IN THE SUPREME COURT OF IOWA
Supreme Court No. 18-0825

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BENJAMIN G. TRANE,
Defendant-Appellant.

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

APPELLEE'S SUPPLEMENTAL BRIEF PURSUANT TO JUNE 18, 2019 IOWA SUPREME COURT ORDER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Federal Statute

State Statutes

Other Authorities

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. Newly Enacted Legislation Foreclosing the Court From Deciding Ineffective Assistance of Counsel Claims on Direct Appeal Applies to All Defendants Whose Cases Were Pending on July 1, 2019.

Authorities

Barthelemy v. J. Ray McDermott & Co., 537 F.2d 168 (5th Cir. 1976)
Bruner v. United States, 343 U.S. 112 (1952)
Fernandez v. I.N.S., 113 F.3d 1151 (10th Cir. 1997)
Hallowell v. Commons, 239 U.S. 506 (1916)
Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939 (1997)
Landgraf v. USI Film Prod., 511 U.S. 244 (1994)
Massaro v. United States, 538 U.S. 500 (2003)
Merchants' Ins. Co. v. Ritchie, 72 U.S. 541 (1866)
Republic Nat. Bank of Miami, 506 U.S 80
Santos v. Guam, 436 F.3d 1051 (9th Cir. 2006)
Woods v. State, 528 U.S. 861 (1999)
United States v. Olano, 507 U.S. 725 (1993)
Anderson v. State, 801 N.W.2d 1 (Iowa 2011)
Bascom v. District Ct., 231 Iowa 360, 1 N.W.2d 220 (1941)
Bd. of Trs. v. City of W. Des Moines, 587 N.W.2d 227 (Iowa 1998)
Christie v. Rolscreen Co., 448 N.W.2d 447 (Iowa 1989)
Denney v. City of Sioux City, 292 N.W.2d 1313 (Iowa 1980
Denton v. Moser, 241 N.W.2d 28 (Iowa 1976)
DeVoss v. State, 648 N.W.2d 56 (Iowa 2002)
Dolezal v. Bockes, 602 N.W.2d 348 (Iowa 1999)
Ennenga v. State, 812 N.W.2d 696 (Iowa 2012)
Everett v. Brewer, 215 N.W.2d 244 (Iowa 1974)
Everett v. State, 789 N.W.2d 151 (Iowa 2010)
Hannan v. State, 732 N.W.2d 45 (Iowa 2007)
Home Sav. & Tr. Co. v. Dist. Court of Polk Cty.,95 N.W. 522 (Iowa 1903)
In re Estate of Falck, 672 N.W.2d 785 (Iowa 2003)
Iowa Beta Chapter of Phi Delta Theta Fraternity v. State, Univ. of Iowa, 763 N.W.2d 250 (Iowa 2009)

Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Shell Oil Co., 606 N.W.2d 370 (Iowa 2000)
Iowa Dep't of Revenue v. Iowa Merit Employment Comm'n, 243 N.W.2d 610 (Iowa 1976)
Iowa Department of Transp. v. Iowa Dist. Court for Scott County, 587 N.W.2d 781 (Iowa 1998)
James v. State, 479 N.W.2d 287 (Iowa 1991)
Kraklio v. Simmons, 909 N.W.2d 427 (Iowa 2018)
Lampson v. Platt, 1 Iowa 556 (1855)
Nguyen v. State, 878 N.W.2d 744 (Iowa 2016)
Rhoades v. State, 848 N.W.2d 22 (Iowa 2014)
Shortridge v. State, 478 N.W.2d 613 (Iowa 1991)
State ex. rel. Lankford, 508 N.W.2d 462 (Iowa 1993)
State ex rel. Brown v. Bradley, 658 N.W.2d 427 (Wis. 2003)
State ex rel. Buechler v. Vinsand, 318 N.W.2d 208 (Iowa 1982
State v. Ambrose, 861 N.W.2d 550 (Iowa 2015)
State v. Barren, 128 Nev. 337, 279 P.3d 182 (Nev. 2012)
State v. Clay, 824 N.W.2d 488 (Iowa 2012)
State v. Ford, 142 N.W. 984 (Iowa 1913)
State v. Heemstra, 721 N.W.2d 549 (Iowa 2006)
State v. Hernandez-Lopez, 639 N.W.2d 226 (Iowa 2002)
State v. Hinners, 471 N.W.2d 841 (Iowa 1991)
State v. Johnson, 2 Iowa 549 (1856)
State v. Juarez-Lopez, No. 10-1645, 2011 WL 2698223 (Iowa Ct. App. July 13, 2011)
State v. Mandicino, 509 N.W.2d 481 (Iowa 1993)
State v. Mann, 602 N.W.2d 785 (Iowa 1999)
State v. McCright, 569 N.W.2d 605 (Iowa 1997)
State v. Miles, 344 N.W.2d 231 (Iowa 1984)
State v. Nichols, 698 A.2d 521 (Me. 1997)
State v. Olsen, 162 N.W. 781 (Iowa 1917)
State v. O'Shea, 634 N.W.2d 150 (Iowa 2001)
State v. Paredes, 775 N.W.2d 554 (Iowa 2009)
State v. Perez, 563 N.W.2d 625 (Iowa 1997)
State v. Propps, 897 N.W.2d 916 (Iowa 2017
State v. Rutledge, 600 N.W.2d 324 (Iowa 1999)
State v. Spreitz, 202 Ariz. 1, 39 P.3d 525 (2002)
State v. Straw, 709 N.W.2d 128 (Iowa 2006)
State v. Tobin, 333 N.W.2d 842 (Iowa 1983)
State v. Yaw, 398 N.W.2d 803 (Iowa 1987)

Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009)
Webster County Bd. Of Supervisors v. Flattery,
268 N.W.2d 869 (Iowa 1978)
Woods v. State, 701 N.E. 1208 (Ind. 1998)
Wright v. State, 2017 WL 140175 (Iowa Ct. App. April 19, 2017)
U.S. Const. amend. XIV
Iowa Code § 4.13(1)(b)
Iowa Code § 814.1(1) (2019)
Iowa Code § 814.1(2) (2019)
Iowa Code § 814.6 (2019)
Iowa Code § 814.7
Iowa Code § 814.7(1) (2017)
Iowa Code § 814.7(3) (2017)
Iowa Code §§ 814.5, 814.6 (2019)
Iowa Const. art. I, § 6
Iowa Const. art. V, § 4
5 Am. Jur. 2d *Appellate Review* § 690, at 360-61 (1995)
14 Uniform Laws Annotated *Model Statutory Construction Act*
§ 14 (1990)
S.F. 589, § 8
S.F. 589, § 28
S.F. 589, § 31
S.F. 589 § 39

STATEMENT OF THE CASE

During the 2019 legislative session, legislators considered and ultimately passed Senate File 589, a criminal omnibus bill continuing a variety of provisions relating to both criminal law and procedure. *See* Bill History, S.F. 589 (Gen. Assembly). Pertinent here, S.F. 589 removes the appellate courts' ability to consider ineffective assistance of counsel claims "on direct appeal from the criminal proceedings." *See* S.F. 589, § 31 (amending Iowa Code section 814.7, regulating ineffective assistance claims on appeal).

