ELECTRONICALLY FILED OCT 09, 2020 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	S.CT. NO. 20-0280
	)	
JORDAN MCKIM CRAWFORD,	)	
	)	
Defendant-Appellant.	)	

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

APPELLANT'S BRIEF AND ARGUMENT

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CERTIFICATE OF SERVICE

On the 9th day of October, 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 Jordan Crawford, No. 6530477, Anamosa State Penitentiary, 406 N. High St., Anamosa, IA 52205.

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether there is insufficient evidence to convict the defendant of aiding and abetting robbery or ongoing criminal conduct?

Authorities

State v. Thomas, 561 N.W.2d 37, 39 (Iowa 1997)

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State v. Lucas, 323 N.W.2d 228, 232 (Iowa 1982)

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A. Aiding and Abetting Robbery in the First Degree

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B. Ongoing Criminal Conduct

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Iowa Code § 814.7 (2019)

1. Iowa Code § 814.7 is a violation of Crawford's due process rights and his right to effective assistance of appellate counsel:

U.S. Const. amend XIV

Iowa Const. art. I § 9

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

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2. Iowa Code § 814.7 improperly restricts the role and jurisdiction of Iowa's appellate courts:

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

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

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

U.S. Const. amend. VI

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Iowa Const. art. I, § 10

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Fed. Rule Crim. Proc. 52

Fed. Rule Evid. 103(e) (2020)

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State v. Johns, 454 P.3d 692, 697 (2019)

State v. Bueso, 225 N.J. 193, 202, 137 A.3d 516, 570 (2016)

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

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State v. Sahinovic, No. 15-0737, 2016 WL 1683039, at *2 (Iowa Ct. App. April 27, 2016)

United States v. Olano, 507 U.S. 725, 734, 113 S.Ct. 1770, 1777 (1993)

ROUTING STATEMENT

This case should be transferred to the Court of Appeals because the issues raised involve applying existing legal principles. Iowa R. App. P. 6.903(2)(d) and 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case: This is an appeal from a conviction and sentence following a jury trial for aiding and abetting robbery in the first degree and ongoing criminal conduct in Jefferson County case number FECR004933.

Course of Proceedings: On July 3, 2019, the State charged the defendant, Jordan McKim Crawford, with aiding and abetting robbery in the first degree in violation of Iowa Code sections 711.1(1), 711.2, and 793.1 (2019), a class B felony. (Trial Information) (App. pp. 7-8). Crawford entered a not guilty plea on July 18, 2019. (Written Arraignment and Plea of Not Guilty) (App. p. 9). On September 4, 2019, the State filed an Amended Trial Information, which added the charge of Ongoing Criminal Conduct in violation of Iowa Code sections

706A.2(1)(d) and 706A.1(5) (2019), a class B felony. (Amended Trial Information) (App. pp. 10-12). The case was tried to a jury beginning October 22, 2019. (Trial tr. Day 1, p. 1, L. 1-25). On October 28, 2019, the jury convicted the defendant of both charges. (Verdict Form – Count I, Verdict Form – Count II) (App. pp. 21-22). On February 3, 2020, the court sentenced the defendant to two prison terms not to exceed 25 years. The sentences were run concurrently with each other. (Judgment and Sentence) (App. pp. 25-30). On February 7, 2020, the defendant filed a notice of appeal. (Notice of Appeal) (App. pp. 31-32).

<u>Facts</u>: On June 1, 2018, Ethan Spray robbed the Pilot Grove Savings Bank in Packwood, Iowa, at gunpoint. (Trial tr., Day 2, p. 7, L. 12-19; p. 10, L. 20 – p. 11, L. 3; Day 3, p. 15, L. 8-14). Following the robbery, he left the bank and got into his Buick, where Ross Thornton was waiting. They drove out of town where Thornton has left his truck. (Trial tr. Day 3, p. 20, L. 12-24). Thornton took $14,000 that Spray took from

