IN THE SUPREME COURT OF IOWA
Supreme Court No. 19-1506

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RANDY ALLEN CRAWFORD,
Defendant-Appellant.

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

APPELLEE'S BRIEF

THOMAS J. MILLER
Attorney General of Iowa

TIMOTHY M. HAU
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
(515) 281-4902 (fax)
tim.hau@ag.iowa.gov

MICHAEL WALTON
Scott County Attorney

NATHAN REPP
Assistant County Attorney

ATTORNEYS FOR PLAINTIFF-APPELLEE

FINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

State Statutes

State Rules

Other Authorities

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether Iowa Code section 814.7 is unconstitutional.

Authorities

Abney v. United States, 431 U.S. 651 (1977)
Evitts v. Lucey, 469 U.S. 387 (1985)
F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920)
Grady v. Iowa State Penitentiary, 346 F.Supp. 681 (N.D. Iowa 1972)
Griffin v. Illinois, 351 U.S. 12 (1956)
Reed v. Reed, 404 U.S. 71 (1971)
Strickland v. Washington, 466 U.S. 668 (1984)
United States v. Olano, 507 U.S. 725 (1993)
Bledsoe v. State, 257 N.W.2d 32 (Iowa 1977)
Crowe v. De Soto Consol. Sch. Dist., 66 N.W.2d 859 (Iowa 1954)
Eden Twp. Sch. Dist. v. Carroll Cnty. Bd. of Ed., 181 N.W.2d 158 (Iowa 1970)
Fullenwider v. State, 674 N.W.2d 73 (Iowa 2004)
State v. Hernandez-Lopez, 639 N.W.2d 226 (Iowa 2002)
Home Sav. & Tr. Co. v. Dist. Court, 95 N.W. 522 (Iowa 1903)
In re C.M., 652 N.W.2d 204 (Iowa 2004)
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)
Kurtz v. State, 854 N.W.2d 474 (Iowa Ct. App. 2014)
Lampson v. Platt, 1 Iowa 556 (1855)
State v. Lathrop, No. 06-0232, 2007 WL 601964 (Iowa Ct. App. Feb. 28, 2007)
State v. Macke, 933 N.W.2d 226 (Iowa 2019)
Matter of Guardianship of Matejski, 419 N.W.2d 576 (Iowa 1988)
Rhoades v. State, 848 N.W.2d 22 (Iowa 2014)
Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998)
Shortridge v. State, 478 N.W.2d 613 (Iowa 1991)
State v. Bruegger, 773 N.W.2d 862 (Iowa 2009)

State v. Connors, No. 11-0477, 2012 WL 4101768 (Iowa Ct. App. Sept. 19, 2012)
State v. Damme, No. 19-1139, ___ N.W.2d ___ (Iowa May 29, 2020)
State v. Gay, 526 N.W.2d 294 (Iowa 1995)
State v. Hinners, 471 N.W.2d 841 (Iowa 1991)
State v. Hutchison, 341 N.W.2d 33 (Iowa 1983)
State v. Johnson, 2 Iowa 549 (1856)
State v. Johnson, 272 N.W.2d 480 (Iowa 1978)
State v. Lang, No. 10-1797, 2011 WL 5867932 (Iowa Ct. App. Nov. 23, 2011)
State v. McCright, 569 N.W.2d 605 (Iowa 1997)
State v. Mitchell, 757 N.W.2d 431 (Iowa 2008)
State v. Newton, 929 N.W.2d 250 (Iowa 2019)
State v. Olsen, 162 N.W. 781 (Iowa 1917)
State v. Rutledge, 600 N.W.2d 324 (Iowa 1999)
State v. Thomas, 190 N.W.2d 463 (Iowa 1971)
State v. Wisher, 217 N.W.2d 618 (Iowa 1974)
State v. Young, 292 N.W.2d 432 (Iowa 1980)
Tindell v. State, 629 N.W.2d 357 (Iowa 2001)
United States ex rel James Davenport & Pet. for Mandamus to Cty. Commissioners of Dubuque Cty., Bradf. 5 (Iowa Terr. 1840), 1840 WL 4020
Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009)
Waldon v. Dist. Ct., 130 N.W.2d 728 (Iowa 1964)
Wright v. Iowa Dep't of Corr., 747 N.W.2d 213 (Iowa 2008)
Iowa Code ch. 47, §§ 76–77
Iowa Code § 793.18
Iowa Code § 814.20
Iowa Code § 814.7
Iowa Code § 822.7 (2005)
Iowa Code § 793.1 (1966)
Iowa Code § 811.5
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 Code §§ 814.1, 814.5, 814.6, 814.19; 814.22, 814.23
Iowa Const. Art. I, § 6
Iowa Const. Art. V, § 3 (1846)
Iowa Const. Art. V, § 4
Iowa Const. Art. V, § 6
Iowa R. App. P. 6.903(2)(g)(1)
Iowa R. App. P. 6.903(2)(g)(3)
Senate File 589

II. Whether trial counsel was ineffective for failing to challenge the sufficiency of the State's evidence Crawford was a "Dealer" under Iowa Code section 453B.1(4).

Authorities

Strickland v. Washington, 466 U.S. 668 (1984)
State v. Adams, 554 N.W.2d 686 (Iowa 1996)
State v. Arrington, No. 03-1318, 2004 WL 894585 (Iowa Ct. App. April 28, 2004)
State v. Bearse, 748 N.W.2d 211 (Iowa 2008)
State v. Canal, 773 N.W.2d 528 (Iowa 2009)
State v. Hartsfield, No. 02-0744, 2003 WL 21919223 (Iowa Ct. App. Aug. 13, 2003)
State v. Jordan, No. 12-0212, 2014 WL 3749335 (Iowa Ct. App. July 30, 2014)
State v. Leckington, 713 N.W.2d 208 (Iowa 2006)
State v. Lucas, 323 N.W.2d 228 (Iowa 1982)
State v. Maxwell, 743 N.W.2d 185 (Iowa 2008)
State v. McKettrick, 480 N.W.2d 52 (Iowa 1992)
State v. Moore, No. 18-0123, 2019 WL 1300251 (Iowa Ct. App. Mar. 20, 2019)
State v. Norman, No.06-0988, 2007 WL 2257325 (Iowa Ct. App. Aug. 8, 2007)
State v. Overstreet, No. 12-1165, 2013 WL 2644635 (Iowa Ct. App. June 12, 2013)
State v. Rumley, Nos. 1999-268, 9-498, 98-1651, 1999 WL 1020552 (Iowa Ct. App. Nov. 10, 1999)
State v. Williams, 695 N.W.2d 23 (Iowa 2005)
State v. Wright, No. 05-0587, 2006 WL 1628120 (Iowa Ct. App. June 14, 2006)

