IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. RANDY ALLEN CRAWFORD, Defendant-Appellant.	)))))))))	S.CT. NO. 19-1506

APPEAL FROM THE IOWA DISTRICT COURT
FOR SCOTT COUNTY
HONORABLE HENRY W. LATHAM II, JUDGE

APPELLANT'S BRIEF AND ARGUMENT AND REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF SERVICE

On the 13th day of July, 2020, 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 Randy Crawford, 1025 14 ½ St., Rock Island, IL 61201.

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Authorities

2019 Iowa Acts ch. 140 § 31

Iowa Const. art. III § 26

State v. Macke, 933 N.W.2d 226, 231 (Iowa 2019)

A. The changes to Iowa Code section 814.7 should be invalidated for improperly restricting the role and jurisdiction of Iowa's appellate courts.

Klouda v. Sixth Judicial Dist. Dept. of Correctional Services, 642 N.W.2d 255, 260 (Iowa 2002)

State v. Phillips, 610 N.W.2d 840, 842 (Iowa 2000)

Planned Parenthood of the Heartland v. Reynolds ex rel. State, 915 N.W.2d 206, 212 (Iowa 2018)

Iowa Const. art. V § 1

Franklin v. Bonner, 201 Iowa 516, ___, 207 N.W. 778, 779 (1926)

Iowa Const. art. V § 4

Iowa Const. art. V § 6

In re Durant Comm. Sch. Dist., 252 Iowa 237, 245, 106 N.W.2d 670, 676 (1960)

Matter of Guardianship of Matejski, 419 N.W.2d 576, 577 (Iowa 1988)

Laird Brothers v. Dickerson, 40 Iowa 665, 670 (1875)

Schrier v. State, 573 N.W.2d 242, 244-45 (Iowa 1997)

Waldon v. District Court of Lee County, 256 Iowa 1311, 1316, 130 N.W.2d 728, 731 (1964)

Iowa Code § 602.4102(2) (2017)

Varnum v. Brien, 763 N.W.2d 862, 875-76 (Iowa 2009)

Iowa Const. Art. XII § 1

U.S. Const. amend. VI

U.S. Const. amend. XIV

Iowa Const. art. I § 10

State v. Ambrose, 861 N.W.2d 550, 556 (Iowa 2015)

B. Senate File 589 violates equal protection.

U.S. Const. amend. XIV

Iowa Const. art. I § 6

Varnum v. Brien, 763 N.W.2d 862, 878 (Iowa 2009)

State v. Doe, 927 N.W.2d 656, 611 (Iowa 2019)

City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 439-41, 105 S.Ct. 3249, 3254-55 (1985)

Iowa R. App. P. 6.601 (2019)

Emery v. Fenton, 266 N.W.2d 6, 10 (Iowa 1978)

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Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S.Ct. 2574, 2582 (1986)

Gideon v. Wainwright, 372 U.S. 335, 344, 83 S.Ct. 792, 796, 9 L.Ed.2d 799 (1963)

U.S. v. Cronic, 466 U.S. 648, 654, 104 S.Ct. 2039, 2044 (1984)

Evitts v. Lucey, 469 U.S. 387, 395, 105 S.Ct. 830, 836 (1985)

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State v. Straw, 709 N.W.2d 128, 138 (Iowa 2006)

State v. Truesdell, 679 N.W.2d 611, 616 (Iowa 2004)

Wiborg v. United States, 163 U.S. 632, 658, 16 S.Ct. 1127, 1137 (1896)

C. Senate File 589 denies Crawford due process and the right to effective counsel on appeal.

U.S. Const. amend XIV

Iowa Const. art. I § 9

Medina v. California, 505 U.S. 437, 112 S.Ct. 2572 (1992)

Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S.Ct. 2574, 2582 (1986)

Gideon v. Wainwright, 372 U.S. 335, 344, 83 S.Ct. 792, 796, 9 L.Ed.2d 799 (1963)

Evitts v. Lucey, 469 U.S. 387, 394, 105 S.Ct. 830, 835 (1985)

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Wiborg v. United States, 163 U.S. 632, 658, 16 S.Ct. 1127, 1137 (1896)

Douglas v. People of State of Cal., 372 U.S. 353, 83 S.Ct. 814 (1963)

Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585 (1956)

D. Alternatively, if this Court chooses to apply Senate File 589 to Crawford's appeal, the Court should adopt a plain error rule.

Jon M. Woodruff, Note, Plain Error by Another Name: Are Ineffective Assistance of Counsel Claims a Suitable Alternative to Plain Error Review in Iowa?, 102 Iowa L. Rev. 1811, 1815 (May 2017)

Wiborg v. United States, 163 U.S. 632, 658, 16 S.Ct. 1127, 1137 (1896)

United States v. Atkinson, 297 U.S. 157, 160, 56 S.Ct. 391, 392 (1936)

Fed. R. Crim. P. 52 (2019)

United States v. Olano, 507 U.S. 725, 732-34, 113 S.Ct. 1770, 1777-78 (1993)

Tory A. Weigand, Raise or Lose: Appellate Discretion and Principled Decision-Making, 17 Suffolk J. Trial & App. Advoc. 179, 199-241 (2012)

State v. Rutledge, 600 N.W.2d 324, 325 (Iowa 1999)

State v. McCright, 569 N.W.2d 605, 607 (Iowa 1997)

Rhoades v. State, 848 N.W.2d 22, 33-34 (Iowa 2014)

Iowa Code § 814.20 (2017)

State v. Young, 292 N.W.2d 432, 435 (Iowa 1980)

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984)

State v. Truesdell, 679 N.W.2d 611, 616 (Iowa 2004)

Iowa Code § 663A.1 (2017)

II. WHETHER DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AND A FAIR TRIAL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE ONE, SECTION TEN OF THE IOWA CONSTITUTION WHEN COUNSEL FAILED TO PROPERLY CHALLENGE THE SUFFICIENCY OF THE EVIDENCE FOR FAILURE TO AFFIX A DRUG TAX STAMP? BECAUSE HEROIN IS SOLD BY WEIGHT, IT DOES NOT QUALIFY UNDER THE "DOSAGE UNIT" ALTERNATIVE CHARGED IN THIS CASE.

Authorities

State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1983)

Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984)

Strickland v. Washington, 466 U.S. 668, 687 (1984)

Iowa Code § 453B.1(3)(a)(4) (2017)

Iowa Code § 453B.12(2) (2017)

Iowa Code § 124.101(5) (2017)

Iowa Code § 124.204(3)(j) (2017)

Iowa Code § 453B.1(10) (2017)

Iowa Code § 453B.1(6) (2017)

Iowa Code § 453B.1(3)(a)(4) (2019)

State v. Hartsfield, No. 02-0744, 2003 WL 21919223 (Iowa Ct. App. Aug. 13, 2003)

State v. Adams, 554 N.W.2d 686, 691 (Iowa 1996)

2019 Iowa Acts ch. 140 § 30

Iowa Code ch. 814

Iowa Code § 453B.1(3)(a)(1) (2017)

State v. Truesdell, 679 N.W.2d 611, 616 (Iowa 2004)

ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because the issue raised involves substantial issues of first impression in Iowa. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(c) (2019). Crawford asks this Court to determine the validity of a newly-enacted statute that purports to strip Iowa's appellate courts of their ability to rule upon claims of ineffective assistance of counsel on direct appeal. Iowa Code § 814.7 (2019); 2019 Iowa Acts ch. 140 § 31. He asserts various constitutional challenges to the new statute and, alternatively, asks the Court to adopt a plain error standard of review for unpreserved claims of insufficient evidence.

