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 APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS FILED AUGUST 4, 2021

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CERTIFICATE OF SERVICE

On August 23, 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 Randy Crawford, 1025 14 ½ St., Rock Island, IL 61201.

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QUESTIONS PRESENTED FOR REVIEW

Crawford was convicted of Failure to Affix a Tax Stamp – even though the "dosage unit" alternative presented to the jury did not apply to heroin – because his attorney failed to properly challenge the sufficiency of the evidence. Should the Iowa Supreme Court re-examine its recent holding in State v. Treptow and its application to jury verdicts?

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STATEMENT IN SUPPORT OF FURTHER REVIEW

COMES NOW Defendant-Appellant and pursuant to Iowa R. App. P. 6.1103 requests further review of the August 4, 2021, decision in State of Iowa v. Randy Allen Crawford, Supreme Court No. 19-1506.

1. The Court of Appeals erred in affirming Crawford's conviction, sentence, and judgment for Failure to Affix Drug Tax Stamp, a class D felony in violation of Iowa Code section 453B.12 (2017).

2. The evidence was insufficient to establish that Crawford had the requisite "dosage units" of heroin to support his tax stamp conviction. 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").

3. Because his trial attorney failed to make the proper challenge during her motion for judgment of acquittal, Crawford claimed trial counsel ineffective. Unfortunately for Crawford, due to the mistrial and retrial of his other charge,

judgment and sentence in his case were not entered until after amended Iowa Code section 814.7 became effective on July 1, 2019.

4. In the guilty plea appeal of State v. Treptow, the Iowa Supreme Court upheld various constitutional challenges to Section 814.7 as amended. State v. Treptow, 960 N.W.2d 98 (Iowa 2021). The Court also declined to adopt plain error review. Id. at 109.

5. Crawford asks this Court to re-examine its holding in Treptow. His case does not involve a guilty plea, can be ruled upon based on the record already made, and would normally result in reversal on direct appeal due to the inherent prejudice caused by trial counsel's breach of duty.

WHEREFORE, Crawford respectfully requests this Court grant further review of the Court of Appeals' decision in his case.

STATEMENT OF THE CASE

Nature of the Case: This is an appeal by Defendant-Appellant Randy Crawford from his conviction, sentence, and judgment for: Failure to Affix Drug Tax Stamp, a class D felony in violation of Iowa Code section 453B.12 (2017). Judgment was entered following two separate jury trials, with the Honorable Henry W. Latham II presiding over all relevant proceedings.

Course of Proceedings: Crawford generally accepts the Court of Appeals' recitation of the course of proceedings.

Facts:

First Trial

On January 3, 2019, uniformed officers from the Davenport police department attempted to execute outstanding warrants on 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

Crawford was convicted of Failure to Affix a Tax Stamp – even though the "dosage unit" alternative presented to the jury did not apply to heroin – because his attorney failed to properly challenge the sufficiency of the evidence. The Iowa Supreme Court should re-examine its recent holding in State v. Treptow and its application to jury verdicts.

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.

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.

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. 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. [1]

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1. 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).

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

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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 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.

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.

The Court of Appeals did not reach this result, however, because it determined it could not rule upon Crawford's claim pursuant to newly amended Iowa Code section 814.7 and State v. Treptow. Opinion. Iowa Code § 814.7 (2019); State v. Treptow, 960 N.W.2d 98 (Iowa 2021). It is true that Treptow upheld various constitutional challenges to application of Section 814.7 to a guilty plea appeal. Id. at

102. Treptow did not, however, address whether the same result would be apply to convictions from jury trials.

Treptow found the "practice of requiring claims of ineffective assistance of counsel to be resolved in the first instance in postconviction-relief proceedings is supported by a variety of legitimate interests. Among others:

> Considering a claim of ineffective assistance of counsel on direct appeal (1) deprives the State, in responding to the defendant's arguments, of the benefit of an evidentiary hearing, including trial counsel's testimony; (2) places [the appellate courts] in the role of factfinder with respect to evaluating counsel's performance; ... and (4) constitutes a significant drain on [appellate court] resources in responding to such claims.

State v. Treptow, 960 N.W.2d 98, 108 (Iowa 2021)(quoting State v. Nichols, 698 A.2d 521, 522 (Me. 1997), holding modified by Petgrave v. State, 208 A.3d 371 (Me. 2019)).

These interests do not apply with the same force to convictions from jury trials as they might to conviction from guilty pleas. With respect to guilty pleas, an inadequate factual basis may not always result in reversal of the conviction because it is possible the State may have additional

evidence it could present to support a factual basis. State v. Schminkey, 597 N.W.2d 785, 792 (Iowa 1999). In a jury trial, the evidence in the trial record is the only evidence that can be used to support the conviction – the State is not permitted to offer additional evidence it did not present in the first instance. Burks v. United States, 437 U.S. 1, 11 (1978)("The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.")

With a guilty plea, an evidentiary hearing may be and often is necessary to place on the record the conversations between defendant and his or her counsel, and the strategic considerations behind the plea. State v. Straw, 709 N.W.2d 128, 138 (Iowa 2006). With a jury trial, there is no need for an evidentiary hearing requiring trial counsel's testimony if the evidence presented at trial is clearly insufficient. The trial record itself establishes the error. State v. Truesdell, 679 N.W.2d 611, 616 (Iowa 2004).

There is no factfinding the appellate courts need to do in reviewing a jury verdict for insufficient evidence – the evidence either establishes the elements of the offense or it does not. Nor is it a drain on appellate court resources to correct an error that is so plain on its face.

Without conceding the constitutional challenges he raised on appeal, Crawford respectfully asks this Court to adopt plain error review for sufficiency-of-the-evidence challenges to convictions based upon jury verdicts.

Plain error review has been recognized by federal courts since 1896. In Wiborg v. United States, the United States Supreme Court was confronted with a claim of insufficient evidence that had not been raised during the jury trial. 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 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.

The Iowa Supreme Court has repeatedly declined to recognize plain error review. State v. Treptow, 960 N.W.2d 98, 109 (Iowa 2021); State v. Rutledge, 600 N.W.2d 324, 325 (Iowa 1999); State v. McCright, 569 N.W.2d 605, 607 (Iowa 1997). 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).

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).

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.

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 a remedy to the defendant. Wiborg v. United States, 163 U.S.

632, 658, 16 S.Ct. 1127, 1137 (1896). The Court should apply plain error to this case and reverse Crawford's conviction.

CONCLUSION

For the reasons addressed above, Defendant-Appellant Randy Crawford respectfully requests this Court vacate the decision of the Court of Appeals, 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.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Application for Further Review was $3.40, 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 FURTHER REVIEWS

This application complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because:

[X] this application has been prepared in a proportionally spaced typeface using Bookman Old Style, font 14 point and contains 5,294 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).

/s/ Theresa R. Wilson Dated: 8/23/21

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