probation, not a deferred judgment.

> As you recall, this is the case where four children were left alone for a period of time while the defendant left the country and went to Germany. And although there was a superintendent of the building where the children lived asked by the defendant to check on them, at the end of the day, they really had no supervision. They were required to make meals, get on the school bus, get dressed, and take care of themselves.
>
> The hazard to the children is immense. Aside from the fact that it's a dangerous world, there was no adult living in the house that could have been available should there have been a medical emergency, a fire, or the possibility of an injury. It's just a dangerous situation for children.
>
> The children have been removed from the defendant. They have dads who are protective. Two went to live in Texas. Two have lived in Cedar Rapids. And their dads are very protective of them. And it's the State's position that those children are in settings where their best interests will be watched, because of how precious they are, Your Honor.
>
> Our position is that the defendant should receive a suspended sentence and probation, that as a condition of probation, and in accordance with what the PSI sets out, she should have whatever therapy and/or counseling is available to her through the Department of Corrections, and that she'd agree to do — at least with the children in Cedar Rapids, that she and her ex-husband in Cedar Rapids have agreed to counseling for these children in a setting that would be best

> for them. But I think she needs counseling too. Her behavior was immature and reckless.
>
> The State has agreed to dismiss Count V.
>
> So, Your Honor, we're asking that she receive a suspended sentence and probation. I'm not arguing for consecutive sentences, Your Honor. I think it's okay for these counts to run concurrently. But to do something less than place her on probation and give a suspended sentence, I think, would diminish the nature of this crime.

Macke's counsel asked to "take a break for a moment" to step into the hallway before the court resumed the hearing with a victim-impact statement. Macke's defense counsel never objected to the State's sentencing recommendation. The sentencing judge stated, "I will follow the State's recommendation in this circumstance" and sentenced Macke to two-year concurrent suspended sentences and two years' probation. The sentencing order and judgment of conviction was entered April 19, 2018, over a year before Senate File 589 was enacted.

Macke, through new counsel, filed this direct appeal on May 14, 2018. Her appellate counsel argued that the State breached the plea agreement by recommending a suspended sentence instead of a deferred judgment and that Macke's prior counsel was ineffective in failing to object to the State's breach of the plea agreement. We transferred the case to the court of appeals. On March 20, 2019, a three-judge panel of the court of appeals affirmed Macke's convictions and sentences but preserved her ineffective-assistance claims for postconviction relief. The court of appeals determined the record was insufficient to resolve the ineffective-assistance claims on direct appeal. The legislature subsequently enacted Senate File 589, which the Governor signed into law on May 16, 2019. The law went into effect on July 1, 2019. We granted Macke's application for further review and ordered the parties to file supplemental briefs on whether the new legislation governed this appeal.

II. Standard of Review.

"We review de novo claims of ineffective assistance of counsel arising from the failure to object to the alleged breach of a plea agreement." *State v. Lopez*, 872 N.W.2d 159, 168 (Iowa 2015).

III. Do the Amendments to Iowa Code Sections 814.6 and 814.7 in Senate File 589 Apply to This Direct Appeal from a Judgment and Sentence Entered Before July 1, 2019?

We must decide whether the 2019 statutory amendments to Iowa Code sections 814.6 and 814.7 enacted in Senate File 589 govern our review of Macke's direct appeal from her 2018 judgment and sentence. The parties agree that the effective date of Senate File 589 is July 1, 2019,[1] but they disagree whether its amendments circumscribe our subsequent review of Macke's appeal pending on that date. This is a question of statutory interpretation.

Macke, relying on *James*, argues that her appeal is governed by the statutes in effect at the time of the district court judgment at issue. 479 N.W.2d at 290. The State responds that *James* should be overruled. The State, relying on federal authority, argues the amendments to those Code provisions are "jurisdiction stripping" and, therefore, govern pending appeals decided after July 1. We begin with the statutory text.

Iowa Code section 814.6, as amended this year, limits appeals from guilty pleas:

[1]"An act of the general assembly passed at a regular session of a general assembly shall take effect on July 1 following its passage unless a different effective date is stated in an act of the general assembly." Iowa Const. art. III, § 26. The parties do not contend the enactment's effective date of July 1, 2019, means it applies to appeals from rulings entered previously. "A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 257, 114 S. Ct. 1483, 1493 (1994).

> 1. Right of appeal is granted the defendant from:
>
> *a.* A final judgment of sentence, except ~~case of~~ in the following cases:
>
> . . . .
>
> (3) A conviction where the defendant has pled guilty. This subparagraph does not apply to a guilty plea for a class "A" felony or in a case where the defendant establishes good cause.

2019 Iowa Acts ch. 140, § 28 (to be codified at Iowa Code § 814.6(1)(*a*) (2020)).

Section 814.7 as amended in Senate File 589 eliminates the ability to pursue ineffective-assistance claims on direct appeal:

> An ineffective assistance of counsel claim in a criminal case shall be determined by filing an application for postconviction relief pursuant to chapter 822. The claim need not be raised on direct appeal from the criminal proceedings in order to preserve the claim for postconviction relief purposes, and the claim shall not be decided on direct appeal from the criminal proceedings.

Id. § 31 (to be codified at Iowa Code § 814.7).