the bank. He also took Spray's clothing and left in the truck. Thornton burned the clothes. (Trial tr. Day 3, p. 19, L. 25 – p. 20, L. 24). According to Spray, the defendant, Jordan Crawford, had given Spray a hat or mask that he wore during the robbery. He testified that Crawford was supposed to give him gloves as well, but he did not. (Trial tr. Day 3, p. 17, L. 10-16; p. 18, L. 3-8). After the robbery, Spray stated that he went to a residence where he, Thornton, and Crawford were present. He stated that they burned the bands that were around the money and that Crawford was in and out of the room and "barely" helped him burn the bands. (Trial tr. Day 3, p. 22, L. 3 – p. 23, L. 7). The three men thereafter left on a trip out west. (Trial tr. Day 3, p. 27, L. 16-23). According to Spray, the three men had previously attempted to break into an ATM machine at a different bank. (Trial tr. Day 3, p. 28, L. 2-15).

During the course of the investigation, police officers found money that was stolen from the bank at Thornton's

residence. (Trial tr. Day 2, p. 151, L. 19-21). In August of 2018, Police found $470 in the defendant's possession; however, none of that money was traced back to the bank in Packwood. (Trial tr. Day 2, p.40, L. 17- 25; p. 47, L. 9-12; p. 51, L. 24 – p. 52, L. 3). Spray testified that he was not sure if Crawford was ever given any money from the bank robbery. (Trial tr. Day 3, p. 44, L. 22-24). During this time, the defendant was employed and was paid $1262 by his employer on July 12, 2018. (Trial tr. Day 3, p. 116, L. 4-14; Defendant's Ex. E) (Conf. App. p. 141).

The police investigation connected Crawford to Thornton though cell phones and a truck. Crawford and Thornton had a cell phone registered to both of them. Crawford also had another cell phone registered to him. (Trail tr. Day 2, p. 89, L. 6-12; p. 107, L. 13 – p. 108, L. 4). Around the time of the robbery, four calls were made between these two cell phones. (Trial tr. Day 2, p. 99 – p. 100, L. 24). The truck that Thornton drove after the bank robbery was registered to

Crawford and insured by Thornton. (Trial tr. Day 2, p. 42, L. 2-4; Day 3, p. 16, L. 20 – p. 17, L. 4). According to Spray, Crawford and Thornton were living at the same residence at the time of the robbery. (Trial tr. Day 3, p. 18, L. 22 – p. 19, L. 5).

During the investigation, police obtained records of Crawford's Facebook messages. According to police, the conversations contained in those messages appeared to indicate that the defendant was trying to sell marijuana. (Trial tr. Day 2, p. 134, L. 5 – p. 136, L. 15; p. 139, L. 13-21).

Crawford was arrested and charged with aiding and abetting the bank in Packwood and for ongoing criminal conduct based on the Packwood robbery, the attempted ATM robbery and Crawford's attempt to sell marijuana. (Trial Information) (App. pp. 7-8).

Further relevant facts will be discussed below.

ARGUMENT

There is insufficient evidence to convict the defendant of aiding and abetting robbery or ongoing criminal conduct.

Preservation of Error and Standard of Review: The court reviews sufficiency of the evidence challenges for corrections of errors at law. State v. Thomas, 561 N.W.2d 37, 39 (Iowa 1997). The defendant moved for a motion for judgment of acquittal at the end of the State's case. In addition, the defendant filed a written "Motion for Directed Verdict of Acquittal." (Trial tr. Day 3, p. 92, L. 19 – p. 95, L. 25; Motion for Directed Verdict of Acquittal) (App. pp. 13-15). Counsel for the defendant argued that the state failed to present credible proof that Crawford was involved in ongoing criminal activity, that the State failed to prove the specified indictable offenses on a continuing basis, and that the State failed to present sufficient proof that Crawford aided and abetted Spray's robbery. (Trial tr. Day 3, p. 92, L. 19 – p. 95, L. 25; Motion for Directed Verdict of Acquittal) (App. pp. 13-15). The Court denied the motion. (Trial tr. Day 3, p. 103, L. 10 – p.

