IN THE SUPREME COURT OF IOWA
Supreme Court No. 20–0280

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JORDAN MCKIM CRAWFORD,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR JEFFERSON COUNTY
THE HONORABLE LUCY J. GAMON, JUDGE

APPELLEE'S BRIEF

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FINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Case

State Cases

State Statutes

Other Authorities

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. The State offered sufficient evidence to prove that the defendant aided and abetted robbery and committed ongoing criminal conduct.

Authorities

Meier v. Senecaut, 641 N.W.2d 532 (Iowa 2002)
Midwest Heritage Bank, FSB v. Northway, 576 N.W.2d 588 (Iowa 1998)
State v. Banes, 910 N.W.2d 634 (Iowa Ct. App. 2018)
State v. Henderson, 908 N.W.2d 868 (Iowa 2018)
State v. Moody, No. 13–0576, 2014 WL 5861763 (Iowa Ct. App. Nov. 13, 2014)
State v. Reed, 618 N.W.2d 327 (Iowa 2000)
State v. Sanford, 814 N.W.2d 611 (Iowa 2012)
State v. Thomas, 847 N.W.2d 438 (Iowa 2014)
Iowa Code § 706A.2(1)(c), (d)

II. The defendant cannot raise an ineffective assistance claim on direct appeal.

Authorities

Griffin v. Illinois, 351 U.S. 12 (1956)
Allison v. State, 914 N.W.2d 866 (Iowa 2018)
Crowe v. De Soto Consol. Sch. Dist., 66 N.W.2d 859 (Iowa 1954)
State v. Hinners, 471 N.W.2d 841 (Iowa 1991)
Home Sav. & Tr. Co. v. Dist. Court, 95 N.W. 522 (Iowa 1903)
Iowa Dep't of Revenue v. Iowa Merit Employment Comm'n, 243 N.W.2d 610 (Iowa 1976)
James v. State, 479 N.W.2d 287 (Iowa 1991)
Lampson v. Platt, 1 Iowa 556 (1855)
Matter of Guardianship of Matejski, 419 N.W.2d 576 (Iowa 1988)
Shortridge v. State, 478 N.W.2d 613 (Iowa 1991)
State v. Johnson, 2 Iowa 549 (1856)
State v. Newton, 929 N.W.2d 250 (Iowa 2019)

State v. Olsen, 162 N.W. 781 (Iowa 1917)
United States ex rel James Davenport & Pet. for Mandamus to Cty. Commissioners of Dubuque Cty., Bradf. 5 (Iowa Terr. 1840), 1840 WL 4020
Iowa Code ch. 47, §§ 76–77
Iowa Code § 814.7
Iowa Code § 793.1 (1966)
Iowa Code § 814.6 (1979)
Iowa Code § 822.5
Iowa Code § 822.9
Iowa Code § 3088, 3090
Iowa Code § 4520 (1873)
Iowa Code § 6936 (1919)
Iowa Code § 9559
Iowa Const. Art. V, § 3 (1846)
Iowa Const. Art. V, § 4
Iowa Const. art. V, § 6
Senate File 589
2019 Iowa Acts ch. 140, § 28 (88th Gen. Assem.)

III. This Court should continue to reject plain error.

Authorities

State v. Brown, 930 N.W.2d 840 (Iowa 2019)
State v. McCright, 569 N.W.2d 605 (Iowa 1997)
State v. Rutledge, 600 N.W.2d 324 (Iowa 1999)

ROUTING STATEMENT

None of the retention criteria in Iowa Rule of Appellate Procedure 6.1101(2) apply to the issues raised in this case, so transfer to the Court of Appeals is appropriate. Iowa R. App. P. 6.1101(1).

STATEMENT OF THE CASE

Nature of the Case

The defendant, Jordan McKim Crawford, appeals his convictions following a jury trial for aiding and abetting first-degree robbery in violation of Iowa Code sections 711.1(1) and 711.2 and ongoing criminal conduct in violation of Iowa Code sections 706A.2(1)(d) and 706A.1(5), the Honorable Lucy J. Gamon presiding.

Course of Proceedings

The State accepts the defendant's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

Facts

The defendant, Ethan Spray, and Ross Thornton agreed to use an acetylene torch to cut open an ATM and take cash. Trial Tr. Day 3, 28:2–15. They owned the torch together. *Id.* at 33:14–23. The defendant cut the ATM open, Thornton assisted, and Spray served as look out. *Id.* at 28:2–15, 29:21–23; 32:25 to 34:10. The heist was captured on video. Ex.10.