As noted, our long-standing precedent holds that "unless the legislature clearly indicates otherwise, 'statutes controlling appeals are those that were in effect at the time the judgment or order appealed from was rendered.' " *James*, 479 N.W.2d at 290 (quoting *Ontjes*, 224 Iowa at 118, 275 N.W. at 330). Roger James was an inmate found guilty of violating prison disciplinary rules. *Id.* at 288. He filed an application for postconviction relief after exhausting his administrative remedies. *Id.* at 288–89. The district court denied his application on June 20, 1990. *Id.* at 289. At that time, "a postconviction applicant had a right of direct appeal from adverse prison disciplinary rulings." *Id.* But a statutory amendment effective July 1, 1990, abrogated the right of direct appeal from prison disciplinary rulings and limited such a challenge to a writ of certiorari. *Id.* James filed his notice of appeal on July 16, and the State

moved to dismiss his appeal based on the statutory amendment, which fits the State's description today of a jurisdiction-stripping enactment. *Id.* at 289–90. James resisted, arguing his right to appeal "became fixed at the time of the postconviction court's final judgments." *Id.* at 290. We agreed with James and concluded that he had "the right to direct appeal in accordance with the pre-amended version of Iowa Code section 663A.9." *Id.*

James is controlling here and dictates the same result. Macke had a right of direct appeal of her ineffective-assistance claim at the time of her guilty-plea based sentence from which she appeals, and her pending appeal is governed by the preamendment versions of Iowa Code sections 814.6 and 814.7. *See id.* The holding of *James* applies to both section 814.6 and section 814.7.

The State urges us to overrule *James*. Stare decisis dictates that we decline the State's invitation to overrule our precedent. *See Book v. Doublestar Dongfeng Tyre Co.*, 860 N.W.2d 576, 594 (Iowa 2015) ("Stare decisis alone dictates continued adherence to our precedent absent a compelling reason to change the law."); *Ackelson v. Manley Toy Direct, L.L.C.*, 832 N.W.2d 678, 688 (Iowa 2013) ("We are slow to depart from stare decisis and only do so under the most cogent circumstances."). The State has not provided us with a compelling reason to overrule *James*.

James honors the canons of construction codified by the legislature. "A statute is presumed to be prospective in its operation unless expressly made retrospective." Iowa Code § 4.5 (2018); *see also Iowa Beta Chapter of Phi Delta Theta Fraternity v. State*, 763 N.W.2d 250, 266 (Iowa 2009) ("Generally, a newly enacted statute is presumed to apply prospectively, unless expressly made retrospective."). The State concedes that neither section 814.6 nor section 814.7 are expressly retroactive.

The State's position on retroactivity conflicts with Iowa Code section 4.13(1), which provides, "The . . . amendment . . . of a statute does not affect . . . [t]he prior operation of the statute or any prior action taken under the statute . . . [or] [a]ny . . . right . . . previously acquired . . . under the statute." Macke held a right to a direct appeal from her judgment of conviction and sentence in 2018, and applying Senate File 589 retroactively to her appeal would eliminate that right, contrary to Iowa Code section 4.13(1)(*a*–*b*). *See State v. Soppe*, 374 N.W.2d 649, 652–53 (Iowa 1985) (applying Iowa Code section 4.13(1) to hold that statutory amendment enhancing punishment "could not take [away a] right" a defendant acquired earlier); *see also In re Daniel H.*, 678 A.2d 462, 466–68 (Conn. 1996) (holding "the removal of a right to a direct appeal [of a juvenile transfer order] is also a substantive change in the law" that applies only prospectively and not retroactively to cases predating statutory amendment).

The State contends *James* is no longer good law after *Hannan v. State*, 732 N.W.2d 45 (Iowa 2007). We disagree. These cases are easily harmonized: the statute in *James* applied only prospectively because it eliminated a right to appeal, while the statute in *Hannan* applied retroactively because it created a new remedy. "[W]e do allow a statute to apply retroactively when the statute provides an additional remedy to an already existing remedy or provides a remedy for an already existing loss." *Iowa Beta Chapter*, 763 N.W.2d at 267. Conversely, "we have refused to apply a statute retrospectively when the statute eliminates or limits a remedy. In the latter situation, we have found the statute to be substantive rather than procedural or remedial." *Id.* (citation omitted).

In *Hannan*, the defendant's conviction for second-degree sexual abuse was affirmed on direct appeal in 1999. *State v. Hannan*,

Nos. 9–312, 98–0343, 1999 WL 710813, at *1 (Iowa Ct. App. July 23, 1999). He then brought a postconviction action alleging, for the first time, ineffective assistance of trial counsel. *Hannan*, 732 N.W.2d at 49. The State argued he failed to preserve error on his ineffective-assistance claim because he failed to bring it in his direct appeal, as our law previously required. *Id.* at 50. Hannan relied on a statutory amendment enacted in 2005 that "allows a defendant to raise ineffective-assistance-of-counsel claims for the first time in [postconviction relief] PCR proceedings." *Id.* The State argued that the 2005 statutory amendment did not benefit Hannan because the criminal judgment he challenged "occurred long before the effective date of the statute." *Id.* Hannan argued the new statute controlled his appeal from the PCR judgment entered after the new statute's effective date. *Id.* at 51. We acknowledged the *James* rule that "statutes controlling appeals are those that were in effect at the time the judgment or order appealed from was rendered." *Id.* at 50 (quoting *Wal-Mart Stores, Inc. v. Caselman*, 657 N.W.2d 493, 498 (Iowa 2003)). We did not retreat from the *James* rule but, instead, decided *Hannan* by applying the *new remedy* enacted in 2005 retroactively.

The State argues the amendment to section 814.7 merely changes the forum for ineffective-assistance claims, without eliminating the right to relief altogether. This statutory change, however, results in significant disadvantages to some defendants and can mean the difference between freedom and incarceration while the case proceeds. A direct appeal is typically a much faster vehicle for relief and allows for release on appeal bond for certain offenses. *See* Iowa Code § 811.5 (governing appeal bonds). By contrast, postconviction proceedings often take much longer while defendants remain incarcerated without a right to release on bond. *Summage v. State*, 579 N.W.2d 821, 823 (Iowa 1998) (per curiam) (holding

appeal bonds are not available in postconviction proceedings); *see also State v. Brubaker*, 805 N.W.2d 164, 170–71 (Iowa 2011) ("[P]reserving ineffective-assistance-of-counsel claims that can be resolved on direct appeal wastes time and resources." (quoting *State v. Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004)).