104, L. 21). At the end of the evidence, counsel for the defendant renewed the motion and the court again denied it. (Trial tr. Day 4, p. 3, L. 12 – p. 4, L. 3). Error therefore was preserved.

If the court finds that error was not adequately preserved, counsel was ineffective in failing to do so and the court should consider the issues under the ineffective assistance of counsel framework. Counsel's failure to preserve error can constitute ineffective assistance of counsel, and, therefore, the Iowa Supreme Court allows an exception to error preservation rules in ineffective assistance of counsel claims. State v. Hrbek, 336 N.W.2d 431, 435-36 (Iowa 1983); State v. Lucas, 323 N.W.2d 228, 232 (Iowa 1982). Claims of ineffective assistance of counsel concern constitutional rights, and the standard of review is therefore de novo. State v. Osborn, 573 N.W.2d 917, 920 (Iowa 1998).

Discussion: In reviewing challenges to the sufficiency of evidence, the court considers all of the evidence viewed "in the

light most favorable to the State, including all reasonable inferences that may be fairly drawn from the evidence." State v. Williams, 695 N.W.2d 23, 27-28 (Iowa 2005). A verdict will be upheld only if substantial evidence in the record supports it. State v. Nitcher, 720 N.W.2d 547, 556 (Iowa 2006). The court considers all the evidence presented, not only inculpatory evidence. State v. Keopasaeuth, 645 N.W.2d 637, 640 (Iowa 2002). Evidence is considered substantial if it can convince a rational jury that the defendant is guilty beyond a reasonable doubt. Williams, 695 N.W.2d at 27-28. In reviewing a challenge to the sufficiency of the evidence, the relevant question is whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See* State v. Turner, 345 N.W.2d 553, 555-556 (Iowa 1983); State v. Robinson, 288 N.W.2d 337, 339 (Iowa 1980). The evidence presented "must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture." State v. Hamilton, 309 N.W.2d 471, 479 (Iowa

1981).

A. <u>Aiding and Abetting Robbery in the First Degree</u>

The defendant was convicted of aiding and abetting the armed robbery of the Packwood bank. During the trial, the defendant did not contest the fact that Ethan Spray robbed the bank. The defense argued that the defendant did not aid and abet that robbery. The Iowa Code defines "Aiding and Abetting" as follows:

> All persons concerned in the commission of a public offense, whether they directly commit the act constituting the offense or aid and abet its commission, shall be charged, tried and punished as principals. *The guilt of a person who aids and abets the commission of a crime must be determined upon the facts which show the part the person had in it, and does not depend upon the degree of another person's guilt.*

Iowa Code § 703.1 (2017) (emphasis added). "To sustain a conviction under a theory of aiding and abetting, 'the record must contain substantial evidence the accused assented to or lent countenance and approval to the criminal act by either actively participating or encouraging it prior to or at the time of its commission.'" <u>State v. Hearn</u>, 797 N.W.2d 577, 580

(Iowa 2011) (quoting State v. Ramirez, 616 N.W.2d 587, 591-92 (Iowa 2000), *overruled on other grounds by* State v. Reeves, 636 N.W.2d 22, 25-26 (Iowa 2001). "Knowledge is essential; however, neither knowledge nor presence at the scene of the crime is sufficient to prove aiding and abetting." State v. Barnes, 204 N.W.2d 827, 828 (Iowa 1972). In State v. Henderson, 908 N.W.2d 868, 876 Iowa 2018), this Court explained that "under a joint criminal conduct theory, the question is whether the charged, later crime was foreseeable, regardless of whether the defendant had the specific intent to commit that crime or knowledge that his or her compatriot was committing the crime." However, "[t]he same is not true under the theory of aiding and abetting. There the defendant must have 'knowingly aided the principal' in committing the crime." Id. "[A]n aiding and abetting conviction requires not just an act facilitating one or another element, but also a state of mind extending to the entire crime." Rosemond v. United States, 572 U.S. 65, 75-76, 134 S. Ct. 1240, 1248 (2014).