After Benjamin Trane's case was retained by this court, the new legislation was signed into effect. The court directed the parties to brief, at a minimum, the issue of whether the amendment precluding the court from deciding ineffective assistance claims on direct appeal is retroactive. *See* June 18, 2019 Order.

ARGUMENT

I. Newly Enacted Legislation Foreclosing the Court From Deciding Ineffective Assistance of Counsel Claims on Direct Appeal Applies to All Defendants Whose Cases Were Pending on July 1, 2019.

A. This is a "Direct Appeal."

Benjamin Trane argues at the outset that irrespective of the retroactivity issue, Senate File 589 does not apply to his case because it is not a "direct appeal." Defendant's Supp. Brief at 16. Trane suggests that the fact that he is appealing a motion for new trial ruling removes him from the category of direct appeals.

In Iowa Code section 814.7, the legislature used the term "direct appeal." Iowa Code § 814.7; S.F. 589, § 31 ("The [ineffective assistance] 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*.") (emphasis added). While not defined in the statute or the rules, "direct appeal" is the same term that the appellate courts routinely use in describing appeals as a matter of right from a final judgment of sentence in criminal cases. *See*, *e.g.*, *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006) ("Only in rare cases will the trial record alone be sufficient to resolve the claim

on direct appeal."); *State v. O'Shea*, 634 N.W.2d 150, 159 (Iowa 2001) ("On direct appeal, this court affirmed [the] conviction, finding trial counsel had failed to preserve error…").

Iowa Code section 814.1 defines and distinguishes appeals from discretionary review: "'Appeal' is the right of both the defendant and the State to have specified actions of the district court considered by an appellate court." Iowa Code § 814.1(1) (2019). "'Discretionary review' is the process by which an appellate court may exercise its discretion, in like manner as under the rules pertaining to interlocutory appeals and certiorari in civil cases, to review specified matters not subject to appeal as a matter of right." Iowa Code § 814.1(2) (2019). A criminal defendant is granted a right of appeal from a "final judgment of sentence" with the exception of simple misdemeanor convictions and ordinance violations, as well as certain guilty pleas under the new legislation. Iowa Code § 814.6 (2019); S.F. 589, § 28.

Here, Trane did not simply appeal his adverse motion for new trial ruling. Indeed, he would not have been permitted to appeal only that ruling. Under the rules, he is permitted to appeal the "final judgment of sentence." Iowa Code § 814.6 (2019). The motion for

new trial ruling in this case and other adverse rulings inhered in the final judgment of sentence. When filing his notice of appeal, Trane appealed "from the final judgment, conviction, and sentence of the Iowa District Court for Lee South–Keokuk County before the Honorable Mark Kruse entered in this case on the 10th day of May 2018 and from all adverse rulings and orders inhering therein." May 20, 2019 Notice of Appeal.

This case is therefore a direct appeal – it is an appeal as a matter of right from all rulings inhering in the final judgment of sentence in Trane's case. *C.f. Denney v. City of Sioux City,* 292 N.W.2d 131, 133 (Iowa 1980) (finding the city's notice of appeal naming the date of a motion for continuance ruling "and for each order and ruling inhering therein" was not a proper notice of appeal because the continuance ruling was not a final judgment, and a subsequent dismissal was not appealed and did not inhere in the continuance ruling); *see also State v. Propps*, 897 N.W.2d 91, 96 (Iowa 2017) ("[F]inal judgment in a criminal case means sentence;" because a ruling on a subsequent motion to correct an illegal sentence was not a "final judgment of sentence" – which occurred three years

earlier, there was no right to appeal; review must come, if at all, in the form of a petition for writ of certiorari).

In sum, review comes in two forms: direct appeal, which is review as a matter of right, and discretionary review by the court, which includes interlocutory appeals, discretionary reviews, and petitions for writ of certiorari. *See generally* Iowa Code §§ 814.5, 814.6 (2019). Trane's case is a direct appeal. The new legislation applies to him because he has raised ineffective assistance claims on direct appeal.

Trane also presents a statutory construction argument to suggest that the new legislation does not apply to him or to any defendant who uses a new trial motion to immediately litigate ineffective assistance claims. Defendant's Supp. Brief at 19-24. He uses various legislative intent arguments to exempt himself from the reach of section 814.7. However, its plain language provides that ineffective assistance of counsel claims shall not be decided on direct appeal from the criminal proceedings. The court should not search for meaning beyond these words. The language is not ambiguous. *See State v. Perez*, 563 N.W.2d 625, 628 (Iowa 1997) (if statutory language is plain and the meaning clear, the court does not search for

legislative intent beyond the words of the statute; "If code sections are unambiguous, we need not resort to principles of statutory construction."); *see also Anderson v. State*, 801 N.W.2d 1, 6 (Iowa 2011) (*superseded by statute on other grounds as stated in Kraklio v. Simmons*, 909 N.W.2d 427 (Iowa 2018) (noting it is the court's duty to accept the law as the legislature enacts it and "not to reason why, but to read, and apply"). This court should decline to further interpret the unambiguous language here.

To the extent Trane convinces the court to engage in statutory construction, it should reject his interpretation of legislative intent. For example, Trane points out that under the new legislation, discretionary review is available for an order denying a motion in arrest of judgment "on grounds other than an ineffective assistance of counsel claim." S.F. 589, § 28; Defendant's Supp. Brief at 20. He contends that because the legislature specifically limited the right to raise ineffective assistance claims in the context of a guilty plea, this signifies a desire to *permit* the claims in the context of a motion of new trial. Defendant's Supp. Brief at 20. To the contrary, this language conveys an effort to harmonize the amended guilty plea provision with the new language of section 814.7, which precludes the

consideration of ineffective assistance claims on direct appeal from the criminal proceedings in all cases.

