IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. TIMOTHY BASQUIN, Defendant-Appellant.	S.CT. NO. 20-1571

APPEAL FROM THE IOWA DISTRICT COURT
FOR FAYETTE COUNTY
HONORABLE RICHARD D. STOCHL, JUDGE (SENTENCING)
HONORABLE ALAN T. HEAVENS, JUDGE (HEARINGS)

APPELLANT'S BRIEF AND ARGUMENT AND REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF SERVICE

On the 12th day of October, 2021, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Timothy Basquin, 17846 T Avenue, Sumner, IA 50674.

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Authorities

Iowa Code § 814.6(1)(a)(3) (2019)

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Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/personally (accessed Apr. 14, 2021)

Hobart v. Hobart, 45 Iowa 501, 503-04 (1877)

State v. Schomaker, 303 N.W.2d 129, 132 (Iowa 1981)

Black's Law Dictionary (11th ed. 2019)

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Iowa R. Judicial Admin. 22.1 (2020)

Iowa Code § 602.4201(1) (2019)

Iowa Const. art V, § 14

Iowa Code § 602.4202 (2019)

Butler v. Woodbury Cnty., 547 N.W.2d 17, 20 (Iowa Ct. App. 1996)

Barry A. Lindahl, 11 *Iowa Practice Series: Civil & Appellate Procedure* § 1:6 (2020)

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ROUTING STATEMENT

This case raises the question whether the Iowa Supreme Court's supervisory orders during the pandemic violated separation of powers by authorizing written felony guilty pleas that were also in violation of the Iowa Rules of Criminal Procedure and caselaw. This case should be retained by the Iowa Supreme Court to address this substantial constitutional question, as well an issue of first impression. Iowa R. App. P. 6.903(2)(d), 6.1101(3)(a), 6.1101(3)(c).

STATEMENT OF THE CASE

Nature of the Case: This is an appeal by Defendant-Appellant Timothy Basquin from the judgment, conviction, and sentence for Possession of Methamphetamine with Intent to Deliver, a class C felony in violation of Iowa Code section 124.401(1)(c)(6) (2019), following an Alford plea of guilty in Fayette County District Court.

Course of Proceedings: The State charged Basquin with Possession of Methamphetamine with Intent to Deliver, a class

C felony in violation of Iowa Code section 124.401(1)(c)(6) (2019), and Burglary in the Third Degree, a class D felony in violation of Iowa Code sections 713.1 and 713.6A(1) (2019) on July 9, 2019. (Information) (App. pp. 8-11). Basquin was released under the supervision of Pretrial Services. (Order 6/10/19) (App. p. 7). He entered a written plea of not guilty and waived speedy trial on July 19, 2019. (Written Arraignment) (App. pp. 12-14).

One of Basquin's court appointed attorneys filed a motion to suppress and brief in support challenging the search that resulted in charges against Basquin.[1] (MTS; Brief) (App. pp. 15-20). The suppression hearing was held on January 27, 2020. (MTS 1:1-25). At this hearing, the district court first addressed defense counsel's motion to withdraw, which was filed on January 21, 2020. (Motion to Withdraw 1/21/20; Order Setting Hearing 1/21/20) (App. pp. 21-23). Both

[1] Basquin was represented by about half a dozen attorneys in district court, who each asked to withdraw due to a breakdown in the attorney-client relationship. (MTS 4:9-8:4).

Basquin and defense counsel expressed their grievances with each other after the district court summarized the history of the case, after which the district court denied the motion and proceeded with the suppression hearing. (MTS 3:1-13:3) (Ruling 1/31/20) (App. pp. 24-26). The district court denied the motion to suppress on January 31, 2020. (MTS Ruling 1/31/20) (App. pp. 27-30).

Basquin subsequently filed a motion to proceed pro se and requested a continuance to prepare for trial. (Pro Se Motion; Continuance Motion) (App. pp. 31-32). The State resisted. (Resistance 2/3/20) (App. p. 33). A hearing was held on February 3, 2020, at which time the district court determined Basquin would proceed pro se with his present counsel acting as standby counsel. (Pro Se 1:1-13:14) (Order 2/5/20) (App. pp. 34-36). At a hearing on March 9, Basquin orally renewed his request that counsel be appointed. Standby counsel was present. (Hearing 3/9/20 1:1-25; 19:5-22:7).

A few days later, the Iowa Supreme Court issued its first pandemic-related supervisory order on March 12, 2020, stating, "The Iowa Judicial Branch is carefully monitoring the situation regarding the spread of the novel coronavirus/COVID-19. In addition, the Governor's Office and the Iowa Department of Public Health have urged Iowans to prepare for its impact 'in the same way they prepare for severe weather or other events that could disrupt their normal routine.'" Iowa Supreme Ct. Supervisory Order, *In the Matter of Ongoing Preparation for Coronavirus/COVID-19 Impact on Court Services* (Mar. 12, 2020) (App. pp. 37-38). The order provided that conferences and hearings could be conducted via video or phone conference. Id. ¶5 (App. p. 38). The next supervisory order stated in relevant part, "Through April 20, district courts may accept written guilty pleas in felony cases in the same manner as in serious and aggravated misdemeanor cases. See Iowa R. Crim. P. 2.8(2)(b) (last paragraph)." Iowa Supreme Ct. Supervisory Order, *In the*

Matter of Ongoing Preparation for Coronavirus/COVID-19 Impact on Court Services ¶6 (Mar. 14, 2020) (App. p. 40).