"[I]n the context of a first-degree robbery prosecution under the dangerous weapon alternative, the State must prove the alleged aider and abettor had knowledge that a dangerous weapon would be or was being used." Henderson, 908 N.W.2d at 876. "Otherwise, the aider and abettor may have knowledge or intent to commit *a* robbery, but not *first-degree* robbery. Id. (emphasis in original). In this case, the State failed to prove the defendant aided and abetted in the robbery, and the robbery in the first degree. The court instructed the jury on Robbery in the First Degree as follows:

> As to Count I, The State must prove all of the following elements of Aiding and Abetting Robbery in the First Degree:
> 1. On or about the 1st day of June, 2018, the defendant had the specific intent to commit a theft, either as principal or as aider and abettor.
> 2. To carry out his intention or to assist another to commit the theft or to escape from the scene, with or without the stolen property, the defendant aided and abetted another in the robbery of the Pilot Grove Savings Bank, during which time Darrell Hoehne was threatened with, or purposefully placed in immediate fear of serious injury.
> 3. The defendant aided and abetted another who was armed with a dangerous weapon.
>
> If the State has proved all of the elements, the

defendant is guilty of Aiding and Abetting Robbery in the First Degree. . . .

(Jury Instruction No. 18) (App. p. 16).

The State produced evidence that the defendant supplied a hat or a facemask to Ethan Spray. (Trial tr. Day 3, p. 17, L. 10-16; p. 46, L. 14-23). The State did not present proof that the defendant supplied the hat or mask to Spray with the specific intent that it be used in the robbery. In fact, Spray's testimony that the defendant failed to supply gloves tends to show that the defendant was not aware that he was supplying Spray with means to commit the robbery. (Trial tr. Day 3, p. 18, L. 3-8). Spray testified that the defendant was not part of the planning of the Packwood bank robbery. (Trial tr. Day 3, p. 46, L. 7-10). The State did not produce any evidence that the defendant had the specific intent to commit a robbery as an aider or an abettor. The State failed to prove the defendant aided and abetted this robbery.

Further the State failed prove he aided and abetted robbery in the first degree, because it produced no evidence

that the defendant knew that Spray would be armed while he robbed the bank. According to Spray, the defendant had nothing to do with the gun he used in the robbery. (Trail tr. Day 3, p. 45, L. 7-16).

Spray failed to testify that the defendant knew, encouraged or lent countenance to the robbery. Knowledge of a crime is not enough. This conviction should be vacated and remanded for dismissal.

B. <u>Ongoing Criminal Conduct</u>

The State charged the defendant with violating Iowa Code section 706A.2(1)(d) (2019), which is the section that concerns specified unlawful activity influenced enterprises. Under subsection (d), it is "unlawful for any person to conspire or attempt to violate or to solicit or facilitate the violations of the provisions of paragraph 'a', 'b', or 'c'". Of paragraphs "a", "b", or "c", it appears the State prosecuted the defendant under paragraph "c", which provides that it is "unlawful for any person to knowingly conduct the affairs of any enterprise

through specified unlawful activity or to knowingly participate, directly or indirectly, in any enterprise that the person knows is being conducted through specified unlawful activity." Iowa Code § 706A.2(1)(c) (2019). The State chose to prosecute the defendant under the "specified unlawful activity influenced enterprises" alternative rather than the "acts of specified unlawful activity" alternative. *See* State v. Olsen, 618 N.W.2d 346, 348-49 (Iowa 2000).

The court instructed the jury on this charge as follows on the charge of Ongoing Criminal Conduct:

> As to Count II, the State must prove that the defendant committed all of the following elements of Commission of Specified Unlawful Activity Influenced Enterprises, Ongoing Criminal Conduct:
>
> 1. During the time period from May 29, 2018, through June 15, 2018, the defendant participated, directly or indirectly, in an enterprise.
> 2. The defendant 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 robber of the Pilot Grove Savings in Packwood, Iowa Bank; and/or c) the distribution either attempted to completed, or marijuana.
>
> If the State has proved both of the above elements, the Defendant is guilty of Commission of Specified Unlawful Activity Influenced Enterprises, Ongoing

Criminal Conduct. . . .