Iowa Code § 453B.1(3)(d)
Iowa Code § 453B.1(3)(a)(4)
Iowa Code § 453B.12(2)
Iowa Code § 453B.1(6)
Iowa Code § 453B.12
75A Am.Jur.2d *Trial* § 1026

ROUTING STATEMENT

The State acknowledges Crawford presents a constitutional challenge to Iowa Code section 814.7, and that at the time of writing, the Iowa Supreme Court has not ruled on like challenges. Appellant's Br. 17; Iowa R. App. P. 6.1101(2)(a), (c)). However, the challenge is presently being raised in many appeals. The Iowa Supreme Court has retained *State v. Boldon*, No. 19-1159, which involves several similar challenges to the statute. His underlying claim is an ineffective assistance of counsel claim relying on existing legal principles. Appellant's Br. 61–70. Because it is likely the Iowa Supreme Court will resolve the question prior to disposition, the State believes the matter should be transferred to the Iowa Court of Appeals.

STATEMENT OF THE CASE

Nature of the Case

Randy Crawford appeals following his conviction by jury for possession of a controlled substance in violation of Iowa Code section 124.401(5); failure to affix a tax stamp in violation of Iowa Code section 453B.12; and two counts of interference with official acts in violation of Iowa Code section 719.1(1)(c). In this direct appeal, he alleges that his conviction for failing to affix a tax stamp to the

controlled substances he possessed must be vacated due to the ineffective assistance of counsel.

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

On January 3, 2019, the Davenport Police Department became aware of Crawford's location at an Outback Steakhouse. Trial I p.158 line 23–p.160 line 10. Crawford had outstanding warrants and police intended to make contact with him to inform him of the warrants and bring him into custody. *Id.* When police converged on his booth and informed Crawford why they were there, he reached to his waist. Trial I p.160 line 12–15.

Believing Crawford to be reaching for a weapon, police reacted and ordered Crawford to submit and put his hands in the air. Trial I p.160 line 16–p.161 line 2. One officer went "flying across the bale, knocking drinks and food all over the restaurant." Trial I p.161 line 7–16. When Crawford tried to stand, police forced him to the ground where Crawford "turtled" as police attempted to restrain him. Trial I p.162 line 11–p.163 line 15. An officer commented "he is eating shit."

Trial I p.178 line 12–22. Eventually he was taken into custody through the officers' use of closed-hand strikes. Trial I p.164 line 19–p.165 line 24.

In the aftermath of the incident, police became aware that Crawford had significant amounts of contraband on his person at the time they approached him. On the floor near the booth where he was seated police found a small baggie of a white powdery substance; white powder was found on seat of the booth itself. Trial I p.164 line 1–11; p.166 line 3–p.167 line 5. Although police's initial field-testing indicated it was crack cocaine, subsequent laboratory testing by the DCI confirmed the substance to be heroin combined with other substances. Trial I p.166 line 3–21; p.168 line 6–p.169 line 23; p.214 line 14–p.216 line 21; p.224 line 1–21.

The packaged contraband weighed 3.1 grams. Trial I p.214 line 2–6. Multiple officers testified that the amount of material in question was not consistent with personal use. Trial I p.179 line 16–p.180 line 11; p.233 line 25–p.234 line 3; p.234 line 24–p.235 line 7; p.238 line 2–19. The officers estimated that Crawford's package contained approximately thirty dosage units. Trial I p.180 line 2–11; p.234 line 16–23; p.239 line 2–23. Niesen counted out twenty-four

chunks he believed to dosage units. Trial I p.183 line 21–p.184 line 6; p.198 line 3–p.199 line 22; Exh.A 4:00–5:10.

No tax stamps were affixed. Trial I p.216 line 22–p.217 line 14; p.272 line 12–15; p.300 line 5–7. No tools for measuring or using the substances were on Crawford's person. Trial I p.236 line 14–p.237 line 234; p.314 line 12–p.315 line 2. One officer testified that although "It's just not typical with heroin" an individual could sell the drug by "break[ing] off a piece and then eyeball[ing] it from there." Trial I p.239 line 2–18. More than $6000 in cash was on Crawford's person. Trial I p.164 line 10–18.

And after Crawford was removed from a police vehicle, officers found another chewed-up baggie on the vehicle's floor. Trial I p.167 line 6–p.168 line 5. Officers believed Crawford had consumed the contraband within—he was taken to the hospital where he complained of feeling ill and vomited. Trial I p.271 line 10–p.272 line 9. He later questioned why police had used such force "all because I got a few rocks." Trial I p.267 line 19–p.268 line 22. Additional facts will be described below where necessary.

ARGUMENT

I. Iowa Code section 814.7 is constitutional and prevents this Court from considering Crawford's ineffective assistance of counsel challenge in this direct appeal.

Preservation of Error

Crawford's brief contains no error preservation section for his constitutional challenge and does not explain how he preserved error on his challenges to Iowa Code section 814.7. Defendant Br. 34–35; Iowa R. App. P. 6.903(2)(g)(1). He did not raise these challenges in the district court. His failure to do is fatal. *State v. Mitchell*, 757 N.W.2d 431, 435 (Iowa 2008). To hold otherwise would eviscerate the error preservation doctrine and permit countless constitutional challenges raised for the first time on appeal.

Standard of Review

The constitutionality of statutes is reviewed de novo. *State v. Newton*, 929 N.W.2d 250, 254 (Iowa 2019).