STATEMENT OF THE CASE

Nature of the Case: This is an appeal by Defendant-Appellant Randy Crawford from his convictions, sentence, and judgment for: Possession of a Controlled Substance (Heroin), a serious misdemeanor in violation of Iowa Code section 124.401(5) (2017); Failure to Affix Drug Tax Stamp, a class D felony in violation of Iowa Code section 453B.12 (2017); and

two counts of Interference with Official Acts in violation of Iowa Code section 719.1(1)(c) (2019). Judgment was entered following two separate jury trials, with the Honorable Henry W. Latham II presiding over all relevant proceedings.

Course of Proceedings: On February 14, 2019, the State filed a trial information in Scott County District Court charging Defendant-Appellant Larry Crawford with: Possession of a Controlled Substance (Cocaine Base) with Intent to Deliver, class C felony in violation of Iowa Code section 124.401(1)(c)(3) (2017) (Count I); Failure to Affix Drug Tax Stamp, a class D felony in violation of Iowa Code section 453B.12 (2017) (Count II); and two counts of Interference with Official Acts in violation of Iowa Code section 719.1(1)(c) (2019) (Counts III, IV). (Information)(App. pp. 6-9). The State also alleged Crawford had a prior conviction for possession of a controlled substance for purposes of Iowa Code section 124.111. (Information)(App. pp. 6-9). Crawford pleaded not guilty and demanded a speedy trial. (Written Arraignment) (App. p. 5).

On April 8, 2019, the State filed an amended trial information changing the substance alleged in Counts I and II from cocaine base to heroin. (App. to Amend Trial Information; Amended Information)(App. pp. 10; 13-16).

Jury trial commenced April 29, 2019. (Trial Tr. p. 1 L.1-25). The jury convicted Crawford as charged under Counts II, III and IV. (Trial Tr. p. 401 L.8-p. 403 L.11; 5/1/19 Verdict Forms Cts. II-IV)(App. pp. 21-24). The jury could not come to a unanimous agreement on Count I. (Trial Tr. p. 399 L.24-p. 401 L.7). The District Court set Count I for retrial with sentencing for the remaining counts to follow. (5/2/19 Jury Trial Order)(App. pp. 25-26).

On May 24, 2019, Crawford filed a pro se motion of acquittal arguing that under Iowa Rule of Criminal Procedure 2.22(6), the District Court was required to give a judgment of acquittal on the Drug Tax Stamp charge. (5/24/19 Motion of Acquittal)(App. pp. 27-29). Crawford referred to the jury's questions to the court regarding dosage units and being

unable to come to a unanimous verdict. (5/24/19 Motion of Acquittal)(App. pp. 27-29).

On June 13, 2019, Crawford filed a pro se motion to dismiss based upon a speedy trial violation and the failure to establish his original charge of possession of crack cocaine. (6/13/19 Motion to Dismiss)(App. pp. 30-31). Crawford filed a separate pro se document the same day claiming his attorney had not visited with him prior to the upcoming trial and alleged she was not properly advocating for him. (6/13/19 Motion on Hung Jury)(App. pp. 32-33). His attorney also filed a motion to withdraw citing a breakdown in communications. (6/18/19 Motion to Withdraw)(App. p. 34).

The District Court issued an order stating Crawford's motions would be denied unless defense counsel requested a hearing. (6/19/19 Order Regarding Pro Se Motion)(App. pp. 37-38). Ultimately, the District Court held a hearing on counsel's motion to withdraw on July 8, 2019. (6/18/19 Order; Withdrawal Tr. p. 1 L.1-25)(App. p. 35-36). The District Court denied the motion to withdraw after Crawford

agreed to cooperate with defense counsel. (Withdrawal Tr. p. 10 L.6-p. 11 L.12; Order Denying App. of Def.'s Counsel to Withdraw)(App. pp. 39-40).

On July 19, 2019, Crawford filed a pro se motion to suppress alleging discrepancies in the identification of the controlled substance and the bag it was contained in. (Motion to Suppress)(App. pp. 41-44). Defense counsel filed a motion to dismiss the Drug Tax Stamp charge based on the jury's failure to render a verdict on Possession of a Controlled Substance with Intent to Deliver. (Def.'s Motion to Dismiss) (App. pp. 45-46).

The motions were discussed immediately prior to retrial. (Retrial Tr. p. 6 L.5-p. 10 L.12). The District Court initially indicated it would not consider Crawford's pro se motion to suppress because of a new law that prohibited defendants who were represented by counsel from filing pro se documents. (Retrial Tr. p. 6 L.15-p. 7 L.1). Defense counsel withdrew the motion. (Retrial Tr. p. 7 L.2-7). Defense counsel also described Crawford's June 13, 2019 motion and her motion to

dismiss as motions for new trial that would be ruled upon after retrial. (Retrial Tr. p. 7 L.11-15, p. 10 L.7-12).

Retrial of Count I commenced July 22, 2019. (Retrial Tr. p. 1 L.1-25). The State was permitted to amend the trial information to remove any reference to counterfeit or simulated controlled substances. (7/23/19 Amended Information)(App. pp. 47-50). Crawford reaffirmed his stipulation to his prior drug conviction. (Retrial Tr. p. 418 L.21-p. 421 L.20). The jury found Crawford guilty of the lesser-included offense of Possession of a Controlled Substance (Heroin). (Retrial Tr. p. 423 L.1-8; Retrial Verdict Forms)(App. p. 51).

On July 30, 2019, Crawford filed a pro se motion for judgment of acquittal or to dismiss Count II. (7/30/19 Motion of Judgment of Acquittal)(App. pp. 52-54). The District Court refused to rule upon Crawford's pro se motion, citing recent legislative changes to Iowa Code section 814.6A. (8/16/19 Order Regarding Pro Se Motion; 8/18/19 Order Regarding Pro Se Motion)(App. pp. 55-58). Crawford

reiterated his arguments in a pro se motion submitted with his letter to Chief District Court Judge Marlita Greve, which was filed on August 21, 2019. (Greve Letter)(App. pp. 59-64).

The District Court held a sentencing hearing on September 5, 2019. (Sent. Tr. p. 1 L.1-25). The District Court denied Crawford's motion for new trial challenging the evidence supporting the drug tax stamp charge. (Sent. Tr. p. 3 L.23-p. 7 L.21). The court sentenced Crawford to one year in jail with a $315 fine, a $10 DARE surcharge, and a $125 LEI surcharge on Count I, five years in prison with a suspended $750 fine and a $125 LEI surcharge on Count II, and one year in jail and a $315 fine on each of Counts III and IV. (Sent. Tr. p. 21 L.16-p. 21 L.20, p. 22 L.2-3; Sent. Order)(App. pp. 65-68). The court ordered the sentences in Counts I and II to run concurrently with one another and the sentences in Counts III and IV to run consecutively with each other and the remaining counts. (Sent. Tr. p. 21 L.21-p. 22 L.11; Sent. Order p. 2)(App. p. 66). The court determined Crawford did not have the reasonable ability to repay category

two expenses. (Sent. Tr. p. 24 L.5-9; Sent. Order p. 2)(App. p. 66).

Crawford filed a pro se notice of appeal on September 6, 2019. (Notice)(App. pp. 69-70).

Facts: Because the verdicts in this case were reached over the course of two separate jury trials, Crawford provides a recitation of the facts from each trial. More attention has been paid to the record in the first trial, as it is the foundation for the primary issue raised on appeal.

First Trial

On January 3, 2019, uniformed officers from the Davenport police department attempted to execute outstanding warrants on Defendant-Appellant Randy Crawford while he was sitting in a booth at an Outback Steakhouse. (Tr. p. 157 L.5-10, p. 158 L.23-p. 160 L.10, p. 161 L.23-p. 162 L.4, p. 250 L.6-p. 251 L.25, p. 255 L.11-16, p. 284 L.5-p. 285 L.24, p. 290 L.2-6). As the officers talked to Crawford about the warrants, they noticed Crawford moving his right hand from the table toward his waistband. (Tr. p. 160 L.11-18, p.

