IN THE SUPREME COURT FOR THE STATE OF IOWA
NO. 18–0825

STATE OF IOWA,
Plaintiff–Appellee,

vs.

BENJAMIN G. TRANE,
Defendant–Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR LEE COUNTY (SOUTH),
HONORABLE MARK KRUSE

DEFENDANT/APPELLANT'S SUPPLEMENTAL BRIEF PURSUANT TO IOWA SUPREME COURT'S JUNE 18, 2019 ORDER

Alfredo Parrish
Adam Witosky
Alexander Smith
Parrish Kruidenier Dunn
Boles Gribble Gentry
Brown & Bergmann L.L.P.
2910 Grand Avenue
Des Moines, Iowa 50312
Telephone: (515) 284-5737
Facsimile: (515) 284-1704
aparrish@parrishlaw.com
awitosky@parrishlaw.com
Attorneys for Appellant

Sheryl Soich
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
Telephone: (515) 281-3648
Facsimile: (515) 281-8894
sherri.soich@ag.iowa.gov
Attorney for Appellee

CERTIFICATE OF FILING AND SERVICE

I hereby certify e-filing of the Defendant/Appellant's Supplemental Brief with the Appellate Court via EDMA on the July 9, 2019, with the following counsel being electronically served:

Sheryl Soich
Assistant Attorney General
Hoover State Office Building,
2nd Floor
Des Moines, Iowa 50319
Telephone: (515) 281-3648
Facsimile: (515) 281-8894
sherri.soich@ag.iowa.gov
Attorney for Appellee

I hereby certify the Defendant/Appellant, Benjamin Trane, was served by mail with this Supplemental Brief on July 9, 2019.

PARRISH KRUIDENIER DUNN BOLES GRIBBLE GENTRY BROWN & BERGMANN, L.L.P.

BY: /s/ Alfredo Parrish .
Alfredo Parrish AT0006051
2910 Grand Avenue
Des Moines, Iowa 50312
Telephone: (515) 284-5737
Facsimile: (515) 284-1704
aparrish@parrishlaw.com
Attorney for Defendant/Appellant

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STATEMENT OF THE CASE

Among the issues presented in Appellant Benjamin Trane's prior briefing are several instances of ineffective assistance by his criminal trial counsel. Subsequent to submission of final briefs, the legislature amended Iowa Code §814.7. By Order on June 18, 2019, this Court directed the parties to submit additional briefing addressing, at a minimum, whether these changes are retroactive.

As an initial matter, Iowa Code §814.7 is not applicable as amended. Iowa Code §814.7 (2019) applies on "direct appeal" and, procedurally, this matter is more accurately classified as an appeal from a new trial motion rather than a "direct appeal."

As to retroactivity, the changes to Iowa Code §814.7 are prospective only, as evidenced first by the underlying legislative intent and then by the substantive nature of the change.

Finally, the amended statute is unconstitutional. It violates the Equal Protection clauses of Article I, Section §6 of the Iowa Constitution and the Fourteenth Amendment of the U.S. Constitution.

ARGUMENTS

I. Changes to Iowa Code §814.7 Do Not Apply to Ineffective Assistance Arguments Raised by New Trial Motions

While the Court asked the parties to "at a minimum, address whether the changes to Iowa Code section 814.7 are retroactive" in S.F. 589, 88th GA, §31 (2019), the Court does not need to decide the issue in this case. Because Trane is appealing claims of ineffective assistance raised through Iowa R. Crim. P. 2.24(2)(b)(9) in his Motion for New Trial, and not raising the claims for the first time on direct appeal, the prohibitions of Iowa Code §814.7 on ineffective assistance of counsel claims do not apply.

Prior to the 2019 amendments, Iowa Code §814.7 stated:

> 1. An ineffective assistance of counsel claim in a criminal case shall be determined by filing an application for postconviction relief pursuant to chapter 822, except as otherwise provided in this section. The claim need not be raised on direct appeal from the criminal proceedings in order to preserve the claim for postconviction relief purposes.
>
> 2. A party may, but is not required to, raise an ineffective assistance claim on direct appeal from the criminal proceedings if the party has reasonable grounds to believe that the record is adequate to address the claim on direct appeal.

> 3. If an ineffective assistance of counsel claim is raised on direct appeal from the criminal proceedings, the court may decide the record is adequate to decide the claim or may choose to preserve the claim for determination under chapter 822.

Iowa Code §814.7 (2017). Consistent with this language, it was common to bring ineffective assistance claims on direct appeal, which would be decided if the record was found adequate. *See State v. Gaskins*, 866 NW 2d 1, 5 (Iowa 2015); *State v. Oetken*, 613 N.W.2d 679, 683 (Iowa 2000). The Court would decide these claims if the record was adequate, because addressing ineffective assistance of counsel claims on direct appeal was a more efficient use of judicial time and resources than preserving them for postconviction relief. *See State v. Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004).

The recently revised Iowa Code §814.7 reads as follows:

> 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). This amendment does not bar Trane's claims of ineffective assistance in this appeal because he is not bringing a claim which "shall not be decided on direct appeal from the criminal proceedings." *Id*. Trane is appealing the denial of his Motion for New Trial. Raising ineffective assistance claims in a Motion for New Trial and then appealing a denial of the claims is distinct from raising the claims for the first time on appeal.