Merits

Iowa Code section 814.7's ban on deciding ineffective assistance claims on direct appeal applies to Crawford's appeal because the district court entered judgment on September 5, 2019. 9/5/2019 Order of Disposition; App.___; *see, e.g., State v. Damme*, No. 19-1139, ___ N.W.2d ___, at *9 (Iowa May 29, 2020) (finding that

defendant's conviction entered on July 1, 2019 meant 814.7 precluded the Iowa Supreme Court from reviewing ineffective assistance claim). Crawford tries to avoid this conclusion by arguing that section 814.7 is unconstitutional. Appellant's Br. 36. Specifically, he thinks that the law "improperly interfere[s] with the separation of powers," "violates equal protection," and "denies [him] due process and the right to effective assistance of counsel." *Id.* at 36, 42, 49. As a fallback position he asks this Court to abandon stare decisis and adopt a plain error standard. Appellant's Br. 52. The addresses these arguments in turn.

A. Requiring defendants to litigate ineffective-assistance 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).[1]

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). Without 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

---

[1] *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.

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 legislature 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 the authority and ability 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 created through the acts of the legislature—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 legislature 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-altering statutes. Like the earlier legislation, the amendment to section 814.7 variously strips and grants jurisdiction from the appellate courts pursuant to the legislature's prerogative to regulate appellate jurisdiction. See Iowa Const. Art. V, § 4. This is consistent with the Separation of Powers contemplated by the Iowa framers.

Crawford 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." Appellant's Br. 39. Relying on

Article V, section 6, he does not believe the legislature can strip the court of jurisdiction over criminal matters that fall within its "general jurisdiction." Appellant's Br. 39–40. There is no dispute that the district courts of Iowa have general jurisdiction over matters civil and criminal. Iowa Const. Art. V, § 6. But the appellate courts "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. Crawford analyzes the wrong provision—there is no constitutional limitation to the legislature's ability to prescribe the manner and limits of appellate jurisdiction.

His citation to *Matter of Guardianship of Matejski*, 419 N.W.2d 576 (Iowa 1988), suffers from the same problem. Appellant's Br. 40. *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. Crawford 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 he analyzes the wrong constitutional provision, his argument is unpersuasive.

Crawford further relies on *Waldon v. Dist. Ct.*, 130 N.W.2d 728, 731 (Iowa 1964) for the proposition that "Once the right to appeal has been granted . . . it must apply equally to all. It may not be extended to some and denied to others." Appellant's Br. 40. But a closer reading of *Waldon* reveals that it does not support Crawford's position.

In the case, the state habeas corpus petitioner argued that his inability to have counsel appointed on appeal and present oral argument would effectively deny him an appeal, violating due process and equal protection. *Waldon*, 130 N.W.2d at 729. After addressing United States Supreme Court precedent addressing the bars to appeals as matter of right, the Iowa Supreme Court rejected Waldon's argument. It noted Waldon's treatment was consistent with all similarly-situated prisoners: "[Waldon's] appeal will receive the same consideration as all other appeals. All that is denied him is the right to

orally argue his case here. This is denied all prisoners. All those similarly situated are on the same footing." *Id.* Applying *Waldon* here, Crawford has a right to an appeal and that right has not been "effectively denied" through requiring him a furnish a transcript or requiring him to satisfy a filing fee prior to pursuing the right. *See Id.* at 730–31. Although he may raise any issue he desires, the legislature has deferred this Court's consideration of any ineffective-assistance claims until postconviction proceedings. In this respect, Crawford is on equal footing with all defendants who pursue a direct appeal.

Contrary to Crawford's argument, the legislature has not removed the Supreme Court's ability to hear appeals from ineffective-assistance claims. Appellant's Br. 41–42. This Court remains the final arbiter of "claimed deprivations" of the right to counsel. *Id.* The amendment to section 814.7 has identified PCR as the exclusive procedure 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.

B. Section 814.7 does not violate Equal Protection because it treats everyone the same.

Crawford argues that section 814.7 violates Equal Protection "because it deprives him of the ability to challenge his conviction on

direct appeal." Appellant's Br. 42–43.[2] He says that treats him differently than defendants who preserved error. *Id.* at 42, 45. But this not so.

Neither the Iowa nor Federal Constitution deny the State the power to treat different classes of people differently. Rather, both deny them

> the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation."

Reed v. Reed, 404 U.S. 71, 75–76 (1971) (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (quotation cleaned up)); *see* Iowa Const. Art. I, § 6. Crawford faces the difficult challenge of rebutting the presumption the statute is constitutional—he must "refute every reasonable basis upon which the statute could be found to be constitutional." *State v. Hernandez-Lopez*, 639 N.W.2d 226, 233 (Iowa 2002).

---

[2] He cites both the Iowa and United States constitutions but does not make arguments specific to each. Defendant Br. 49–55. The State, therefore, does not treat them distinctly either.

The equal protection inquiry under both constitutions is three-fold: (1) does the legislation distinguishes between similarly situated parties; (2) if so, what is the nature of the classification; and (3) does the statute survive the applicable standard of scrutiny.

The first inquiry is easily resolved—the statute does not distinguish between anyone. Section 814.7 prevents all defendants from raising claims of ineffective assistance on direct appeal. Iowa Code § 814.7. Treating people equally does not offend Equal Protection, and Crawford's claim fails at the outset.

Moreover, were the Court to proceed beyond the threshold inquiry, the question then turns to the nature of the classification the statute creates and what is the applicable standard of review. The Court must determine whether the statute "classifies individuals 'in terms of their ability to exercise a fundamental right or when it classifies or distinguishes persons by race or national origin.'" *Wright v. Iowa Dep't of Corr.*, 747 N.W.2d 213, 216 (Iowa 2008). If the statute so classifies the individual, then the burden falls to the State to demonstrate the classification is narrowly tailored to a compelling state interest. *Id.*

If the classification does not fall under strict scrutiny review, the next standard inquires whether the State created a "quasi-suspect" classification—such as gender, sexual orientation, or illegitimacy. *See Varnum v. Brien*, 763 N.W.2d 862, 880–81 (Iowa 2009) (quoting *Sherman v. Pella Corp.*, 576 N.W.2d 312, 317 (Iowa 1998)). For the law to survive intermediate scrutiny, it must "not only further an important governmental interest and be substantially related to that interest, but the justification for the classification must be genuine and must not depend on broad generalizations." *Id.*

And, if the classification does not fall under strict or intermediate scrutiny, the court then reviews the matter for a rational basis. *Id. at* 879–80. Under rational basis review, Crawford must bear the burden to demonstrate the classification bears no rational relationship to a legitimate government interest. *Id.*

