

**IN THE SUPREME COURT FOR THE STATE OF IOWA
NO. 19-0267**

**STATE OF IOWA,
Plaintiff-Appellee**

vs.

**JASMAINE R. WARREN,
Defendant-Appellant.**

**APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY,
HONORABLE SCOTT ROSENBERG**

DEFENDANT/APPELLANT'S FINAL REPLY BRIEF

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ARGUMENT

I. Iowa Code § 814.28 does not apply to this pending appeal

The State concedes the core points of Warren’s first argument: The State agrees that the evidence was insufficient to prove beyond a reasonable doubt that Iowa Code § 321.2(1)(c) was violated. (Appellee’s Br. at 13). And the State agrees that the verdict handed down from the bench trial was indeed a general verdict. (Appellee’s Br. at 14). The State then recognizes that reversal is generally the appropriate remedy under these circumstances per the rule of “sound judicial administration” whereby appellate courts must reverse a conviction when a general verdict was entered but one theory of guilty was not supported by sufficient evidence. (Appellee’s Br. at 14). Searching for a way around this sound judicial rule, the State turns to the recently-enacted Iowa Code § 814.28.

In 2019, the Iowa legislature enacted Iowa Code § 814.28, captioned “General verdicts.” That statute states in full:

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.

S.F. 589, 88th GA, § 32 (2019), *available at* <https://www.legis.iowa.gov/docs/publications/LGE/88/SF589.pdf>.

Iowa Code § 814.28 became effective on July 1, 2019. Iowa Const. art. III, § 26 (providing legislation with no express effective date becomes effective on July 1 of the year of enactment).

Iowa Code § 814.28 does not apply to Warren’s pending appeal no matter how you cut it. Legislative intent and the presumption that statutes are prospective support the conclusion that § 814.28 operates only prospectively. Further, because § 814.28 removes a remedy, it is substantive and applies prospective only. Iowa Code § 4.13 also precludes the retroactive application of § 814.28. Finally, the plain language of Iowa Code § 814.28 does not apply to this case because it arose from a bench verdict, not a jury verdict.

A. Legislative intent renders changes to Iowa Code § 814.7 prospective only

The question of whether a newly enacted statute operates retrospectively or prospectively only is one of legislative intent. *State Ex Rel. Turner v. Limbrecht*, 246 N.W.2d 330, 332 (Iowa 1976). “A statute is presumed to be prospective in its operation unless

expressly made retrospective.” Iowa Code § 4.5. An exception exists when the statute concerns remedies or procedures. *Limbrecht*, 246 N.W.2d at 332. If the statute affects substantive rights, it generally applies prospectively only. *Id.* If it only affects remedies or procedures, it will generally apply both prospectively and retrospectively. *Id.* Whether the statute relates to remedy or procedure as opposed to substantive rights is not conclusive, however, of the underlying question of legislative intent. *Id.* at 333.

Nothing in S.F. 589 indicates that Iowa Code § 814.28 is retroactive. Accordingly, it is presumed to apply prospectively only. *In re Marriage of Williams*, 595 N.W.2d 126, 130 (Iowa 1999) (“Nothing in the new law indicates it was to be applied retroactively, and the trial court was correct in declining to apply it to this case.”).

Notably, the legislature did explicitly direct that some portions of S.F. 589 apply retroactively. *See* S.F. 589, 88th GA, §2 (2019) (adding Iowa Code § 901C.3(7) stating “This section applies to a misdemeanor conviction that occurred prior to, on, or after July 1, 2019.”). If the legislature intended for Iowa Code § 814.28 to apply to pending appeals, it would have said as much. “[L]egislative intent is expressed by omission as well as by inclusion, and the express

mention of one thing implies the exclusion of others not so mentioned.” *Staff Mgmt. v. Jimenez*, 839 N.W.2d 640, 649 (Iowa 2013). The lack of language making § 814.28 retroactive is a clear indicator of the legislator’s intent that it applies prospectively only.

The legislature’s intent for the § 814.28 to be only applied prospectively has been clearly spoken by omission of any expressed retrospective language. The legislature’s intent is the controlling factor and has been conclusively established even without an analysis on substantive rights.