Trane argues in his merits brief the phrase "When from *any other cause* the defendant has not received a fair and impartial trial" includes claims of ineffective assistance for purposes of a Motion for New Trial. Iowa R. Crim. P. 2.24(2)(b)(9) (emphasis added). This interpretation works just as well with the new statute and other statutory provisions of S.F. 589. Motions for New Trial still need to be reviewed for error, and the legislative intent of Iowa R. Crim. P. 2.24(2)(b)(9) is still that ineffective assistance claims may be brought in Motions for New Trial.

Trane expects the State to argue the amended language funneling ineffective assistance claims to postconviction relief proceedings precludes the Court from deciding ineffective

assistance claims raised through a Motion for New Trial or on appeal from a Motion for New Trial. The legislature has spoken to this, however, and their intent to allow Motions for New Trial to encompass ineffective assistance claims remains clear by not excluding their review under the amended Iowa Code§814.6(2)(f).

S.F. 589, 88th GA (2019), establishing the new Iowa Code §814.6(2)(f), clarifies that discretionary review is available on "[a]n order denying a motion in arrest of judgment on grounds other than an ineffective assistance of counsel claim." S.F. 589, 88th GA, §28 (2019). "[L]egislative intent is expressed by omission as well as by inclusion, and the express mention of one thing implies the exclusion of others not so mentioned." *Staff Mgmt. v. Jimenez*, 839 N.W.2d 640, 649 (Iowa 2013). Motions in arrest of judgment are usually used for guilty pleas. *See* Iowa R. Crim. P. 2.24(3); 2.8(2)(d).

Thus, the legislature restricted appellate review for claims of ineffective assistance in post-trial motions for those who plead guilty, but did not do so for those claims of ineffective assistance for those who filed a Motion for New Trial. This signifies the legislative intent to permit such claims on appeal.

A rule of statutory construction is to read statutes as a whole. *Iowa Ins. Inst. v. Core Grp. of Iowa Ass'n for Justice,* 867 N.W.2d 58, 72 (Iowa 2015). To read the statutes as a whole, the Court must continue allowing claims of ineffective assistance to be brought through Motions for New Trial. The Court considers all parts of the statute together without giving undue importance to a single part or provision. *State v. Schlemme*, 301 N.W.2d 721, 723 (Iowa 1981). To give both Iowa R. Crim. P. 2.24(2)(b)(9) and Iowa Code §814.7 meaning, the Court must allow ineffective assistance claims in Motions for New Trial.

If the Court thinks Iowa R. Crim. P. 2.24(2)(b)(9) and Iowa Code § 814.7 are ambiguous when read together, the Court should interpret them as still allowing claims of ineffective assistance raised in a Motion for New Trial to be heard on appeal. Ambiguity allowing reasonable minds to disagree or causing an uncertain meaning requires the Court to engage in statutory construction. *Janson v. Fulton,* 162 N.W.2d 438, 443 (Iowa 1968). If adherence to the strict letter of the law leads to injustice, absurdity, or contradictory provisions, the Court will look for another

meaning. *City of Fort Dodge v. Iowa Public Employment Relations Board,* 275 N.W.2d 393, 396-97 (Iowa 1979).

Legislative intent is determined by considering the objective the legislature sought to accomplish and evils to be remedied, while construing it in a manner to effectuate the statute's purpose rather than one which will defeat it. *Crow v. Shaeffer,* 199 N.W.2d 45, 47 (Iowa 1972). Statutes are to be interpreted so that they are reasonable and workable. *State v. Iowa Dist. Ct.,* 889 N.W.2d 467, 473 (Iowa 2017).

The intent behind S.F. 589, 88th GA (2019) was to increase judicial efficiency, decreasing the number of cases heard on appeal as well as restricting appeals for ineffective assistance claims to only be litigated when there is a sufficient record to rule on them. This is clear from its provisions prohibiting ineffective assistance claims on appeal where they had been allowed, if the record was adequate. S.F. 589, 88th GA, §31 (2019). By removing all such claims from direct appeal and requiring additional record through postconviction proceedings, the Court will not be presented claims with inadequate records.

The legislation also restricts appeals so there is no appeal as of right in cases where the defendant has pled guilty unless the defendant establishes good cause. S.F. 589, 88th GA, §28 (2019). This is intended to decrease the number of cases on appeal and restrict ineffective assistance claims to only where an adequate record can be established.

Allowing ineffective assistance claims to be brought through Iowa R. Crim. P. 2.24(2)(b)(9), and then subsequently decided on appeal increases judicial efficiency. Litigation should be final at the earliest possible date, and it is better for legal arguments to be heard on their merits in the underlying criminal case rather than waiting for its merits to be determined in a possible postconviction relief proceeding. *State v. Ortiz*, 766 N.W.2d 244, 250 (Iowa 2009). Such resolution is best furthered when the district court can take testimony from the trial attorney, assess whether decisions were strategic, and judge credibility.

The trial court is often in the best position to judge whether the violation of a duty by trial counsel affected the underlying proceeding. This is seen in how Motions for New Trial based on the

weight of the evidence are already entrusted to the trial court, who is able to weigh the evidence and consider the credibility of the witnesses. *State v. Scalise*, 660 N.W.2d 58, 65 (Iowa 2003). The trial court is already familiar with the evidence, the jury, and the performance of the attorneys, and the memory of any needed witnesses will be fresher. Allowing the trial court to adjudicate prejudice and the attorney's performance is much more judicially efficient than waiting, sometimes years, for a different trial judge in a postconviction court to try and reconstruct credibility issues and relearn all of the evidence in the case.