252 L.18-p. 253 L.4, p. 286 L.3-p. 287 L.15). When Crawford did not respond to commands to show his hands and concerned that he might be reaching for a weapon, officers tackled him. (Tr. p. 160 L.22-16, p. 253 L.5-p. 254 L.18, p. 286 L.24-p. 288 L.13).

Officers were able to get Crawford onto the ground, but he "turtled up" by placing his arms under his body. (Tr. p. 162 L.22-p. 163 L.23, p. 255 L.23-p. 256 L.20, p. 288 L.14-p. 290 L.1). Crawford continued to ignore commands to show his hands, and officers had to use closed-hand strikes to obtain compliance. (Tr. p. 164 L.19-p. 165 L.10, p. 257 L.3-p. 259 L.23, p. 290 L.7-p. 293 L.8). One of the officers noticed he appeared to be chewing something, and they feared he was trying to destroy evidence. (Tr. p. 262 L.14-21, P. 293 L.25-p. 294 L.16, p. 300 L.13-16). They did not find any weapons or contraband on him. (Tr. p. 163 L.24-25, p. 190 L.17-p. 191 L.191). Two officers received minor injuries in the attempt to arrest Crawford. (Tr. p. 174 L.15-p. 175 L.18, p. 264 L.16-p. 265 L.25).

What officers did find, however, was a small tied-off bag with a substance that was consistent with narcotics on the floor near where officers had struggled with Crawford. (Tr. p. 164 L.1-11, p. 191 L.16-24, p. 262 L.22-p. 263 L.16). There was no tax stamp on it. (Tr. p. 272 L.12-15, p. 300 L.2-7). Officers also found $6,302 in cash on Crawford. (Tr. p. 164 L.9-14, p. 299 L.15-23, p. 354 L.8-13). There was a white powdery substance on the booth where Crawford had been sitting, and it field tested positive as crack cocaine. (Tr. p. 166 L.3-9). The substance had the same appearance as the substance in the bag. (Tr. p. 166 L.16-21).

Crawford was taken to the police station in the back of a squad car. (Tr. p. 167 L.6-11). After he was removed, officers found what appeared to be a chewed-up plastic bag on the floor of the car. (Tr. p. 167 L.6-13, p. 300 L.17-p. 301 L.3). The car would have been searched by officers prior to placing Crawford in it. (Tr. p. 177 L.11-23, p. 303 L.24-p. 304 L.13). According to Detective Richard Niesen, people who

are dealing in narcotics and have it on them will ingest it if they need to hide it from police. (Tr. p. 167 L.14-p. 168 L.2).

Crawford was taken to the hospital out of a concern that he had ingested drugs. (Tr. p. 267 L.19-268 L.3, p. 303 L.19-23). At the hospital, Crawford admitted possessing a few rocks and admitted that he had aggressively come out of the booth. (Tr. p. 268 L.4-22). Officer Bryant Wayland testified he usually heard the term "rock" used in conjunction with crack cocaine and not heroin. (Tr. p. 277 L.11-18).

Niesen used a field test for crack cocaine on the bag from the restaurant, the white powder on the booth, and the bag found in the squad car. (Tr. p. 168 L.6-p. 169 L.11, p. 176 L.3-18). The items tested positive for crack cocaine. (Tr. p. 169 L.12-14, p. 200 L.13-p. 201 L.1). Niesen testified to trying to count the "rocks" in the bag – which he considered dosage units. (Tr. p. 183 L.21-p. 184 L.6). He counted 24, though some were larger, some were smaller, and there was a lot of dust. (Tr. p. 198 L.3-p. 199 L.1). Niesen measured the substance as weighing 2.2 grams. (Tr. p. 200 L.10-12).

Because field tests are not always accurate, Niesen sent the items to a lab for further testing. (Tr. p. 169 L.15-23).

Criminalist Orville Berbano of the Iowa Division of Criminal Investigations crime lab tested the substance found in the bag at the restaurant, which was described as rock substance, 2.2 grams, crack cocaine broken into 24 pieces located in a torn-off baggie. (Tr. p. 186 L.7-11, p. 206 L.1-14, p. 210 L.2-24, p. 213 L.15-19). Based on the tests he performed, the substance was 3 grams of heroin. (Tr. p. 214 L.2-p. 215 L.19). Berbano acknowledged that officers can misinterpret the results of field tests. (Tr. p. 216 L.3-21). In addition, the scales used by his lab are accurately calibrated, whereas an agency scale might not be. (Tr. p. 219 L.8-p. 220 L.2). Niesen testified this was the first time he had ever had a field test be inconsistent with later testing. (Tr. p. 185 L.10-23).

Niesen testified that the substance that was found in this case was more than what would be consistent with personal use of either crack cocaine or heroin. (Tr. p. 179 L.16-21).

He testified that for either crack cocaine or heroin the dosage unit would be 0.1 gram, or 30 dosage units in three grams. (Tr. p. 179 L.22-p. 180 L.7). According to Niesen, heroin users usually do not carry 30 dosage units of heroin or carry the amount of money found in this case. (Tr. p. 180 L. 8-14).

Detective Bryan Butt served as a street crimes and narcotics investigator with the Tactical Operations Bureau for seven years. (Tr. p. 231 L.1-23). He handled cases involving heroin at both the state and federal level. (Tr. p. 233 L.2-16). He testified that, in his training and experience, three grams of heroin was more than a user would carry at any given time. (Tr. p. 233 L.17-p. 234 L.3). The large amount of currency found on Crawford and the lack of paraphernalia for drug use were also potential indicators of dealing. (Tr. p. 234 L.4-15, p. 235 L.16-p. 236 L.1, p. 273 L.273 L.13-18, p. 314 L.12-p. 315 L.2).

According to Butt, heroin is typically sold in "point" amounts of a tenth of a gram. (Tr. p. 234 L.16-23). In Davenport, a tenth of a gram of heroin might go for $25 to

$30. (Tr. p. 234 L.16-23). Three grams of heroin would equal 30 tenth-of-a-gram amounts for individual sale. (Tr. p. 234 L.16-23, p. 239 L.19-23). Butt testified he has never encountered a heroin user with 3 grams on them because the drug is so addictive people use it as soon as they obtain it. (Tr. p. 234 L.24-p. 235 L.15).

Butt testified heroin dealers do not always carry scales with them, and that it was possible Crawford simply had not broken the heroin into quantities for sale yet. (Tr. p. 236 L.14-21). Butt described heroin as usually being injected or snorted, so either in a powder or liquid form. (Tr. p. 236 L.22-p. 237 L.19).

Butt testified the most typical weights for heroin or crack that are sold to the end user are a tenth of a gram up to a half gram or even a gram. (Tr. p. 239 L.2-8). The typical breakdown was into tenth-of-a-gram amounts packaged into aluminum bindles or baggies. (Tr. p. 243 L.18-24). He said that if a dealer did not have a scale he would have to break off

a piece and "eyeball" the amount, but that doing so was "just not typical with heroin." (Tr. p. 239 L.9-18).

Retrial

The testimony on retrial, focused as it was on Count I, was generally similar to the testimony at the first trial. Officers testified to approaching Crawford at the Outback Steakhouse on January 3, 2019 and informing him of his outstanding warrants. (Retrial Tr. p. 207 L.8-p. 209 L.22, p. 264 L.1-p. 265 L.17, p. 293 L.15-p. 294 L.10). They recounted the movement of his hand toward his waistband, the concerns that caused them, and the resulting struggle. (Retrial Tr. p. 209 L.23-p. 212 L.14, p. 237 L.1-24, p. 266 L.2-p. 270 L.2, p. 285 L.22-p. 286 L.10, p. 295 L.1-p. 297 L.19, p. 303 L.10-p. 304 L.19, p. 313 L.14-23).