On March 24, 2020 the district court denied Basquin's request that counsel be appointed to him, stating in part, "Further appointment of court-appointed counsel appears unlikely to result in effective representation." (Order 3/24/20) (App. pp. 45-48). An April 2, 2020 supervisory order replaced all previous orders and extended the authorization to accept written felony pleas to August 3, 2020. Iowa Supreme Ct. Supervisory Order, *In the Matter of Ongoing Preparation for Coronavirus/COVID-19 Impact on Court Services* ¶15 (Apr. 2, 2020) (App. p. 53). A May 22, 2020 order replaced all previous orders regarding adult criminal cases and extended the authorization to accept written felony pleas to December 31, 2020. Iowa Supreme Ct. Supervisory Order, *In the Matter of Ongoing Preparation for Coronavirus/COVID-19 Impact on Court Services* ¶26 (May 22, 2020) (App. p. 69).

Meanwhile, the instant case proceeded with Basquin acting as his own counsel; trial was continued until November 11, 2020 due to the pandemic. (Continuance Order 7/30/20) (App. pp. 88-89). On October 1, 2020, Pretrial Services alleged that Basquin violated the terms of his release, which resulted in the issuance of a warrant. (PTR Report; Order 10/1/20; Bench Warrant) (App. pp. 95-99; Conf. App. p. 34). Basquin wrote the court a letter explaining that he had been ill. (Letter 10/8/20) (App. pp. 100-103).

On November 3, 2020, an initial appearance on the warrant was held, and Basquin requested counsel. (Initial Appearance 11/3/20) (App. pp. 104-106). The district court reappointed the attorney who had been acting as standby counsel. (Order 11/4/20) (App. pp. 107-108). Bond was set at $25,000 then changed to no bond. (Record of Bond Review 11/4/20; Bond Order 11/4/20) (App. pp. 109-112). The very same day, an order was entered scheduling a plea hearing on November 23. (Counsel Order 11/4/20) (App. pp. 113-114).

The next day, defense counsel requested a continuance of the trial date because he had been elevated from standby to active counsel. (Motion to Continue) (App. p. 115). The continuance was granted. (Order 11/6/20) (App. pp. 116-117).

Subsequently, a written Alford plea to Possession of Methamphetamine with Intent to Deliver, a class C felony, was filed by the prosecutor on November 12, 2020. (Plea) (App. pp. 122-133). That same day, the district court entered an order continuing the pretrial conference and trial dates. (Order 11/12/20) (App. pp. 134-135).

Sentencing was held the following day on November 13, 2020; reporting was waived. (Judgment) (App. pp. 136-140). Basquin was granted a suspended sentence with informal probation for two years pursuant to the plea agreement. (Judgment) (App. pp. 136-140). A fine of $1,000 and 15% surcharge were suspended, and count II was dismissed. (Judgment) (App. pp. 136-140). Basquin filed a timely notice of appeal on December 1, 2020. (Notice) (App. p. 153).

Facts: Fayette Police Chief Benjamin Davis received a call from Dalton Steere on June 6, 2019 around 10:45 p.m. Steere reported that he and his roommates had moved out of a townhouse rental and were awaiting refund of the security deposit. Checking to see if the cleaning lady was doing her job, Steere saw her with a man through the townhome window. (Davis Report, pp.2-3) (Conf. App. pp. 7-8). Steere claimed they were weighing "a mound of cocaine" in the kitchen. (MTS 36:2-14; 42:21-22; 44:1-25)

Davis directed Officer Stone Allan to standby down the street from the townhome until he arrived at the scene. Davis confirmed with the townhome owners that it was currently occupied and no one should be present, although they did have a cleaning lady. When the officers arrived, they found Terri Woods and Timothy Basquin in the garage. (Davis Report, pp.2-3) (Conf. App. pp. 7-8).

Allan remained in the garage with Basquin and Woods. During a search of the residence for other individuals, Davis

observed a baggie containing a white substance, a small scale, and a pipe on the kitchen counter. (Davis Report, p.2) (Conf. App. p. 7). No other drugs were found, except a small baggie Basquin had on his person, which he relinquished at the jail. (Allen Report, p.2) (Conf. App. p. 11). The drugs later tested positive as methamphetamine. The total amount of methamphetamine found was just over four grams.[2] (Lab Report) (Conf. App. p. 24).

Woods was confirmed as the cleaning lady. The owners said there was no reason she should be cleaning at that hour, but the owner conceded that she hadn't told Woods that she could only clean during the daytime. (MTS 30:18-31:8; 32:2-33:4; 34:10-11; 35:7-18). The owner was aware that Woods previously had a friend help her. (MTS 34:10-23).