Once the record has been established in the trial court, it is judicially efficient to decide the issue on appeal rather than preserve the issue for postconviction relief. When the record is adequate and the claims can be addressed on direct appeal, waiting for postconviction relief to adjudicate them wastes judicial time and resources. *State v. Brubaker*, 805 N.W.2d 164, 170-71 (Iowa 2011) (*quoting Truesdell*, 679 N.W.2d at 616). Allowing ineffective assistance claims raised through Iowa R. Crim. P. 2.24(2)(b)(9) and a new trial hearing to be reviewed, as needed, on appeal allows

litigation to stay with the fewest judges in the fewest proceedings as possible.

II. Legislative Intent Renders Changes to Iowa Code §814.7 Prospective Only

The question of whether a newly enacted statute operates retrospectively or prospectively only is one of legislative intent. *State Ex Rel. Turner v. Limbrecht*, 246 N.W.2d 330, 332 (Iowa 1976). "A statute is presumed to be prospective in its operation unless expressly made retrospective." Iowa Code §4.5. An exception exists when the statute concerns remedies or procedures. *Limbrecht*, 246 N.W.2d at 332. If the statute affects substantive rights, it generally applies prospectively only. *Id.* If it only affects remedies or procedures, it will generally apply both prospectively and retrospectively. *Id.* Whether the statute relates to remedy or procedure as opposed to substantive rights is not conclusive, however, of the underlying question of legislative intent. *Id.* at 333.

Via §4.5, the legislature has told the Court it intends the amendments to §814.7 to be only applied prospectively. "[L]egislative intent is expressed by omission as well as by inclusion, and the express mention of one thing implies the

exclusion of others not so mentioned." *Jimenez*, 839 N.W.2d at 649. The legislature has specified the parts to be applied retrospectively, something it was fully capable of indicating when retroactivity was intended. *See* S.F. 589, 88th GA, §2 (2019) (adding Iowa Code §901C.3(7) stating "This section applies to a misdemeanor conviction that occurred prior to, on, or after July 1, 2019.").

The legislature's intent for the amended §814.7 to be only applied prospectively has been clearly spoken by omission of any expressed retrospective language. The legislature's intent is the controlling factor and has been conclusively established even without an analysis on substantive rights.

III. Iowa Code §4.13(1) Prohibits Changes to Iowa Code §814.7 From Affecting Trane's Ongoing Appeal

The amendment of a statute cannot affect any prior action taken under the statute. Iowa Code §4.13(1)(a). Similarly, statutory change does not affect any "proceeding, or remedy in respect of any privilege, obligation, liability, penalty, forfeiture, or punishment[.]" Iowa Code §4.13(1)(d). A proceeding already underway prior to an amendment may be continued under the prior statutory language.

Id. Under §4.13, the changes to Iowa Code §814.7 may not be applied to deprive Trane of his claims pending on appeal.

To begin, the Iowa Supreme Court determined it would retain this matter for hearing under Iowa R. App. P. 6.1101(2) more than a month before these changes were signed into law. (Notice.Retention.03/24/2019.) This action, alongside Trane's act of seeking appeal on the issues of ineffective assistance raised through Iowa R. Crim. P. 2.24(2)(b)(9) as grounds for new trial, were taken in reliance on the prior version of Section 814.7. *See* Iowa Code §814.7(2) (2017) (party may raise ineffective assistance claim on direct appeal); Iowa Code §814.7(3) (2017) (court may decide the record is adequate to decide the claim or choose to preserve for postconviction relief). The changes to Section 814.7 cannot affect efforts by this Court to determine the process Trane was entitled to at the time the district court decided his case.

This appeal is a "proceeding" under Iowa Code §4.13(1)(d) as defined by the Iowa Supreme Court:

> In a general sense, the form and manner of conducting juridical business before a court or judicial officer; regular and orderly progress in form of law; including all possible steps in an

> action from its commencement to the execution of judgment.

Eldridge City Utilities v. Iowa State Commerce Commission, 303 N.W.2d 167, 170 (Iowa 1981) (*quoting* Black's Law Dictionary 1368 (Revised 4th Ed. 1968)). Put another way, a proceeding is "a step taken by a suitor to obtain action by a court." *Id*. (internal citations omitted). Trane commenced this proceeding under Iowa Code §814.7(2) in the form and manner it permitted for purposes of obtaining action by this Court.

This Court, in turn, retained the questions Trane posed in respect to a privilege, liability, penalty, or punishment. Under the prior language of §814.7, Trane was privileged to raise ineffective assistance claims on direct appeal. *See* Black's Law Dictionary 1359 (Revised 4th Ed. 1968) ("Privilege. A particular and peculiar benefit or advantage enjoyed by a person, company, or class beyond the common advantages of other citizens."). The questions raised in this appeal are whether Trane's criminal liability was constitutionally established, and whether he is appropriately subject to penalty and punishment. Under long-standing statutory law, the changes to §814.7 cannot affect Trane's right to obtain relief from his

unconstitutional conviction through a previously commenced proceeding.