Next, they agreed to rob the Pilot Grove Savings Bank in Packwood, Iowa ("Bank"). *See* Trial Tr. Day 3, 15:8–10, 17:10 to 19:24, 24:7–11. They had "an understanding as to how" the stolen "money was going to be used." Trial Tr. Day 3, 24:7–11. The defendant agreed to get Spray a mask and gloves for the robbery, though he only got him a mask. *Id.* at 17:10–16.

Spray drove most the way to Packwood in his Buick, while Thornton drove a dark maroon Dodge pickup registered to the defendant. *Id.* at 16:11 to 17:2; Trial Tr. Day 2, 78:6–10. Spray followed Thornton. Trial Tr. Day 3, 19:6 to 21:1. They stopped a couple miles from town, parked the pickup, and went to the Bank in the Buick. *Id.* In the 20 minutes surrounding the robbery, there were five calls between a phone registered to the defendant and another phone registered to both Thornton and the defendant. Trial Tr. Day 2, 99:20 to 101:5, 107:13 to 108:4.

Once at the Bank, Spray entered and pointed a gun at the manager. *Id.* at 10:20–23. He demanded money. *Id.* at 11:1 to 13:22. He left with around $18,000. *Id.* at 14:1–9. Thornton drove them back to the defendant's pickup. Trial Tr. Day 3, 20:15–24. Thornton took the money and Spray's clothes and left in the pickup. *Id.*

Both men returned to Thornton's residence. *Id.* at 22:3–14. They burned two-dollar bills and the bands holding the stolen money. *Id.* at 22:21 to 24:1. The defendant briefly helped with burning the bands. *Id.* at 22:21 to 23:7.

They got a friend to rent them a car, paying the deposit in cash. *Id.* at 108:7–18; Ex.11 (rental agreement); C.App.135–40. In the days after the robbery the defendant, Spray, and Thornton drove to Los Angeles and Oregon with the stolen money. Trial Tr. Day 3, 25:18 to 27:23. In Oregon, the defendant contacted multiple people via Facebook trying to buy pounds of "green," slang for marijuana. Trial Tr. Day 2, 129:20 to 132:5, 135:2 to 137:9; Ex.8 (Facebook messages) at 117–119, 127 to 131; C.App.120–22, 130–34.

After returning to Iowa, the defendant contacted many people via Facebook trying to sell marijuana. *See generally* Ex.8 (Facebook messages); C.App.4–134; Trial Tr. Day 2, 142:6–11. He told people he had a "p" for $2,200 or multiple pounds for $2,000 a pound. Ex.8 (Facebook messages) at 49, 63, 92–93, 95, 102; C.App.52, 66, 95–96, 97, 105. Sometimes, he sent a picture of a large quantity of marijuana. *Id.* at 62, 65, 75; C.App.65, 68, 78. He told possible customers about the various types of marijuana he had, like "purple haze," "golden

pineapple[,] girl scout cookies[,] white widow[,] and blueberry headband." *Id.* at 74; C.App.77. Sometimes he offered to sell smaller quantities. *Id.* at 102; C.App.105. One message referred to the defendant as a "drug dealer." *Id.* at 76; C.App.79.

A couple months after the Bank robbery, police obtained search warrants for all three confederates' residences. Trial Tr. Day 2, 40:17 to 41:10. At Thornton's residence they found "50 to $55,000." Trial Tr. Day 3, 90:24 to 91:2. At either Thornton's or Spray's residence, police found a sheet of prices for various weights of a drug. *Id.* at 72:22 to 73:23; Ex.5B; App.23. Those prices corresponded to the prices that the defendant offered via Facebook. *Compare* Ex.5B; App.23, *with* Ex.8 (Facebook messages) at 92–95; C.App.95–98. And at Spray's, they found a note that said "Im Freaking out Feds are onto us!! Do you know how to look for wire taps and/or bugs?" Ex.5C; App.24; Trial Tr. Day 3, 76:5–12.

En route to the defendant's residence, police saw the defendant driving his Volkswagen bug. Trial Tr. Day 2, 42:23 to 44:1. They stopped him and searched the car, locating a small amount of marijuana, $470, and two phones. Trial Tr. Day 2, 45:6 to 47:12. One

of the phones was exclusively the defendant's, while the other "was in [the defendant's] and Ross Thornton's name." *Id.* at 46:5–10.

The State charged the defendant with aiding and abetting first-degree robbery and ongoing criminal conduct. Am. Trial Info.; App.10. A jury convicted him as charged. Verdict; App.21–22. He timely appealed. J. & Sentence (2/3/2020); App.25; Notice Appeal (2/7/2020); App.31.