The State also argues that applying the 2019 statutory amendments to pending appeals furthers the legislative goals of curtailing frivolous appeals and ensuring ineffective-assistance-of-counsel claims are heard in a forum where the necessary record can be developed. But we must apply the new enactment as written, not by what the legislature might have said or intended. Missing from the amendments to Iowa Code sections 814.6 and 814.7 is any language stating the provisions apply retroactively to cases pending on direct appeal on July 1, 2019, or to guilty pleas accepted before that date. The clear indication of intent for retroactive application must be found in the text of the statute; legislative history is no substitute. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 288, 114 S. Ct. 1522, 1522 (1994) (Scalia, J., concurring in the judgment) ("No legislative history can [supply the clear statement required for retroactive application], only the text of the statute.").

We presume the legislature is aware of our cases interpreting its statutes and the rules established within them. *See Ackelson*, 832 N.W.2d at 688. We made clear in *James* that unless the legislature clearly provides otherwise, an enactment restricting a right to appeal will only apply prospectively. If the legislature wanted the amendments to Iowa Code sections 814.6 and 814.7 to apply retroactively, it had to say so expressly. It did not. *See Brewer v. Iowa Dist. Ct.*, 395 N.W. 2d 841, 843 (Iowa 1986) ("If it had been the purpose of the 1984 amendment [adding a three-year statute of limitations to the postconviction-relief statute] to abate pending

proceedings as well as to limit the time for commencing new proceedings, we believe the legislature would have made that intention clear."). Given the absence of an express legislative directive to apply the amended sections 814.6 and 814.7 to pending appeals, we decline to change the rules after the game is played.

The State turns to federal law to argue we should revisit *James* in light of a discussion in the subsequent United States Supreme Court *Landgraf* decision, noting federal courts have "regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when suit was filed." 511 U.S. 244, 274, 114 S. Ct. 1483, 1501–02 (1994) (majority opinion) (citing cases dating back to 1870). Justice Scalia's concurrence elaborated, "[T]he 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." *Id.* at 293, 114 S. Ct. at 1525 (Scalia, J., concurring in the judgment). *Landgraf* did not actually interpret a jurisdiction-stripping statute. Rather, *Landgraf* held that a 1991 amendment adding money damage remedies and a right to a jury trial in Title VII of the Civil Rights Act did not apply to cases arising before its enactment. *Id.* at 283, 286, 114 S. Ct. at 1506, 1508 (majority opinion).

The State contends the 2019 amendments to Iowa Code sections 814.6 and 814.7 are jurisdiction-stripping and govern appellate adjudications after July 1 of this year regardless of the date of the district court judgment or guilty plea at issue. The State cites no Iowa precedent following this federal jurisdiction-stripping canon, and the State's effort to apply it here conflicts with *James* and our prior precedent. *See Frink v. Clark*, 226 Iowa 1012, 1017, 285 N.W. 681, 684 (1939) ("This court has

expressly recognized that, after the commencement of an action, the question of jurisdiction is purely judicial and a legislative act, which attempts to deprive the court of jurisdiction, is unconstitutional."); *McSurely v. McGraw*, 140 Iowa 163, 167, 118 N.W. 415, 418 (1908) ("When action is once commenced the question of jurisdiction s purely a judicial one, and the Legislature should not attempt to usurp the functions of the judiciary by such an act as is now under consideration. These principles are so fundamental as scarcely to need the citation of authorities in their support."). Under *James*, the relevant "event" for determining the governing law is the entry of the district court judgment being appealed, not the appellate court's adjudication. 479 N.W.2d at 290. In any event, the State exaggerates the force of the jurisdiction-stripping canon.

More recently, in *Hamdan v. Rumsfeld*, the Supreme Court emphasized that jurisdiction-stripping provisions do not necessarily "apply to cases pending at the time of their enactment." 548 U.S. 557, 577, 126 S. Ct. 2749, 2765 (2006). " '[N]ormal rules of construction,' including a contextual reading of the statutory language, may dictate otherwise." *Id.* (alteration in original) (quoting *Lindh v. Murphy*, 521 U.S. 320, 326, 117 S. Ct. 2059, 2063 (1997)). Unlike *Landgraf*, *Hamdan* actually interpreted a jurisdiction-stripping statute, the Detainee Treatment Act (DTA). Salim Ahmed Hamdan, a Yemeni national, was captured during hostilities with the Taliban in Afghanistan and transported to Guantanamo Bay in 2002. *Id.* at 566, 126 S. Ct. at 2759. His petition for a writ of certiorari was pending in the Supreme Court when the DTA was signed into law in 2006, and the United States moved to dismiss his petition on grounds the DTA deprived the Court of jurisdiction. *Id.* at 572, 126 S. Ct. at 2762. The Court denied the motion, noting the "presumption" that a jurisdiction-stripping statute applies to pending

appeals "is more accurately viewed as the nonapplication of another presumption . . . against retroactivity—in certain limited circumstances" such as when "the change in the law does not 'impair rights a party possessed when he acted.' " *Id.* at 576–77, 126 S. Ct. at 2764–65 (quoting *Landgraf*, 511 U.S. at 280, 114 S. Ct. at 1505). As noted, the amendments to Iowa Code sections 814.6 and 814.7, if applicable, would impair Macke's existing right to a direct appeal of her guilty plea and ineffective-assistance-of-counsel claims, such that the presumption *against* retroactivity applies.