IV. Changes to Iowa Code §814.7 Are Substantive Changes to a Criminal Statute to be Applied Prospectively Only

It is "well-settled law that substantive amendments to criminal statutes do not apply retroactively." *State v. Harrison*, 914 N.W.2d 178, 205 (Iowa 2018). Substantive law creates, defines, and regulates rights, while procedural law establishes "'the practice, method, procedure, or legal machinery by which the substantive law is enforced.'" *Baldwin v. City of Waterloo*, 372 N.W.2d 486, 491 (Iowa 1985) (*quoting Limbrecht*, 246 N.W.2d at 332).

The right of appeal is "entirely statutory, yet where such right is given it is substantial and an accused may not be deprived thereof…by any other act or failure to act upon the part of the State which unfairly denies him his appeal." *Sewell v. Lainson*, 57 N.W.2d 556, 563 (Iowa 1953). The legislature may not extinguish a right to an action after its accrual. *Dolezal v. Bockes*, 602 N.W.2d 348, 351 (Iowa 1999). The changes to §814.7 constitute an act by the State which, if applied to Trane, would deprive him of his substantive and accrued right of appeal. *See id.* (right of action

accrues when aggrieved party has right to institute and maintain action).

The change explicitly removes the right of appeal for ineffective assistance claims with no regard for the sufficiency of the record. Application of this to Trane would unfairly deny him his appeal of these claims. The right of appeal is not limited to only legally obtained judgments as "[t]he great object of an appeal is to show that the judgment is not legal." *State v. Olsen*, 162 N.W. 781, 782 (Iowa 1917) (*quoting Petty v. Durall*, 4 Greene 120, 121 (Iowa 1853)). The questions posed by claims of ineffective assistance cut directly to the legality of a conviction, as a conviction cannot stand absent constitutionally guaranteed effective assistance.

The right of appeal holds true where any doubt on the sufficiency of the record is due to the trial court's refusal to accept admissible evidence. *Sewell*, 57 N.W.2d at 564 (trial court denies due process when it precludes a showing of grounds to set aside a conviction). This is true even where other avenues of relief are available if the evidence for setting aside a conviction would be sufficient if accepted by the trial court. *Id.* at 562.

Under the language of §814.7 at the time this appeal was filed and retained by this Court, Trane was expressly permitted to raise ineffective assistance on direct appeal. *See Boomhower v. Cerro Gordo County Bd. of Adjustment*, 163 N.W.2d 75, 76 (Iowa 1968) (right to appeal exists where statute expressly makes provision therefor). This right of appeal is substantive, as it is a right created, defined, and regulated by the statute creating it. *Cf. Giles v. State*, 511 N.W.2d 622, 625 (Iowa 1994) (amendment changing "right of review from a direct appeal to petition by writ of certiorari… worked not merely a technical or lexicographical revision, but a substantive change in appeal rights."); *Schultz v. Gosselink*, 148 N.W.2d 434, 436 (Iowa 1967) *overruled on other grounds Goetzman v. Wichern*, 372 N.W.2d 742 (1982) (recognizing authorities holding a right of appeal is substantive while manner of exercise is procedural).

The recent changes to §814.7 are not mere clarifications or technical modifications. They fully abrogate the right of direct appeal of a criminal conviction from a constitutional violation. Like *Giles*, the statutory right of direct appeal is replaced with a wholly different process. 511 N.W.2d at 625. These are substantive

changes by any definition. *See State v. Williams*, No. 17-1989, 2019 WL 2236108, *14 (Iowa May 24, 2019) (amendment eliminating duty to retreat from reasonable force statute was a substantive and prospective change).

This is a different circumstance than that considered in *Hannan v. State*, 732 N.W.2d 45 (Iowa 2007) which addressed §814.7's permitting ineffective assistance claims to be pursued through postconviction relief without first being raised on direct appeal. The dispute in *Hannan* concerned a defendant raising ineffective assistance for the first time on postconviction relief despite not preserving the claim through direct appeal and the judgment being final long before §814.7 became effective. *Id.* at 50. Prior to §814.7, a defendant had to either raise ineffective assistance on direct appeal or present "sufficient reason" for not doing so. *Collins v. State*, 477 N.W.2d 374, 376 (Iowa 1991). The State contended the claim had not been so preserved, with §814.7 being only prospective under the rule that "statutes controlling appeals are those that were in effect at the time the judgment or order appealed from was rendered." *Hannan*, 732 N.W.2d at 50.

The Court noted Section 814.7 "describe[ed] the procedure to bring a claim of ineffective assistance of counsel." *Id.* at 51. It did not affect a substantive right, but rather prescribed a method for enforcing a right or redressing its invasion. *Id.* In finding §814.7 retroactive, the Court focused on "the evil" §814.7 was to remedy, and whether an existing statute already governing that "evil." *Id.* The "evil" was litigants raising ineffective assistance claims without an adequate record, with §814.7 attempting to conserve judicial resources and place such claims with the most informed court. *Id.* Before §814.7, no statute addressed this matter. *Id.*

The present circumstances are the opposite of *Hannan*, with a different conclusion being required. In creating §814.7, the legislature statutorily clarified the process for pursuing ineffective assistance claims with an insufficient record, yet expressly allowed for pursuing such claims through appeal on sufficient record. Importantly, the preexisting right of appeal remained intact, with the process becoming more defined. *See State v. Kellog*, 263 N.W.2d 539, 544 (Iowa 1978) (relaxing general rule of preservation to allow claims of ineffective assistance requiring additional record to be

preserved for postconviction relief). This was the background in which *Hannan* was decided. The statute amended adequately addressed the same evil, with the discretion of Iowa's appellate courts sufficient to ensure judicial economy and record sufficiency.