ARGUMENT

I. The State offered sufficient evidence to prove that the defendant aided and abetted robbery and committed ongoing criminal conduct.

Preservation of Error

The defendant moved for judgment of acquittal arguing that "[n]o credible proof was presented that [he] … aided and abetted" the Bank robbery and that the State failed to prove he committed ongoing criminal conduct, including the continuity element. Mot. J. Acquittal (10/25/2019) at ¶¶ 4(a), 4(b)(3); App.13–14; *see also* Trial Tr. Day 3, 95:14–22. The district court overruled his motion preserving error. Trial Tr. Day 3, 104:19–21; *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

But the defendant did not argue that the State failed to prove that he aided and abetted first-degree robbery, specifically. He did not

argue that the State failed to prove that he knew or specifically intended that a gun would be used in the robbery. *See* Mot. J. Acquittal (10/25/2019); App.13; Trial Tr. Day 3, 93:6 to 104:21. His argument that the State offered insufficient evidence that he aided and abetted first-degree robbery is thus unpreserved. *See Meier*, 641 N.W.2d at 537.

Standard of Review

This Court reviews sufficiency claims for correction of errors at law. *State v. Thomas*, 847 N.W.2d 438, 442 (Iowa 2014) (quoting *State v. Sanford*, 814 N.W.2d 611, 615 (Iowa 2012)). It considers all the evidence "in the light most favorable to the State" including reasonable inferences, though it does not consider "just the inculpatory evidence." *Id.* If the evidence could "convince a rational jury that the defendant is guilty beyond a reasonable doubt," it is sufficient. *Id.* The jury is "free to reject certain evidence, and credit other evidence." *Id.*

Merits

The defendant argues that the State failed to offer sufficient evidence that he aided and abetted the Bank robbery or committed

ongoing criminal conduct. Defendant Br. at 20. The State takes his arguments in turn.

A. The State offered sufficient evidence that the defendant aided and abetted the Bank robbery by providing a mask and pickup truck knowing they would be used in the Bank robbery.

The defendant argues that the State failed to prove that he aided and abetted "robbery in the first degree." Defendant Br. at 25. He says that the State failed to produce evidence that he knew or specifically intended that Spray would use a gun during the robbery. *Id.* at 26–7. If this Court finds that claim preserved, the State agrees. *See State v. Henderson*, 908 N.W.2d 868, 876 (Iowa 2018) (requiring knowledge, not mere foreseeability, that a gun would be used to convict for aiding and abetting first-degree robbery).

Turning to second-degree robbery, the defendant claims that "the State failed to prove [he] aided and abetted this robbery." Defendant Br. at 26. To prove that the defendant aided and abetted second-degree robbery, the State had to show that he "had the specific intent to commit a theft … as aider and abettor[,]" and "[t]o carry out his intention or to assist another to commit the theft … the defendant … did aid and abet another" in the Bank robbery. Jury Instr. No. 19; App.17. "'Aid and abet' means to knowingly approve and

agree to the commission of a crime, either by active participation in it or by knowingly advising or encouraging the act in some way before or when it is committed." Jury Instr. No.21; App.18. The State offered ample evidence that the defendant aided and abetted the robbery.

The State proved that the defendant had the "specific intent to commit theft" as an aider and abettor. First, the defendant agreed to the plan to rob the Bank. *See* Trial Tr. Day 3, 15:8–10, 17:10 to 19:24, 24:7–11. Second, he provided support for the plan by giving the gunman a mask and allowing his pickup to be used as transportation. *Id.* at 17:10–16; Trial Tr. Day 2, 78:6–10. Third, after the robbery, he continued with the plan of using the proceeds to travel to Oregon to buy marijuana and sell that marijuana in Iowa. Trial Tr. Day 2, 129:20 to 132:5, 135:2 to 137:9; Trial Tr. Day 3, 25:18 to 27:23; Ex.8 (Facebook messages) at 127 to 131; C.App.130–34.

The State also proved that the defendant aided and abetted the robbery by encouraging the act before it was committed. As just explained, he agreed to the bank robbery. He then encouraged it by providing materials to help carryout and get away with the robbery undetected. He gave the gunman a mask. Trial Tr. Day 3, 17:7–16. And he let the getaway driver use his pickup to travel most the way to

the Bank. *Id.* at 16:20 to 17:2; Trial Tr. Day 2, 78:6–10. The getaway driver also used the pickup to return with the robbery proceeds. Trial Tr. Day 3, 20:15–24. And to further help avoid detection, the defendant helped burn the money bands. *Id.* at 22:21 to 23:7.