The *Hamdan* Court rejected retroactive application of the DTA under a different canon, the "familiar principle of statutory construction . . . that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute." *Id.* at 578, 126 S. Ct. at 2765. Noting other provisions of the DTA were expressly made applicable to pending cases, the omission of such language in the jurisdiction-stripping section meant it did not apply to pending appeals. *Id.* at 579–80, 126 S. Ct. at 2766.[2]

We apply the same canon here and reach the same result. We, too, have recognized that legislative intent is expressed through selective placement of statutory terms. *Oyens Feed & Supply, Inc. v. Primebank*, 808 N.W.2d 186, 193 (Iowa 2011). As such, when the legislature includes particular language in some sections of a statute but omits it in others, we presume the legislature acted intentionally. *Id.* In other sections of Senate File 589, the legislature expressly states the section applies prospectively

[2]The State cites no contrary authority decided after *Hamdan* (and we found none) applying the jurisdiction-stripping canon to hold that a statutory amendment governs pending appeals when the provision at issue lacks language requiring that result while other provisions in the same amendment do contain an express statement of retroactivity or applicability to pending cases.

or retrospectively or both. *Compare* 2019 Iowa Acts ch. 140, § 2 (to be codified at Iowa Code § 901C.3(7) (2020)) ("This section applies to a misdemeanor conviction that occurred prior to, on, or after July 1, 2019."), *id.* § 8 (to be codified at Iowa Code § 902.12(2A)) ("A person serving a sentence for a conviction for robbery in the first degree in violation of section 711.2 for a conviction that occurs on or after July 1, 2018, shall be denied parole or work release until the person has served between one-half and seven-tenths of the maximum term of the person's sentence as determined under section 901.11, subsection 2A."), *and id.* § 39 (to be codified at Iowa Code § 902.12(4)) ("A person serving a sentence for a conviction for arson in the first degree in violation of section 712.2 that occurs on or after July 1, 2019, shall be denied parole or work release until the person has served between one-half and seven-tenths of the maximum term of the person's sentence as determined under section 901.11, subsection 4."), *with id.* § 28 (to be codified at Iowa Code § 814.6) (providing no specific effective date), *and id.* § 31 (to be codified at Iowa Code § 814.7) (same). We conclude the absence of retroactivity language in sections 814.6 and 814.7 means those provisions apply only prospectively and do not apply to cases pending on July 1, 2019.

Our decision in *James* placed the legislature on notice that it must clearly specify when a provision limiting a right to appeal is to apply to pending cases. *James*, 479 N.W.2d at 290. As the *Landgraf* Court observed,

> Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits. Such a requirement allocates to Congress responsibility for fundamental policy judgments concerning the temporal reach of statutes, and has the additional virtues of giving legislators a predictable background rule against which to legislate.

511 U.S. at 272–73, 114 S. Ct. at 1501. We agree.

Because we hold Senate File 589's amendments to Iowa Code sections 814.6 and 814.7 do not govern this appeal, we do not reach Macke's constitutional claim that retroactive application of those laws would violate state and federal due process. Nor do we reach her argument that the breach of her plea agreement constituted "good cause" allowing an appeal of her guilty plea under section 814.6, as amended.

IV. Did the State Breach the Plea Agreement?

We now address the merits of Macke's appeal. "[B]ecause a plea agreement requires a defendant to waive fundamental rights, we are compelled to hold prosecutors and courts to the most meticulous standards of both promise and performance." *Lopez*, 872 N.W.2d at 171 (quoting *State v. Bearse*, 748 N.W.2d 211, 215 (Iowa 2008)). We must decide whether the State's sentencing recommendation breached the parties' plea agreement. If so, Macke's counsel was ineffective for failing to object to the breach, we presume prejudice, and her remedy is to be "resentence[d] by a different judge, with the prosecutor obligated to honor the plea agreement and sentencing recommendation." *Id.* at 180–81. Our threshold question is whether the record in this direct appeal is sufficient to resolve that question. The court of appeals concluded the record was insufficient and preserved Macke's ineffective-assistance-of-counsel claim for postconviction proceedings. On our de novo review, we find the record is sufficient under the rules governing guilty pleas. We find the parties' plea agreement included a term to jointly recommend a deferred judgment, and the State breached that agreement, requiring a remand for resentencing.

Macke's petition to plead guilty (*Alford*), signed by Macke and her counsel, stated, "The plea agreement is Alford plea to Counts 1-4 of [Trial Information]; joint Recommendation of Deferred Judgment and Probation. State will dismiss Ct. 5 [the gun charge]." Macke's counsel during the plea hearing represented to the court on the record that the plea agreement was for dismissal of "the gun charge in this case, as well as the recommendation—joint recommendation of a deferred judgment to the charges" of child endangerment. The State did not object to that description of the plea agreement or assert different terms, nor did the court ask the State to confirm the terms of the plea agreement in open court. The court accepted Macke's plea, but within minutes issued a written order on a form apparently provided by the Polk County Attorney's Office reciting a plea agreement with different terms: "The Defendant will ask for a deferred judgement and probation. The State reserves its recommendations until it has an opportunity to review the PSI." The written order, however, was not read or shown to Macke during the hearing. So what were the terms of the parties' plea agreement, if any, as to a sentencing recommendation?

We view the record in light of the governing rules. Iowa Rule of Criminal Procedure 2.10(2) provides, "If a plea agreement has been reached by the parties the court shall require the disclosure of the agreement in open court at the time the plea is offered." *Accord* Iowa R. Crim. P. 2.8(2)(*c*) ("The terms of any plea agreement shall be disclosed of record as provided in rule 2.10(2)."). The purpose of requiring disclosure "in open court" is to allow a colloquy to ensure that the defendant's plea is knowing, intelligent, and voluntary. *Id.* r. 2.8(2)(*b*); *State v. Loye*, 670 N.W.2d 141, 150–51 (Iowa 2003). The controlling terms, therefore, are those described on the record during the plea hearing rather than the

conflicting terms of the written order because the written order was never reviewed with Macke in open court. *See Loye*, 670 N.W.2d at 153–54 ("A written plea agreement is not a substitute for the in-court colloquy required by rule 2.8(2)(*b*) in felony cases.").