Trane is pursuing an appeal expressly afforded him under §814.7. Trane's right of appeal accrued with the denial of his Motion for New Trial. The record is sufficient for appeal. Critically, should the court find an insufficient record, it was due to the district improperly refusing to allow Trane to establish this record. *See Sewell*, 57 N.W.2d at 564 ("…[I]t was the duty of the trial court to consider the testimony on both sides and to make his determination therefrom[.]")

The recently enacted amendment, however, does not change a process. It abrogates the statutory right to appeal based on ineffective assistance. *See* Iowa Code §814.7 (2019) ("…the claim shall not be decided on direct appeal from the criminal proceedings.") Even if this were permissible prospectively, it cannot be applied to cases where the judgment appealed from was rendered prior to July 1, 2019. This was the Court's finding in

James v. State, 479 N.W.2d 287 (Iowa 1991) in similar circumstances. Prisoners pursuing postconviction relief from disciplinary rulings sought direct appeal under Iowa Code §663A.9. *James,* 479 N.W.2d at 289. An amendment to this statute removing the right to direct appeal became effective eleven days after the district court had denied relief and before notices of appeal had been filed. *Id*. The prisoners' right to direct appeal remained, however, because it existed at the time of the district court's ruling. *Id*. The same holds true for Trane.

Trane's appeal in this case was taken under his right of appeal as it existed at the time of the district court decision. The subsequent legislative action did not simply divert his claim through another statutory process where no statute expressly governed; rather, it actively abrogated his right of appeal after he had effectuated it. This Court must find, under long-standing statutes controlling the application of such amendments, these substantive change to the criminal appeal process can be applied prospectively only.

V. Changes to Iowa Code §814.7 Violate Equal Protection under Article I, §6 of the Iowa Constitution and the Fourteenth Amendment of the U.S. Constitution

If the amendments to §814.7 were applied to Trane, he would be deprived of another substantive right, one of Constitutional magnitude. Where the right to appeal exists, it must be applied equally and may not be extended to some, but denied others. *In Interest of Chambers*, 152 N.W.2d 818, 820 (Iowa 1967). Where State action denies the right of appeal to one while granting it to another, it is denying equal protection of the law. *Waldon v. District Court of Lee County*, 130 N.W.2d 728, 731 (Iowa 1964). The recent amendment renders Section 814.7 a violation of Trane's right to equal protection under Article I, §6 of the Iowa Constitution and the Fourteenth Amendment of the U.S. Constitution.

The Iowa Constitution provides: "All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens." Iowa Const. Art. I, §6.

The United States Constitution also prohibits any state from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV.

"The essence of equal protection is equal justice." *State v. Whitfield*, 212 N.W.2d 402, 413 (Iowa 1973) (Uhlenhopp, J., concur). Equal protection requires laws to treat all those similarly situated with respect to the purposes of the law alike. *Varnum v. Brian*, 763 N.W.2d 862, 883 (Iowa 2009). This renders it impossible to determine "'reasonableness of a [legislative] classification without taking into consideration, or identifying, the purpose of the law.'" *Id*. (citation omitted).

The first step under the Iowa Constitution is to determine whether there is a distinction made between similarly situated individuals. *Nguyen v. State*, 878 N.W.2d 744, 758 (Iowa 2016). The second step is to "examine the legitimacy of the end to be achieved; we then scrutinize the means used to achieve that end." *LSCP, LLLP v. Kay Decker*, 861 N.W.2d 846, 860 (Iowa 2015).

The categories created by the amended §814.7 are:

1. Criminal defendants, like Trane, whose trial counsel failed to preserve error and whose trial record is sufficient to adjudicate the ineffective assistance claim; and
2. Criminal defendants whose counsel effectively preserved error.

Both classes of defendants have a statutory right of appeal. Iowa Code §814.6(1)(a). This only exclusion is for simple misdemeanors and ordinance violations. *Id.* The only difference is one class received effective assistance and the other did not.

Appellate treatment of prosecutorial misconduct, which itself is a due process violation, illustrates these classes. *State v. Piper*, 663 N.W.2d 894, 913 (Iowa 2003) *overruled on other grounds State v. Hanes*, 790 N.W.2d 545, 551 (Iowa 2010). When objected to, prosecutorial misconduct is preserved for direct appeal. *Piper*, 663 N.W.2d at 913. When not, it can only be raised as ineffective assistance. *State v. Graves*, 668 N.W.2d 860, 868 (Iowa 2003). Under the amended §814.7, one defendant can immediately pursue the constitutional violation, while the other loses not only their

right to a fair trial, but the right to pursue the violation, through no fault of their own. *Graves* itself is a clear example of how this would play out:

> We could preserve the defendant's ineffective-assistance claim to provide counsel with an opportunity to explain his conduct, but there really are only two plausible explanations: (1) counsel reasonably believed such objections or requests had no merit, or (2) counsel acquiesced in the prosecutor's misconduct as a matter of trial strategy.

Id. at 882. The Court had no problems taking immediate action to address the constitutional violation denying the defendant a fair trial. This is an example of Iowa appellate court's longstanding ability to effectively and efficiently resolve claims of ineffective assistance from a sufficient trial record.