Both Basquin and Woods declined to answer questions. (Davis Report, p.3) (Conf. App. p. 8). Davis obtained a search

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[2] It's unclear from the record where a third substance was found; it was described as "tan powder" that also tested positive as methamphetamine and weighed .27 grams. (Lab Report) (Conf. App. p. 24).

warrant to search Basquin's motorcycle. No controlled substances were found. (Davis Report, p.4) (Conf. App. p. 9).

ARGUMENT

I. Before accepting a felony guilty plea, the district court must "address the defendant personally in open court." The Supreme Court's 2020 supervisory orders in response to the pandemic authorized written pleas to felonies, and the district court accepted Basquin's written plea to a class C felony without personally addressing him. Did the Supreme Court's supervisory orders violate this Court's own precedent, due process, and separation of powers?

Application of Iowa Code Section 814.6(1)(a)(3) (2019): Iowa Code section 814.6(1)(a)(3) prohibits a direct appeal as a matter of right from a "conviction where the defendant has pled guilty." Iowa Code § 814.6(1)(a)(3) (2019). The prohibition does "not apply to a guilty plea for a class "A" felony or in a case where the defendant establishes good cause." Id. This Court has adopted "a legally sufficient reason" as the definition of good cause under section 814.6. State v. Damme, 944 N.W.2d 98, 104 (Iowa 2020).

Good cause is context-specific. Id. Thus far, the Court has found that good cause exists to challenge a discretionary

sentence following a guilty plea. Id. at 105. Challenging the revocation of a deferred judgment after a plea likewise provides good cause. State v. Thompson, 951 N.W.2d 1, 5 (Iowa 2020). In Damme, the Court "saved for another day the question of what constitutes good cause to appeal to challenge a guilty plea." Damme, 944 N.W.2d at 105.

In 2012, only 1.5% of felony cases went to trial in Iowa. Rhoades v. State, 880 N.W.2d 431, 449 (Iowa 2016). That means 98.5% were resolved through plea bargains. There is already the pressure to plead guilty in order to avoid more severe consequences after trial or to resolve multiple charges. Now, add a pandemic with pretrial jail conditions that prevent social distancing and the unavailability of masks, in addition to extended speedy trial deadlines and repeated continuances in the court system. Thea Johnson, *Crisis and Coercive Pleas*, 110 J. Crim. L. & Criminology Online 1, 3-5 (2020). All of these factors increase the potential involuntariness of a guilty plea, and when the court does not personally address a

defendant entering a felony plea, the constitutionality of that plea is in question, as is discussed below.

Basquin's claims are legally sufficient because he is challenging a guilty plea entered in violation of the Iowa Rules of Criminal Procedure and this Court's precedent, and the plea's voluntariness is in question. All of these factors warrant a finding of good cause. Basquin respectfully requests this Court find good cause to review this appeal.

Preservation of Error: Basquin did not file a motion in arrest of judgment to challenge his plea of guilty, which would normally preclude challenging his plea on appeal. See Iowa R. Crim. P. 2.24(3)(a) (2019) ("A defendant's failure to challenge the adequacy of a guilty plea proceeding by motion in arrest of judgment shall preclude the defendant's right to assert such challenge on appeal."). However, the district court must *personally* advise a criminal defendant pleading guilty to a felony offense of the right to file a motion in arrest of judgment and its preclusive effect. State v. Hook, 623 N.W.2d 865, 868

(Iowa 2001), abrogated in part on other grounds by State v. Barnes, 652 N.W.2d 466, 468 (Iowa 2002) (per curiam) (holding that a defendant may execute a valid written waiver of the right to file a motion in arrest of judgment for serious and aggravated misdemeanors). This responsibility cannot be delegated to defense counsel. See State v. Worley, 297 N.W.2d 368, 370 (Iowa 1980). "Failure by a judge to comply with this rule operates to reinstate the defendant's right to appeal the legality of his plea." State v. Oldham, 515 N.W. 2d 44, 46 (Iowa 1994). Basquin pled guilty to a class C felony offense on paper. (Plea) (App. pp. 122-133). While the form included a provision that Basquin waived the right to file a motion in arrest of judgment, there was no colloquy with the judge in which the judge personally advised Basquin of this right. (Plea, ¶24) (App. p. 127). Therefore, error was preserved.

Standard of Review: The Court's review of a claim of error in a guilty plea proceeding is at law. State v. Meron, 675 N.W.2d 537, 540 (Iowa 2004). However, Basquin claims his

guilty plea was not made knowingly and intelligently. Because this claim implicates the Due Process Clause of the Fourteenth Amendment to the United States Constitution and article I, section 9 of the Iowa Constitution, this Court's review is de novo. See State v. Loye, 670 N.W.2d 141, 150 (Iowa 2003). A separation-of-powers challenge is also reviewed de novo. See Klouda v. Sixth Judicial Dist. Dept. of Corr. Serv., 642 N.W.2d 255, 260 (Iowa 2002).

Merits: Pursuant to the Iowa Supreme Court's supervisory order for court practices during the COVID-19 pandemic, the Fayette County District Court accepted a written guilty plea to a class C felony signed by Basquin, defense counsel, and the prosecutor. The validity of the supervisory order and acceptance of a written plea for a felony offense are the subject of this appeal.

