Plain Error by Another Name: Are Ineffective Assistance of Counsel Claims a Suitable Alternative to Plain Error Review in Iowa?

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ABSTRACT: This Note analyzes recent Iowa Supreme Court decisions involving ineffective assistance of counsel claims from the viewpoint that the court is actually using such claims as a substitute for adopting the plain error rule, which has never happened in Iowa. While many states and the federal courts review issues such as the sufficiency of the factual basis for a guilty plea and prosecutorial misconduct under plain error analysis, the Iowa Supreme Court has reviewed these issues within the framework of ineffective assistance of counsel. Frequently, such review has led to holdings that defense counsel were ineffective because a prejudicial error occurred at trial, but with little regard for whether counsel's performance fell below a reasonable standard of professionalism. This Note argues that the Iowa Legislature should take action to incorporate the plain error rule, as set forth in Federal Rule of Criminal Procedure 52(b), into the Iowa Rules of Appellate Procedure, allowing Iowa courts to preserve ineffective assistance of counsel claims for situations in which the defense counsel could reasonably be held responsible.

[*] J.D. Candidate, The University of Iowa College of Law, 2017. I would like to thank Emily Crofford, Tessa Register, and Mike Kaufmann for their comments, and the entire *Iowa Law Review* Volume 102 staff for their tireless work in helping to publish this Note. Thanks also to John McCormally for bringing the *Rhoades* case to my attention and serving as a sounding board during the writing process, and to my family and friends for their endless patience during law school. Any errors remain my own.

I. INTRODUCTION

The legal profession is one that has historically been attentive to the professional responsibility of its practitioners, and rightfully so given the high-stakes fiduciary roles that attorneys occupy. Criminal defense attorneys, for example, are entrusted to ensure that clients receive a sound defense against charges that could deprive them of life or liberty. Certainly, these are responsibilities that must be taken seriously, and professional responsibility demands much of an attorney under those circumstances. But does professional responsibility require the ability to prophesize future developments in the law? In Iowa, a number of recent cases appear to have held defense counsel to just such a standard.

In federal and most state courts, some incidences of unpreserved error—error that was not objected to at trial—can be reviewed on appeal under what is commonly known as the "plain error rule." Such a rule has never been adopted in Iowa, however, and as a result the only way for an appellant to seek review of unpreserved trial error is to argue that his or her counsel was constitutionally deficient in failing to object. As a result, the Iowa Supreme Court, in order to review unpreserved trial error, has occasionally concluded that trial counsel was ineffective in circumstances in which counsel's conduct appears to have been well within the bounds of constitutional adequacy—and such cases include appeals in which the court

has found trial counsel deficient for failing to ground their trial strategy in law that did not yet exist at the time of the trial. This Note argues that Iowa's use of ineffective assistance of counsel claims as a vehicle for the review of unpreserved trial error leads to absurd findings of constitutionally inadequate representation, and that Iowa's judicial system will be better served by the legislative adoption of the plain error rule.

Part II of this Note details the development of plain error doctrine in federal and state courts and provides a description of ineffective assistance of counsel claims. Subpart III.A discusses a number of Iowa cases in which the Iowa Supreme Court arguably allowed an ineffective assistance of counsel claim to be used as a means to review unpreserved trial error without regard for trial counsel's actual performance. Subpart III.B argues that: (1) Iowa's current application of ineffective assistance of counsel law is unfair to defense counsel, in that it requires more than can reasonably be expected of them at trial and potentially subjects them to liability for failing to meet the unreasonable expectation; (2) ineffective assistance of counsel claims are ill-suited vehicles for the variety of errors that the plain error rule might address; and (3) the plain error rule would better serve Iowa courts. Finally, Part IV offers a legislative solution that would introduce the language of Federal Rule of Criminal Procedure 52(b) into the Iowa Rules of Appellate Procedure.

II. BACKGROUND

Because this Note argues that the use of ineffective assistance of counsel claims as a proxy for plain error appellate review is undesirable, it is useful to briefly discuss the development of both doctrines in order to highlight their differing policy goals. This Part discusses the development of plain error review in both the federal courts and various state courts, as well as the development of ineffective assistance of counsel claims as a means of protecting a defendant's Sixth Amendment right to counsel.