(Jury Instruction No. 25) (App. p. 19).[1] The court instructed the jury that "[s]pecified unlawful activity is defined as any act, including any preparatory or completed offense, committed for financial gain on a continuing basis, that is punishable as an indictable offense under the laws of the state in which it occurred and under the laws of this state." (Jury Instruction No. 27) (App. p. 20). This instruction tracks the language defining "specified unlawful activity" in Iowa Code section 706A.1(5) (2019).

The State failed to produce substantial evidence that the defendant participated in specified unlawful activity on a continuing basis. Specified unlawful activity is an "act, including any preparatory or completed offense, committed for financial gain on a continuing basis, that is punishable as an indictable offense under the laws of the state in which it

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[1] Although the State charged the defendant with conspiring, attempting or soliciting a violation of subsection "c", the court instructed the jury not under conspiracy, but as a principal. *See* Iowa Code §§ 706A.1(c), (d) (2017).

occurred and under the laws of this state." Iowa Code § 706A.1(5) (2019). Here, the State alleged the offenses that the defendant participated in were the theft of the ATM in Brighton, Iowa, on May 29, 2018, the robbery at the Packwood Bank on June 1, 2018, and the "distribution, either attempted or completed of marijuana." (Jury Instruction No. 25) (App. p. 19). First, the alleged attempted distribution of marijuana is not a crime in Iowa. The State failed to show that attempted distribution of marijuana is a crime in any other state. Second, the State failed to produce any evidence that the defendant completed any distribution of marijuana in any state. The State only produced evidence that it claimed were communications between the defendant and other people about the sale of marijuana. (State's Ex. 8; Trial tr. Day 2, p. 139, L. 13 – p. 141, L. 15) (Conf. App. pp. 4-134). Therefore, the attempted sale of marijuana is not and indictable offense and cannot be used to establish specified unlawful activity. The State offered no evidence that the defendant completed

any sale or distribution of marijuana. There was insufficient evidence therefore that the "distribution, either attempted or completed of marijuana" is an indictable offense and therefore is not specified unlawful activity. (Jury Instruction No. 25) (App. p. 19).

That leaves the ATM theft and the bank robbery. If the court finds sufficient evidence that the defendant aided and abetted in the bank robbery, these two offenses do not establish that the specified unlawful activity was conducted on a continuing basis. This Court has interpreted "continuing basis" to require a relationship between the predicate acts and the threat of continuing activity. State v. Reed, 618 N.W.2d 327, 334-35 (Iowa 2000). A relationship exists if the predicate acts "have the same or similar purposes, results, participants, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated events." Id. at 641. Continuity can be established in two ways. The State can show continuity over closed

period by proving series of related predicates extending over a substantial period of time. Reed, 618 N.W.2d at 335. Second, "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." State v. Banes, 910 N.W.2d 634, 640-41 (Iowa Ct. App. 2018). The State must prove the unlawful activities are related and they pose a threat of continued activity. Midwest Heritage Bank, FSB v. Northway, 576 N.W. 2d 588, 591 (Iowa 1998).

Assuming the State established a relationship between the ATM theft and the robbery, it did not establish continuity. These acts occurred three days apart. Therefore, the State has not established a closed period where the acts extended over a substantial period of time. *See* Banes, 910 N.W.2d at 641(finding that a series of burglaries over a period of a few days was not a "series of related predicates over 'a substantial period of time'") (citations omitted); Reed, 618 N.W.2d at 336

(stating that predicate acts over a few weeks or months with no threat of future criminal conduct does not satisfy this requirement).