> *"One procedure cannot be right for every case; yet a right procedure must be followed in every case. 'The history of American freedom is, in no small measure, the history of procedure.'" Brainard v. State, 222 N.W.2d 711, 723 (Iowa 1974) (quoting Malinski v. New York, 324 U.S. 401, 414 (1945) (Frankfurter, J., concurring)).*

A. The Iowa Supreme Court's supervisory orders authorizing written felony pleas violated this Court's own precedent.

Iowa rules regarding felony pleas serve dual purposes that were denied to Basquin. Iowa Rule of Criminal Procedure 2.8(2)(b) states:

> The court may refuse to accept a plea of guilty, and shall not accept a plea of guilty without first determining that the plea is made voluntarily and intelligently and has a factual basis. Before accepting a plea of guilty, the court *must address the defendant personally in open court* and inform the defendant of, and determine that the defendant understands, the following:
>
> (1) The nature of the charge to which the plea is offered.
>
> (2) The mandatory minimum punishment, if any, and the maximum possible punishment provided by the statute defining the offense to which the plea is offered.
>
> (3) That a criminal conviction, deferred judgment, or deferred sentence may affect a defendant's status under federal immigration laws.
>
> (4) That the defendant has the right to be tried by a jury, and at trial has the right to assistance of counsel, the right to confront and cross-examine witnesses against the defendant, the right not to be compelled to incriminate oneself, and the right to present witnesses in the defendant's own behalf and

> to have compulsory process in securing their attendance.
>
> (5) That if the defendant pleads guilty there will not be a further trial of any kind, so that by pleading guilty the defendant waives the right to a trial.
>
> The court may, in its discretion and with the approval of the defendant, waive the above procedures in a plea of guilty to a serious or aggravated misdemeanor. If the above procedures are waived in such a plea, the defendant shall sign a written document that includes a statement that conviction of a crime may result in the defendant's deportation or other adverse immigration consequences if the defendant is not a United States citizen.

Iowa R. Crim. P. 2.8(2)(b) (2019) (emphasis added). Iowa law regarding guilty pleas has mostly followed federal jurisprudence. State v. Finney, 834 N.W.2d 46, 55-60 (Iowa 2013) (discussing history of Iowa law on guilty pleas). Rule 2.8 incorporated the American Bar Association guilty plea standards, which are essentially the rule's federal counterpart, Federal Rule of Criminal Procedure 11. Brainard v. State, 222 N.W.2d 711, 713 (Iowa 1974).

These standards ensure that defendants knowingly, intelligently, and voluntarily waive their constitutional rights when entering a guilty plea with an understanding of its consequences, and that frivolous attacks on guilty pleas are more easily disposed of with an adequate record. Id. at 713-14; accord McCarthy v. United States, 394 U.S. 459, 466 (1969) ("By personally interrogating the defendant, not only will the judge be better able to ascertain the plea's voluntariness, but he also will develop a more complete record to support his determination in a subsequent postconviction attack.").

> The[se standards] require that when a guilty plea is tendered the judge must *personally* address the defendant to determine whether (1) he understands the charge made, (2) is aware of the penal consequences of the plea, and (3) the plea is entered voluntarily. They also require (4) that the judge make such inquiry as will satisfy him there is a factual basis for the plea.

Brainard, 222 N.W.2d at 713 (emphasis added). The dual purposes of the rule are undermined when the court relies on assumptions not based on responses in the record. McCarthy,

394 U.S. at 467. Scrupulous compliance with the guilty plea procedure prevents the need for speculation about what occurred. Id. at 471.

The Iowa Supreme Court authorized written pleas in felony cases starting in March 2020, stating, "Through April 20, district courts may accept written guilty pleas in felony cases in the same manner as in serious and aggravated misdemeanor cases. See Iowa R. Crim. P. 2.8(2)(b) (last paragraph)." Iowa Supreme Ct. Supervisory Order, *In the Matter of Ongoing Preparation for Coronavirus/COVID-19 Impact on Court Services* ¶6 (Mar. 14, 2020) (App. p. 40). A subsequent supervisory order extended the deadline to December 31, 2020. Iowa Supreme Ct. Supervisory Order, *In the Matter of Ongoing Preparation for Coronavirus/COVID-19 Impact on Court Services* ¶26 (May 22, 2020) (App. p. 69). A written guilty plea signed by Basquin and his counsel, as well as the prosecutor, was filed on November 12, 2020. (Plea) (App. pp. 122-133). The next day, Basquin was sentenced in a

hearing where reporting was waived by the parties. (Judgment) (App. pp. 136-140). The dual purposes of Rule 2.8 were not met or scrupulously adhered to in this case. The supervisory order disregarded a mandatory personal colloquy between the judge and defendant and ensured the record was silent.