Crawford fames the relevant classification as "a group of criminal defendants who have been convicted based upon insufficient evidence as shown by the record made in district court. . . . Senate File 589 has singled out those wrongfully-convicted defendants who were provided ineffective assistance of counsel for disparate treatment." Appellant's Br. 45. He does not address the standard of

review for his offered classification, nor provide any authority to support it. This is grounds to find waiver. Iowa R. App. P. 6.903(2)(g)(3). To the extent the Iowa Supreme Court in *Macke* "acknowledged the significant disadvantages to criminal defendants who must proceed directly to postconviction proceedings in lieu of direct appeal" that commentary was dicta to the opinion's holding. Appellant's Br. 45 n.1; *State v. Macke*, 933 N.W.2d 226, 233, 235–36 (Iowa 2019). Contrary to Crawford's assumption, each defendant's conviction remains presumptively correct until he or she establishes it is not. *See Kurtz v. State*, 854 N.W.2d 474, 479 (Iowa Ct. App. 2014); *see also* Iowa Code § 811.5 (requiring defendant to begin serving sentence absent bail); *Grady v. Iowa State Penitentiary*, 346 F.Supp. 681, 683 (N.D. Iowa 1972) ("[A]ll authorities are in agreement that the Eighth Amendment does not give a right to bail pending appeal. . . . There is no presumption of innocence in the appellate process, at least not in the same sense as that before criminal trial").

As for his argument the amended statute infringes on the right to counsel as a fundamental right and necessitates strict scrutiny review, he is mistaken. Appellant's Br. 45–46. Resolving a claim of ineffective assistance of counsel on direct appeal is not a fundamental

right. Iowa law has long foreclosed the assertion that a *direct appeal* is a fundamental right: "the right to appeal is not a fundamental right, nor even a constitutional right." *In re C.M.*, 652 N.W.2d 204, 210 (Iowa 2004) (citing *Abney v. United States*, 431 U.S. 651, 656 (1977)). Appellant's Br. 46. His claim is subject to rational-basis review because raising ineffective-assistance on direct appeal is not a fundamental right. *See Varnum*, 763 N.W.2d at 879–80 (providing rational-basis review for most equal protection challenges); *see also Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (no constitutional right to appeal); *Hinners*, 471 N.W.2d at 843 (same). Under that review, it is rational to treat preserved error differently from unpreserved error. Doing so encourages timely objections before the trial court and gives that court a chance to resolve them. That is rational.

Accepting Crawford's argument that it violates Equal Protection to treat preserved error differently from unpreserved error requires overruling two important legal concepts. First, it would functionally end error preservation. Under Crawford's reasoning, courts could not treat unpreserved error differently than preserved error without violating Equal Protection. Second, it would overrule *Strickland v. Washington*, 466 U.S. 668 (1984), because the ineffective-assistance

framework puts more onerous burdens on individuals raising ineffectiveness claims than those presenting claims with preserved error. Finally, it would essentially render each and every time an Iowa appellate court deferred consideration of an ineffective assistance claim a constitutional violation. *See* Appellant's Br. 46. This Court should decline to hold that both it and the United States Supreme Court have been violating Equal Protection for decades.

In sum, the defendant's Equal Protection claim fails because section 814.7 treats defendant pursuing direct appeal the same and is rational to do so.

C. 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.

Crawford argues that "section 814.7 denies [him] due process and the right to effective counsel on appeal." Appellant's Br. 49 (typography altered).[3] His argument fails.

To begin, he has counsel on appeal. *See* Appellant's Br. He also had counsel in the district court. *See*, *e.g.*, Trial I p.1. If he files a PCR application, he has the right to counsel in the trial court and on

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

appeal and may attack his earlier attorneys' efficacy. Iowa Code § 822.5. 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. It does not deny him his Right to Counsel.

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." *Hinners*, 471 N.W.2d at 843. If the defendant is not entitled to an appeal from his convictions at all, Due Process does not demand he be allowed to raise an ineffective-assistance claim on direct appeal instead of in PCR. Discussed in Division II(B), it cannot be so that every time an Iowa appellate court "refused" to exercise its discretion to consider an ineffective assistance claim and preserved the matter for postconviction relief it also necessarily violated the defendant's right to Due Process.

Crawford's passing citation to *Evitts v. Lucey*, 469 U.S. 387 (1985) is unhelpful. Appellant's Br. 51. The case is inapplicable to his presented due process claim. In *Evitts*, the defendant's first appeal as a matter of right was *dismissed* when his appointed counsel failed to file a

"statement of appeal" that complied with Kentucky's procedural rules of appeal; the Kentucky Supreme Court summarily affirmed the dismissal though counsel had subsequently attempted to correct the error. 469 U.S. 389–90. After a federal district court granted the petitioner habeas relief and the Sixth Circuit affirmed that grant, Kentucky appealed. The United States Supreme Court affirmed the lower courts' grants of relief, holding that the right to the effective assistance of counsel attached through the first appeal as a matter of right:

> To prosecute the appeal, a criminal appellant must face an adversary proceeding that—like a trial—is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant—like an unrepresented defendant at trial—is unable to protect the vital interests at stake. To be sure, respondent did have nominal representation when he brought this appeal. But nominal representation on an appeal as of right—like nominal representation at trial—does not suffice to render the proceedings constitutionally adequate; a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all.

Id. at 396. It further concluded an appeal "is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." *Id.* at 396–97. The opinion is inapplicable to Crawford's present claim; it says nothing about the ability to litigate

trial counsel's efficacy in a direct appeal. And nothing about trial counsel's inadequacies has prevented Crawford's appellate counsel from diligently reviewing the record for preserved error. The fact counsel could find no meritorious claim other than the ineffective assistance claim addressed below does not mean Crawford has been denied due process.

Crawford says that if he cannot raise ineffective assistance on direct appeal, the statute "essentially extinguishes [his] ability to challenge the sufficiency used to convict him because his trial attorney violated his right to effective counsel." Appellant's Br. 51. He does not say how this is so. To the contrary, our supreme court is capable of and has previously granted postconviction relief to where counsel failed to adequately challenge the sufficiency of the State's evidence. *See Fullenwider v. State*, 674 N.W.2d 73, 78 (Iowa 2004). Nor does he cite authority to show why he cannot file a PCR application while his direct appeal pends. The State is unaware of such a prohibition. But even if he could not file a PCR application until his appeal ended, Due Process does not prevent putting hard choices to defendants. *See State v. Gay*, 526 N.W.2d 294, 297 (Iowa 1995) (holding that it did not violate due process to require a defendant to choose between waiving his right to an extradition hearing or face conviction for failing to appear at trial).