The State proved that the defendant had the specific intent to rob the Bank and aided and abetted the robbery by lending it material support. This Court should affirm his robbery conviction.

B. The State proved that the defendant committed ongoing criminal conduct by stealing from an ATM and robbing the Bank to get money to purchase marijuana to sell for profit in Iowa.

The defendant argues that the State failed to offer sufficient evidence that he engaged in ongoing criminal conduct. Defendant Br. at 20. He says that the "State failed to produce substantial evidence that [he] participated in specified unlawful activity on a continuing basis." *Id.* at 29. Because "the jury was instructed without objection, the jury instruction[s] become[] law of the case" for sufficiency claims. *State v. Banes*, 910 N.W.2d 634, 639 (Iowa Ct. App. 2018); Trial Tr. Day 4, 4:18 to 5:24. To convict the defendant of ongoing criminal conduct, the State had to prove that he: (1) "participated, directly or indirectly, in an enterprise[,]" and (2) "knew the enterprise was being conducted through specified unlawful activity on a

continuing basis, to wit: a) the theft of money from the Brighton, Iowa ATM; and/or b) the robbery of the [Bank]; and/or c) the distribution, either attempted or completed, of marijuana." Jury Instr. No. 25; App.19.

1. The State proved that the defendant conducted the enterprise through the unlawful activities of theft, robbery, and distributing or attempting to distribute marijuana.

To begin, the defendant does not contest that he participated in an enterprise. Indeed, he worked with Spray and Thornton to steal from the Brighton ATM and rob the Bank, then used the proceeds to buy marijuana in Oregon for distribution in Iowa. Trial Tr. Day 3, 15:8–10, 17:10 to 19:24, 24:7–11, 28:2–15, 29:21–23; 32:25 to 34:10; Ex.8 (Facebook messages); C.App.4–134; Ex.10.

Next, the State proved that the defendant "knew the enterprise was being conducted through specified unlawful activity on a continuing basis." Jury Instr. No.25; App.19. The instructions listed three acts that the State could prove to satisfy this element: the AMT theft, the Bank robbery, and "distribution, either attempted or completed, of marijuana." *Id.*; App.19.

The State proved both that the defendant committed the ATM theft and Bank robbery. It proved that he committed theft by using an

acetylene torch to open the Brighton ATM and steal money with Thornton and Spray. *See id.*; App.19. Spray testified to as much, and surveillance video confirmed Spray's testimony. Trial Tr. Day 3, 28:2–15, 29:21–23; 32:25 to 34:10; Ex.10. And as already explained, the State proved that the defendant aided and abetted the Bank robbery. S*ee* Jury Instr. No. 25; App.19.

The State also proved that the defendant engaged in "the distribution, either attempted or completed, of marijuana." *Id.*; App.19. Spray testified that the three confederates agreed how to use the robbery proceeds and went to Oregon to purchase marijuana. Trial Tr. Day 3, 24:7–11; *see id.* at 25:18 to 27:23. Cell tower data confirmed that the purchasing trip to Oregon occurred. *See id.* at 25:18 to 27:23. The defendant's Facebook messages showed that he tried to buy pounds of marijuana in Oregon. Trial Tr. Day 2, 129:20 to 132:5, 135:2 to 137:9; Ex.8 (Facebook messages) at 127 to 131; C.App.130–34. Facebook messages also showed that in the days after visiting Oregon, he contacted many people trying to sell pounds of marijuana. *See generally* Ex.8 (Facebook messages); C.App.4–134; Trial Tr. Day 2, 142:6–11. In messages he offered specific strains of marijuana for sale, including "purple haze," "golden pineapple[,] girl

scout cookies[,] white widow[,] and blueberry headband." Ex.8 (Facebook messages) at 74; C.App.77. In those messages he was referred to as a "drug dealer." *Id.* at 76; C.App.79. When police executed a search warrant at either Spray's or Thornton's residence, they found a list of prices for various weights of a drug. Trial Tr. Day 3, 72:22 to 73:23; Ex.5B; App.23. The pricelist corresponded to the prices offered by the defendant in his Facebook messages. *Compare* Ex.5B; App.23, *with* Ex.8 (Facebook messages) at 92–95 ; C.App.95–98. Police found a note at Spray's residence saying that the "Feds [were] on to them." Ex.5C; App.24; Trial Tr. Day 3, 76:5–12. And at Thornton's residence police found "50 to $55,000." Trial Tr. Day 3, 90:24 to 91:2. The defendant offered no evidence explaining how he or his confederates would have lawfully had that much cash. *See id.* at 114 to 124. This evidence allowed the jury to find both that the defendant distributed marijuana and that he attempted to distribute marijuana.