The grave consequences accompanying a felony conviction require the court to discharge its duties to a defendant personally. "The consequences of a felony conviction greatly affect society's view of a defendant, his job opportunities, his liberty interests, and other rights and privileges the rest of us take for granted. The additional stigma of a felony conviction creates a greater need for the justice system to ensure that justice is, indeed, being served." State v. Hook, 623 N.W.2d 865, 870 (2001). This greater loss of liberty and rights heightens the court's inquiry into the understanding and voluntariness of a defendant's felony plea. Id. A defendant facing death or imprisonment must have a

full understanding of the plea and its consequences. Boykin v. Alabama, 395 U.S. 238, 243-44 (1969). "It is, therefore, not too much to require that, before sentencing defendants to years of imprisonment, district judges take the few minutes necessary to inform them of their rights and to determine whether they understand the action they are taking." McCarthy v. United States, 394 U.S. 459, 472 (1969). Rule 2.8(2)(b) specifically requires the court to speak with the defendant personally; this procedure can only be waived for serious and aggravated misdemeanors. Iowa R. Crim. P. 2.8(2)(b); State v. Barnes, 652 N.W.2d 466, 468 (Iowa 2002) (per curiam). Basquin pled guilty to a class C felony, which carried up to ten years in prison and a fine up to $50,000. Iowa Code §§ 124.401(1)(c)(6), 902.9(1)(d) (2019). Yet, the Court's supervisory order violated Rule 2.8 by allowing district courts to accept felony pleas when the court did not personally address the defendant in open court.

Rule 2.8 required that the court address Basquin personally in open court. "Before accepting a plea of guilty, the court must address the defendant personally in open court . . . ." Iowa R. Crim. P. 2.8(2)(b). The plain meaning of personally indicates the defendant and judge must meet in person. Personally is defined as "in person." *Personally*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/personally (accessed Apr. 14, 2021). This Court has considered different definitions of "open court," depending on the context. See, e.g., Hobart v. Hobart, 45 Iowa 501, 503-04 (1877) (defining the phrase in a divorce statute); State v. Schomaker, 303 N.W.2d 129, 132 (Iowa 1981) (applying the 1968 Black's Law Dictionary definition to a rule of criminal procedure). The requirements are that the judge and parties be present to conduct judicial business; it may also include a session where the public is free to attend. *Open Court*, Black's Law Dictionary (11th ed. 2019). There may also be a requirement that it be recorded or on the record. Id.; see

also Schomaker, 303 N.W.2d at 132. Under the ordinary-meaning canon, applied to constitutions, statutes, rules, and private instruments, "Interpreters should not be required to divine arcane nuances or to discover hidden meanings." Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 54, 69 (Thompson/West 2012).

In the federal context, Rule 43 provides when a criminal defendant must be present but permits misdemeanor defendants to appear by videoconferencing. Fed. R. Crim. P. 43 (2019). The Seventh Circuit found that Rule 43 prevented the defendant from appearing for a felony plea via videoconferencing despite his waiver of presence due to medical issues because the rule mandates a defendant be present. United States v. Bethea, 888 F.3d 864, 866 (7th Cir. 2018) ("The presence requirement is couched in mandatory language—'the defendant *must* be present.'"). Those circuits interpreting Rule 43 have found the plain meaning of the word "present" means "physically present." Meaghan Annet,

Comment, *To Be Physically Present or Not to Be Physically Present: The Use of Videoconferences During Felony Proceedings*, 60 B.C. L. Rev. E-Supplement II.-165, 173-74 (Mar. 21, 2019) [hereinafter Annet].

Rule 43 does, however, permit guilty pleas by videoconference for misdemeanors. Bethea, 888 F.3d at 867 ("That the drafters did not include that option in the felony plea is telling."). The Seventh Circuit expressed sympathy for the government's concerns and for defendants with significant health problems, but the rule simply did not permit felony pleas by videoconference. Id. at 868. While Annet agreed with the court's holding, the author lamented that the Seventh Circuit didn't take the opportunity to encourage Congress to modify the rule. Annet at II.-177. The Coronavirus pandemic provided the motivation for Congress to act. On March 27, 2020, as part of the CARES Act, Congress granted federal courts the authority to conduct felony pleas by videoconference or telephone when they "cannot be conducted

in person without seriously jeopardizing public health and safety, and the district judge in a particular case finds for specific reasons that the plea or sentencing in that case cannot be further delayed without serious harm to the interests of justice." Coronavirus Aid, Relief and Economic Security Act, Pub. L. No. 116-136, § 15002(b)(2), 134 Stat. 527 (2020). The Chief Judge of the Southern District of Iowa implemented this procedure, authorizing felony pleas by videoconference on September 3, 2020. Southern Dist. of Iowa Public Admin. Order No. 20-AO-19-P, *In the Matter of Pandemic Caused Jury Trial Continuances* (Sept. 3, 2020) (App. pp. 92-94).

No such legislative action occurred in Iowa authorizing felony pleas on paper.[3] The Iowa Supreme Court issued a supervisory order that defied this Court's precedent as well as rules of criminal procedure that had been approved by the Iowa Legislature. Notably, proposed amendments to the Iowa

[3] The argument that the Court's supervisory order violated separation of powers is addressed in Section C below.