B. Iowa Code § 814.28 applies prospectively only because it eliminates a remedy and thus is a substantive change

It is “well-settled law that substantive amendments to criminal statutes do not apply retroactively.” *State v. Harrison*, 914 N.W.2d 178, 205 (Iowa 2018). Substantive law creates, defines, and regulates rights, while procedural law establishes “the practice, method, procedure, or legal machinery by which the substantive law is enforced.” *Baldwin v. City of Waterloo*, 372 N.W.2d 486, 491 (Iowa 1985) (quoting *Limbrecht*, 246 N.W.2d at 332). Contrary to the State’s argument, simply because § 814.28 is intended to remedy a perceived problem does not make it remedial:

It would not be an exaggeration to suggest that the legislature nearly always has in mind some problem that it seeks to address in a legislative enactment. So, if a mere legislative purpose to remedy a perceived defect in the law made a statute remedial, very few statutes would not fall within this classification. Therefore, we are convinced any correction made of defects in presently existing law must relate to remedial laws, i.e., laws that pertain to a means or method of addressing wrongs or obtaining relief.

Anderson Fin. Servs., LLC v. Miller, 769 N.W.2d 575, 580 (Iowa 2009).

Iowa Code § 814.28 does not merely clarify or technically modify the law. Iowa Code § 814.28 fully abrogates the remedy required when evidence is sufficient to support one theory of prosecution. This is a substantive change by any definition. The Iowa Supreme Court has explicitly held that statutes eliminating a remedy are substantive:

[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, 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.

Iowa Beta Chapter of Phi Delta Theta Fraternity v. State, Univ. of Iowa, 763 N.W.2d 250, 267 (Iowa 2009) (internal citations omitted); see also *Moose v. Rich*, 253 N.W.2d 565, 572 (Iowa 1977) (finding legislation was not retroactive when it did “not provide for redress of

wrongs, but rather makes a policy decision to limit the redress available”).

Iowa Code § 814.28 thus cannot be applied to cases where the judgment appealed from was rendered prior to July 1, 2019. Warren’s appeal in this case and the remedy she requested was taken under rights as they existed under the law at the time of the district court decision. The subsequent legislative action did not simply divert her claim through another statutory process where no statute expressly governed; rather, it actively abrogated her right to a particular remedy while her case was pending. This Court must find § 814.28 is a substantive change to the criminal appeal process that can be applied prospectively only.

C. Iowa Code § 4.13(1) prohibits the enactment of Iowa Code § 814.28 from applying to Warren’s pending appeal

Even if there was retroactive language within the Senate file, or if this or another court of this State tried to apply the statutory changes retroactively, such an action would violate the savings clause section of Iowa Code § 4.13(1). The amendment of a statute cannot affect any prior action taken under the statute. Iowa Code § 4.13(1)(a). Similarly, statutory change does not affect any

“proceeding, or remedy in respect of any privilege, obligation, liability, penalty, forfeiture, or punishment[.]” Iowa Code § 4.13(1)(d). A proceeding already underway prior to an amendment may be continued under the prior statutory language. *Id.* This appeal is a “proceeding” under Iowa Code § 4.13(1)(d) as defined by the Iowa Supreme Court:

In a general sense, the form and manner of conducting juridical business before a court or judicial officer; regular and orderly progress in form of law; including all possible steps in an action from its commencement to the execution of judgment.

Eldridge City Utilities v. Iowa State Commerce Commission, 303 N.W.2d 167, 170 (Iowa 1981) (*quoting* Black's Law Dictionary 1368 (Revised 4th Ed. 1968)). Put another way, a proceeding is “a step taken by a suitor to obtain action by a court.” *Id.* (internal citations omitted).

Warren commenced this proceeding in the form and manner it permitted for purposes of obtaining action by this Court. This case was appealed and briefed by Warren months prior to when Iowa Code § 814.28 went into effect on July 1, 2019. Her argument was made in reliance on the then-existing law. The enactment of § 814.28 cannot then be applied to deny her relief. Under § 4.13, then, the

enactment of Iowa Code § 814.28 may not be applied to deprive Warren of her remedy on appeal. It would be fundamentally unfair to change the rules in the middle of the ballgame.