In *Loye*, the court accepted the defendant's guilty plea to multiple offenses and transferred her case to drug court for supervision. *Id.* at 144. She was unsuccessful in drug court, and the court then imposed consecutive prison sentences totaling sixty-four and one-half years. *Id.* She appealed her sentence, and the State contended she had waived her right to appeal in her plea agreement. *Id.* at 147. We rejected the State's waiver argument because the plea agreement was not in the record and was not reviewed with Loye in open court during her guilty plea hearing, as required by rule 2.8(2)(*b*). *Id.* at 153–54; *see also Baker v. United States*, 781 F.2d 85, 90 (6th Cir. 1986) ("It is impossible for a trial judge to properly administer a plea agreement if it consists of secret terms known only to the parties."). The record of the proceedings in open court controls our analysis, not any off-the-record side deals.

Here, we lack an affirmative statement by the prosecutor on the record that the State agreed to jointly recommend a deferred judgment and probation for Macke. We urge judges conducting plea hearings to ensure that counsel for the defendant and the State orally confirm the terms of any plea agreement in open court. In any event, on our de novo review, we infer the State's acceptance from the prosecutor's silence when Macke's counsel recited their plea agreement with that term in open court. Macke entered her *Alford* plea with the express understanding that the State would jointly recommend a deferred judgment, and the court accepted her plea on that record. If defense counsel misstated the terms of the plea agreement, the prosecutor should have said so in open court. We are

unwilling to assume the plea agreement was later modified or waived off the record. To be enforceable against the defendant, a change in the terms of the plea agreement must be made in open court with a colloquy to confirm the defendant's guilty plea is knowing and voluntary.

The State at the sentencing hearing recommended a two-year prison sentence, suspended. The State thereby breached the parties' plea agreement to jointly recommend a deferred judgment and probation. Defense counsel "was duty-bound to object." *Lopez*, 872 N.W.2d at 169. His failure to object constitutes ineffective assistance of counsel, with prejudice to Macke presumed. *Id.* at 169–70. Macke requests resentencing. We have noted that "violations of either the terms or the spirit of the agreement require reversal of the conviction or vacation of the sentence." *Id.* at 171 (quoting *Bearse*, 748 N.W.2d at 215). We remand the case for resentencing by a different judge. *See id.* at 181. On remand, the prosecutor is required to honor the plea agreement by jointly recommending a deferred judgment. *See id.*

V. Disposition.

For the foregoing reasons, we vacate the decision of the court of appeals. We affirm Macke's conviction but vacate her sentence and remand the case for resentencing before a different judge consistent with this opinion.

DECISION OF COURT OF APPEALS VACATED; DISTRICT COURT CONVICTION AFFIRMED, SENTENCE VACATED, AND CASE REMANDED FOR RESENTENCING WITH INSTRUCTIONS.

All justices concur except Mansfield, J., who concurs in part and dissents in part, and McDonald, J., who dissents.

MANSFIELD, Justice (concurring in part and dissenting in part).

I concur in Division III of the court's opinion. I dissent from Division IV. I believe the record is inadequate to determine what the parties' plea agreement was.

The parties apparently reached a plea agreement. From the record it is unclear whether it involved a joint recommendation of a deferred judgment, which is what defense counsel said in the petition to plead guilty and in open court at the change of plea hearing; or whether the State had the right to make an independent sentencing recommendation, which is what the order entered at the plea hearing stated. I note that the plea hearing commenced at 9:06 a.m. and concluded at 9:12 a.m. on February 26, 2018, whereas the order was efiled at 9:11 a.m. on the 26th. In other words, it appears the court was finalizing the order during the change of plea hearing itself. And they contradict each other.

Defense counsel never objected to the court's order. Moreover, a fairly lengthy sentencing proceeding occurred nearly two months later on April 19. The proceeding took approximately forty minutes of court time, and there was considerable discussion and debate regarding the sentence. Yet defense counsel—while asking for a deferred judgment on behalf of his client—never claimed there was an *agreement* to jointly recommend a deferred judgment.

Reasonable people can wonder, therefore, what the deal was.

Two possibilities exist here. One is that the parties actually had an agreement to jointly recommend a deferred judgment. In that event, the State breached the plea agreement and it should be enforced.

The other possibility, however, is that the parties' plea agreement did not include a joint sentencing recommendation. In that event, we

should not enforce something the parties didn't actually agree to. Instead, because the colloquy on February 26 was defective if that was the agreement, the plea should be set aside.

The majority confuses what is a necessary condition of court approval of a plea agreement (i.e., recital of the plea agreement in open court on the record) with what constitutes the actual agreement. Whatever the parties agree to has to be recited. However, the converse is not always true: whatever a party says in open court is not necessarily the agreement. Something that one party recited but that wasn't actually agreed to should not be controlling. Plea bargains are akin to contracts. *Rhoades v. State*, 880 N.W.2d 431, 449 (Iowa 2016) ("A plea bargain also may be regarded as a contract where both sides ordinarily obtain a benefit."). Would anyone say it is clear on this record what the parties' contract was?

I would reverse Macke's conviction and sentence and remand for the court to conduct a hearing to determine whether there was an agreement to jointly recommend a deferred judgment. If so, the agreement should be enforced and there should be a resentencing before a different judge on that basis. If not, there was no valid plea and the parties should be restored to their pre-plea positions.

For the foregoing reasons, I respectfully concur in part and dissent in part.

McDONALD, Justice (dissenting).