Classifications deny equal protection where the lines drawn do not rationally advance a legitimate government purpose. *Bierkamp v. Rogers*, 293 N.W.2d 577, 581 (Iowa 1980). Because of the statutory nature of right of appeal, the appropriate standard of review is rational basis. *In re C.M.*, 652 N.W.2d 204, 210 (Iowa 2002). Though Trane bears the burden of negating any claimed reasonable basis, this Court application of the standard requires

such basis to be "realistically conceivable" with "a basis in fact." *Behm v. City of Cedar Rapids*, 922 N.W.2d 524, 546-47 (Iowa 2019).

This is where the purpose of the amendment comes into play. There is nothing in the amendment suggesting a change from the original purpose identified in *Hannan*: judicial economy and record sufficiency. 732 N.W.2d at 51. To begin, the Court has expressly recognized, "Preserving ineffective assistance of counsel claims that can be resolved on direct appeal wastes time and resources." *Truesdell*, 679 N.W.2d at 616. This finding was made mere months before the original language of Iowa Code §814.7 became effective in July 2004. For at least one hundred fifteen years, this Court has efficiently addressed claims of ineffective assistance raised on direct appeal. *See State v. Barr*, 98 N.W. 595, 597 (Iowa 1904) (conviction reversed where defendant had no reasonable opportunity to be defended by counsel despite absence of objection).

While there has obviously been an increase in the number of appeals taken in that time, the number of those seeking ineffective assistance claims to be resolved on direct appeal can only be a small portion of that number. Since §814.7 was first enacted in 2004

through 2017, the total number of cases addressed by the Iowa Court of Appeals has fluctuated between a low of 930 in 2014 and a high of 1,389 in 2016. (*See* Iowa Court of Appeals Case Statistics - https://www.iowacourts.gov/iowa-courts/court-of-appeals/caseload-statistics, last visited July 9, 2019.) This coincided with the Iowa Supreme Court accepting "a more-limited caseload" in 2002 "resulting in a sizeable increase in caseload for the Court of Appeals." (*Id*. at n.5.)

Overall, in this time, the Court of Appeals ruled on 15,500 cases. (*Id*.) In that same time, counsel's research on Westlaw, conducted by searching for cases containing the phrase "ineffective assistance", shows a total of 3,327 with that term. While unable to definitively determine the numerical split between those cases addressed on direct appeal and those preserved for postconviction relief, of the 1,294 opinions issued in 2017, only 36% of all cases were categorized as criminal while 13% were categorized as postconviction. (*Id*.) Common sense dictates while many of the 168 postconviction cases involved ineffective assistance, only a fraction of the 466 cases would. Little efficiency would be sacrificed in

considering the ineffective assistance claim raised in this small percentage of cases.

This must be compared to the significant increased burden on the district courts who will have to hold full civil proceedings on all cases in which a criminal defendant seeks redress from the ineffective assistance received. This concern was partially addressed in Arguments Section I, *supra*. The effect of the changes means finding space on crowded trial dockets, hearings on procedural matters, presiding over the discovery process, ruling on dispositive motions, and ultimately trying defendant's claim a second time when resolution on direct appeal was possible. The burden on the district court is extreme and requiring every claim of ineffective assistance to be heard through a separate trial proceeding increases this burden to a degree disproportionate to that saved by the appellate courts. And ultimately, many of these cases end up back before the appellate court anyway, meaning that any relief achieved is only temporary. The only efficiency gained would be a result of State-imposed barriers to obtaining relief. Efficiency gained by increasing the difficulty in adjudicating

constitutional violations is a false gain, and does nothing but further undermine the right lost.

Nor do the changes further the interests of record sufficiency. Before the amendment, when the record was sufficient, it was addressed on appeal, and when not, it was preserved for postconviction relief. Now, all claims are preserved for postconviction, even when the record is already sufficient. By forcing a second proceeding on a developed record, these changes impose an unnecessary additional burden on the district court.

This does not even consider the burden on the defendant. The financial burden of a second district court proceeding for which their best result would be a third district court proceeding is unfair and improper. Their ability to participate in postconviction proceedings is often hampered by incarceration with such cases often lingering for years before being adjudicated. Unlike when the case is heard on appeal, there is no bond available during postconviction proceedings forcing defendants to sit in prison while the constitutionality of their conviction is addressed through an unnecessary civil proceeding.

In sum, there is no rational basis reasonably furthered by the amendment to Section 814.7. There is no rational distinction between defendant's like Trane, whose ineffective assistance claims have a sufficient record, and any other defendant seeking direct appeal. The amendment to Section 814.7 violated equal protection, and must be struck down as unconstitutional.

VI. If Iowa Code §814.7 Applies to the Proceeding, A Plain Error Rule Should Be Adopted

For years, Iowa has refused to adopt a plain error rule. With the legislature restricting ineffective assistance solely to postconviction relief, plain error must be adopted to increase judicial efficiency. *Rhoades 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." *Id.*

One need look no farther than guilty pleas for this need. Errors in federal guilty pleas are corrected using plain error. *See U.S. v. Dominguez Benitez*, 542 U.S. 74, 83 (2004). In Iowa, however, the lack of factual basis for a guilty plea is raised on ineffective assistance grounds, with attorneys prohibited from

giving an improper factual basis for a strategic reason as this "would erode the integrity of all pleas and the public's confidence in our criminal justice system." *State v. Hack*, 545 N.W.2d 262, 263 (Iowa 1996).