The defendant says that because "attempted distribution of marijuana is not a crime in Iowa," it cannot go towards proving ongoing criminal conduct. Defendant Br. at 30. He points to the instruction defining "[s]pecified unlawful activity" as "any act … that

is punishable as an indictable offense" in Iowa to support his argument. *Id.* at 29 (quoting Jury Instr. No. 27; App.20) But the marshalling instruction allowed the jury to consider "attempted" "distribution … of marijuana" in determining whether the defendant "knew the enterprise was being conducted through specified unlawful activity on a continuing basis." Jury Instr. No. 25; App.19. This Court can reconcile Instructions 25 and 27 by reading Instruction 27 to expand the unlawful activity to any crime in Iowa, not just the three activities listed in Instruction 25. Jury Instrs. 25, 27; App.19, 20. To the extent Instructions 25 and 27 conflict, the defendant did not object to them, so the jury could convict him if it found the State proved the elements in the marshalling instruction, including that the defendant attempted to distribute marijuana. And as the State just explained, its evidence allowed the jury to conclude that the defendant distributed marijuana, not just attempted to do so.

The marshalling instruction was consistent with the crime the State charged. It charged the defendant with ongoing criminal conduct by *attempting* to conduct his enterprise through specified unlawful activity. Am. Trial. Info. (9/4/2019) at 1–2; App.10–11; Iowa Code § 706A.2(1)(c), (d). By charging him with *attempting* to conduct

the enterprise through unlawful activity, the defendant need not have successfully completed all the unlawful activity but merely attempted to conduct the enterprise through unlawful activity. So, using the money from the theft and robbery to attempt to distribute marijuana in Iowa was enough.

The State offered sufficient evidence allowing the jury to find that the defendant engaged in specified unlawful activities—the ATM theft, Bank robbery, and attempted or completed marijuana sales. Jury Instr. No.25; App.19. Because that is what the marshalling instruction required, this Court should conclude that the State proved he engaged in specified unlawful activities. *See Banes*, 910 N.W.2d at 639 (holding unobjected to instruction become law of the case).

2. The State proved that the defendant committed the unlawful activities on a continuing basis.

The district court did not define continuing basis. But Iowa courts have determined that "'continuity' is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *State v. Reed*, 618 N.W.2d 327, 334–35 (Iowa 2000) (quoting *Midwest Heritage Bank, FSB v. Northway*, 576 N.W.2d 588, 591 (Iowa 1998)). A "continuing basis may be found,

even where predicate acts occur over a short period of time, if there is a demonstrated relationship between the predicate acts and a threat of continuing criminal activity." *Banes*, 910 N.W.2d at 640–41.

Here, the State proved that the defendant's past conduct "project[ed] into the future" because of the "demonstrated relationship between the predicate acts" and "threat of continuing criminal activity." *See id*. As already explained, the defendant, Spray, and Thornton agreed to steal from the Brighton ATM and rob the Bank to get money to buy marijuana in Oregon to sell in Iowa. They succeeded in taking around $18,000 from the Bank and an unknown amount from the ATM. Trial Tr. Day 2, 14:1–9. They went to Oregon. Trial Tr. Day 3, 25:18 to 27:23. While there, the defendant used Facebook to try to buy pounds of marijuana. Trial Tr. Day 2, 129:20 to 132:5, 135:2 to 137:9; Ex.8 (Facebook messages) at 127 to 131; C.App.130–34. Apparently he succeeded because upon returning from Oregon he began contacting people and offering to sell them marijuana. *See generally* Ex.8 (Facebook messages); C.App.4–134; Trial Tr. Day 2, 142:6–11. He offered to sell a pound of marijuana for $2,200 and multiple pounds for $2,000 a pound. Ex.8 (Facebook messages) at 92–95; C.App.95–98. A pricelist found at a

confederate's residence listed a single pound for $2,200 and multiple pounds for $2,000 per pound. Trial Tr. Day 3, 72:22 to 73:23; Ex.5B; App.23. Police also found "50 to $55,000" at Thornton's residence. Trial Tr. Day 3, 90:24 to 91:2. And a note found at Spray's asserted that the FBI was on to them. *Id.* at 76:5–12; Ex.5C; App.24.