Effective July 1, 2019, this court lost the authority to decide a claim of ineffective assistance of counsel on direct appeal. *See* 2019 Iowa Acts ch. 140, § 31 (to be codified at Iowa Code § 814.7 (2020)) (providing "[a]n ineffective assistance of counsel claim . . . shall not be decided on direct appeal from the criminal proceedings"). Nonetheless, in this direct appeal, the majority decides the defendant's claim of ineffective assistance of counsel after the effective date of the statute. I respectfully dissent.

I.

Whether a statute applies retrospectively, prospectively, or both is simply a question regarding the correct temporal application of a statute. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 291, 114 S. Ct. 1522, 1524 (1994) (Scalia, J., concurring in the judgment) (stating this is a "mundane question" regarding the "temporal application of a statute"). The determination of the correct temporal application of a statute is three-part inquiry.

First, the court must determine whether application of a statute is in fact retrospective. Application of a statute is in fact retrospective when the statute applies a new rule, standard, or consequence to a prior act or omission. *See Frideres v. Schiltz*, 540 N.W.2d 261, 264 (Iowa 1995) ("A law is retroactive if it affects acts or facts which occurred, or rights which accrued, before the law came into force."). The prior act or omission is the event of legal consequence "that the rule regulates." *Landgraf*, 511 U.S. at 291, 114 S. Ct. at 1524. In other words, the event of legal consequence is the specific conduct regulated in the statute.

Second, if the court determines operation of a statute is in fact retrospective, the court must determine whether the statute should be

applied retrospectively. This is straight-forward inquiry. "Our legislature has provided a statutory general rule that determines the applicability of its laws." *Frideres*, 540 N.W.2d at 264. Iowa Code section 4.5 (2018) provides "[a] statute is presumed to be prospective in its operation unless expressly made retrospective." In my view, this requires an assessment of statutory text to determine whether there is an express statement making the statute retrospective. End of inquiry.

Third, if the court determines the text of the statute authorizes retrospective application of the statute, the court must then determine whether any other rule of law prohibits retrospective application of the statute. For example, the defendant might argue the retrospective application of a statute violated her right to due process or violates the Ex Post Facto Clause.

II.

At issue is the temporal application of amendments to Iowa Code sections 814.6 and 814.7 enacted in Senate File 589 (the Omnibus Crime Bill). I address each in turn.

A.

Iowa Code section 814.6 governs the criminal defendant's right to appeal. At the time judgment of sentence was entered in this case, section 814.6 provided, with minor exceptions not applicable here, a defendant was authorized to pursue a direct appeal from any final judgment of sentence. *See* Iowa Code § 814.6(1)(*a*) ("Right of appeal is granted the defendant from . . . [a] final judgment of sentence . . . ."). The Omnibus Crime Bill changed this provision. The statute now provides, with exceptions not applicable here, a criminal defendant does not have an appeal as a matter of right from judgment of sentence if the judgment of sentence was entered pursuant to a conviction following a guilty plea. *See*

2019 Iowa Acts ch. 140, § 28 (to be codified at Iowa Code § 814.6(1)(*a*)(3) (2020)).

In determining whether this amendment governs the defendant's right to appeal in this case, the first inquiry is whether application of the amendment is in fact retrospective. It seems clear to me it is. The event of legal consequence is the entry of judgment of sentence. Judgment of sentence was entered in April 2018. The defendant timely appealed as a matter of right from the entry of judgment of sentence. The application of the amendment to an event of consequence antedating the effective date of the amendment is in fact a retrospective application of the statute.

Having concluded the application of the amendment to this case is in fact retrospective, the second inquiry is whether the legislature authorized retrospective application of the statute. *See* Iowa Code § 4.5 (2018). Here, there is no statutory language authorizing the retrospective application of the statute. Thus, the statute operates only prospectively and cannot change the legal consequence of the entry of judgment and sentence. *See id.* Because the text of the statute does not provide for retrospective application, there is no need to proceed to the third step of the test. I thus concur in the majority's holding that the defendant can pursue this appeal as a matter of right.

B.

Iowa Code section 814.7 governs the presentation and disposition of a claim of ineffective assistance of counsel on direct appeal. At the time the defendant filed her notice of appeal in this case, the Code authorized the defendant to present a claim of ineffective assistance of counsel. *See* Iowa Code § 814.7(2) ("A party may, but is not required to, raise an ineffective assistance claim on direct appeal from the criminal proceedings . . . ."). The Code also authorized this court to "decide the claim" or

"preserve the claim for determination" in postconviction-relief proceedings. *Id.* § 814.7(3). The Omnibus Crime Bill changed this provision. The amendment restricted this court's authority to decide claims of ineffective assistance of counsel on direct appeal, providing "the claim shall not be decided on direct appeal from the criminal proceedings." 2019 Iowa Acts ch. 140, § 31 (to be codified at Iowa Code § 814.7 (2020)).

In determining whether this amendment governs the defendant's right to bring this claim in this case, the first inquiry is whether application of the amendment is in fact retrospective. With respect to this amendment, the event of legal consequence is this court's exercise of judicial power—specifically, this court's authority to decide a claim of ineffective assistance of counsel on direct appeal. As Justice Scalia explained in *Landgraf*, applying a statute to prevent the exercise of judicial power after the effective date of a statute is in fact a prospective application of a statute:

> Our jurisdiction cases are explained, I think, by the fact that 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. Thus, applying a jurisdiction-eliminating statute to undo past judicial action would be applying it retroactively; but applying it to prevent any judicial action after the statute takes effect is applying it prospectively.

Landgraf, 511 U.S. at 293, 114 S. Ct. at 1525.