Moreover, it is unlikely the legislature contemplated the practice of raising ineffective assistance claims in the context of a new trial motion. The State continues to maintain that a motion for new trial is not the proper vehicle through which to litigate ineffective assistance claims, and section 814.7, even in its original form, bears that out: "An ineffective assistance claim in a criminal case shall be determined by filing an application for postconviction relief pursuant to chapter 822, except as otherwise provided in the section [allowing for consideration on direct appeal if the record is adequate]." Iowa Code § 814.7(1) (2017). Under the prior law, the two avenues for litigating ineffective assistance claims specifically mentioned were postconviction proceedings and in limited circumstances, direct appeal. Thus, the legislature's failure to specifically include motions for new trial in the new legislation speaks to their irrelevance in the context of ineffective assistance litigation, rather than to a desire to craft an exception to the express prohibition of the new legislation.

In fact, it would make little sense to permit ineffective assistance claims to be raised through a motion for new trial, given

the new legislation prohibiting the court from deciding ineffective assistance claims on direct appeal. A defendant who raised an ineffectiveness claim immediately after trial in a new trial motion would be unable to challenge the ruling unless and until he pursued the claim in postconviction proceedings. Because, as discussed above, this case is a direct appeal, Trane and others like him are precluded from challenging a new trial ruling denying ineffective assistance claims. This is further support for the proposition that postconviction proceedings – not new trial motions – are the proper vehicle for litigating ineffective assistance claims.

The court should also reject the argument that the purpose of the legislation is better served under Trane's interpretation. Defendant's Supp. Brief at 21-25. Trane's argument that the appellate court would be provided a complete record on the ineffective assistance claims from the motion for new trial hearing does not take into account that the process is not equipped to fully illuminate the claims. A postconviction hearing – designed for that very process, complete with discovery and other trial rights – is far preferable to a makeshift trial tacked on at the time of sentencing, with no chapter 822 structures in place.

B. Senate File 589 is a Jurisdiction-Stripping Statute that Applies to All Pending Cases.

Trane next asks the court to engage in a retroactivity analysis and weigh whether the new statute is procedural, remedial, or substantive. Defendant's Supp. Brief at 25. The court should decline the invitation: "a retroactivity analysis is unnecessary because [section 28 of S.F. 589] is a jurisdictional statute," and jurisdictional statutes apply to all pending cases. *See State v. Barren*, 128 Nev. 337, 342, 279 P.3d 182, 185 (Nev. 2012). If the court does analyze the competing factors regarding retroactivity, section 31 of S.F. 589 is procedural and/or remedial, and therefore applies to all pending cases.

The United States Supreme Court has "regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Landgraf v. USI Film Prod.*, 511 U.S. 244, 274 (1994). This is because jurisdictional statutes "speak to the power of the court," not "the rights or obligations of the parties." *Id.* at 274 (citing and quoting *Republic Nat. Bank of Miami*, 506 U.S 80, 100 (Thomas, J., concurring)). As Justice Scalia noted in his specially concurring opinion in *Landgraf*, "the purpose of provisions conferring or

eliminating jurisdiction is to permit or forbid the exercise of judicial power—so that the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised." *Landgraf*, 511 U.S. at 293 (Scalia, J., specially concurring).

In Iowa, courts distinguish between subject matter jurisdiction and the authority of a court to hear a case. *See State v. Mandicino*, 509 N.W.2d 481, 482 (Iowa 1993); *but see State v. Johnson*, 2 Iowa 549, 549 (1856) ("The question is one simply as to the power and jurisdiction of this court."). In *In re Estate of Falck*, this court explained:

> [W]e distinguished subject matter jurisdiction from the court's "lack of authority to hear a particular case," also referred to as "lack of jurisdiction of the case." "Subject matter jurisdiction" refers to the power of a court to deal with a class of cases to which a particular case belongs. A constitution or a legislative enactment confers subject matter jurisdiction on the courts. Although a court may have subject matter jurisdiction, it may lack the authority to hear a particular case for one reason or another.

672 N.W.2d 785, 789-90 (Iowa 2003) (citation omitted) (quoting *Christie v. Rolscreen Co.*, 448 N.W.2d 447, 450 (Iowa 1989)).

In this case, whether the amendment of section 814.7 defeats the appellate courts' subject matter jurisdiction or authority to hear a

particular type of claim (ineffective assistance of counsel on direct appeal), the distinction is semantic and the result is the same. The change affects the exercise of judicial power. As such, it is a jurisdiction-stripping provision that applies to pending cases. It applies regardless of a retroactivity analysis because in pending cases the exercise of judicial power has not occurred yet.[1] *See Landgraf*, 511 U.S. at 293 (Scalia, J., specially concurring).

The sole exception to the rule that jurisdiction-stripping statutes apply to all pending cases is if the effect of the statute is that certain claims cannot be heard "at all" in any tribunal. *See Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 951 (1997). In other words, a jurisdictional statute may not apply to all pending cases when it fully extinguishes a substantive claim, such that it can never be heard. *See id.* But this concern is not present for

[1] This federal approach better serves the intent of the legislature when it enacts statutes affecting jurisdiction of the appellate courts. Especially where, as here, the legislature designed the amendment to address the proliferation of frivolous appeals and to ensure that claims are litigated in the best possible forum, the amendment should apply across the board. Because jurisdiction-stripping statutes regulate the exercise of judicial power, they are not technically retroactive when applied to pending cases. On the contrary, refusing to apply jurisdiction-stripping statutes to pending cases has the effect of suspending the legislature's intended effective date until a decision is reached in each case.

statutes that "merely address[] *which* court shall have jurisdiction to entertain a particular cause of action," as these statutes "merely … regulate the secondary conduct of litigation and not the underlying primary conduct of the parties." *Id.* (emphasis in original). Here, no claim of ineffective assistance has been fully extinguished. Senate File 589 only modified the tribunal to hear the claims in the first instance.

As this court has recognized, the legislature is the arbiter of which "avenue of appellate review is deemed appropriate" for a particular class of cases. *Shortridge v. State*, 478 N.W.2d 613, 615 (Iowa 1991), *superseded by a statute on other grounds*. Senate File 589 provides specific direction on the point at which this court may or may not exercise appellate review of ineffective assistance of counsel claims. *See* S.F. 589, § 31. That provision necessarily repealed the previous version of 814.7, which permitted the court's consideration of an ineffective assistance claim on direct appeal if the record was adequate to decide the claim. *See* Iowa Code § 814.7(3) (2017).