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

D. Iowa courts have routinely rejected the adoption of "plain error" and Crawford provides no persuasive ground to change course.

Finally, anticipating this Court will apply section 814.7 to his appeal, Crawford once again asks this Court to embrace the "plain error" doctrine. It has in the past unequivocally held that it will not. *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.") (citing *State v. McCright*, 569 N.W.2d 605, 607 (Iowa 1997)); *see also State v. Hernandez-Lopez*, 639 N.W.2d 226, 234 (Iowa 2002) ("We reject the defendants' suggestion that the importance and gravity of an unpreserved constitutional issue creates an exception to our error preservation rules."). If this case is routed to the Iowa Court of Appeals, this ends the analysis. *See, e.g., State v. Connors*, No. 11-0477, 2012 WL 4101768, at *2 (Iowa Ct. App. Sept. 19, 2012) (declining to adopt the plain error rule because the Iowa Supreme Court resoundingly rejected it in *Rutledge* and noting the Iowa Court of Appeals is "bound by our supreme court's pronouncements"

rejecting plain error). In the intervening years, neither our legislature nor the Iowa Supreme Court have modified the rules of criminal or appellate procedure to create such a rule, suggesting each believes the long-established rule to be correct. Crawford presents several reasons to now adopt plain error. None justify a change in course.

First, Crawford urges the Court has previously adopted exceptions to the rules requiring error to be preserved. Appellant's Br. 46. This is true. But for more than forty years this Court has steadfastly declined to adopt plain error and abandon the error preservation requirement, instead adopting an expansive approach to ineffective assistance of counsel claims. *See Rhoades v. State*, 848 N.W.2d 22, 33–34 (Iowa 2014) (Mansfield, J., concurring); *State v. Johnson*, 272 N.W.2d 480, 484 (Iowa 1978) (rejecting clear error standard, "Adequate remedies do exist at the trial court level and should be exercised at appropriate times."). Crawford offers no persuasive reason why this Court should now do so. This is especially true where trial counsel could have acted to prevent or correct the perceived error and the ineffective assistance framework already exists. *Johnson*, 272 N.W.2d at 484.

Crawford suggests Iowa Code section 814.20 could provide the necessary basis for plain error review. Appellant's Br. 47. He reads too much into the statute. Because appeals are creatures of statute in Iowa, empowering statutes must give authority to the appellate courts to review the appeal and act. *See* Iowa Code §§ 814.1, 814.5, 814.6, 814.19; 814.22, 814.23; *see also* Iowa Const. Art. V, Sec. 4 ("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." (emphasis added)); *Eden Twp. Sch. Dist. v. Carroll Cnty. Bd. of Ed.*, 181 N.W.2d 158, 162 (Iowa 1970). Section 814.20 provides the statutory super-structure which authorizes an appellate court to resolve a criminal appeal.

In fact, review of Iowa law constructing section 814.20 and its predecessor—Iowa Code section 793.18 (1977)—compels the *opposite* conclusion he reaches. The Iowa Supreme Court has expressly found the language within section 814.20 (then section 793.18) "does not

mandate a reversal where errors asserted below are not raised on appeal or where proper objections were not made below to errors assigned in this court." *State v. Thomas*, 190 N.W.2d 463, 465 (Iowa 1971); *see also State v. Wisher*, 217 N.W.2d 618, 620–21 (Iowa 1974) (rejecting suggestion that failure to preserve error could be overlooked based on section 793.18's text that "the supreme court must examine the record, without regard to technical errors or defects which do not affect the substantial rights of the parties and render such judgment on the record as the law demands").

His reliance on *State v. Young* is also misplaced. In *Young*, the Iowa Supreme Court concluded an illegal sentence claim may be addressed even when raised for the first time on appeal. *State v. Young*, 292 N.W.2d 432, 435 (Iowa 1980). But it did so because of its longstanding practice of correcting illegal sentences on appeal and its construction that the adoption of rule 2.24(5)—then rule 23(5)(a)—did not require the matter to be first presented to the district court. *Id.* at 435. Its discussion of section 814.20 was cursory:

> Nothing in rule [2.24(5)] expressly requires a motion thereunder prior to appeal, section 814.20 of the Code authorizes us to dispose of an appeal by affirmation, reversal, "or modification" of the judgment, and we prefer to remain with the prior practice. We thus reject

> the State's contention that rule [2.24(5)] must be initially applied.

Id. Sufficed to say, an illegal sentence challenge and a substantive challenge to a jury instruction are not equivalent. *See State v. Lang*, No. 10-1797, 2011 WL 5867932, at *1–2 (Iowa Ct. App. Nov. 23, 2011) (finding defendant's challenges to the jury instructions given at trial was improper ground to be raised in a motion to correct an illegal sentence); *see also Tindell v. State*, 629 N.W.2d 357, 359 (Iowa 2001) ("[O]ur cases . . . allow challenges to illegal sentences at any time, but they do not allow challenges to sentences that, because of procedural errors, are illegally imposed.") *and State v. Bruegger*, 773 N.W.2d 862, 871–72 (Iowa 2009) ("[T]he purpose of [the rule] allowing review of an illegal sentence is to permit correction at any time of an illegal sentence, not to re-examine errors occurring at the trial or other proceedings prior to the imposition of the sentence." (internal quotation omitted)). Neither section 814.20 or *Young* favor the adoption of plain error.

Finally, Crawford suggests the error in this case "is routinely reviewed for plain error. . ." Appellant's Br. 47. But in Iowa, it has also been reviewed under the ineffective assistance framework. *See State v. Lathrop*, No. 06-0232, 2007 WL 601964, at *1 (Iowa Ct. App. Feb.

28, 2007). This offers no persuasive reason to abandon the rules of error preservation.