These facts show that the completed crimes—theft and robbery—were related to the threat of continuing crime, that is marijuana sales. The State proved that the defendant and his confederates stole from the ATM and robbed the Bank to finance their marijuana distribution plan. And they took considerable steps to carryout that plan. The State showed that their criminal acts created a risk of continuing criminal acts in the future, proving continuity. *See Reed*, 618 N.W.2d at 335 (proof that drug dealing would continue in future satisfied continuity element).

Alternatively, the jury could have found "a closed period of repeated conduct" to satisfy the continuity element. *See id.* at 334–35. As just explained, the defendant stole from an ATM and aided and abetted the bank robbery. He then used the proceeds to buy marijuana. And the jury could have found—using his Facebook messages and the unexplained $55,000 found at his confederate's

residence—that he distributed that marijuana in the weeks after he returned to Iowa from. These repeated drug sales satisfy a closed concept of continuity. *See State v. Moody*, No. 13–0576, 2014 WL 5861763, at *13 (Iowa Ct. App. Nov. 13, 2014) ("When [an] individual performs illegal drug transactions on a continual basis constituting a specified unlawful activity, he or she is guilty of ongoing criminal conduct.").

* * *

The State offered sufficient evidence that the defendant aided and abetted robbery and committed ongoing criminal conduct. This Court should therefore affirm both convictions.

II. The defendant cannot raise an ineffective assistance claim on direct appeal.

Preservation of Error

The defendant argues that Iowa Code section 814.7's prohibition on raising ineffectiveness claims on direct appeal violates the United States and Iowa constitutions. Defendant Br. at 33–46. Normally, he could raise this issue for the first time on appeal. But he does not actually argue that his counsel was ineffective. Instead, he says that if his counsel did not preserve the sufficiency arguments he makes, then the court can address them via ineffective assistance.

Defendant Br. at 21. But he does not actually argue his counsel was ineffective. *See generally id.* For example, he argues neither breach nor prejudice. *Cf.* Defendant Br. at 51 (asserting in his plain error argument that he previously explained how counsel breached a duty and he suffered prejudice on his sufficiency claim without arguing either point). Because the defendant does not assert an ineffectiveness claim, this Court need not decide his constitutional challenges to section 814.7 because doing so would be academic.

Standard of Review

This Court reviews constitutional questions de novo. *State v. Newton*, 929 N.W.2d 250, 254 (Iowa 2019).

Merits

The defendant argues that section 814.7 violates his "due process rights and his right to effective assistance of appellate counsel." Defendant Br. at 36 (bold removed). He also says that section 814.7 "improperly restricts the role and jurisdiction of Iowa's appellate courts." *Id.* at 39 (bold removed). The State takes his arguments in turn.

A. Section 814.7 violates neither Due Process nor the Right to Counsel because defendants can still litigate ineffective assistance claims and have counsel at every stage.

The defendant argues that section 814.7 violates his "due process rights and his right to effective assistance of appellate counsel." Defendant Br. at 36 (bold removed).[1] His argument fails.

To begin, the defendant has counsel on appeal. *See* Defendant Br. He also had counsel in the district court. *See*, *e.g.*, Trial Tr. Day 1, 1. If he files a PCR application, he has the right to counsel in the trial court and on appeal. Iowa Code § 822.5; *Allison v. State*, 914 N.W.2d 866, 871 (Iowa 2018). In short, section 814.7 does not prohibit him from having counsel, it just changes the forum to raise an ineffectiveness claim attacking trial counsel's performance. That does not deny him his Right to Counsel at all, much less on appeal.

Nor does it violate Due Process. The United States Supreme Court has held that "a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all." *Griffin*, 351 U.S. at 18. And the Iowa Supreme Court has said: "In Iowa the right of appeal is statutory and not constitutional."

[1] The defendant references both the Iowa and United States constitutions but makes a single argument, so the State does likewise.

Hinners, 471 N.W.2d at 843. If the defendant is not entitled to an appeal from his convictions at all, Due Process surely does not demand he be allowed to raise an ineffective-assistance claim on direct appeal instead of in PCR.

This Court should reject his Right to Counsel and Due Process claims.

B. Requiring defendants to litigate ineffectiveness claims in post-conviction-relief actions does not violate separation of powers.

The Iowa Constitution establishes the Supreme Court as a tribunal for the correction of errors at law, "under such restrictions as the general assembly may, by law, prescribe." Iowa Const. Art. V, § 4. Consistent with the text of the Iowa Constitution, the Supreme Court has repeatedly held that appellate jurisdiction in Iowa is "statutory and not constitutional." *State v. Hinners*, 471 N.W.2d 841, 843 (Iowa 1991).