The officers recalled how they did not find any contraband on Crawford, but located a white powder on his seat and a small bag containing a white powdery substance in the area of the booth. (Retrial Tr. p. 212 L.15-p. 16, p. 270 L.23-p. 271 L.8, p. 275 L.13-23, p. 297 L.20-25). They

testified that he appeared to be chewing on something during the struggle and spit another plastic baggie out of his mouth as he was being transported to the jail in a squad car. (Retrial Tr. p. 213 L.17-p. 214 L.20, p. 268 L.8-16, p. 274 L.23-p. 275 L.9, p. 277 L.9-p. 278 L.8, p. 305 L.10-p. 307 L.23). The substances tested field tested positive for crack cocaine and Crawford admitted at the hospital he had "a few rocks" – what officers understood to mean crack cocaine. (Retrial Tr. p. 212 L.20-p. 214 L.20, p. 225 L.3-20, p. 240 L.17-p. 241 L.5, p. 244 L.2-p. 245 L.12, p. 248 L.12-p. 249 L.4, p. 279 L.18-p. 280 L.8, p. 293 L.1-7, p. 308 L.19-p. 309 L.10). He was also found to have approximately $6,300 in cash on him. (Retrial Tr. p. 214 L.21-p. 215 L.7, p. 271 L.18-24).

Niesen testified he took the substance out of its plastic bag for testing and sent the bag to be fingerprinted. (Retrial Tr. p. 224 L.10-p. 225 L.2). The bag at the time of the incident appeared to be white, but by the time of trial and retrial was pink. (Retrial Tr. p. 242 L.9-25). Crime Scene

Technician Alycia Fritz was unable to obtain any usable prints from the bag, and acknowledged that the dye process she used turned the bag pink. (Retrial Tr. p. 256 L.1-p. 257 L.5, p. 259 L.11-p. 18).

Niesen admitted the scale he used to weigh the substance was not certified and that the field tests they use are not as accurate as the testing done by the crime lab. (Retrial Tr. p. 250 L.3-p. 251 L.11). Berbano testified that he received the substance for testing and that it was, in fact, heroin. (Retrial Tr. p. 323 L.18-p. 326 L.6). He also measured the weight of the heroin at 3.0 grams using his calibrated scales. (Retrial Tr. p. 327 L.4-p. 328 L.17).

Officers testified that the amount of drugs contained in the bag – whether crack cocaine or heroin – would not be consistent with personal use. (Retrial Tr. p. 231 L.20-p. 232 L.8, p. 283 L.16-p. 284 L.1, p. 310 L.9-p. 311 L.3, 350 L.10-17, p. 352 L.2-8). They testified that a standard dosage unit for heroin was one tenth of a gram and that the three grams of heroin found would equal 30 dosage units. (Retrial Tr. p. 232

L.9-19, p. 310 L.12-21, p. 345 L.8-15, p. 345 L.16-22). Wayland differentiated crack cocaine as usually being sold in rocks, rather than by weight. (Retrial Tr. p. 314 L.3-17). Butt reiterated that heroin was typically sold in tenth-of-a-gram amounts and more rarely half-gram or gram amounts. (Retrial Tr. p. 346 L.19-22, p. 348 L.10-17).

ARGUMENT

I. AS A JURISIDICTIONAL MATTER, CRAWFORD SHOULD BE PERMITTED TO PROCEED WITH HIS APPEAL ON HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO CHALLENGE THE SUFFICIENCY OF THE EVIDENCE. SENATE FILE 589 CANNOT STRIP THIS COURT OF JURISDICTION TO RULE UPON CONSTITUTIONAL CLAIMS. ALTERNATIVELY, SUFFICIENCY CHALLENGES SHOULD BE AMENABLE TO PLAIN ERROR REVIEW.

On July 1, 2019, Senate File 589 took effect. 2019 Iowa Acts ch. 140 § 31; Iowa Const. art. III § 26. The legislation is relevant to Crawford's claim on appeal because it purports to prohibit Iowa's appellate courts from ruling upon claims of ineffective assistance of counsel:

> 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.~~

2019 Iowa Acts ch. 140 § 31 (emphasis in original).

The Iowa Supreme Court has held that the new legislation is not retroactive in operation and applies based upon the entry of judgment being appealed from. State v. Macke, 933 N.W.2d 226, 231 (Iowa 2019). In this case, Crawford was sentenced on September 5, 2019, and filed his notice of appeal on September 6, 2019. (Sent. Order;

Notice)(App. pp. 65-70). Under Macke, the new legislation is applicable to his appeal.

Nonetheless, Crawford contends the new legislation should not be applied to his case because it improperly invades the jurisdiction and authority of the Court and violates equal protection, due process, and the right to counsel. Crawford asks this Court to strike down the statute on these grounds. In the alternative, he asks this Court to adopt a plain error rule when the issue involves a challenge to the sufficiency of the evidence.

A. The changes to Iowa Code section 814.7 should be invalidated for improperly restricting the role and jurisdiction of Iowa's appellate courts.

Senate File 589 improperly interferes with the separation of powers, with this Court's jurisdiction, and with the Court's role in addressing constitutional violations.

"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 Correctional Services, 642 N.W.2d 255, 260 (Iowa 2002)(quoting State v. Phillips, 610 N.W.2d 840, 842 (Iowa 2000)). The doctrine means that one branch of government may not impair another branch in "the performance of its constitutional duties." Id.

> The Iowa Constitution, like its federal counterpart, establishes three separate, yet equal, branches of government. Iowa Const. art. III, § 1. Our constitution tasks the legislature with making laws, the executive with enforcing the laws, and the judiciary with construing and applying the laws to cases brought before the courts.
>
> Our framers believed "the judiciary is the guardian of the lives and property of every person in the State." 1 The Debates of the Constitutional Convention of the State of Iowa 229 (W. Blair Lord rep., 1857) [hereinafter The Debates], http://www.statelibraryofiowa.org/services/collections/law-library/iaconst. Every citizen of Iowa depends upon the courts "for the maintenance of [her] dearest and most precious rights." Id. The framers believed those who undervalue the role of the judiciary "lose sight of a still greater blessing, when [the legislature] den[ies] to the humblest individual the protection which the judiciary may throw as a shield around [her]." Id.

Planned Parenthood of the Heartland v. Reynolds ex rel. State, 915 N.W.2d 206, 212 (Iowa 2018).

All judicial power in Iowa is vested in the Iowa Supreme Court and its inferior courts. Iowa Const. art. V § 1. "Courts constitute the agency by which judicial authority is made operative. The element of sovereignty known as judicial is vested, under our system of government, in an independent department, and the power of a court and the various subjects over which each court shall have jurisdiction are prescribed by law." Franklin v. Bonner, 201 Iowa 516, ___, 207 N.W. 778, 779 (1926).

With respect to the jurisdiction of the courts, the Iowa Constitution provides:

> Sec. 4. Jurisdiction of supreme court. The supreme court shall have appellate jurisdiction only in cases in chancery, and shall constitute a court for the correction of errors at law, under such restrictions as the general assembly may, by law, prescribe; and shall have power to issue all writs and process necessary to secure justice to parties, and shall exercise a supervisory and administrative control over all inferior judicial tribunals throughout the state.

Iowa Const. art. V § 4.

> Sec. 6. Jurisdiction of district court. The district court shall be a court of law and equity, which shall be distinct and separate jurisdictions, and have jurisdiction in civil and criminal matters arising in their respective districts, in such manner as shall be prescribed by law.