There is also substantial reason to doubt the benefits a plain error rule would provide. Iowa's existing ineffective assistance claim is far more likely to result in a favorable outcome for defendants. It requires a defendant to establish breach and prejudice. Ordinarily, plain error review does as well. *See United States v. Olano*, 507 U.S. 725, 732–34 (1993) (relief requires an "error" that is plain and "must have affected the outcome of the district court proceedings"). Although ineffective assistance is not an easy standard to satisfy, it does not also require the defendant to demonstrate an impact on "the fairness, integrity or public reputation of judicial proceedings" as plain error would. *See id.* at 732. Nor does it leave the decision of whether to grant relief "within the sound discretion of the court" to be applied "in those circumstances in which a miscarriage of justice would otherwise result." *Id.* at 735–36 (citation omitted). Both of these latter standards are, frankly, nebulous. The existing ineffective-assistance framework's simplified showing makes relief more accessible. Adopting a plain error rule would create surplus remedy with an unwieldly standard.

In reality, the reason Crawford urges this Court to adopt a plain error standard is to avoid both error preservation and the implications of the Iowa legislature's recent amendments to Iowa Code section 814.7. Considered apart or together, neither is cause for this Court to retreat from its more-than-forty years of precedent. Those earlier courts were also aware instructional error claims could be resolved through postconviction relief. In fact, when previous cases rejecting the plain error standard were decided, ineffective assistance of counsel claims were required to be preserved on direct appeal prior to litigation in the postconviction relief action. *See State v. Hutchison*, 341 N.W.2d 33, 38–39 (Iowa 1983) (rejecting plain error exception to error preservation); *Bledsoe v. State*, 257 N.W.2d 32, 32–34 (Iowa 1977) (superseded by Iowa Code section 822.7 (2005)) (discussing requirement of preservation of ineffective assistance of counsel on direct appeal for litigation in post-conviction relief proceedings). Iowa law provides Crawford the means to pursue his ineffective assistance of counsel claim. He cannot complain that he must comply with the necessary procedure to pursue it. As Iowa law requires, the matter should be litigated and a full record

developed in a postconviction action. For now, this Court may affirm his convictions.

II. Officers found Crawford with the equivalent of thirty dosage units on his person. Counsel had no obligation to raise a meritless motion for judgment of acquittal.

Preservation of Error

Crawford concedes error was not preserved. Appellant's Br. 61, 69. Even so, the State cannot contest error preservation. Ineffective assistance of counsel challenges have long been excepted from the error preservation requirement. *See, e.g., State v. Lucas*, 323 N.W.2d 228, 232 (Iowa 1982)

Standard of Review

Iowa courts review of claims of ineffective assistance of counsel de novo. *See, e.g.*, *State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008).

Merits

Crawford urges his conviction for failure to affix a drug tax stamp must be vacated due the State's insufficient evidence and counsel's failure to make a specific motion for judgment of acquittal targeting that inadequacy. To prevail, he must demonstrate trial attorney breached an essential duty and prejudice resulted from the breach. *State v. Maxwell*, 743 N.W.2d 185, 196 (Iowa 2008); *see also Strickland*, 466 U.S. at 687–88. To establish prejudice, he must prove

there is a reasonable probability that but for counsel's unprofessional error, the result of the proceeding would have been different. *Id*. This Court can review the prongs in any order to resolve the claim. If it concludes either is lacking, it must deny the claim outright. *State v. McKettrick*, 480 N.W.2d 52, 56 (Iowa 1992).

Crawford believes his trial counsel breached an essential duty when she did not raise a motion for judgment of acquittal specifically challenging the State's failure to prove that heroin was not sold by weight and that he possessed ten or more units. Appellant's Br. 61–69. Because they were not objected to the jury instructions became the law of the case. Trial I p.321 line 14–p.325 line 21; *See State v. Canal*, 773 N.W.2d 528, 530 (Iowa 2009)). Under those instructions, the State was required to prove:

> 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.

Instr. 29; App. 19; *see* Iowa Code § 453B.12(2). The jury was further instructed that a taxable substance was "a controlled substance" and that heroin was a controlled substance. Instr. 22; App. 17. Finally, the jury was instructed that a "dosage unit" was "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." Instr. 23; App. 18; *see* Iowa Code § 453B.1(3)(a)(4).

Crawford asserts the "evidence present in this case established that heroin is sold by weight, rendering the 'dosage unit' alternative inapplicable." Appellant's Br. 64. Because the amount of heroin police recovered would not satisfy the definition of "seven or more grams of a taxable substance other than marijuana" alternative, he believes counsel breached an essential duty by not moving for and obtaining a judgment of acquittal on this ground. Crawford is mistaken. Counsel had no obligation to raise a meritless motion for judgment of acquittal.

Crawford fails to consider the standard upon which trial counsel's motion would have been reviewed. A court considering defense counsel's motion for judgment of acquittal based on the sufficiency of the evidence review the evidence in the light most

favorable to the State and indulge in all "legitimate inferences and presumptions which may be fairly and reasonably deduced from the evidence in the record." *State v. Leckington*, 713 N.W.2d 208, 213 (Iowa 2006); *State v. Williams*, 695 N.W.2d 23, 28 (Iowa 2005).

> [t]he function of the court, on a motion to direct a verdict of acquittal, is limited to determining whether there is sufficient evidence from which reasonable persons could have found the defendant guilty as charged. It is not the province of the court, in determining the motion, to resolve conflicts in the evidence, to pass upon the credibility of witnesses, to determine the plausibility of explanations, or to weigh the evidence; such matters are for the jury. . . . *Any inconsistencies in the testimony of a defense witness are for the jury's consideration, and do not justify a court's usurpation of the factfinding function of the jury.*

Williams, 695 N.W.2d at 28 (quoting 75A Am.Jur.2d *Trial* § 1026, at 573–74 (emphasis added)). Taken in the light most favorable to the State, the record here provided substantial evidence from which a reasonable person could have found that Crawford possessed more than ten dosage units of heroin, because as the officers testified, heroin's dosage unit is not always sold by weight.

Detective Butt testified that although not typical, heroin could be broken down and sold by "eyeballing" it without a scale. Trial I

p.239 line 2–18. He noted that doing so would "come from experience in trafficking. So you have been doing it for a while if you're breaking it off." *Id.* Crawford was not found with a scale or any other paraphernalia on his person. Trial I p.236 line 14–p.17 line 21; p.234 line 4–15. Niesen and Butt each testified the amount found was not consistent with a user's possession. Trial I p.179 line 16–21; p.180 line 8–11; p.233 line 25–p.234 line 3; p.234 line 24–p.235 line 7. The amount of currency on Crawford's person was also inconsistent with heroin use. Trial I p.180 line 12–17; p.234 line 8–15; p.235 line 19–p.236 line 4. And the record demonstrated Crawford had *consumed* some of the product he was carrying and had to be taken to the hospital. Trial Tr. p.175 line 24–p.179 line 15. This evidence permitted the jury to infer Crawford possessed even more heroin than was actually recovered. This was sufficient.