Rules of Criminal Procedure allow initial appearances by videoconference. Iowa Supreme Ct. Order, *In the Matter of Public Comment on Proposed Amendments to Chapter 2, Iowa Rules of Criminal Procedure—Extension of Comment Period* (June 25, 2020); Proposed Iowa R. Crim. P. 2.2(2) (App. pp. 82-85). No such proposed amendment is in place for guilty pleas. A proposed change to Rule 2.8 states, "The defendant *shall* be placed under oath for the guilty plea colloquy provided by rule 2.8(2)(b). The court *shall* question the defendant and, if necessary, may allow either counsel to question the defendant." Proposed Iowa R. Crim. P. 2.8(2)(c) (emphasis added) (App. pp. 86-87). These proposed amendments to Rule 2.8 indicate that the judge must personally address the defendant; a written plea will not suffice. In the instant case, the court did not personally address Basquin, and no valid action authorized a substitute procedure for written felony pleas.

A written plea to a felony does not comply with the rules of criminal procedure. Substantial compliance with Rule 2.8(2)(b) is required. Meron, 675 N.W.2d at 542. Under this standard, a court "is not required to advise a defendant of his rights using the precise language of the rule; it is sufficient that the defendant be informed of his rights is such a way that he is made aware of them." State v. Myers, 653 N.W.2d 574, 578 (Iowa 2002). "The record must confirm the existence of substantial compliance in listing each right." Meron, 675 N.W.2d at 542. "Substantial compliance requires that the essence of each requirement of the rule be expressed to allow the court to perform its important role in each case." Id. at 544. As such, under Rule 2.8(2)(b), the court must substantially comply with the obligation to inform the defendant of the rights listed within the rule. Myers, 653 N.W.2d at 577-78.

The court must *literally* – not just substantially – comply with the requirement to engage in a personal colloquy with

defendants pleading guilty to felony charges. State v. Moore, 638 N.W.2d 735, 738 (Iowa 2002); Myers, 653 N.W.2d at 577; Hook, 623 N.W.2d at 870-71. "Literal compliance, by personally addressing the defendant on the record, establishing a factual basis for the plea, its voluntariness, and the defendant's understanding of the required matters, is well scripted in rule 8(2)(b)." Moore, 638 N.W.2d at 738-39. In a felony case, the court may not rely, to any extent, on a written plea of guilty to satisfy the requirements of Rule 2.8(2)(b). Moore, 638 N.W.2d at 738. As this Court has stated:

> If economy of time prompts the use of written forms in lieu of literal compliance, we believe full compliance with the rule would actually take less time than it would take a court to partially comply with the rule and weave into the colloquy the supplemental application to withdraw the not-guilty plea. In any event, compliance with the rule is time well spent.

Moore, 638 N.W.2d at 739; accord Brainard, 222 N.W.2d at 722-23 (providing a script to follow). Therefore, "at no time can a written guilty plea to a felony serve as a substitute for a question the court is required to pose to the defendant

directly." Hook, 623 N.W.2d at 870-71. While the written plea in this case included the matters a judge would inquire about, it did not literally comply with the rules, as required for a felony. Therefore, the guilty plea was not valid.

Furthermore, Basquin's waiver of a personal colloquy does not vitiate the supervisory order's unconstitutional procedure. The Meron Court rejected the State's argument that the defendant's consent to an abbreviated plea colloquy supported "a relaxation of the substantial compliance standard." Meron, 675 N.W.2d at 543. Finding that this approach was contradictory to the purpose of the rule and would completely eviscerate it, the Court held that the court's role is not subject to waiver. Id. at 544. "Substantial compliance requires that the essence of each requirement of the rule be expressed to allow the court to perform its important role in each case." Id. Basquin waived a personal colloquy with the court in the written plea. (Plea, ¶21) (App. p.

126). However, it wasn't valid because he could not waive the court's important role in personally addressing him.

The remedy is to remand Basquin's case to the district court. Noncompliance with the personal requirements of rule 2.8(2)(b) constitutes reversible error. Hook, 623 N.W.2d at 867. The remedy is to reverse and remand to the district court. Meron, 675 N.W.2d at 544. Therefore, this case should be remanded to the Fayette County District Court.

B. The Iowa Supreme Court's supervisory orders authorizing written felony pleas violated due process.

1. A guilty plea must be entered voluntarily. Due process requires that a guilty plea be knowing and voluntary. U.S. Const. amend. XIV; Iowa Const. art. I, § 9; State v. Straw, 709 N.W.2d 128, 133 (Iowa 2006). "A defendant waives a variety of constitutional rights by pleading guilty to criminal offense, and it is fundamental that a plea of guilty is valid only if it is given voluntarily, knowingly, and intelligently." Meron, 675 N.W.2d at 542. In order to determine whether a guilty plea is voluntary, knowing, and intelligent, the court must inquire if

the defendant is aware of the constitutional protections being given up. Id. Rule 2.8(2)(b) provides a blueprint to the court for making this inquiry. Straw, 709 N.W.2d at 133. That blueprint was not followed in this case, as discussed in Section A above and incorporated herein.