Iowa Const. art. V § 6.

It should not go unnoticed that the Iowa Constitution mentions that limitations on the manner of the Court's jurisdiction can be prescribed by the legislature. Iowa Const. art. V § 4. The Iowa Supreme Court has previously recognized statutory limitations placed on the right to appeal, for example. See In re Durant Comm. Sch. Dist., 252 Iowa 237, 245, 106 N.W.2d 670, 676 (1960)("We have repeatedly held the right of appeal is a creature of statute. It was unknown at common law. It is not an inherent or constitutional right and the legislature may grant or deny it at pleasure.").

But the ability of the legislature to "prescribe" the "manner" of jurisdiction should not be confused with an ability to remove jurisdiction from the Court. Subject matter

jurisdiction is conferred upon Iowa's courts by the Iowa Constitution. Matter of Guardianship of Matejski, 419 N.W.2d 576, 577 (Iowa 1988). They have general jurisdiction over all matters brought before them and the legislature can only prescribe the manner of its exercise; the legislature cannot deprive the courts of their jurisdiction. Id. (referring to Laird Brothers v. Dickerson, 40 Iowa 665, 670 (1875)); Schrier v. State, 573 N.W.2d 242, 244-45 (Iowa 1997).

"Once the right to appeal has been granted, however, it must apply equally to all. It may not be extended to some and denied to others." Waldon v. District Court of Lee County, 256 Iowa 1311, 1316, 130 N.W.2d 728, 731 (1964). Although Iowa Code section 602.4102 contemplates the Iowa Supreme Court handling criminal appeals, Senate File 589 makes claims of ineffective assistance of counsel unreviewable on direct appeal. Iowa Code § 602.4102(2) (2017). This is particularly problematic for the Court's inherent jurisdiction.

The Iowa Supreme Court has both the jurisdiction and the duty to invalidate state actions that conflict with

the state and federal constitutions. See Varnum v. Brien, 763 N.W.2d 862, 875-76 (Iowa 2009)(courts are obliged to protect the supremacy of the constitution); Iowa Const. Art. XII § 1. One of the rights enumerated in both constitutions is the assistance of counsel. U.S. Const. amends. VI, XIV; Iowa Const. art. I § 10. The constitutional right to counsel means the right to effective assistance of counsel. State v. Ambrose, 861 N.W.2d 550, 556 (Iowa 2015).

A statute that seeks to divest Iowa's appellate courts of their ability to decide and remedy claimed deprivations of constitutional rights improperly intrudes upon the jurisdiction and authority of the judicial branch.

> No law that is contrary to the constitution may stand. Iowa Const. art. XII, § 1. "[C]ourts must, under all circumstances, protect the supremacy of the constitution as a means of protecting our republican form of government and our freedoms." Varnum v. Brien, 763 N.W.2d 862, 875 (Iowa 2009). Our framers vested this court with the ultimate authority, and obligation, to ensure no law passed by the legislature impermissibly invades an interest protected by the constitution.

Planned Parenthood of the Heartland v. Reynolds ex rel. State, 915 N.W.2d 206, 212-13 (Iowa 2018). "The obligation to resolve this grievance and interpret the constitution lies with this court." Id.

By removing consideration of ineffective assistance claims – specifically – from the realm direct appeal, the legislature is intruding on Iowa appellate courts' independent role in interpreting the constitution and protecting Iowans' constitutional rights. The legislature has violated the separation of powers and impermissibly interfered with the inherent jurisdiction of the Court. The provision of Senate File 589 that prohibits the Court from ruling upon claims of ineffective assistance of counsel should be invalidated.

B. Senate File 589 violates equal protection.

Crawford contends Senate File 589 denies him equal protection under the law because it deprives him of his ability to challenge the sufficiency of the evidence on direct appeal based upon the fact his attorney failed to provide effective assistance of counsel.

Both the federal and state constitutions provide for equal protection of citizens under the law. U.S. Const. amend. XIV; Iowa Const. art. I § 6. "Like the Federal Equal Protection Clause found in the Fourteenth Amendment to the United States Constitution, Iowa's constitutional promise of equal protection is essentially a direction that all persons similarly situated should be treated alike." Varnum v. Brien, 763 N.W.2d 862, 878 (Iowa 2009)(internal quotation marks omitted). Accord State v. Doe, 927 N.W.2d 656, 611 (Iowa 2019).

There are three classes of review for an equal protection claim based upon the underlying classification or right involved. Classifications based on race, alienage, or national origin and classifications impacting fundamental rights are evaluated according to strict scrutiny. Varnum v. Brien, 763 N.W.2d at 879. Such classifications are "presumptively invalid and must be narrowly tailored to serve a compelling governmental interest." Id. Intermediate or heightened scrutiny is applied to "quasi-suspect groups. Id. To survive

intermediate scrutiny, the law must not only further an important governmental interest and be substantially related to that interest, but the justification for the classification must be genuine and must not depend on broad generalizations. Id. All other classifications are evaluated using rational basis review, in which a complainant has the "heavy burden of showing the statute is unconstitutional and must negate every reasonable basis upon which a classification may be sustained." Id. See City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 439-41, 105 S.Ct. 3249, 3254-55 (1985)(discussing different levels of scrutiny under federal equal protection analysis).

The first step in analyzing an equal protection claim is to determine if the legislation is treating similarly situated persons differently. State v. Doe, 927 N.W.2d 656, 611 (Iowa 2019). "[T]o truly ensure equality before the law, the equal protection guarantee requires that laws treat all those who are similarly situated with respect to the purposes of the law alike." Varnum v. Brien, 763 N.W.2d at 883.

Crawford asserts there is a group of criminal defendants who have been convicted based upon insufficient evidence as shown by the record made in the district court. Within this group, Senate File 589 has singled out those wrongly-convicted defendants who were provided ineffective assistance of counsel for disparate treatment. Whereas a properly represented defendant can obtain relief from his criminal conviction on direct appeal, an improperly represented defendant may not get relief on direct appeal and must instead pursue postconviction relief while, in many cases, being required to serve his sentence.[1] The legislature has treated Crawford and defendants like him differently based upon his

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1. Although there is an option to post an appeal bond and stay a criminal sentence in most cases, there is no such option for bond in postconviction. See Iowa R. App. P. 6.601 (2019)(supersedeas bond on appeal); Emery v. Fenton, 266 N.W.2d 6, 10 (Iowa 1978)(postconviction applicants are not bailable). The Iowa Supreme Court has acknowledged the significant disadvantages to criminal defendants who must proceed directly to postconviction proceedings in lieu of direct appeal. State v. Macke, 933 N.W.2d 226, 233 (Iowa 2019). Crawford is out on appeal bond as is not currently incarcerated.

assertion of a violation of the constitutional right to effective assistance of counsel.

Crawford further contends that his claim of disparate treatment involves the deprivation of a fundamental right. The right to counsel is a fundamental right. Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S.Ct. 2574, 2582 (1986)(citing Gideon v. Wainwright, 372 U.S. 335, 344, 83 S.Ct. 792, 796, 9 L.Ed.2d 799 (1963)). The right to counsel "assures the fairness, and thus the legitimacy, of our adversary process." Id. Because the right to counsel is so vital to the accused, courts have long recognized that the right to counsel means the right to effective counsel. U.S. v. Cronic, 466 U.S. 648, 654, 104 S.Ct. 2039, 2044 (1984); Evitts v. Lucey, 469 U.S. 387, 395, 105 S.Ct. 830, 836 (1985).

Accordingly, by depriving Crawford of his right to direct review of his claim of ineffective assistance of counsel, Senate File 589 deprives him of a fundamental right. Strict scrutiny should apply to his claim on appeal. Varnum v. Brien, 763 N.W.2d 862, 879 (Iowa 2009); See City of Cleburne, Tex. v.