And if this were not enough, Niesen counted out the "rocks" of heroin—twenty-four in addition to dust. Trial I p.183 line 25–p.185 line 9; p.198 line 3–p.199 line 22; Exh.A 4:00–5:10. He considered each rock or chunk a dosage unit. Trial I p.184 line 4–6. Taken in a light most favorable to the verdict, this testimony independently provided substantial evidence to support submitting the matter to the

jury. *See State v. Norman*, No.06-0988, 2007 WL 2257325, at *2 (Iowa Ct. App. Aug. 8, 2007) (affirming conviction over sufficiency challenge, noting Norman had more than ten "rocks" of cocaine on his person, a noteworthy amount of cash, and lack of paraphernalia on his person); *State v. Wright*, No. 05-0587, 2006 WL 1628120, at *1–*2 (Iowa Ct. App. June 14, 2006) ("It is undisputed that Wright was in possession of 6.42 grams of crack cocaine, which consisted of twenty-one rocks of twenty and fifty dollar size. An additional twenty-seven individually wrapped rocks of crack cocaine weighing a total of 3.45 grams were found on the ground under Wright after his struggle with the officers. . . . The testimony of police officers also indicated that the plastic bags of crack cocaine found on and under Wright's person contained more than ten dosage units of crack cocaine.").

The core of Crawford's challenge is that the officers' testimony "establishes that heroin is, in fact, sold by weight." Appellant's Br. 66. The State disagrees. The fact that a dosage unit has a weight, does not mean that that is how the drug is sold. Rather, the evidence in Crawford's trial showed that heroin is sold in various dosage units which all necessarily have a certain weight.

Officer Niesen testified "we consider a .1 gram a dosage unit" for heroin, and that Crawford possessed over thirty dosage units under this metric. Trial I p.179 line 22–p.180 line 7; p.214 line 2–6. Butt corroborated this testimony, stating that the drug was sold in "point amounts," and that "for this example, if you have three grams of heroin, you would have up to 30 tenth of a gram amounts there. If it was broken down for individual unit sale." Trial I p.234 line 16–23; p.239 line 2–23. Previous Iowa courts have found that equivalent testimony was sufficient to support conviction. *See State v. Arrington*, No. 03-1318, 2004 WL 894585, at *2 (Iowa Ct. App. April 28, 2004) (rejecting defendant's sufficiency challenge, "Officer Wolf testified that a dosage unit for crack cocaine is 1/10 of a gram. Arrington possessed 4.5 grams of crack cocaine, which according to Wolf's testimony equals forty-five dosage units. There is sufficient evidence of Arrington's failure to affix a drug tax stamp as required by section 453B.12."); *State v. Rumley*, Nos. 1999-268, 9-498, 98-1651, 1999 WL 1020552, at *2 (Iowa Ct. App. Nov. 10, 1999) (finding that defendant's 2.39 gram rock was approximately 23 dosage units based on testimony that "the large rock possessed by Rumley would not be ingested by anyone without being chipped down into the small rocks.

It would be unlikely for a dealer to sell one large rock; their profits come from cutting a big rock into smaller pieces and selling those"). This alone resolves the claim against Crawford; counsel had no duty to raise a motion for judgment of acquittal that would be doomed to failure.

Further supporting the State's "dosage unit" definition was the evidence showing street-level "heroin" is not sold by weight of pure heroin; the product bought by users generally has "a cutting agent in it." Trial I p.244 p.14–17. As Berbano testified, the heroin in this case was adulterated with quinine to "stretch[] the drug out" and alter its effect. Trial I p.224 line 4–21. Butt had previously seen the drug "cut" with Fentanyl, Dormin, or Sleep Aid. Trial I p.244 line 3–16. This testimony showed that end-level users do not buy a set weight of heroin, but a "dosage unit" which contains the drug and other substances.

In support of his claim, Crawford relies heavily on *State v. Hartsfield*, No. 02-0744, 2003 WL 21919223 (Iowa Ct. App. Aug. 13, 2003). In *Hartsfield*, police found a six individually packaged rocks of crack cocaine in a package tossed by the defendant and another .07 gram rock of crack in his vehicle. *Hartsfield*, 2003 WL 21919223, at

*1–*2. After charging him with failing to affix a drug tax stamp, the State proceeded under the theory that Hartsfield was a "dealer" because he possessed more than ten dosage units under Iowa Code section 453B.1(3)(d). *Id.* at *4. On appeal, Hartsfield urged that each of the seven rocks found by police were the applicable dosage unit and that the State had failed to prove otherwise. *Id.* at *4–*5.

At trial, the State had presented evidence that dealers of crack cocaine would sell the substance in "$20 and $50 rocks, and that generally $20 rocks are between .07 and .2 grams while $50 rocks are between .2 and .5 grams." *Id.* at *5. In addition to the officers' experience with street level dealers, they testified "the Iowa Department of Revenue and Finance considers one 'dosage unit' to be .1 gram." *Id.* The officers noted that the six rocks they found in the apartment were individually packaged in the typical manner to be sold as individual rocks "ready to be dispensed to the ultimate consumer on the street." *Id.*

The court of appeals panel found that the evidence at trial demonstrated that the crack was sold as a "rock" to the "ultimate user" and vacated his conviction:

> The officers testified at trial that crack cocaine is typically sold on the street in $20 and $50

> rocks and packaged for sale in tied off corners of plastic baggies. They further testified the rocks here all appeared to be of sizes in which crack cocaine is dispensed to the ultimate user, and to be packaged for delivery rather than for personal use. All of the rocks found here were the typical $20 and $50 rocks and were packaged in a manner for sale to the ultimate user, directly in line with the officers' expert testimony regarding how rocks were packaged to be dispensed to the ultimate user. Accordingly, based on the evidence in the record and the clear definition of "dosage unit" in section 453B.1(6), we find a "dosage unit" must be defined as the unit of measurement in which the substance is dispensed to the ultimate user, here either $20 or $50 individual rocks of crack cocaine. Because Hartsfield possessed only seven individual rocks of crack cocaine he possessed only seven "dosage units" of the taxable substance and thus does not fit under the definition of a "dealer" found in section 453B.1(3)(d).