While this case does not involve the court's jurisdiction, it does involve the court's authority to exercise judicial power. Thus, properly understood, application of the amendment is not in fact a retrospective application of the statute. Instead, it is a prospective application of the statute to this court's exercise of judicial power occurring after the effective date of the amendment. *See Republic Nat'l Bank of Miami v. United States*,

506 U.S. 80, 100, 113 S. Ct. 554, 565 (1992) (Thomas, J., concurring in part and concurring in the judgment) ("But not every application of a new statute to a pending case will produce a 'retroactive effect.' '[W]hether a particular application *is* retroactive' will 'depen[d] upon what one considers to be the determinative event by which retroactivity or prospectivity is to be calculated.' " (alterations in original) (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 857–58, 857 n.3, 110 S. Ct. 1570, 1587–88, 1588 n.3 (1990) (Scalia, J., concurring in the judgment))); *State v. Blank*, 930 P.2d 1213, 1223 (Wash. 1997) (en banc) ("A statute operates prospectively when the precipitating event for [its] application . . . occurs after the effective date of the statute . . . ." (alterations in original) (quoting *Aetna Life Ins. v. Wash. Life & Disability Ins. Guar. Ass'n*, 520 P.2d 162, 170 (Wash. 1974) (en banc))). Because this amendment does not in fact operate retrospectively, there is no need to analyze the question under the second and third parts of the test.

The majority opinion's conclusion that *James v. State*, 479 N.W.2d 287 (Iowa 1991), precludes application of the amendment to section 814.7 is a misreading of *James*. At issue in *James* was whether the applicants had the right to appeal from prison disciplinary rulings. *See id.* at 290. "The statute controlling appeals from prison disciplinary rulings which was in effect on that date provided for a right of direct appeal." *Id.* The court held "[b]ecause statutes controlling appeals are those that were in effect at the time the judgment or order appealed from was rendered," the applicants had the right to appeal. *Id.* *James* was limited to the question of whether the applicants had the ability to pursue an appeal as a matter of right. The event of legal consequence in that case was the entry of the rulings in the prison disciplinary cases. There is nothing in *James* that addresses the question presented in this case—what statute controls the

exercise of judicial power at the time the power is exercised. *James* is simply inapplicable to the question regarding the correct temporal application of the amendment to section 814.7.

Contrary to the majority's interpretation of *James*, the general rule is that statutes eliminating or restricting the exercise of judicial power after the date of enactment do not raise concerns regarding retroactivity. *See, e.g.*, *St. Cyr v. INS*, 229 F.3d 406, 420 (2d Cir. 2000), *aff'd*, 533 U.S. 289, 290–91, 121 S. Ct. 2271, 2274–75 (2001) ("It is true that a change in law that 'speak[s] to the power of the court rather than to the rights or obligations of the parties' may be applied in a case without raising concerns that it is impermissibly retroactive." (alteration in original) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274, 114 S. Ct. 1483, 1502 (1994) (majority opinion))); *Turkhan v. Perryman*, 188 F.3d 814, 826 (7th Cir. 1999) (stating present law applies because it "speak[s] to the power of the court" (quoting *Landgraf*, 511 U.S. at 274, 114 S. Ct. at 1502)); *In re Resolution Tr. Corp.*, 888 F.2d 57, 58 (8th Cir. 1989) ("[T]he general rule is otherwise with respect to new enactments changing procedural or jurisdictional rules. If a case is still pending when the new statute is passed, new procedural or jurisdictional rules will usually be applied to it."); *Henry v. Ashcroft*, 175 F. Supp. 2d 688, 693 (S.D.N.Y. 2001) (stating that statutes "that 'speak to the power of the court' . . . generally do not raise concerns about retroactivity" (quoting *Landgraf*, 511 U.S. at 274, 114 S. Ct. at 1502)); *DeGroot v. DeGroot*, 939 A.2d 664, 670 n.5 (D.C. 2008) (stating "a court may apply new laws to pending cases when those laws 'speak to the power of the court' " (quoting *Coto v. Citibank FSB*, 912 A.2d 562, 566 n.4 (D.C. 2006)); *State v. Barren*, 279 P.3d 182, 185 (Nev. 2012) (stating present law governs and that "a retroactivity analysis is unnecessary because [it] is a jurisdictional statute"); *Univ. of Texas Sw.*

Med. Ctr. at Dallas v. Estate of Arancibia ex rel. Vasquez-Arancibia, 324 S.W.3d 544, 548 (Tex. 2010) (stating that statutes that speak to the power of the court "may be applied to cases pending at the time of enactment").

Because the presumption against the retrospective application of a statute cannot work to bar the prospective application of a statute affecting this court's authority, I respectfully dissent from the majority's decision to resolve the defendant's claim of ineffective assistance of counsel in this direct appeal. The amendment to the statute clearly prohibits this exercise of judicial authority after July 1, 2019. I would follow the plain language of the statute and preserve the defendant's claim of ineffective assistance of counsel for postconviction-relief proceedings.

III.

The three-part test set forth and applied above is not explicitly set forth in our caselaw. However, our caselaw in this area is a Rorschach test of immaterial distinctions, unhelpful declarations, and result-oriented decisions. The majority opinion does its best to defend the old doctrine, but when the presumption against the retrospective application of a statute can be used to bar the prospective application of a statute, it is time to reconsider the doctrine.

The primary deficiency in our caselaw (and the majority opinion) is it ignores the initial inquiry of whether a statute is in fact retrospective. Instead of creating workable doctrine and corresponding vocabulary to resolve the threshold question of when the operation of statute *is in fact retrospective*, our caselaw has instead substituted a complex taxonomy and corresponding rules to determine when a statute *should be applied retrospectively*. Except these are wholly separate questions; substituting one for the other merely confuses the issues. *See Landgraf*, 511 U.S. at 291–92, 114 S. Ct. at 1524 (Scalia, J., concurring in the judgment) ("The

critical issue, I think, is not whether the rule affects 'vested rights,' or governs substance or procedure, but rather what is the relevant activity that the rule regulates.").