Cleburne Living Center, 473 U.S. 432, 440, 105 S.Ct. 3249, 3254 (1985)(discussing different levels of scrutiny under federal equal protection analysis).

Regardless of whether this Court considers Crawford's claim under strict scrutiny or rational scrutiny, however, Senate File 589 cannot stand. Video from the legislature's discussions regarding the bill indicates it was designed to reduce "waste" caused by "frivolous appeals" in the criminal justice system. Senate Video 2019-03-28 at 1:49:10-1:49:20[2], statements of Senator Dawson, available at https://www.legis.iowa.gov/dashboard?view=video&chamber=S&clip=s20190328125735925&dt=2019-03-28&offset=3054&bill=SF%20589&status=i.

To the extent Senate File 589 prevents appellate courts from ruling upon claims of ineffective assistance of counsel for defendants claiming a conviction was obtained upon insufficient evidence, the bill is neither narrowly tailored nor

2. Times listed on video links are approximate.

rationally related to its legislative purpose. Crawford recognizes that many claims of ineffective assistance of counsel can require development of additional record in a postconviction proceeding. State v. Straw, 709 N.W.2d 128, 138 (Iowa 2006). A claim of ineffective assistance of counsel for failure to properly move for a judgment of acquittal is not one of them. See, e.g., State v. Truesdell, 679 N.W.2d 611, 616 (Iowa 2004); Wiborg v. United States, 163 U.S. 632, 658, 16 S.Ct. 1127, 1137 (1896). Such claims can be decided on direct appeal because they require no additional record. State v. Truesdell, 679 N.W.2d at 616. "Preserving ineffective assistance of counsel claims that can be resolved on direct appeal wastes time and resources." Id. Senate File 589 is not only not narrowly tailored or rationally related to the government's professed purpose, but directly contravenes it.

Senate File 589 denies Crawford equal protection under the law and should not be applied to his appeal.

C. Senate File 589 denies Crawford due process and the right to effective counsel on appeal.

Both the Iowa Constitution and the United States Constitution ensure criminal defendants are accorded due process of law. U.S. Const. amend XIV; Iowa Const. art. I § 9. In the realm of criminal law, however, the Due Process Clause has limited operation beyond the rights guaranteed in the Bill of Rights. Medina v. California, 505 U.S. 437, 112 S.Ct. 2572 (1992).

The right to counsel is a fundamental right. Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S.Ct. 2574, 2582 (1986)(citing Gideon v. Wainwright, 372 U.S. 335, 344, 83 S.Ct. 792, 796, 9 L.Ed.2d 799 (1963)). It is so fundamental to due process that it has been made obligatory on the states. Evitts v. Lucey, 469 U.S. 387, 394, 105 S.Ct. 830, 835 (1985). The right to counsel means the right to effective counsel. U.S. v. Cronic, 466 U.S. 648, 654, 104 S.Ct. 2039, 2044 (1984). This guarantee extends to the first appeal as of right. Evitts v. Lucey, 469 U.S. at 396, 105 S.Ct. at 836.

"A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." Id. An appellate attorney need not submit every argument urged by an appellant, but "the attorney must be available to assist in preparing and submitting a brief to the appellate court … and must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim." Id. at 394, 105 S.Ct. at 835.

Crawford contends Senate File 589 violates his right to counsel on appeal and, therefore his right to due process, by interfering with appellate counsel's ability to effectively represent him. Senate File 589 purports to prohibit an appellate court from deciding his claim of ineffective assistance of counsel on direct appeal even though the underlying claim of insufficient evidence is one of the rare ineffective assistance claims that could be decided on direct appeal. State v. Truesdell, 679 N.W.2d 611, 616 (Iowa 2004); Wiborg v. United States, 163 U.S. 632, 658, 16 S.Ct. 1127,

1137 (1896). Where a state provides an appeal as of right but refuses to allow a defendant a fair opportunity to obtain an adjudication on the merits of his appeal, the "right" to appeal does not comport with due process. Evitts v. Lucey, 469 U.S. at 405, 105 S.Ct. at 841 (citing Douglas v. People of State of Cal., 372 U.S. 353, 83 S.Ct. 814 (1963); Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585 (1956)).

> A system of appeal as of right is established precisely to assure that only those who are validly convicted have their freedom drastically curtailed. A State may not extinguish this right because another right of the appellant-the right to effective assistance of counsel-has been violated.

Id. at 399-400, 105 S.Ct. at 838.

Senate File 589 essentially extinguishes Crawford's ability to challenge the sufficiency of the evidence used to convict him because his trial attorney violated his right to effective counsel. Accordingly, Senate File 589 denies Crawford due process and should not be applied to his appeal.

D. Alternatively, if this Court chooses to apply Senate File 589 to Crawford's appeal, the Court should adopt a plain error rule.

Should this Court determine that the legislature can properly prevent Iowa's appellate courts from ruling on claims of ineffective assistance of counsel on direct appeal from a criminal conviction, Crawford asks this Court to adopt plain error review.

Plain error review has been recognized by federal courts since 1896. Jon M. Woodruff, Note, Plain Error by Another Name: Are Ineffective Assistance of Counsel Claims a Suitable Alternative to Plain Error Review in Iowa?, 102 Iowa L. Rev. 1811, 1815 (May 2017). In Wiborg v. United States, the United States Supreme Court was confronted with a claim of insufficient evidence that had not been raised in the trial court. Wiborg v. United States, 163 U.S. 632, 658, 16 S.Ct. 1127, 1137 (1896). The Court ruled on the merits of the claim and articulated the foundation for the plain error rule, holding "although this question was not properly raised, yet if a plain error was committed in a matter so absolutely vital to

defendants, we feel ourselves at liberty to correct it." Id. The Court would later hold:

> In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings.

United States v. Atkinson, 297 U.S. 157, 160, 56 S.Ct. 391, 392 (1936).

The federal plain error rule has been codified in the Federal Rules of Criminal Procedure:

> Rule 52. Harmless and Plain Error
> (a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.
> (b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Fed. R. Crim. P. 52 (2019). Although the language of the rule does not describe what a "plain error" is or what "substantial rights" are, the advisory committee note says it is a codification of existing law, citing Wiborg. Fed. R. Crim. P. 52 (2019)(note to subdivision (b)).

The United States Supreme Court created a three-part standard for plain error in United States v. Olano. United States v. Olano, 507 U.S. 725, 732-34, 113 S.Ct. 1770, 1777-78 (1993). First, there must be an error, such as a deviation from a legal rule, which has not been affirmatively waived. Id. at 732-33, 113 S.Ct. at 1777. Second, the error must be plain, meaning clear or obvious. Id. at 734, 113 S.Ct. at 1777. Third, the error must affect substantial rights, meaning the defendant has the burden of proving the error was prejudicial in that it affected the outcome of the district court proceedings. Id., 113 S.Ct. at 1777-78. Of course, other federal and state courts have adopted their own interpretations of the plain error rule. See generally Tory A. Weigand, Raise or Lose: Appellate Discretion and Principled Decision-Making, 17 Suffolk J. Trial & App. Advoc. 179, 199-241 (2012).

The Iowa Supreme Court has repeatedly declined to recognize plain error review. State v. Rutledge, 600 N.W.2d 324, 325 (Iowa 1999); State v. McCright, 569 N.W.2d 605, 607

(Iowa 1997). The Court has justified requiring error preservation in the trial court as follows:

> On closer reflection we think simple justice demands rigid adherence to the rule. The rule does not proceed, as cynics would have it, from some vague fear of blindsiding a trial judge, but rather from the very real fear of blindsiding the trial process. Long experience has taught us that the bulk of mistakes made at trial can and will be corrected whenever the trial court is alerted to them. The public should not be required to fund a system that would allow trial counsel to, as lawyers often phrase it, "bet on the outcome."