Moreover, appellate jurisdiction in Iowa is "statutory and not constitutional." *State v. Hinners*, 471 N.W.2d 841, 843 (Iowa 1991). The Constitution, rather than granting appellate jurisdiction in law

actions, provides for the regulation of appellate jurisdiction by legislation:

> The supreme court … 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, § 4 (emphasis added). Under this constitutional provision, "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 of Polk Cty.*, 95 N.W. 522, 524 (Iowa 1903). As the court noted in interpreting virtually identical language from the 1846 Constitution: "[T]he power is clearly given to the General Assembly to restrict this appellate jurisdiction." *Lampson v. Platt*, 1 Iowa 556, 560 (1855) (comma omitted).

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). "It is well settled in this state that, in the absence of a statute authorizing an appeal by the state, an appellate court cannot acquire jurisdiction to review the proceedings below." *State v. Ford*, 142 N.W. 984, 985

(Iowa 1913). 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).

From these holdings, which stretch back more than a century, it is evident that the legislative branch in Iowa possesses nearly unbounded authority to regulate the taking of appeals at law. *See, e.g.*, *James*, 479 N.W.2d at 290; *State v. Olsen*, 162 N.W. 781, 782 (Iowa 1917); *Johnson*, 2 Iowa at 549. Given that the source of this court's authority to decide criminal appeals is the General Assembly, not the Constitution, any statute that reduces or modifies the court's authority to decide criminal appeals is necessarily jurisdiction-stripping. Because jurisdiction-stripping statutes apply to all pending cases, S.F. 589 applies to this case. *See Landgraf*, 511 U.S. at 275 (majority); *James*, *id.* at 293 (Scalia, J., specially concurring); *Merchants' Ins. Co. v. Ritchie*, 72 U.S. 541, 543 (1866).

C. If the Court Applies a Substantive/Procedural Legislative Intent Retroactivity Analysis, the Legislation is Procedural and/or Remedial and Therefore Retroactive.

As noted, this court need not conduct a substantive/procedural retroactivity analysis because section 28 of S.F. 589 is a jurisdiction-

stripping statute. *See Barren*, 279 P.3d at 185. However, if the court does engage in a substantive/procedural analysis, S.F. 589 should be applied retroactively.

First, while there is often a presumption that legislation is prospective only, the text of S.F. 589 precludes that presumption here. When a legislature acts to make some portions of a statute prospective only but is silent as to other portions of the statute, there is no presumption of prospective-only operation. *See Fernandez v. I.N.S.*, 113 F.3d 1151, 1153 (10th Cir. 1997) (Congress rendering some provisions prospective-only suggested that other provisions, absent prospective-only language, were retroactive).

Here, some provisions of S.F. 589 include express dates for prospective-only or limited-retroactivity application. *See* S.F. 589, § 8 (limiting changes to robbery penalty to "a conviction that occurs on or after July 1, 2018"); S.F. 589, § 39 (limiting changes to arson penalty to conviction "that occurs on or after July 1, 2019"). The express inclusion of prospective-only language for some sections, but not for the section that regulates review of ineffective assistance of counsel claims on direct appeal, eliminates the presumption in favor of prospective-only application. *See Fernandez*, *id.* Thus the

presumption in this case is that the legislature did *not* intend section 31 to be applied prospectively only.[2]

Second, Trane contends that section 31 of S.F. 589 takes away a substantive right — the right to present an ineffective assistance claim on direct appeal. Defendant's Supp. Br. at 29-30. This is a procedural right, not a substantive right. "[E]very relevant case has made it clear that a change in the number of tribunals authorized to hear a litigant's arguments does not implicate the litigant's substantive rights." *Santos v. Guam*, 436 F.3d 1051, 1056 (9th Cir. 2006) (Wallace, J., concurring) (collecting cases); *see Bruner v. United States*, 343 U.S. 112, 117 (1952) (statute that "simply reduced the number of tribunals authorized to hear and determine such rights and liabilities" did not alter any substantive rights); *Hallowell v. Commons*, 239 U.S. 506, 508 (1916) (holding jurisdiction-stripping statute "takes away no substantive right, but simply changes the

[2] Trane points out that the expungement provision in section 2 of the new legislation provides, "This section applies to a misdemeanor conviction that occurred prior to, on, or after July 1, 2019," and contends that by omission, the legislature signaled its intent for prospective application only of section 31, the ineffective assistance provision. However, as discussed above, changes affecting the machinery of a claim are procedural and apply to all pending cases, so no specific retroactivity language was necessary.

tribunal that is to hear the case"). In other words, "the number and identity of the courts to which a litigant may present his substantive claims is not a substantive right." *Santos*, 436 F.3d at 1056 (Wallace, J., concurring) (collecting cases). Therefore, Trane has not lost a substantive right. He can raise any claim after July 1, 2019 that he could before July 1, 2019 — although he must first take the claim to the postconviction court before appealing that ruling.

Procedural changes regulate "the practice, method, procedure, or legal machinery by which the substantive law is enforced or made effective." *Iowa Beta Chapter of Phi Delta Theta Fraternity v. State, Univ. of Iowa*, 763 N.W.2d 250, 266 (Iowa 2009) (internal citation and quotation marks omitted). A change in the tribunal to hear a case is a procedural change, as the defendant can still seek to vindicate his legal challenges, albeit in a different forum. This affects the machinery of raising an ineffective assistance claim, not a defendant's ability to make an ineffective assistance challenge. *See Hannan v. State*, 732 N.W.2d 45, 51 (Iowa 2007) (finding amendment to section 814.7 procedural because it regulated the procedure of raising ineffective assistance claims). Such changes are retroactive even when the change in machinery or procedure may indirectly affect the

outcome of a matter. *E.g.*, *State ex rel. Buechler v. Vinsand*, 318 N.W.2d 208, 210 (Iowa 1982) (admissibility of certain blood tests).

When section 814.7 was first enacted, this court found that the provision that ineffective assistance claims need not be raised on direct appeal applied retrospectively because it was procedural – it changed applicable procedural rules without creating/extinguishing any claim:

> . . . [Section 814.7] is a statute describing the procedure to bring a claim of ineffective assistance of counsel. Thus, we are not required to determine what "time the judgment or order appealed from was rendered" because we do not believe this rule applies to section 814.7.
>
> . . . Section 814.7 governs the methods by which a defendant may assert a claim of ineffective assistance of counsel. *See* Iowa Code § 814.7. As such, it "prescribes a method of enforcing rights or obtaining redress for their invasion." [*Dolezal*, 602 N.W.2d at 351]. Moreover, section 814.7 does not affect the substantive rights of parties, but rather "governs the practice, method, procedure, or legal machinery by which the substantive law is enforced or made effective." *Bd. of Trs. v. City of W. Des Moines*, 587 N.W.2d 227, 231 (Iowa 1998). This indicates section 814.7 is procedural and may be applied retroactively.
>
> [. . .]
>
> Section 814.7 remedies the evil that occurs when litigants must raise ineffective assistance

> of counsel claims without an adequate record. Thus, the statute attempts to conserve judicial resources and place the defendant's claim in the court that is most informed to handle it. . . . As a result, we think the legislature's attempt to fix a procedural wrong evinces an intent to make the statute retroactive. *See Bd. of Trs.*, 587 N.W.2d at 231–32. Accordingly, Hannan's claim is properly before us under section 814.7.