In addition to confusing the issues, the taxonomy and rules are opaque and largely unworkable in any meaningful sense. Our cases have identified at least five different categories of statutes: remedial, procedural, substantive, curative, and emergency. *See Iowa Beta Chapter of Phi Delta Theta Fraternity v. State*, 763 N.W.2d 250, 266 (Iowa 2009) ("In the absence of a legislative declaration that the statute applies retrospectively, the second step of the analysis is to determine whether the statute is procedural, remedial, or substantive."); *Bd. of Trs. of Mun. Fire & Police Ret. Sys. v. City of West Des Moines*, 587 N.W.2d 227, 230 n.4 (Iowa 1998) ("We have also determined curative legislation or emergency legislation may be given retrospective application."). Depending upon the categorization of the statute, our caselaw provides different rules, exceptions, and exceptions to exceptions that govern the temporal application of the statute.

Take, for example, remedial statutes. "A remedial statute intends to correct 'existing law or redress an existing grievance.' " *Iowa Beta Chapter*, 763 N.W.2d at 266 (quoting *Baldwin v. City of Waterloo*, 372 N.W.2d 486, 491 (Iowa 1985)). A remedial statute is one which "regulates conduct for the public good." *Iowa Comprehensive Petrol. Underground Storage Tank Fund Bd. v. Shell Oil Co.*, 606 N.W.2d 370, 375 (Iowa 2000).

> [It] affords a private remedy to a person injured by a wrongful act, corrects an existing law or redresses an existing grievance, gives a party a mode of remedy for a wrong where none or a different remedy existed, or remedies defects in the common law and in civil jurisprudence generally.

Bd. of Trs. of Mun. Fire & Police Ret. Sys., 587 N.W.2d at 231. Our caselaw sets forth "a three-part test to determine" whether the legislature intended retrospective or prospective application of a remedial statute. *Anderson Fin. Servs., LLC v. Miller*, 769 N.W.2d 575, 579 (Iowa 2009); *Emmet Cty. State Bank v. Reutter*, 439 N.W.2d 651, 654 (Iowa 1989).

> First, we look to the language of the new legislation; second, we consider the evil to be remedied; and third, we consider whether there was any previously existing statute governing or limiting the mischief which the new legislation was intended to remedy.

Iowa Comprehensive Petrol., 606 N.W.2d at 375 (quoting *Emmet Cty. State Bank*, 439 N.W.2d at 651). Depending upon how the court assesses those three factors, our cases generally allow retrospective application of a remedial statute. *See Iowa Beta Chapter*, 763 N.W.2d at 267 ("[W]e 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 . . . ."). Except if the remedial statute eliminates a remedy. *See id.* ("[W]e have refused to apply a statute retrospectively when the statute eliminates or limits a remedy."). In that case, our caselaw simply reclassifies as substantive what it had previously classified as "procedural" or "remedial." *Groesbeck v. Napier*, 275 N.W.2d 388, 390–91 (Iowa 1979) (en banc) (classifying a statute as substantive because it eliminated a remedy). Why does the reclassification matter? Because substantive statutes are not applied retrospectively. *See Vinson v. Linn-Mar Cmty. Sch. Dist.*, 360 N.W.2d 108, 121 (Iowa 1984) (holding a statute was substantive because it took away a right of recovery and holding the statute thus could not be applied retrospectively).

I need not discuss any of the other categories or corresponding rules to flesh out the issue. The rules governing the temporal application of the

additional categories of statutes are equally opaque. The main point here is the categorical scheme is subject to numerous, apparent shortcomings.

First, the categorical scheme is contrary to section 4.5 of the Code, which provides a statute shall have prospective operation only unless the legislature expressly provides to the contrary. Nowhere does the Code provide for the categorical scheme set forth in our caselaw.

Second, the categorical scheme is in tension with our caselaw, which provides legislative intent controls. *See, e.g.*, *Dindinger v. Allsteel, Inc.*, 860 N.W.2d 557, 563 (Iowa 2015) ("It is well established that a statute is presumed to be prospective only unless expressly made retrospective." (quoting *Anderson Fin. Servs.*, 769 N.W.2d at 578)); *Iowa Comprehensive Petrol.*, 606 N.W.2d at 375 ("Absent an expressed indication to the contrary, statutes are generally presumed to apply prospectively."); *Emmet Cty. State Bank*, 439 N.W.2d at 654 ("The determination instead boils down to whether the legislature intended to give the amendment here retrospective or prospective application."); *Barad v. Jefferson County*, 178 N.W.2d 376, 378 (Iowa 1970) ("The question of retrospectivity is one of legislative intent. Where the legislature has clearly expressed its intent we do not resort to rules of statutory construction." (citation omitted)).

Third, our categorical approach is a rhetorical device to justify results-oriented decisions rather than an analytical device to actually decide cases. The classification of any statute as remedial, procedural, substantive, curative, or emergency is largely guesswork. While there might be straight-forward cases at either end of the spectrum, for the great number of cases, the classification is likely to turn on the court's whim. For example, as noted above, our cases specifically state that a remedial statute should be reclassified as a substantive statute if the statute eliminates a remedy. That exception seems wholly arbitrary to me. We

have an adversarial legal system. Any statute that works a debit in the ledger of one party puts a credit in the ledger of the adverse party. It is thus unclear to me why the elimination of a remedy makes a remedial statute substantive but the addition of a remedy keeps a remedial statute remedial. "The seemingly random exceptions to the Court's 'vested rights' (substance-vs.-procedure) criterion must be made, I suggest, because that criterion is fundamentally wrong." *Landgraf*, 511 U.S. at 291, 114 S. Ct. at 1524.

Because of the deficiencies in our existing caselaw, I would move away from the categorical distinctions and instead adopt the three-part test set forth in this opinion.

IV.

For these reasons, I respectfully dissent.