To that end, "when the Legislature prescribes the method for the exercise of the right of appeal or supervision, such method is exclusive, and neither court nor judge may modify these rules without express statutory authority, and then only to the extent specified." *Home Sav. & Tr. Co. v. Dist. Court*, 95 N.W. 522, 524 (Iowa 1903). In other words, "the power is clearly given to the General Assembly to

restrict this appellate jurisdiction." *Lampson v. Platt*, 1 Iowa 556, 560 (1855) (comma omitted).[2]

Being "purely statutory," the grant of "appellate review is … subject to strict construction." *Iowa Dep't of Revenue v. Iowa Merit Employment Comm'n*, 243 N.W.2d 610, 614 (Iowa 1976). Absent a statute authorizing an appeal, this Court cannot acquire jurisdiction by an appeal. *See Crowe v. De Soto Consol. Sch. Dist.*, 66 N.W.2d 859, 860 (Iowa 1954) ("It is our duty to reject an appeal not authorized by statute."). Such authorizing statutes can be modified, and the authority to hear a particular class of appellate cases "may be granted or denied by the legislature as it determines." *James v. State*, 479 N.W.2d 287, 290 (Iowa 1991). Under Iowa's constitutional structure, the role of the judiciary is to decide controversies, but the

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[2] *Lampson* involved interpretation of a materially identical predecessor provision in the 1846 Constitution. The only difference between the 1846 and 1857 provisions is that commas were added to set off "by law," as follows: "shall constitute a court for the correction of errors at law, under such restrictions as the general assembly may, by law, prescribe." Iowa Const. Art. V, § 3 (1846). These commas did not change the provision's meaning.

And if there was any lingering question about a potential change in meaning over time, it is relevant that the Court's territorial analogue also had its jurisdiction "limited by law." *See United States ex rel James Davenport & Pet. for Mandamus to Cty. Commissioners of Dubuque Cty.*, Bradf. 5, 11 (Iowa Terr. 1840), 1840 WL 4020.

General Assembly is the arbiter of which "avenue of appellate review is deemed appropriate" for a particular class of cases. *See Shortridge v. State*, 478 N.W.2d 613, 615 (Iowa 1991), *superseded by statute on other grounds.*

These holdings show that the legislative branch in Iowa possesses nearly unbounded authority to regulate the taking of appeals at law. *See, e.g. James*, 479 N.W.2d at 290; *State v. Olsen*, 162 N.W. 781, 782 (Iowa 1917); *State v. Johnson*, 2 Iowa 549, 549 (1856). Because the source of the Supreme Court's authority to decide criminal appeals is through acts of the General Assembly, not the Constitution, it necessarily follows that legislation in this area is consistent with the Separation of Powers.

Indeed, for nearly two hundred years the General Assembly has been active in adding to or subtracting from the Supreme Court's appellate jurisdiction:

- **From 1838 into the early years of statehood**, the Territorial Legislature and General Assembly authorized the Supreme Court to hear writs of error for non-capital criminal defendants "as a matter of course," whereas the Court only had authority to hear writs in capital cases upon "allowance" of a Judge of the Supreme Court. *See* Iowa Code § 3088, 3090–91 (1851); Iowa Code ch. 47, §§ 76–77 (Terr. 1843); Iowa Code ch. Courts, §§ 76–77, p. 124 (Terr. 1839).

- **In the late 19th and into the 20th Century,** the district court had authority to hear all appeals from inferior tribunals, often as a trial anew. *See*, *e.g.,* Iowa Code § 6936 (1919) (district court had original and appellate jurisdiction of criminal actions), § 9241 (1919) ("trial anew" for appeals from justice court); § 161 (1873) (district court had original and appellate jurisdiction of criminal actions). The criminal decisions of the district court were, in turn, reviewable by the Supreme Court. *E.g*., Iowa Code § 9559 (1919); Iowa Code § 4520 (1873).

- **From approximately 1924 until 1971**, the General Assembly granted the Supreme Court authority to review "by appeal" "any judgment, action, or decision of the district court in a criminal case," for both indictable and non-indictable offenses. *See* Iowa Code § 793.1 (1966) (all criminal cases); § 762.51 (1966) (non-indictable); ch. 658, § 13994 (1924) (all criminal cases); ch. 627, § 13607 (1924) (non-indictable).