The silent record in this case renders Basquin's plea involuntary. A defendant waives constitutional rights by pleading guilty: the right to a trial by jury, to confront accusers, and against self-incrimination. Boykin v. Alabama, 395 U.S. 238, 243 (1969); Iowa R. Crim. P. 2.8(2)(b). "[A]lthough the procedure embodied in Rule 11 has not been held to be constitutionally mandated, it is designed to assist the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary." McCarthy v. United States, 394 U.S. 459, 465 (1969) (internal citations omitted). Waiver of these constitutional rights cannot be presumed from a silent record. Boykin, 395 U.S. at 243. This is because "a plea of guilty is

more than an admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality." Id. at 242-43. The Due Process Clause requires this waiver to be voluntary in order to be valid. McCarthy, 394 U.S. at 466. Even if there is overwhelming evidence of guilt, the plea must be "voluntary in a constitutional sense." State v. Finney, 834 N.W.2d 46, 53 (Iowa 2013) (citing Henderson v. Morgan, 426 U.S. 637, 644-45 (1976)). "Plainly, Henderson stands for the proposition that overwhelming evidence of guilt from an objective point of view does not necessarily mean the defendant subjectively made a knowing and voluntary waiver of his constitutional rights or made a knowing and voluntary plea." Id. at 53. The district court had a duty to ensure Basquin's plea was knowing and voluntary after personally addressing him. Iowa R. Crim. P. 2.8(2)(b). It failed to do so.

The voluntariness of Basquin's plea is in question because of the history of this case. Basquin made clear his intent to fight these charges from the beginning, by repeatedly demanding counsel that would adequately represent him, pursuing a motion to suppress, and engaging in pro se representation when his requests for new counsel were denied. Basquin had let one plea offer expire without accepting it. (Pro Se 2/3/20 13:16-17:1). He declined the same offer on November 2, 2020. (PTC 11/2/20 1:1-25; 4:6-25). It wasn't until he was jailed, and once again saddled with defense counsel who didn't want to represent him[4] that a guilty plea miraculously fell into place. The Court's supervisory order authorizing written felony pleas allowed the parties and district court to quickly wash their hands of a difficult

[4] Defense counsel had previously informed the district court at a hearing on counsel's own motion to withdraw on January 27, 2020 that, "I'm mad, Judge, I'll be honest, and I don't want to be with [Basquin] anymore. I want nothing more to do with him. . . . I don't like him, and I don't want to be around him." (MTS 10:5-13).

defendant with little fanfare or the process that he was due under the United States and Iowa Constitutions.

Moreover, in lieu of a personal colloquy with the judge ensuring he understand the nature of the offense, the rights he was giving up, and the potential consequences of his plea, Basquin had to digest a seven-page written plea. (Plea) (App. pp. 122-133). The written plea was also confusing because it indicated both that he was pleading guilty to counts I and II, and that the plea agreement was for count I only. (Plea, ¶¶6-7, 9) (App. pp. 123-124).

2. Failure by the court to advise the defendant of the nature of the offense renders the plea involuntary. "'[A] defendant must be aware not only of the constitutional protections that he gives up by pleading guilty, but he must also be conscious of 'the nature of the crime with which he is charged' and the potential penalties.'" State v. Loye, 670 N.W.2d 141, 150–51 (Iowa 2003) (quoting State v. Fluhr, 287 N.W.2d 857, 863 (Iowa 1980)). To ensure the plea is voluntary

a defendant must be advised, *on the record*, of the nature of the offenses to which he is pleading guilty. Iowa R. Crim. P. 2.8(2)(b)(2) (emphasis added).

The rule "does not require any particular form of explanation of the charge" and a court is not always required to specifically articulate each individual element of the crime. Worley, 297 N.W.2d 368, 371 (Iowa 1980). Rather, "[t]he complexity of the charge and the circumstances of each case determine the extent of dialogue necessary to explain the charge." Id. The substantial compliance standard is met if it is "apparent in the circumstances the defendant understood the nature of the charge." Loye, 670 N.W.2d at 151. In some cases, the name of the offense itself may be sufficiently descriptive to impart an understanding of the nature of the charge. Worley, 297 N.W.2d at 371 (offense of operating while intoxicated is one such offense). Where an element of specific intent is involved, however, the court must ensure that the defendant understands that particular element before

accepting the defendant's plea of guilty. Id. Additionally, the use of technical or legalistic terms is not sufficient to convey the nature of the offense. "Only lay-oriented explanations" will be deemed to convey the necessary explanation of the nature of the offense. State v. Fluhr, 287 N.W.2d 857, 867 (Iowa 1980), overruled on other grounds by State v. Kirchoff, 452 N.W.2d 801, 805 (Iowa 1990).

Not only did the court not personally address Basquin, the written plea merely referred to the trial information rather than explaining the elements of the crime. (Plea, ¶5) (App. p. 123). The trial information is written in legalese, not layperson terms. (Information) (App. pp. 8-11). And even though Basquin had acted pro se prior to entering the plea, he made clear to the court that he did not feel equipped to do so and did not have legal training. (Pro Se 2/3/20 1:1-25; 5:16-19; 10:5-15). He even asked that counsel be appointed to him again at a hearing on March 9, 2020 and was denied. (Hearing 3/9/20 1:1-25; 19:5-22:7) (Order 3/24/20, p.3) (App.

p. 47). The written plea's mere reference to the statutory language of the trial information was insufficient to apprise Basquin of the nature of this element of the offense. See Loye, 670 N.W.2d at 151; Fluhr, 287 N.W.2d at 867; Worley, 297 N.W.2d at 371. Therefore, he was not properly advised, as required by Rule 2.8. His plea was involuntary.