D. The plain language of Iowa Code § 814.28 does not apply to this case

When interpreting a statute, courts are bound by the plain language of the statute. *Kay-Decker v. Iowa State Bd. of Tax Rev.*, 857 N.W.2d 216, 223 (Iowa 2014). “[T]he express mention of one thing implies the exclusion of other things not specifically mentioned.” *Hawkeye Land Co. v. Iowa Utilities Bd.*, 847 N.W.2d 199, 210 (Iowa 2014) (internal quotation marks omitted). “When a statute's language is clear, [appellate courts] look no further for meaning than its express terms.” *Id.* (internal quotation marks omitted).

Iowa Code § 814.28, by its plain language, applies only to general verdicts entered by a jury. Again, the statute states in full:

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.

Iowa Code § 814.28 (emphasis added); *compare to* Iowa R. of Evid. 5.1101 (explicitly stating rules of evidence are applicable to both bench and jury trials).

With no mention of bench trials, and multiple mentions of jury trials, the plain language of Iowa Code § 814.28 dictates that it applies only to a general verdict entered by a jury. Therefore, Iowa Code § 814.28 does not apply to Warren.

II. Warren must be granted a new trial as the remedy

The State argues that Warren's conviction should be vacated and her case remanded in order to allow the district court to issue a new ruling on the existing record. (Appellee's Br. at 18). This is not the correct remedy. The Iowa Supreme Court has made clear: "We review a claim of insufficient evidence in a bench trial just as we do in a jury trial." *State v. Myers*, 924 N.W.2d 823, 826–27 (Iowa 2019). A general verdict entered by a judge is treated no differently than a verdict entered by a jury. *Id.* Even for a judge, a general verdict based on a crime with multiple bases for guilt must have substantial evidence to support each alternative under the statute. *Id.* The remedy is also the same regardless of whether the verdict was entered by a judge or jury. *Id.* If one alternative under a general verdict is not

supported by substantial evidence, the verdict must be vacated and the case remanded for dismissal.

Myers is a very recent example of this rule. In *Myers*, where the Supreme Court reversed because of the same error that occurred in Warren's case, the district court's verdict was reversed and the case was remanded with instructions to dismiss. *Id.* at 831. The same remedy is due Warren.

III. Iowa Code § 814.7 does not apply to this pending appeal

Whether Iowa Code § 814.7 applies to bar ineffective-assistance claims in appeals filed prior to July 1, 2019 is a question that has been briefed and was argued on August 8, 2019 to the Iowa Supreme Court in *State v. Macke*, No. 18-0839; *State v. Trane*, No. 18-0825; and *State v. Corta Draine*, No. 18-1292. Consequently, this issue likely will be resolved by the Iowa Supreme Court prior to the adjudication of Warren's appeal. Warren accordingly will address this issue in an abbreviated fashion.

Iowa Code § 814.7 does not apply to this pending appeal for the same reasons that § 814.28 do not apply:

- Iowa Code § 814.7 is presumed to apply prospectively because nothing in the legislation states otherwise, whereas other portions of S.F. 589 explicitly apply retroactively;

- Applying § 814.7 retroactively would violate the savings clause section of Iowa Code § 4.13(1) because her right to raise an ineffective-assistance claim had already vested;
- Iowa Code § 814.7 substantively changes the law and thus applies only prospectively.

Warren incorporates the authority cited under issue I in support of this issue.

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CERTIFICATE OF COMPLIANCE AND SERVICE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1), excluding the parts of the brief exempted by Rule 6.903(1)(g)(1), which are the table of contents, table of authorities, statement of the issues, and certificates. The brief contains 2,211 words.

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P.6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in font size 14, Bookman Old Style.

I hereby certify that I e-filed this brief with the Electronic Document Management System with the Iowa Judicial Branch on September 11, 2019. I hereby certify that on September 11, 2019, I did serve Defendant-Appellant's Final Reply Brief on Appellant by emailing one copy to:

Jasmaine Warren
Defendant-Appellant

 /S/ *Gina Messamer*

Dated: September 11, 2019
Gina Messamer