Just as in Banes, the State was unable to produce any evidence that there was a threat of future criminal conduct. Although the State may have proven two crimes over 3 days, there was nothing to indicate these men intended to continue robbing and stealing. Indeed, the charges were not brought until over one year later and there was no alleged additional criminal activity within that time period. (Criminal Complaint and Arrest Warrant, 6/24/2019) (App. p. 5). The State therefore failed to produce substantial evidence of ongoing criminal conduct and the charge should be dismissed.

C. Ineffective Assistance of Counsel

If the court finds that counsel's motion for judgment of acquittal did not preserve any of the issues argued above, counsel was ineffective in failing to do so. To prove a claim of ineffective assistance of counsel, the defendant must show (1)

trial counsel failed to perform an essential duty, and (2) prejudice resulted. Strickland v. Washington, 466 U.S. 668, 688 (1984). "Ineffective assistance under Strickland is deficient performance by counsel resulting in prejudice, with performance being measured against an 'objective standard of reasonableness,' 'under prevailing professional norms.'" State v. Maxwell, 743 N.W.2d 185, 195 (Iowa 2008) (quoting Rompilla v. Beard, 545 U.S. 374, 380 (2005)). The defendant's legal representative has a duty to know the law and to be aware of changes in the law. In addition to counsel's duty to advocate his cause, consult with the defendant and to keep him informed regarding critical developments during the legal process, "[c]ounsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 2065 (1984).

Prejudice exists when counsel's failure to perform an essential duty undermines confidence in the outcome of the

proceeding. State v. Clay, 824 N.W.2d 488, 496 (Iowa 2012). This "does not mean a defendant must establish that counsel's deficient conduct more likely than not altered the outcome in the case. A defendant need only show that the probability of a different result is sufficient to undermine confidence in the outcome." State v. Maxwell, 743 N.W.2d 185, 196 (Iowa 2008).

"The failure of trial counsel to preserve error at trial can support an ineffective assistance of counsel claim." State v. Truesdell, 679, N.W.2d 611, 615-16 (Iowa 2004). If the record "fails to reveal substantial evidence to support the convictions, counsel was ineffective for failing to properly raise the issue and prejudice resulted." Id. at 616.

In 2019, the Iowa legislature sought to remove the ability of this Court to hear claims of ineffective assistance of counsel. As amended in 2019, Iowa Code § 814.7 states:

> "An ineffective assistance of counsel claim in a criminal case shall be determined by filing an application for postconviction relief pursuant to chapter 822. 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."

Iowa Code § 814.7 (2019).

1. Iowa Code § 814.7 is a violation of Crawford's due process rights and his right to effective assistance of appellate counsel:

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. 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 (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 Iowa Code § 814.7 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. Iowa Code § 814.7 purports to prohibit an appellate court from deciding his claims of ineffective assistance of counsel on direct appeal even though the issue of the failure to object to an erroneous jury instruction on direct appeal. *See, e.g.* State v. Goff, 342 N.W.2d 830, 837-38 (Iowa 1983). 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.

Precluding Crawford's ineffective assistance of counsel claim extinguishes his right to contest the validity of his conviction because his counsel failed to object to Instruction number 10. Accordingly, § 814.7 denies Crawford's due process and should be determined to be unconstitutional.

2. Iowa Code § 814.7 improperly restricts the role and jurisdiction of Iowa's appellate courts:

Iowa Code § 814.7 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. Recently, the Iowa Supreme Court examined the judicial branch's role within Iowa's "venerable system of government:"

> The Iowa Constitution, like its federal counterpart, establishes three separate, yet equal, branches of government. 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." Every citizen of Iowa depends upon the courts "for the maintenance of [her] dearest and most precious rights." 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]."

<u>Planned Parenthood of the Heartland v. Reynolds ex rel. State</u>, 915 N.W.2d 206, 212 (Iowa 2018) (internal citations omitted) (alteration in original).

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." <u>Franklin v. Bonner</u>, 207 N.W.2d 778, 779 (Iowa 1926).

Article V, sections 4 and 6 are related to the jurisdiction of the courts. Article V, section 4 provides the jurisdiction of the Iowa Supreme Court. Iowa Const. art. V, § 4. It states:

> 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. Likewise, Article V, section 6 provides for the jurisdiction of the district court. It states:

> 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.