The Federal Rules best articulates the standard: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b). "[T]he court should not exercise that discretion unless the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *U.S. v. Olano*, 507 U.S. 725, 732 (1993).

The U.S. Supreme Court has recognized and applied plain error since at least the late 19th century. The phrase "plain error" first appeared in *Wiborg v. U.S.*, 163 U.S. 632 (1896). In *Wiborg*, a ship captain and two mates were charged with waging a military expedition and enterprise against a territory with which Congress had not declared war. *Wiborg*, 163 U.S. at 633. Prior to submitting the matter to the jury, no "motion or request was made that the jury be instructed to find for defendants…." *Id.* at 645. All three defendants were eventually convicted and sentenced. *Id.* at 633.

After reviewing the facts and evidence on appeal, the U.S. Supreme Court found plain error was committed in not instructing the jury to acquit the two mates. *Id.* at 659. The Court found the evidence insufficient to conclude the mates had any knowledge of the captain's plan to engage in a military enterprise prior to boarding the ship. *Id.* Considering their conviction without adequate proof a grave injustice, the Court decided it "may properly take notice of what we believe to be a plain error, although it was not duly excepted." *Id.* The Court further stated, "if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it." *Id.* at 658. It reversed the judgment against the mates and remanded with instructions to set aside the verdict and grant a new trial. *Id.* at 660.

In 1936, the U.S. Supreme Court articulated a plain error standard slightly different from *Wiborg*. Shifting the focus from the effect of plain errors on the defendant to the effect of plain errors on the judiciary, the Court declared: "In exceptional circumstances, *especially in criminal cases*, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has

been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings." *U.S. v. Atkinson*, 297 U.S. 157, 160 (1936) (emphasis added). This standard is still employed today. *See Carlton v. U.S.*, 135 S. Ct. 2399 (Mem), 2399 (2015) (reiterating *Atkinson* standard).

In *Olano*, the U.S. Supreme Court "granted certiorari to clarify the standard for 'plain error' review by the courts of appeals under Rule 52(b)." 507 U.S. at 731. The Court broke down Rule 52(b) into a four-part test for determining when appellate courts should exercise their discretion to correct plain errors.

First, there must be "error." *Olano*, 507 U.S. at 732. Importantly for the present case, deviation from a legal rule constitutes error. *Id.* at 732-33. "If a legal rule was violated during the district court proceedings, and if the defendant did not waive the rule, then there has been an 'error' within the meaning of Rule 52(b) despite the absence of a timely objection." *Id.* at 733-34.

Second, the error must be "plain," meaning "clear" or "obvious." *Id.* at 734. The error must have been clear under the current law at the time it was made. *Id.*

Third, the plain error must "affect substantial rights." *Id*. This means the error must have been prejudicial or "affected the outcome of the district court proceedings." *Id*. The defendant bears the burden to show prejudice by the plain error and typically an appellate court cannot correct error absent this showing. *Id*. S*ee also U.S. v. Young*, 470 U.S. 1, 16 n. 14 (1985) ("[F]ederal courts have consistently interpreted the plain-error doctrine as requiring an appellate court to find that the claimed error not only seriously affected 'substantial rights,' but that it had an unfair prejudicial impact….").

Lastly, the *Atkinson* standard "should guide the exercise of remedial discretion…." *Olano*, 507 U.S. at 736. Appellate courts should rectify plain forfeited errors affecting substantial rights when the errors "'seriously affect the fairness, integrity or public reputation of judicial proceedings.'" *Id*. (*quoting Atkinson*, 297 U.S. at 160). It is important to note "an error may 'seriously affect the fairness, integrity or public reputation of judicial proceedings' *independent* of the defendant's innocence." *Id*. at 736-37 (emphasis added). This shows the importance the Court placed on protecting

the fairness and integrity of judicial proceedings, placing it above a court's goal of determining actual guilt or innocence. *See Id.* at 736 ("[W]e have never held that a Rule 52(b) remedy is *only* warranted in cases of actual innocence.").

The plain error rule will not, however, become a panacea. The plain error must affect substantial rights, and even then "Rule 52(b) leaves the decision to correct the forfeited error within the sound discretion of the court of appeals…." *Id.* at 732. However, the Court thought important for appellate courts to have the option since:

> a rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with…the rules of fundamental justice….

Id. (*citing Hormel v. Helvering*, 312 U.S. 552, 557 (1941)).

There is a litany of reasons why Iowa should adopt the plain error doctrine. These reasons would protect not only Trane, but all Iowans from the consequences suffered.

First, there is a gap in this Court's ability to grant redress to Iowans. It is a maxim of the law that *ubi jus ibi remedium* - there is no wrong without a remedy. *See Sch. Comm. Of Boston v. United*

Steelworkers of Am., Local 8751, AFL-CIO, CLC, 557 N.E.2d 51, 58 (Mass. App. Ct. 1990) (noting the idea that a wrong requires a remedy "is at least as old as *Marbury v. Madison*[.]"). Without ineffective assistance claims, this Court has few tools at its disposal to grant relief when error is not properly preserved. Adopting plain error, and offering an ability to overcome counsel's failure to preserve error, will help overcome this gap in ability to redress the wrongs Iowans have suffered. *See Young*, 470 U.S. at 15 ("The plain-error doctrine…tempers the blow of a rigid application of the contemporaneous-objection requirement."); *State v. Odom*, 300 S.E.2d 375, 378 (N.C. 1983) (adopting plain error rule to relieve harshness of requiring defects be objected to in prior proceedings).