Because Basquin was insufficiently informed of the nature of the offense he was pleading guilty to and his guilty plea was unknowing and involuntary, this case should be reversed and remanded. "Substantial compliance requires that the essence of each requirement of the rule be expressed to allow the court to perform its important role in each case." Meron, 675 N.W.2d at 544. When that does not occur, the remedy is to reverse and remand to the district court. Id. Therefore, this case should be reversed and remanded to the Fayette County District Court.

C. The Iowa Supreme Court's supervisory orders authorizing written felony pleas violated separation of powers.

"The separation-of-powers doctrine is violated 'if one branch of government purports to use powers that are clearly forbidden, or attempts to use powers granted by the constitution to another branch.'" Klouda v. Sixth Judicial Dist. Dept. of Corr. Serv., 642 N.W.2d 255, 260 (Iowa 2002) (citation omitted). The doctrine means that one branch of government may not impair another branch in "the performance of its constitutional duties." Id. Each branch must also remain independent. State v. Thompson, 954 N.W.2d 402, 410 (Iowa 2021).

The Supreme Court supervisory orders exercised powers delegated to the legislature. All judicial power in Iowa is vested in the Iowa Supreme Court and its inferior courts. Iowa Const. art. V, § 1. The Supreme Court is also granted "supervisory and administrative control" over the inferior judicial tribunals by constitution and by rule. Iowa Const. art.

V, § 4; Iowa R. Judicial Admin. 22.1 (2020). The judicial department is granted statutory authority to "prescribe all rules of pleading, practice, evidence, and procedure, and the forms of process, writs, and notices, for all proceedings in all courts of this state." Iowa Code § 602.4201(1) (2019). "However, the constitutional text reserves to the legislative department authority to regulate the practice and procedure in all Iowa courts." Thompson, 954 N.W.2d at 411. The Iowa Constitution provides, "It shall be the duty of the general assembly to provide for the carrying into effect of this article, and to provide for a general system of practice in all the courts of this state." Iowa Const. art V, § 14.

Historically, practice and procedure in the court system was governed by statutes rather than court rules, though it has evolved into a mixture of the two. Thompson, 954 N.W.2d at 412-13 (discussing the history of statutes and court rules governing practice and procedure in Iowa). The legislature delegates the rulemaking power to the court subject to the

legislature's oversight and power to amend. Iowa Code § 602.4202 (2019); Thompson, 954 N.W.2d at 414. This Court has recognized the constitutionality of that practice. Thompson, 954 N.W.2d at 414. The legislature "possesses the fundamental responsibility to adopt rules of practice for our courts." Id. at 415 (quoting Butler v. Woodbury Cnty., 547 N.W.2d 17, 20 (Iowa Ct. App. 1996). The power to provide for emergency action during the pandemic rested with the legislature.

The Court's supervisory orders overstepped the powers of the judicial branch by acting without legislative authority. The Iowa Supreme Court's supervisory power isn't frequently used. Barry A. Lindahl, 11 *Iowa Practice Series: Civil & Appellate Procedure* § 1:6 (2020). One example is a case in which the Court exercised this function to take disciplinary action in a district court. In re Municipal Court of City of Cedar Rapids, 188 N.W.2d 354 (Iowa 1971). In the instant case, the Court exercised its authority to alter the procedure for felony guilty

pleas, in violation of precedent and court rules, as discussed in Section A above and incorporated herein. The Court did not propose an amendment to the rules of criminal procedure and receive legislative approval, as required. See Iowa Code § 602.4202. Therefore, it exceeded its powers and its actions were unconstitutional.

The Court's supervisory powers do not extend to altering the rules of criminal procedure, even during times of a public health crisis or disaster. Such powers are not foreign to the Court, however, because the rules regarding bar admission explicitly provide that the Court can act to ensure provision of legal services following a major disaster. Iowa R. Bar Admission 31.17 (2020). If the Court and legislature believed such powers were necessary, they could have followed the rulemaking procedures under Iowa Code Section 602.4202 to allow for emergency action by the Court during a pandemic or major disaster. The actions of the federal court system are an example, as discussed in Section A above, wherein Congress

enacted legislation that allowed felony pleas via videoconference. Coronavirus Aid, Relief and Economic Security Act, Pub. L. No. 116-136, § 15002(b)(2), 134 Stat. 527 (2020).

It is undeniable that the Coronavirus pandemic's impact on the judicial system and other institutions was unprecedented. Through its supervisory orders, the Court sought to mitigate the health risk to Judicial Branch employees, parties, and the public. Unfortunately, it lacked the authority to act in the manner it chose to regarding felony guilty pleas. Basquin's case must be reversed and remanded.

CONCLUSION

For all of the reasons discussed above, Defendant-Appellant Timothy Basquin respectfully requests this Court reverse and remand the case to the Fayette County District Court.

REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $4.03, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR BRIEFS

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because:

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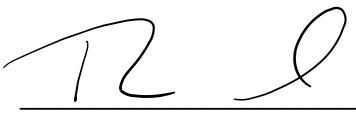

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