State v. Rutledge, 600 N.W.2d at 326.

At the same time, Justice Mansfield has recognized that Iowa's appellate courts have generally substituted ineffective assistance analysis for plain error:

> Although we have not said so as a court, I think the reality is that our court has an expansive view of ineffective assistance of counsel. See State v. Clay, 824 N.W.2d 488, 504 (Iowa 2012) (Mansfield, J., concurring specially). In some respects, we are using ineffective assistance as a substitute for a plain error rule, which we do not have in Iowa. See State v. Rutledge, 600 N.W.2d 324, 325 (Iowa 1999) ("We do not subscribe to the plain error rule in Iowa, have been persistent and resolute in rejecting it, and are not at all inclined to yield on the point."). One of those areas is guilty pleas, where we vacate a plea whenever the record does not contain a factual

basis for each element of the crime, seemingly without regard to counsel's actual competence. See State v. Gines, 844 N.W.2d 437, 441 (Iowa 2014). In Gines, we said:

> Where a factual basis for a charge does not exist, and trial counsel allows the defendant to plead guilty anyway, counsel has failed to perform an essential duty. Prejudice is inherent in such a case. The only inquiry is whether the record shows a factual basis for the guilty plea.

Id. (citation omitted) (internal quotation marks omitted).

> Thus, even as we use the terminology "ineffective assistance" as a tool to review criminal convictions, I think it is especially important that we not appear to be criticizing counsel when we are talking about a legal construct of this court. See Clay, 824 N.W.2d at 504 (Mansfield, J., concurring specially) (objecting to any general suggestion that a criminal defense attorney who commits ineffective assistance by our standards has also committed an ethical violation). I join the majority opinion in this case, but I do so without finding fault in the performance of Rhoades's defense counsel.

Rhoades v. State, 848 N.W.2d 22, 33-34 (Iowa 2014)

(Mansfield, J., concurring specially).

There is a basis for plain error review in Iowa law. Iowa Code section 814.20 gives the appellate courts broad authority

to affirm, modify, or reverse a judgment, order a new trial, or reduce a defendant's punishment. Iowa Code § 814.20 (2017). It was this provision the Iowa Supreme Court relied upon when it corrected an illegal sentence without the benefit of a motion to do so in the district court. See State v. Young, 292 N.W.2d 432, 435 (Iowa 1980).

> If a sentence is illegal for example, a court mistakenly imposes a ten-year term when the statute authorizes a five-year maximum the practice in this state has been for the district court to correct the illegality when it comes to that court's attention, or for this court to do so or to direct the district court to do so when it comes to this court's attention. Thus rule 23(5)(a) really adds nothing new; it reflects what Iowa courts have been doing. See, e. g., State v. Van Klaveren, 208 Iowa 867, 873, 226 N.W. 81, 84 (1929) (this court sua sponte modified sentence to eliminate imprisonment for nonpayment of court costs); State v. Williams, 195 Iowa 374, 376, 191 N.W. 790, 791 (1923) ("when complaint is lodged against the judgment entered the defendant is privileged to have the error corrected on motion in the trial court or by appeal to this court" statute required imprisonment for nonpayment of fine to be at specified rate per day but sentence required imprisonment until fine paid); State v. Sayles, 173 Iowa 374, 383, 155 N.W. 837, 840 (1916) (this court on own initiative changed indeterminate sentence to determinate in accordance with statute for the particular crime). Nothing in rule 23(5)(a) expressly requires a motion

> thereunder prior to appeal, section 814.20 of the Code authorizes us to dispose of an appeal by affirmation, reversal, "or modification" of the judgment, and we prefer to remain with the prior practice. We thus reject the State's contention that rule 23(5)(a) must be initially applied.

Id.

As a practical matter, there is fairly little difference in the analysis for plain error versus an ineffective assistance of counsel claim. For plain error, the defendant must establish an obvious error occurred in the district court proceedings. United States v. Olano, 507 U.S. 725, 732-34, 113 S.Ct. 1770, 1777 (1993). For ineffective assistance, the defendant must establish that counsel breached an essential duty. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984). Counsel must essentially commit error so serious it cannot be said he or she was functioning "as the 'counsel' guaranteed … by the Sixth Amendment." Id. For plain error, the defendant must establish that his substantial rights were violated, meaning that the error impacted the outcome of the proceedings. United States v. Olano, 507 U.S. at 733-34, 113

S.Ct. at 1777-78. For ineffective assistance, the defendant must establish that but for the error the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. at 694, 104 S.Ct. at 2068. The two concepts are different in name only, at least for violations of established law.[3]

In this particular case, there is no basis for differentiating between plain error and ineffective assistance of counsel. Crawford claims that his attorney failed to properly challenge the sufficiency of the evidence to support his convictions. It is the sort of claim that, if established, would warrant a reversal for ineffective assistance. State v. Truesdell, 679 N.W.2d 611, 616 (Iowa 2004). It is the same challenge raised in Wiborg, in which the United States Supreme Court first articulated the plain error rule to provide

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3. Because Crawford is not raising a novel claim of ineffective assistance of counsel, he makes no arguments as to how or if the plain error doctrine should be expanded to address such claims.

a remedy to the defendant. Wiborg v. United States, 163 U.S. 632, 658, 16 S.Ct. 1127, 1137 (1896).

The appellate courts are fully capable of ruling upon a sufficiency argument directly. It is simply a question of whether the record already established in the district court supports the legal elements of the offense of conviction. State v. Truesdell, 679 N.W.2d at 616. It is an answer that the appellate courts can provide to defendants without spending needless expense and resources litigating the issue in a separate postconviction proceeding. An early ruling on appeal may also save the citizens of Iowa from the expense incurred by incarcerating a defendant during the pendency of any postconviction proceeding, only to later discover the defendant was wrongfully convicted. See Iowa Code § 663A.1 (2017) (wrongful imprisonment).

Accordingly, if this Court is now prohibited from ruling upon claims of ineffective assistance of counsel, Crawford respectfully asks this Court to adopt a plain error rule to

address those claims where error was plain and affected the substantial rights of the defendant.

II. DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AND A FAIR TRIAL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE ONE, SECTION TEN OF THE IOWA CONSTITUTION WHEN COUNSEL FAILED TO PROPERLY CHALLENGE THE SUFFICIENCY OF THE EVIDENCE FOR FAILURE TO AFFIX A DRUG TAX STAMP. BECAUSE HEROIN IS SOLD BY WEIGHT, IT DOES NOT QUALIFY UNDER THE "DOSAGE UNIT" ALTERNATIVE CHARGED IN THIS CASE.

Preservation of Error: Appellate review is not precluded if failure to preserve error results from a denial of effective assistance of counsel. State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1983).

Scope of Review: Review is de novo. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984).

Merits: A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction under the federal and state constitutions has two components:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). See also Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984). Defendant has the burden to prove both of these elements by a preponderance of the evidence. Strickland v. Washington, 466 U.S. at 687.

Crawford contends trial counsel rendered ineffective assistance when she challenged the sufficiency of the evidence for Failure to Affix a Drug Tax Stamp as charged under Count II. Although counsel did move for a judgment of acquittal, counsel failed to argue that heroin is sold by weight and therefore does not fall under the dosage unit alternative charged by the State. Because the evidence was not adequate to establish the charge, Crawford should have received an

acquittal on Count II. He was prejudiced by trial counsel's breach and his conviction, judgment, and sentence on Count II should be vacated.