Second, this Court is really already using ineffective assistance of counsel as a replacement for the plain error rule. *Rhoades*, 848 N.W.2d at 33 (Mansfield, J., concurring). Justice Mansfield pointed out the Iowa Supreme Court will reverse a conviction if there is no factual basis for the conviction, but will do so based on the grounds counsel failed an essential duty, rather than engage in plain error analysis. *Id.* at 34 (*citing State v. Gines*,

844 N.W.2d 437, 441 (Iowa 2014)). Plain error analysis would allow the Court to analyze plain errors in the proper manner, rather than straining the bounds of traditional ineffective assistance analysis. *Id.* at 33 (Court's "expansive view of ineffective assistance of counsel" leads to it being used as a substitute for plain error). In analyzing plain errors under the plain error rule, rather than ineffective assistance, the Court can also avoid the pitfall of appearing to criticize counsel in which it finds no fault. *See id.* at 34 ("I think it is especially important that we not appear to be criticizing counsel....").

Third, failure to adopt the plain error doctrine is, respectfully, an example of form over substance. Without plain error, wronged Iowans must rely on filing postconviction relief to overcome failures of counsel to preserve error, rather than simply addressing those issues on direct appeal. Adopting plain error buoys judicial economy. Postconviction relief proceedings often take years in district court alone while petitioners sit in jails or prisons while justice slowly grinds out a result. Dr. King said that justice delayed

is justice denied, and the plain error rule can bring justice more swiftly, with less rigid adherence to form.

Fourth, failing to adopt plain error raises two concerns of judicial integrity. First, Iowa is one of very few states yet to recognize this form of redress. *See State v. McAdams*, 594 A.2d 1273, 1275 (N.H. 1991) (Batchelder and Johnson, JJ., concurring) (as of 1991, New Hampshire was "one of only thirteen jurisdictions that have not yet adopted some form of the plain error rule…."). This Court jealously protects the extra rights Iowans hold under the Iowa Constitution, beyond the "admirable floor" of the federal constitution. In this one area, however, it lags behind. Second, this Court cannot leave Iowans in the lurch. This Court should carefully consider the public's perception of judicial proceedings in state court when there is undeniable error without redress.

This Court needs this additional tool for cases like this. Among the claims asserted is a failure to object to a jury instruction which is legally improper on its face. Under this instruction, the jury was permitted to convict Trane of a single count of child endangerment by combining evidence of alleged endangerment of

two separate children. The State argues this issue was not properly preserved requiring it be considered under ineffective assistance. If this Court agrees with the State on preservation, and §814.7 applied as amended, this clear legal error will be driven back into the district court for postconviction relief. This is an error, plain on its face, which resulted in a criminal conviction. Under the amended §814.7, this is just the first erroneous instruction resulting in incarceration which will clog the district court dockets absent a plain error review.

Finally, and the reason it is time to leave the rule behind, is that circumstances have changed and it is now more judicially inefficient to not adopt the plain error rule than to embrace it. Our error preservation rules are meant to give notice to opposing counsel and the district court so the court can correct errors as soon as possible. *State v. McCright*, 569 NW 2d 605, 608 (Iowa 1997). It is also meant to prevent parties from sitting mute on errors made by the court and then complain on appeal. *State v. Rutledge*, 600 NW 2d 324, 326 (Iowa 1999).

The restrictions of plain error alleviate these concerns. It can only be used in select circumstances. But the lack of plain error review combined with the lack of postconviction relief means that the court is adding additional unnecessary postconviction proceedings when there have been egregious errors in guilty pleas, jury instructions, and admission of evidence. Before, the court was able to correct these errors on appeal through ineffective assistance of counsel claims. Without a plain error rule, the Court is mandating cases be dragged out for years unnecessarily.

CONCLUSION

The Court's question is not one which must be answered to resolve Trane's appeal, as Trane's case is procedurally distinct from those cases impacted by the change. Should the Court, however, find this case to be the appropriate vehicle to answer the question, it clear from the plain language of the change that the legislature intended only a prospective application. This intent is appropriate given the substantive changes abrogate the preexisting right of appeal for criminal defendants in Trane's position, factors which legally require a solely prospective application.

Furthermore, should retroactivity be found, the Court must find the changes to be unconstitutional as violating Trane's rights to Equal Protection under Article I, §6 of the Iowa Constitution and the Fourteenth Amendment of the U.S. Constitution.

Finally, given the impact of amending §814.7, it is time for this Court to adopt plain error. Adopting this rule will permit cases, like Trane's, to be fully resolved on direct appeal where the error is plain and prejudicial, without the need for time-consuming additional civil proceedings.

For all these reasons, the Court must consider Trane's appeal on its merits.

PARRISH KRUIDENIER DUNN BOLES GRIBBLE GENTRY BROWN & BERGMANN, L.L.P.

BY: */s/ Alfredo Parrish*

Alfredo Parrish AT0006051
Adam C. Witosky AT0010436
Alexander Smith AT0011363
2910 Grand Avenue
Des Moines, Iowa 50312
Telephone: (515) 284-5737
Facsimile: (515) 284-1704
Email: aparrish@parrishlaw.com
awitosky@parrishlaw.com
asmith@parrishlaw.com
Attorneys for Defendant/Appellant

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Brenda Mozena