Hannan, 732 N.W.2d at 50-51.

The same analysis that classified section 814.7 as procedural and retrospective when first enacted applies with equal force to this amendment, which also prescribes a procedure for asserting and deciding ineffective assistance claims. *See id.*; *accord* S.F. 589, § 31 (preserving the portion of section 814.7 that states: "[a]n ineffective assistance of counsel claim in a criminal case shall be determined by filing an application for postconviction relief pursuant to chapter 822"). Contrary to Trane's position, that the most recent amendment may be less desirable to some defendants does not take it outside of the *Hannan* analysis, as it still regulates the consideration of ineffective assistance claims under section 814.7.

The statute is also remedial. Remedial legislation is that "which regulates conduct for the public good." *Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Shell Oil Co.*, 606

N.W.2d 370, 375 (Iowa 2000) (combating the evil of petroleum releases and lack of funds to address the problem). Remedial statues are often applied retroactively, based on an analysis of 1) the language of the legislation; 2) the evil to be remedied; and 3) whether there was any previously existing statute governing or limiting the mischief which the new legislation was intended to remedy. *E.g.*, *Shell Oil Co.*, *id.* at 375.

This court finds statutes to be remedial and retroactive even when the first factor is silent, if the second two factors point toward the statute's remedial purpose. *Hannan*, 732 N.W.2d at 51. The language used by the legislature here is either neutral or weighs in favor of retroactivity, given its jurisdiction-stripping effect, as discussed above. The statute remedies evils by reducing the excessive appellate case load, limiting the waste of appellate resources, and more efficiently spending taxpayer dollars by shifting decision-making from the appellate courts to the district court in resolving claims of ineffective assistance in the first instance. *See Hannan*, 732 N.W.2d at 51 (similarly describing the purpose of the earlier amendment to section 814.7 as attempting to "conserve judicial resources and place the defendant's claim in the court that is most

informed to handle it"). Finally, the previous version of section 814.7 conferred appellate jurisdiction for review of all ineffective assistance claims with an adequate record. In practice, however, many defendants continued to raise ineffective assistance claims on direct appeal, regardless of the sufficiency of the record supporting the claims. The new legislation appears to be a direct response to that concern.

If this court analyzes whether section 31 of S.F. 589 is substantive, procedural, or remedial, it should conclude that is it procedural and/or remedial, as it did in *Hannan*. The statute applies thus to all pending cases, including this one.

D. The General Savings Clause of Iowa Code section 4.13(1) Does Not Apply to Jurisdiction-Stripping Statutes.

Trane also argues that application of Senate File 589 to his pending case violates the general savings clause, Iowa Code section 4.13(1). Defendant's Supp. Brief at 26-31. That section states that the revision or amendment of a statute does not affect any right previously "acquired, accrued, accorded, or incurred" under the statute. Iowa Code § 4.13(1)(b). Trane argues that his direct appeal to this court is a vested right or privilege that cannot be removed by

the amendment to section 814.7. The law does not support this position. *Bruner*, 343 U.S. at 117 ("This case is not affected by the so-called general savings statute…"). When the legislature modifies appellate jurisdiction, it "has not altered the nature of validity of [one party's] rights or the [other party's] liability but has simply reduced the number of tribunals authorized to hear and determine such rights and liabilities." *Id.*

In *Iowa Department of Transp. v. Iowa Dist. Court for Scott County*, this court considered the application of the general savings clause to the repeal of Iowa Code section 321J.4(3)(b) (1995), which provided an opportunity for criminal defendants who suffered a six-year license revocation to have their eligibility for a driver's license restored after two years. 587 N.W.2d 781 (Iowa 1998). The case involved defendants for whom the two-year period had expired prior to the repeal of the statute. They argued that they had acquired a right to a hearing to seek restoration of their eligibility and that such right could not be taken away by the repeal of the statute. *Id.* at 783.

This court rejected that claim, holding that "a litigant's interest in a certain procedure is not an accrued right or privilege in the context of a savings statute." *Id.* at 783-84. Other cases agree. *See,*

e.g., *Vinsand*, 318 N.W.2d at 209-10 (stating that savings statutes do not apply to procedural statutes; procedural statutes do not "create or take away vested rights"); *Denton v. Moser*, 241 N.W.2d 28, 31 (Iowa 1976) ("No one can claim to have a vested right in any particular mode of procedure for an enforcement or defense of his rights."); *Bascom v. District Ct.*, 231 Iowa 360, 362–63, 1 N.W.2d 220, 221 (1941) (same); *see also* 14 Uniform Laws Annotated *Model Statutory Construction Act* § 14 commentary at 405 (1990) (in commenting on prospective versus retrospective application of a statute, the commissioners state, "If a procedural statute is amended, the rule is that the amendment applies to pending proceedings as well as those instituted after the amendment.").

As noted, Senate File 589 does not destroy Trane's ability to pursue his ineffective assistance of counsel claims. He can proceed with his claims through postconviction relief under chapter 822. The savings clause does not "preserve the right to have a claim heard by any particular tribunal." *Barthelemy v. J. Ray McDermott & Co.*, 537 F.2d 168, 172 (5th Cir. 1976). Trane's interest in a specific procedure (direct appeal versus postconviction relief followed by an appeal) is not an accrued right or privilege for purposes of section 4.13(1).

Section 31 of S.F. 589 does not affect the parties' rights or liabilities, but instead modifies the tribunal that initially hears and determines those rights and liabilities – shifting review of all ineffective assistance claims to postconviction relief proceedings at the outset. The savings clause does not apply.