Id. at *6 (footnote omitted). The panel rejected the State's argument that the total weight of the crack could be considered to show Crawford possessed twenty-one "dosage units," finding such a definition "is contrary to the plan language of the statute under which Hartsfield was charged, which applies to taxable substances 'not sold by weight.'" *Id.* at *6–7. *Hartsfield* is distinguishable.

Unlike the seven crack rocks in *Hartsfield*, the heroin in this case was not pre-packaged for the ultimate user. It was found in a

single amount inconsistent with personal use. Trial I p.179 line 16–21; p.180 line 8–11; p.233 line 25–p.234 line 3; p.234 line 24–p.235 line 7; Exh. A 00:00–2:30 (depicting heroin in one packaged bundle). And, consider the fact that evidence showed Crawford consumed some of the contraband before he was taken into custody—the actual amount he actually possessed was more than the three grams presented at trial. Trial p.262 line 14–p.264 line 12; p.271 line 10–p.272 line 9; p.298 line 1–8; p.300 line 8–p.303 line 15; Exh. 5.

Second, the officers in this case did not testify that it was the department of finance and revenue's position that .1 grams was consistent with a dosage unit, it was *their* conclusion how much would be necessary to "get high" based on experience in narcotics investigation. Trial I p.179 line 22–p.180 line 4; p.157 line 11–p.158 line 19; p.233 line 17–p.234 line 3; p.234 line 16–p.235 line 7; p.238 line 2–p.240 line 10; p.231 line 12–p.233 line 13.

Finally, *Hartsfield* did not foreclose the very theory on which the State relied on in this trial. The opinion assumed as true the State's proposition that controlled substances may be sold in "dosage units" rather than weight. *Hartsfield*, 2003 WL 21919223, at *5 ("The State's charge against Hartsfield and its arguments on appeal assert

that crack cocaine is dispensed to the ultimate user in dosage units rather than by weight. Without so deciding, we will assume the State's position on this question is correct."), *7. It simply concluded that each of the pre-packaged rocks did not meet the requisite number of dosage units. As the prosecutor argued before the jury, the State had shown that Crawford possessed the requisite number of dosage units because the evidence at trial did not support finding he was selling by weight:

> And this last part, not sold by weight. Now, can heroin be sold by weight? Yes. We were talking about a dosage unit being a certain fraction of a gram. Can it also be something else? Detective Butt came in and said absolutely, if someone is experienced enough, they can eyeball it and sell off certain amounts. He didn't have a scale on him. No measuring device. So if he was selling it, he wasn't necessarily doing it by weight. And it doesn't say never sold by weight, because heroin is sold by weight sometimes, but just not in this case. The Defendant didn't appear to be selling heroin by weight in this case.

Trial I p.370 line 9–20.

Because it is distinguishable, *Hartsfield* is not panacea for Crawford's position. In fact, *Hartsfield*'s logic has not once been cited since the opinion's release over fifteen years ago. The case appears to be an aberration—one this Court should disavow. Iowa's appellate

courts have repeatedly rejected sufficiency challenges to tax-stamp convictions where the State's evidence shows the defendant possessed an amount of controlled substance that would ordinarily be broken down into smaller dosage units. *State v. Adams*, 554 N.W.2d 686, 691 (Iowa 1996) (affirming sufficiency challenge claiming crack cocaine is "sold by weight, not by dosage unit," where minutes indicated that officer would testify the defendant "had ten or more dosage units of crack cocaine"); *see also State v. Moore*, No. 18-0123, 2019 WL 1300251, at *2–*3 (Iowa Ct. App. Mar. 20, 2019) (finding counsel was not ineffective for failing to challenge sufficiency of intent to deliver controlled substances, noting a police officer "testified that the dosage unit for crack cocaine is approximately one-tenth of a gram and sells for approximately ten to twenty dollars. In his experience, Sergeant Scott did not consider 3.94 grams—thirty-nine units worth—of crack cocaine to be a personal use amount"); *State v. Overstreet*, No. 12-1165, 2013 WL 2644635, at *2 (Iowa Ct. App. June 12, 2013) (a baggie with 4.12 grams of crack cocaine's quantity was "equivalent to twenty to forty-one ordinary dosage units").

By example, in *State v. Jordan*, No. 12-0212, 2014 WL 3749335, at *3 (Iowa Ct. App. July 30, 2014) the court rejected the defendant's

sufficiency challenge to a drug tax stamp count and observed that when arrested he "had 2.07 grams of cocaine . . . Officer Matthew McGeogh testified the crack cocaine could have been broken down into about twenty dosage units, and was "a large, very, very large rock for someone to buy it to ingest." *Id.* Similar to this case, the police in *Jordan* testified, "You never see anyone that's a crack user to have this much on them." *Id.* Another officer had "testified the rock of 2.07 grams of crack cocaine could have been split into between twenty to forty dosage units. He also testified the size of the rock of crack cocaine was not consistent with personal use." This same logic applies here and supports finding that Crawford's attorney was not ineffective for making a similarly flawed sufficiency challenge. *See also Arrington*, 2004 WL 894585, at *2; *Rumley*, 1999 WL 1020552, at *2.

Taken in the light most favorable to the State, substantial evidence demonstrated that Crawford possessed more than ten "dosage units" of heroin. Counsel was not ineffective for failing to raise a motion for judgment of acquittal on these grounds. Regardless of whether this Court reaches the merits of Crawford's claim, it should affirm his conviction.

CONCLUSION

Because Iowa Code section 814.7 is constitutional, Crawford's ineffective assistance of counsel claim cannot be considered in this direct appeal. Even so, the claim fails on its merits because the record established he possessed enough dosage units to fall under the definition of a "dealer" and failed to affix a drug tax stamp to the contraband. This Court should affirm.

REQUEST FOR NONORAL SUBMISSION

The State does not request oral argument. In the event the Court orders oral argument, the State would be heard.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

TIMOTHY M. HAU
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
tim.hau@ag.iowa.gov

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:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **9,3851** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: July 24, 2020

TIMOTHY M. HAU
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
tim.hau@ag.iowa.gov