- **In 1972**, the General Assembly established the modern unified court system and stripped the Supreme Court of authority to review non-indictable criminal cases, other than by discretionary review. *See* 1972 Iowa Acts, ch. 1124 (64th Gen. Assem., 2nd Sess.); *id*. § 73.1 ("No judgment of conviction of a nonindictable misdemeanor … shall be appealed to the supreme court except by discretionary review as provided herein."); *id*. § 275 (amending 793.1); *id*. § 282 (repealing 765.51). The General Assembly also entirely stripped the Court of authority to engage in appellate review of acquittals in non-indictable cases. *Id.* § 73.1.

- **In 1979,** following substantial revisions throughout the criminal portions of the Code, the General Assembly granted the appellate courts authority to hear appeals from all "final judgment[s] of sentence," but again denied the Supreme Court authority to decide appeals from simple-misdemeanor and ordinance-violation convictions absent discretionary review. Iowa Code § 814.6 (1979).

- **In 2019**, the General Assembly stripped the appellate courts of authority to decide appeals following a guilty plea for non-Class A felonies. *See* 2019 Iowa Acts ch. 140, § 28 (88th Gen. Assem.).

Senate File 589 is the latest in a long line of jurisdiction-stripping and jurisdiction-conferring statutes. Like the earlier legislation, SF589 variously strips and grants jurisdiction from the appellate courts pursuant to the General Assembly's prerogative to regulate appellate jurisdiction. *See* Iowa Const. Art. V, § 4. This is the Separation of Powers contemplated by the Iowa Framers.

The defendant asserts that while the legislature can "'prescribe' the 'manner' of jurisdiction" that "should not be confused with an ability to remove jurisdiction from the Court." Defendant Br. at 41–2. But the Iowa Constitution allows the General Assemble to "prescribe" the "manner" of *district court* jurisdiction. Iowa Const. art. V, § 6. The Supreme Court, however, "shall constitute a court for the correction of errors at law, under such restrictions as the general assembly may, by law, prescribe." *Id.* at art. V, § 4. In short, the defendant analyzes the wrong provision—the general assembly is not limited to prescribing the manner of the Supreme Court's jurisdiction.

His citation to *Matter of Guardianship of Matejski*, 419 N.W.2d 576 (Iowa 1988), suffers from the same problem. Defendant Br. at 41–42. *Matejski* is about whether the district court had authority to order a sterilization in the absence of legislation expressly granting or denying that authority. 419 N.W.2d at 576–80. Because no statute removed such cases from the district court's jurisdiction, *Matejski* does not apply here. Plus, the court analyzed district court jurisdiction under Article V, section 6 of the Iowa Constitution, not Supreme Court jurisdiction under Article V, section 4. Those constitutional provisions have different language. The defendant offers no explanation of why "in such manner" means the same things as "under such restrictions." *Compare id.* Art. V, § 6, *with id.* Art. V, § 4. Nor does he grapple with the differing jurisdictional grants. *Id.* Because the defendant analyzes the wrong constitutional provision, his argument lacks force.

Notably, the General Assembly did not remove the Supreme Court's ability to hear appeals from ineffective-assistance claims. It just made PCR the exclusive avenue to litigate such claims. PCR applicants can still appeal the denial of their ineffectiveness claims to

the Supreme Court. Iowa Code § 822.9. Section 814.7 does not violate Separation of Powers.

* * *

This Court need not decide the constitutionality of section 814.7 because the defendant does not actually assert an ineffectiveness claim. But if it does analyze section 814.7's constitutionality, that law passes muster.

III. This Court should continue to reject plain error.

Preservation of Error

The defendant can raise this claim for the first time here.

Standard of Review

To reverse existing precedent, the defendant must make the "highest possible showing." *State v. Brown*, 930 N.W.2d 840, 854 (Iowa 2019).

Merits

The defendant invites this Court to adopt plain error. Defendant Br. at 46–51. But Iowa Courts "do not subscribe to the plain error rule …, have been persistent and resolute in rejecting it, and are not at all inclined to yield on the point." *E.g.*, *State v. Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999) (citing *State v. McCright*, 569 N.W.2d 605, 607 (Iowa 1997)). The defendant has not satisfied the "highest possible

showing required to overcome stare decisis." *See Brown*, 930 N.W.2d at 854. This Court should therefore decline his invitation.

CONCLUSION

For the foregoing reasons, the State requests that this Court affirm the defendant's convictions.

REQUEST FOR NONORAL SUBMISSION

This case is appropriate for nonoral submission.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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) or (2) because:

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