Trane also cites *James v. State*, 479 N.W.2d 287, 290 (Iowa 1991) for the proposition that a statute limiting review of prison-discipline decisions from direct appeal to certiorari did not apply to pending cases when the district court judgment pre-dated the statute. *James*, 479 N.W.2d at 289-90; Defendant's Supp. Brief at 34-35. There was no discussion of jurisdiction-stripping in the *James* decision. *See id.* Instead, the decision rested solely on a "general rule" that "statutes controlling appeals are those that were in effect at the time the judgment or order appealed from was rendered." *Id.* (internal citation and quotation marks omitted). The court applied that "general rule" to the statute shifting the manner of appeal. *See id.*

Because the parties do not appear to have urged a jurisdiction-stripping analysis in the *James* briefing, it is understandable that the court did not address the issue. Further, *James* predates *Landgraf*

and does not confront the consistent body of caselaw prior to *Landgraf* holding that jurisdiction-stripping statutes apply to pending cases. *See Landgraf*, 511 U.S. at 274; *Bruner*, 343 U.S. at 116; *Ritchie*, 72 U.S. at 543. Also, more recent case law, such as this court's decision in *Hannan*, casts serious doubt on the *James* analysis. In *Hannan*, as discussed, this court found that the 2004 amendment to section 814.7 (which eliminated the requirement that ineffective-assistance claims first be raised on direct appeal) applied to all pending appellate cases as a remedial or procedural rule. *See Hannan*, 732 N.W.2d at 51 & n.2. *Hannan* dealt specifically with a version of the statute presented here. In any event, the State presses the jurisdiction-stripping issue today. This court should revisit *James* and find that the jurisdiction-stripping nature of S.F. 589 overpowers any general rule to the contrary. *See James,* 479 N.W.2d at 290.

E. The New Legislation Does Not Violate Equal Protection Principles.

Trane next contends that the new legislation violates principles of equal protection. Defendant's Supp. Brief at 36-44. He argues that the two classes created by the amended version of section 814.7 are criminal defendants whose lawyers preserved error at trial and those

who did not preserve error, contending their dissimilar treatment is unfair. Defendant's Supp. Brief at 38-39.

The United States Constitution ensures "equal protection of the laws." U.S. Const. amend. XIV. Article I, section 6 of 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. "Iowa's constitutional promise of equal protection is essentially a direction that all persons similarly situated should be treated alike." *Varnum v. Brien*, 763 N.W.2d 862, 878 (Iowa 2009) (quotations omitted).

However, "the constitutional pledge of equal protection does not prohibit laws that impose classifications." *Id.* at 882. "Instead, equal protection demands that laws treat alike all people who are similarly situated with respect to the legitimate purposes of the law." *Id.* (quotations omitted). Thus, a "threshold test" to the equal protection analysis under the Iowa Constitution requires a party to show "as a preliminary matter that they are similarly situated" to the class of persons enjoying the legal benefit the plaintiff desires. *Id.* at

882; *Nguyen v. State,* 878 N.W.2d 744, 758 (Iowa 2016) ("The first step in our equal protection analysis under the Iowa Constitution is to determine whether there is a distinction made between similarly situated individuals."). "Under this threshold test, if plaintiffs cannot show as a preliminary mater that they are similarly situated, courts do not further consider whether their different treatment… is permitted under the equal protection clause." *Varnum*, *id.* at 882. Trane cannot satisfy the threshold test here.

In *Nguyen v. State*, the Iowa Supreme Court unanimously rejected an equal protection claim rooted in a retroactivity analysis of state court decisions. The defendant contended that the state equal protection clause required application of the *Heemstra* merger rule to cases on collateral review. 878 N.W.2d at 757-58. After recognizing that the United States Supreme Court has repeatedly held that state courts may choose to apply new rules of state law prospectively only, the court considered whether the Iowa Constitution required a different result, concluding "that defendants whose convictions become final before the law changed in *Heemstra* are not similarly situated to defendants charged after *Heemstra*." *Id.* at 758.

In *Wright v. State*, 2017 WL 140175, *1-3 (Iowa Ct. App. April 19, 2017), the defendant raised a state equal protection claim similar to Trane's. He contended that *Heemstra's* application to only non-resolved cases in which the issue had been raised in the district court rather than cases in which counsel had failed to raise the issue violated equal protection. *Wright, id.* at *1-2 (*citing State v. Heemstra,* 721 N.W.2d 549, 558 (Iowa 2006). In ordering a new trial, the postconviction court in *Wright* found "little perceptible difference" between defendants who had timely objected at trial and those who had not. *Id.* On appeal, the court disagreed, collecting cases and distinguishing between the two classes and their legal claims: "It is not unconstitutional or even unreasonable to treat as similarly situated only those parties who cases are "factually and legal similar' and 'share similar procedural histories.'" *Wright, id* at *3. (quoting *State ex rel. Brown v. Bradley*, 658 N.W.2d 427, 433 n. 7 (Wis. 2003) (citation omitted).

The two classes at issue here, as in *Wright*, are factually and legally dissimilar. A defendant who lodges an objection in district court expects an appellate court to review that issue on appeal. By contrast, a defendant who makes no objection enjoys no justified

expectation of appellate review. This is because error-preservation-by-contemporaneous-objection is a central component of our bifurcated system of trial and appeal. *State v. Paredes*, 775 N.W.2d 554, 573 (Iowa 2009) (Cady, J., dissenting) ("The doctrine of preservation of error is built on the premise that trial courts must first decide legal questions, and appellate courts review the decisions made."). Objection both affords the district court an "opportunity to avoid or correct error" and encourages the parties to create an adequate record for appellate review. *State v. Ambrose*, 861 N.W.2d 550, 556 (Iowa 2015). Without objection, the opposing party loses the opportunity (1) to provide legal argument, (2) to present evidence to support the argument, and (3) "'to take proper corrective measures or pursue alternatives in the event of an adverse ruling.'" *State v. Mann*, 602 N.W.2d 785, 791 (Iowa 1999) (quoting *State v. Tobin*, 333 N.W.2d 842, 844 (Iowa 1983)).

Because there is an important distinction between cases in which error was preserved and cases in which error was not preserved, "[t]he equal protection clause does not require that these dissimilar cases be treated the same." *Wright, id* at * 4. Trane thus cannot satisfy the threshold test.

Even assuming for purposes of argument that Trane could pass the threshold test and demonstrate that he and defendants who have preserved error at trial are similarly situated, he still cannot prevail. Rejecting a state-law equal protection challenge on collateral review in *Nguyen*, 878 N.W.2d at 758, the Iowa Supreme Court relied on a much earlier equal protection case that recognized a retroactivity claim "involved no fundamental constitutional right." *Id. (*citing *Everett v. Brewer*, 215 N.W.2d 244, 245-54 (Iowa 1974)). Thus, as Trane acknowledges, the court need only determine whether there is a rational basis or "a plausible policy reason for the classification," which is a "very deferential standard." *See Varnum*, 763 N.W.2d at 879. The plausible policy reason or rational basis for the classification here is to reduce the burgeoning appellate caseload and conserve judicial resources, as well as providing more complete records for review.