Notably, the Iowa Constitution provides that limitations on the manner of the Court's jurisdiction can be prescribed by the legislature. See Iowa Const. art. V § 4. 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. In re 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. (quoting Laird Brothers v. Dickerson, 40 Iowa 665, 670 (1875)); Schrier v. State, 573 N.W.2d 242, 244–45 (Iowa 1997).

The Iowa Supreme Court has previously recognized statutory limitations placed on the right to appeal, for example. See In re Durant Comm. Sch. Dist., 106 N.W.2d 670, 676 (Iowa 1960) (citations omitted) ("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."); see also Wissenberg v. Bradley, 229 N.W.2d 20

(Iowa 1929). The United States Supreme Court has held similarly. McKane v. Durston, 153 U.S. 684, 687–88 (1894) ("A review by an appellate court of the final judgment in a criminal case, however grave the offence of which the accused is convicted, . . . is not now a necessary element of due process of law."). However, these holdings are subject to criticism. See Cassandra Burke Robinson, The Right to Appeal, 91 N.C.L. Rev. 1219, 1221 (2013) (arguing U.S. Supreme Court has relied on "nineteenth century dicta" for the proposition that due process does not require a right of appeal and expressing concerns that states will attempt to eliminate appeals as of right "in order to save fiscal and administrative resources"); Marc M. Arkin, Rethinking the Constitutional Right to an Appeal, 39 UCLA L. Rev. 503 (1992); Jones v. Barnes, 463 U.S. 745, 756 n. 1 (1983) (Brennan, J. dissenting) (predicting that if the court were squarely faced with the issue, it would hold that due process requires a right to appeal a criminal conviction).

"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." In re Chambers, 152 N.W.2d 818, 820 (Iowa 1967) (citing Waldon v. District Court of Lee County, 130 N.W.2d 728, 731 (Iowa 1964)). Although Iowa Code section 602.4102 contemplates the Iowa Supreme Court handling criminal appeals, the amendment to section 814.7 would make claims of ineffective assistance of counsel unreviewable on direct appeal. Iowa Code § 602.4102(2) (2019). 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) (noting the courts have an obligation to protect the supremacy of the constitution). One of the rights enumerated in both the United States and Iowa Constitutions is the

assistance of counsel. U.S. Const. amends. VI, XIV; Iowa Const. art. I, § 10. Having a constitutional right to counsel means the having a right to *effective* assistance of counsel. State v. Ambrose, 861 N.W.2d 550, 556 (Iowa 2015) (citations omitted).

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. The Iowa Supreme Court has eloquently stated:

> No law that is contrary to the constitution may stand. "[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." 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, 915 N.W.2d at 212–13 (internal citations omitted) (alteration in original). "The obligation to

resolve this grievance and interpret the constitution lies with this court." Id.

By removing the court's consideration of ineffective-assistance-of counsel claims on direct appeal, the legislature is intruding on Iowa appellate courts' independent role in interpreting the constitution and protecting Iowans' constitutional rights. This action by the legislature violates the separation of powers and impermissibly interferes with the inherent jurisdiction of the Court. Accordingly, this Court should invalidate the statutory changes prohibiting the Court from ruling upon claims of ineffective assistance of counsel that are presented on direct appeal.

D. Plain Error

The plain error rule has long been part of our federal jurisprudence. "if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it." Wiborg v. U.S., 163 U.S. 632, 658, 16 S.Ct. 1127, 1137 (1896).

Both the Federal Rules of Criminal Procedure and the Federal Rules of Evidence provide that a court may take notice of plain error despite that fact that the issue has not been preserved. Fed. Rules Crim. Proc. 52, Fed. Rules Evid. 103(e) (2020).

Admittedly, the Iowa Rules of Evidence and Criminal Procedure contain no such provisions. However, the stated purpose of the rules of evidence contains a statement of purpose which is consistent with the adoption of the plain error standard:

> Rule 5.102 Purpose. These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination

Iowa R. Evid. 5.102 (2020).