The charges the State initially brought against Crawford were made under the assumption that the substance he was alleged to have possessed was crack cocaine. (Information)(App. pp. 6-9). Before trial, the DCI Crime Lab determined the substance was actually 3.0 grams of heroin. (3/26/19 Notice of Addt'l Minutes)(Conf. App. pp. 4-5). Accordingly, the State amended the trial information prior to trial to reflect the correct substance. (4/8/19 App. to Amend Information; 4/8/19 Order to Amend Information; 4/8/19 Amended Information)(App. pp. 10-16).

Consistent with the State's charging document, the jury was instructed:

> Under Count 2, the State must prove each of the following elements of Drug Stamp Tax Violation:
> 1. On or about the 3rd day of January, 2019, the defendant knowingly possessed, distributed, or offered to sell a taxable substance as defined in Instruction No. 22.

2. Defendant possessed ten or more dosage units of a taxable substance not sold by weight.

3. The taxable substance that defendant possessed did not have permanently affixed to it a stamp, label or other official indication of payment of the state tax imposed on the substance.

(Trial Inst. 29)(App. p. 19). Iowa Code §§ 453B.1(3)(a)(4), 453B.12(2) (2017). The jury was instructed that "taxable substance" meant "controlled substance" and that heroin was a controlled substance. (Trial Inst. 22)(App. p. 17). Id. §§ 124.101(5); 124.204(3)(j); 453B.1(10). The jury was also instructed that "As used in element number 2 of Instruction No. 29, "dosage unit" means the unit of measurement in which a substance is dispensed to the ultimate user. It includes, but is not limited to a pill, capsule or microdot." (Trial Inst. 23)(App. p. 18). Id. § 453B.1(6).

The evidence presented in this case established that heroin is sold by weight, rendering the "dosage unit" alternative inapplicable. See Iowa Code § 453B.1(3)(a)(4) (2019)(referring to 10 or more dosage units of a taxable substance "not sold by weight").

The officers in this case consistently described the standard "dosage unit" for heroin as being one-tenth of a gram, though on occasion they might see users with a half-gram or one gram. (Tr. p. 179 L.22-p. 180 L.7, Tr. p. 234 L.16-23, Tr. p. 239 L.2-8). Detective Bryan Butt served as a street crimes and narcotics investigator with the Tactical Operations Bureau for seven years and handled heroin cases at both the state and federal level. (Tr. p. 231 L.1-23, p. 233 L.2-16). According to Butt, three grams of heroin would equal 30 tenth-of-a-gram amounts for individual sale. (Tr. p. 234 L.16-23, p. 239 L.19-23).

Detective Richard Niesen testified to trying to count the "rocks" in the bag, which he also considered dosage units – at least when he thought the substance was crack cocaine. (Tr. p. 183 L.21-p. 184 L.6). He counted 24, though some were larger, some were smaller, and there was a lot of dust. (Tr. p. 198 L.3-p. 199 L.1). Butt, however, described heroin as usually being injected or snorted, so either in a powder or liquid form. (Tr. p. 236 L.22-p. 237 L.19). He said that if a

dealer did not have a scale to weigh the product he would have to break off a piece and "eyeball" the amount, but that doing so was "just not typical with heroin." (Tr. p. 239 L.9-18).

Although the officers occasionally referred to "dosage units," their testimony establishes that heroin is, in fact, sold by weight. The standard "dosage unit" for heroin was defined by the officers as one-tenth of a gram – or weight – and not by a number of rocks, pills, capsules, or microdots. See Iowa Code § 453B.1(6) (defining "dosage" unit and providing examples). Butt acknowledged heroin is not sold as individual rocks, which makes sense if the user is ultimately going to snort or inject it. (Tr. p. 236 L.22-p. 237 L.19, p. 239 L.9-18).

The Iowa Court of Appeals considered a similar question in the unpublished opinion of State v. Hartsfield. State v. Hartsfield, No. 02-0744, 2003 WL 21919223 (Iowa Ct. App. Aug. 13, 2003). Hartsfield was found with seven rocks of crack cocaine and argued that the rocks were the dosage units and, because there were fewer than 10, the evidence was

insufficient to convict him. Id. at *5. The State argued that the dosage unit was .1 gram, according to officer testimony, and therefore the total weight of the rocks – 2.16 grams – met the dosage unit requirement. Id.

The Court of Appeals first noted that Section 453B was silent as to what a dosage unit for crack cocaine might be. Id. Rather, the Code defined the dosage unit as the unit of measurement in which a substance is dispensed to the ultimate user. Id. at *5-6. According to the Court "[d]efining a 'dosage unit' of crack cocaine as .1 grams, a measure of weight, is contrary to the plain language of the statute under which Hartsfield was charged, which applies to taxable substances 'not sold by weight.' Id. at *6. The Court of

Appeals found the evidence against Hartfield insufficient to support his conviction. Id. at *7.[4, 5]

[4.] In State v. Adams, the Iowa Supreme Court rejected a similar challenge to the sufficiency of the evidence based upon crack cocaine being sold by weight. State v. Adams, 554 N.W.2d 686, 691 (Iowa 1996). Adams had submitted to a trial on the minutes of testimony and therefore also stipulated to the officer's statement that Adams had 10 or more dosage units of crack cocaine. Id. There is no such stipulation in this case.

[5.] Interestingly, Crawford cited Hartsfield in a pro se motion to dismiss he filed in conjunction with a letter to the Chief Judge following his retrial. (Greve Letter – Motion to Dismiss)(App. pp. 59-64). Crawford cited Hartsfield for the proposition that .1 gram was not a dosage unit for crack cocaine. (Greve Letter – Motion to Dismiss)(App. pp. 59-64). The District Court did not consider the filing because "[p]ursuant to Iowa Code section 814.6A, a defendant who is currently represented by counsel shall not file any pro se document except for a motion seeking disqualification of appointed counsel." (8/16/19 Order Regarding Pro Se Motion; 8/18/19 Order Regarding Pro Se Motion)(App. pp. 55-58).

The creation of section 814.6A was part of Senate File 589 described in Issue I above and took effect on July 1, 2019. 2019 Iowa Acts ch. 140 § 30. Section 814.6A is contained in the Iowa Code chapter on "Appeals" and therefore would not appear to be applicable to pro se filings in the trial courts. Iowa Code ch. 814. While not directly challenged in this appeal, it may be helpful for the appellate courts to provide some guidance on the provision's applicability to criminal trials.

This case demands a like result. The State's witnesses defined the dosage unit for heroin according to its weight. If it is sold by weight, the dosage unit alternative of Section 453B.1(6) is inapplicable. Iowa Code § 453B.1(3)(a)(4) (2017). Nor would the heroin have qualified under 453B.1(3)(a)(1) – had it been charged – as there was not seven or more grams of heroin involved. Id. § 453B.1(3)(a)(1).

In her motion for judgment of acquittal, trial counsel challenged the sufficiency of the evidence for Failure to Affix a Drug Tax Stamp, but did not argue the inapplicability of the dosage unit alternative based upon heroin being sold by weight. (Tr. p. 319 L.7-25, p. 356 L.12-15). She breached an essential duty and prejudiced Crawford's case by failing to do so.

"Clearly, if the record in this case fails to reveal substantial evidence to support the convictions, counsel was ineffective for failing to properly raise the issue and prejudice resulted." State v. Truesdell, 679 N.W.2d 611, 616 (Iowa 2004). The error was plain. Crawford's conviction, sentence

and judgment under Count II should be vacated and his case remanded for dismissal of that charge and resentencing.

CONCLUSION

For the reasons addressed above, Defendant-Appellant Randy Crawford respectfully requests this Court vacate his conviction, sentence, and judgment for Failure to Affix a Drug Tax Stamp and remand his case to the District Court for dismissal of the charge and resentencing.

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 $4.98, 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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/s/ Theresa R. Wilson Dated: *7/13/2020*

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