As the Supreme Judicial Court of Maine recognized, several important policy considerations justify the restriction of ineffective assistance claims to postconviction proceedings:

> Today we make clear that we will not consider a claim of the ineffective assistance of counsel on direct appeal ... There are a number of pragmatic considerations that underlie our

> decision. Considering a claim of ineffective assistance of counsel on direct appeal (1) deprives the State, in responding to the defendant's arguments, of the benefit of an evidentiary hearing, including trial counsel's testimony; (2) places us in the role of factfinder with respect to evaluating counsel's performance; (3) encourages a defendant to seek a different counsel for the purpose of raising on a direct appeal the claim of the ineffective assistance of counsel; and (4) constitutes a significant drain on our resources in responding to such claims.
>
> Regardless of the merit of the defendant's contentions, the resolution of his claim, and all claims of ineffective assistance of counsel, must in the first instance be determined in a post-conviction proceeding.

State v. Nichols, 698 A.2d 521, 522 (Me. 1997); *see also State v. Spreitz*, 202 Ariz. 1, 39 P.3d 525, 527 (2002) ("…[W]e reiterate that ineffective assistance of counsel claims are to be brought in [postconviction] proceedings. Any such claims improvidently raised in a direct appeal will not be addressed by appellate courts regardless of merit… This ensures criminal defendants a timely and orderly opportunity to litigate ineffectiveness claims and, we believe, promotes judicial economy by disallowing piecemeal litigation.").[3]

[3] For a discussion of the three approaches to the presentation of ineffective assistance of counsel claims, see *Woods v. State*, 701 N.E. 1208, 1216-21 (Ind. 1998), *cert. denied*, 528 U.S. 861 (1999) (dividing

While Trane may disagree that this method best promotes judicial economy, the legislature is free to craft a remedy that is a rational attempt at solving a problem this court has recognized. Addressing a claim of unpreserved error on direct appeal is nearly always premature, if not impossible, without additional record. *See Straw*, 709 N.W.2d at 138 ("In only rare cases will the defendant be able to muster enough evidence to prove prejudice without a postconviction relief hearing."). It is usually critical to develop a post-trial record regarding whether any error truly occurred, whether strategic considerations influenced the decision not to raise objections below, and whether any error could have impacted the outcome of the proceedings. *See, e.g.*, *State v. Juarez-Lopez*, No. 10-1645, 2011 WL 2698223, at *3 (Iowa Ct. App. July 13, 2011) ("There is no indication in the record on appeal whether defense counsel discussed immigration consequences with the defendant. We

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cases into 1) those that require defendants to bring an ineffective assistance claim on direct appeal or forfeit the claim; 2) those that require ineffectiveness claims to be brought in a collateral proceeding and absolutely prohibit the claim on direct appeal; and 3) those that permit consideration of ineffective assistance claims on direct appeal only in limited circumstances where the record contains all of the information necessary to decide the claim). In Iowa, the courts have employed versions of each of the three approaches during the evolution of the case law and statutory framework.

conclude this issue must be preserved for possible postconviction proceedings."). Courts on direct appeal will be spared the time and effort previously required of them by now bypassing the inquiry of whether the record is sufficient to address ineffectiveness claims. Even if this procedure is not a perfect fit in every single case, it does not have to be to pass constitutional muster. It is a plausible and rational policy goal. Trane's equal protection argument should be rejected.

F. This Court Should Not Adopt a Plain Error Standard.

Trane's last claim is that the court should adopt a standard of plain error. He contends that the new legislation routing all ineffective assistance claims to postconviction proceedings makes the adoption of a plain error rule imperative. This court should continue to reject that invitation for the policy reasons the court has always espoused, and further hold that a plain error standard would circumvent the intent of the legislation.

"We do not subscribe to the plain error rule in Iowa, have been persistent and resolute in rejecting it, and are not at all inclined to yield on the point." *State v. Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999) (citing *State v. McCright*, 569 N.W.2d 605, 607 (Iowa 1997)

("In short, we do not recognize a 'plain error' rule which allows appellate review of constitutional challenges not preserved at the district court level in a proper and timely manner."); *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."); *State v. Miles*, 344 N.W.2d 231, 233 (Iowa 1984) ("We do not have a plain error rule.").

Trane argues that a plain error rule would address a gap in the court's ability to redress wrongs that Iowans have suffered from the failure to preserve error. There is no true gap, however. Between the correction of preserved errors on direct appeal and the presentation of ineffective assistance claims in postconviction proceedings with a corresponding right to appeal, criminal defendants will in Iowa continue to have their claims fully addressed and reviewed.

In arguing for the adoption of plain error, the defendant points out Justice Mansfield's special concurrence in *Rhoades v. State,* 848 N.W.2d 22 (Iowa 2014):

> Although we have not said so as a court, I think the reality is that our court has an expansive view of ineffective assistance of counsel. *See State v. Clay*, 824 N.W.2d 488,

> 504 (Iowa 2012) (Mansfield, J., concurring specially). In some respects, we are using ineffective assistance as a substitute for a plain error rule, which we do not have in Iowa. *See State v. Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999) ("We do not subscribe to the plain error rule in Iowa, have been persistent and resolute in rejecting it, and are not at all inclined to yield on the point."). . . .
>
> Thus, even as we use the terminology "ineffective assistance" as a tool to review criminal convictions, I think it is especially important that we not appear to be criticizing counsel when we are talking about a legal construct of this court. *See Clay*, 824 N.W.2d at 504 (Mansfield, J., concurring specially) (objecting to any general suggestion that a criminal defense attorney who commits ineffective assistance by our standards has also committed an ethical violation).

Rhoades, 848 N.W.2d at 33–34 (Mansfield, J., concurring specially).

Trane argues that the Iowa Supreme Court "is really already using ineffective assistance of counsel as a replacement for the plain error rule." Defendant's Supp. Brief at 50-51 (citing *Rhoades*, *id.*). While this is true, that fact undermines rather than fortifies the argument calling for adoption of a plain error standard. Iowa Supreme Court decisions of recent vintage "recognize a rather broad concept of what constitutes a failure to perform an essential duty for ineffective-assistance-of-counsel purposes." *State v. Clay*, 824

N.W.2d 488, 504 (Iowa 2012) (Mansfield, J., concurring specially) (citing *Ennenga v. State*, 812 N.W.2d 696, 702 n.5 (Iowa 2012); *Everett v. State*, 789 N.W.2d 151, 159 (Iowa 2010)). The plain error doctrine is thus unnecessary in Iowa. Changing the label of a claim from "ineffective assistance of counsel" to "plain error" would not allay the substance of Justice Mansfield's concern. The defense lawyer under a plain error analysis would be nonetheless subject to a finding that his or her misstep was "obvious" or "clear under the current law at the time it was made," which is necessarily still a criticism of counsel's judgment or performance. *See United States v. Olano*, 507 U.S. 725, 734 (1993). To the extent that defense lawyers should not be unfairly maligned in the process, as Justice Mansfield laments, the special concurrence has brought that concern to light.