This Court has previously taken notice of the potential inefficiencies associated with postconviction relief proceedings. "Preserving ineffective-assistance-of-counsel claims that can

be resolved on direct appeal wastes time and resources." State v. Truesdell, 679 N.W.2d 611, 616 (Iowa 2004).

A 1991 case decided by the Supreme Court of New Hampshire asserted that at that time only 13 jurisdictions had not adopted the plain error standard. State v. McAdams, 594 A.2d 1273, 1275 (N.H. 1991). Thirteen state cases were cited for this proposition. *Id.* Since that time, some of the states referenced have adopted the plain error rule. These states include Georgia Gates v. State, 6298 Ga. 324, 326, 781 S.E.2d 772, 775 (2016), Kansas, Breedlove v. State, 310 Kan. 56, 70 445 P.3d 1101, 1111 (2019), Montana, State v. Johns, 454 P.3d 692, 697 (2019), New Jersey, State v. Bueso, 225 N.J. 193, 202, 137 A.3d 516, 570 (2016).

This Court has previously rejected the plain error rule in no uncertain terms. State v. Rutledge, 600 N.W.2d 324, 325 (Iowa 1999). However, this was prior to the enactment of legislation which essentially denies appellate redress to criminal defendants who have suffered the consequences of

their trial counsel's failure to properly advance and protect their legal interests.

Iowa's current error preservation rules may unfairly disadvantage criminal defendants and their attorneys. Claims of ineffective assistance may be resolved on the breach of duty prong where counsel may be blamed not only for his or her errors or omissions but those of police, prosecutors, and judges. Ultimately, it is the criminal defendant who suffers for these errors, sometimes, without any legal remedy. See Snethen v. State, 308 N.W.2d 11, 16 (Iowa 1981) (trial counsel not ineffective to make an argument contrary to existing law). *But see* State v. Ingram, 914 N.W.2d 794, 799 (Iowa 2018) (As has been noted by other state courts before us, it would amount to malpractice for lawyers not to understand the potential for an independent state court interpretation under the state constitution that is more protective of individual rights.).

This Court should reconsider its longstanding rejection of plain error doctrine. *See e.g.* 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."); State v. McCright, 569 N.W.2d 605, 607 (Iowa 1997) ("In short, we do not recognize a "plain error" rule which allows appellate review of constitutional challenges not preserved at the district court level in a proper and timely manner."); Rhoads v. State, 848 N.W.2d 22, 33 (Iowa 2014) (Mansfield, J. concurring) ("In some respects, we are using ineffective assistance as a substitute for a plain error rule, which we do not have in Iowa."); State v. Sahinovic, No. 15-0737, 2016 WL 1683039, at *2 (Iowa Ct. App. April 27, 2016) (McDonald, J., concurring) ("I write separately to note there may be merit in adopting a plain error rule rather than continuing to stretch the doctrinal limits of the right to counsel to address unpreserved error."). Federal Rule of Criminal Procedure 52(b) states that "A plain error that

affects substantial rights may be considered even though it was not brought to the court's attention." Under this rule, "plain" generally means "the court of appeals cannot correct an error pursuant to Rule 52(b) unless the error is clear under current law." United States v. Olano, 507 U.S. at 734, 113 S.Ct. at 1777.

As stated above, when the State fails to produce substantial evidence of a crime and counsel does not object, counsel is ineffective and the defendant was necessarily prejudiced. We have that circumstance in this case. There was very little evidence produced at trial and if the court determines that counsel did not adequately preserve the error, then such error is plain. The defendant should not be required to forego immediate appellate relief where such error is plain.

CONCLUSION

For the foregoing reasons, the Appellant requests the Court vacate the convictions and remand the case for dismissal.

NONORAL SUBMISSION

Counsel requests not 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 $3.76, 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

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:

[X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 6,465 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Maria Ruhtenberg Dated: 10/09/20

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