Iowa's ineffective assistance framework already mirrors the plain error framework that the defendant proposes – it requires a showing of error (breach) and substantial resultant effect (prejudice). *See*, *e.g.*, *State v. Yaw*, 398 N.W.2d 803, 805 (Iowa 1987) (rejecting plain error standard, and suggesting that if true, "failure to lodge the confrontation objection constituted deficient performance by counsel and resulted in prejudice to the defendant, the issue would be

properly raised and preserved by a post-trial claim of ineffective assistance of counsel"). Moreover, Iowa's ineffective assistance framework – unlike the plain error standard – does not require showing an impact on "the fairness, integrity or public reputation of judicial proceedings" – which strikes the State as a nebulous and unworkably vague standard for determining whether to grant relief. Further, the rubric of ineffective assistance does not leave the decision whether to grant relief "within the sound discretion of the court" once the required showing has been made. *See* Defendant's Supp. Br. at 15-16 (quoting *Olano*, 507 U.S. at 732, 736-37 (1993)). As such, Iowa's current ineffective assistance framework makes relief *more* accessible and predictable by simplifying the required showing. Trane's argument that adopting a plain error rule would enhance Iowa courts' ability to remedy trial errors should be rejected.

In advocating for plain error, Trane also argues that justice delayed is justice denied, suggesting that postconviction proceedings may drag on for years. Defendant's Supp. Brief at 51-52. There is no systemic reason for a slow-moving postconviction case, however. Nothing in chapter 822 prevents the expeditious resolution of a postconviction claim, and some claims can be resolved within a

matter of months. The appellate process can be a lengthy one, and it is less capable of compression than district court proceedings given the various stages of an appeal. The change to section 814.7 ensures that defendants will proceed directly to postconviction proceedings and the appellate court will have the benefit of a completely developed record when deciding those claims on appeal. As the United States Supreme Court has recognized:

> When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose. Under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), a defendant claiming ineffective counsel must show that counsel's actions were not supported by a reasonable strategy and that the error was prejudicial. The evidence introduced at trial, however, will be devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose the facts necessary to decide either prong of the Strickland analysis. If the alleged error is one of commission, the record may reflect the action taken by counsel but not the reasons for it. The appellate court may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive or was taken because the counsel's alternatives were even worse. *See Guinan*, supra, at 473 (Easterbrook, J., concurring) ("No matter how odd or deficient

> trial counsel's performance may seem, that lawyer may have had a reason for acting as he did …. Or it may turn out that counsel's overall performance was sufficient despite a glaring omission …"). The trial record may contain no evidence of alleged errors of omission, much less the reasons underlying them. And evidence of alleged conflicts of interest might be found only in attorney-client correspondence or other documents that, in the typical criminal trial, are not introduced. *See*, *e.g.*, *Billy-Eko*, supra, at 114. Without additional factual development, moreover, an appellate court may not be able to ascertain whether the alleged error was prejudicial.
>
> Under the rule we adopt today, ineffective-assistance claims ordinarily will be litigated in the first instance in the district court, *the forum best suited to developing the facts necessary to determining the adequacy of representation during an entire trial*. The court may take testimony from witnesses for the defendant and the prosecution and from the counsel alleged to have rendered the deficient performance.

Massaro v. United States, 538 U.S. 500, 505 (2003) (emphasis added). Postconviction proceedings remain the best vehicle to litigate ineffective assistance claims. The new legislation is not a reason to adopt plain error in Iowa.

The defendant's final argument "raises two concerns of judicial integrity." Defendant's Supp. Brief at 52. First, he invites Iowa to join the majority of states that have adopted a plain error rule.

Second, he cautions that failure to correct trial errors will adversely affect "the public's perception of judicial proceedings… when there is undeniable error without redress." Defendant's Supp. Brief at 51-52.

Neither of these concerns about external perceptions of judicial integrity override the fairness-related concerns that animate Iowa's error preservation rules, including the desire to protect litigants and lower courts "from being ambushed by parties raising issues on appeal that were not raised in the district court." *DeVoss v. State*, 648 N.W.2d 56, 63 (Iowa 2002); *see also* 5 AM. JUR. 2D *Appellate Review* § 690, at 360-61 (1995) ("Furthermore, it is unfair to allow a party to choose to remain silent in the trial court in the face of error, taking a chance on a favorable outcome, and subsequently assert error on appeal if the outcome in the trial court is unfavorable."); *see also Rutledge*, *id.* at 326 ("The public should not be required to fund a system that would allow trial counsel to, as lawyers often phrase it, 'bet on the outcome.' After all the lawyer might be the only person in the courtroom alert to an error. It would be flagrantly unjust to allow such a lawyer to sit mute and complain only on appeal following an unfavorable outcome.").

Finally, this court should refuse to adopt a plain error standard for one additional reason. Respecting the long tradition of requiring error preservation to reach claims on appeal, the legislature has now acted to ensure that unpreserved claims will be fully litigated in postconviction proceedings rather than on direct appeal. The legislation mandated a process that was followed in the great majority of cases already. *See Straw*, *id.* To adopt a plain error rule to specifically avoid that result – as Trane requests – would frustrate the intent of the legislature to require error preservation and ensure complete records, and would amount to judicial legislation. *See Webster County Bd. Of Supervisors v. Flattery*, 268 N.W.2d 869, 873-74 (Iowa 1978) ("We have repeatedly declined to legislate."). To create an exception for plain error resolution on appeal essentially usurps "the prerogative of the legislature to declare what the law shall be." *State ex. rel. Lankford*, 508 N.W.2d 462, 463 (Iowa 1993). This court should decline Trane's invitation.

CONCLUSION

For the reasons discussed above, the State asks the court to find that Senate File 589 applies to Benjamin Trane and all other pending cases. It also asks that court to find that the new legislation does not violate equal protection principles. The State further respectfully requests that the court affirm Trane's convictions for assault with intent to commit sexual abuse, sexual exploitation by a counselor or therapist, and child endangerment.

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(f)(1) or (2) because:

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