A. HISTORY AND DEVELOPMENT OF THE PLAIN ERROR DOCTRINE

In the U.S. judicial system, the "general rule" is that an objection must be made at trial in order to preserve a potential error for review by an appellate court.[1] For over a century, however, the "plain error rule" has been

1. Dustin D. Berger, *Moving Toward Law: Refocusing the Federal Courts' Plain Error Doctrine in Criminal Cases*, 67 U. MIAMI L. REV. 521, 530 (2013) (quoting Lester B. Orfield, *The Scope of Appeal in Criminal Cases*, 84 U. PA. L. REV. 825, 840 (1936)); *see also* Wainwright v. Sykes, 433 U.S. 72, 90 (1977) ("If a criminal defendant thinks that an action of the state trial court is about to deprive him of a federal constitutional right there is every reason for his following state procedure in making known his objection."); United States v. Jarvis, 7 F.3d 404, 410 (4th Cir. 1993) (noting the "general rule that entitlement to appellate review is dependent upon a party's lodging a contemporaneous objection in the tribunal of first instance"); Joe Ivy Gillespie, Note, *Appellate Review In a Criminal Case of Errors Made Below Not Properly Raised and Reserved*, 23 MISS. L.J. 42, 42 (1951) (stating the "general and traditional rule" that "[a]n

recognized as an exception that allows an appellate court to take notice of certain errors on appeal, even if they were not objected to at trial.[2]

Since one of the primary purposes of appellate review is to correct errors made at the trial level, it is fitting that courts have adopted an exception that allows for review of errors that may have improperly prejudiced the outcome of a trial, even when an objection was not raised at the trial level. In *United States v. Atkinson*, the Supreme Court balanced the policy considerations requiring an objection before the trial court in order to permit appellate review with those favoring an exception for plain error.[3] The Court stated:

> The verdict of a jury will not ordinarily be set aside for error not brought to the attention of the trial court. This practice is founded upon considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact.[4]

However, the Court recognized that there were overriding policy considerations that mandated review of plain errors, stating that "[i]n 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."[5]

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appellate court is precluded from considering a case, whether it be civil or criminal, if the error made in the trial court is not properly raised and reserved").

2. *See* Wiborg v. United States, 163 U.S. 632, 658–59 (1896) (noting that "if a plain error was committed in a matter . . . absolutely vital to defendants, we feel ourselves at liberty to correct it" and that "we may properly take notice of what we believe to be a plain error, although it was not duly excepted"); *see also* United States v. Guerrero, 517 F.2d 528, 531 (10th Cir. 1975) (refusing to consider issues for the first time on appeal absent a finding of plain error); United States v. Eisenmann, 396 F.2d 565, 568 (2d Cir. 1968) (requiring plain error in order to review errors not raised before the trial court); Hemphill v. United States, 112 F.2d 505, 507 (9th Cir. 1940) (noting that "we have the right under our rules, should we choose to exercise it, to notice plain error, unassigned or unnoticed in the trial court, to prevent a miscarriage of justice in an exceptional case, where the error is particularly harmful"), *rev'd*, 312 U.S. 657 (1941) (per curiam); LEMUEL H. FOSTER, FOSTER'S FIRST BOOK OF PRACTICE AT COMMON LAW, IN EQUITY AND UNDER THE CODES 307–08 (3d ed. 1900) (noting that the rules of the United States Circuit Courts of Appeal permitted the review of "plain error not assigned").

3. United States v. Atkinson, 297 U.S. 157, 159–60 (1936).

4. *Id.* at 159.

5. *Id.* at 160; *see also* Henderson v. United States, 133 S. Ct. 1121, 1129–30 (2013) ("[P]lain-error review is not a grading system for trial judges. It has broader purposes, including in part allowing courts of appeals better to identify those instances in which . . . appeal will meet the demands of fairness and judicial integrity.").

Empirical data suggests that the courts have good reason to be concerned about errors in criminal trials. For instance, at least one empirical study has shown that the rate of erroneous convictions in capital rape-murder cases—cases that in theory would receive a very high level of scrutiny from all involved in the trial—is as high as five percent.[6] Thus, the policy rationale driving the application of plain error review—preservation of fairness and integrity in judicial proceedings, as well as their public reputation—explicitly focuses on minimizing the sort of erroneous results found in the empirical data.

The recognition of the plain error rule in federal courts dates back to at least 1896.[7] By the middle of the 20th century, the rule had been recognized and implemented by the Supreme Court on a frequent basis.[8] When the Federal Rules of Criminal Procedure were adopted in 1944, they included Rule 52(b), which provides that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention."[9] The advisory committee notes accompanying the Rules made clear that Rule 52(b), instead of introducing a new guideline for appellate review, codified existing law.[10] Since the Federal Rules of Criminal Procedure went into effect in 1946, the plain error rule has been binding upon all federal courts.

Despite the fact that plain error review was codified and made binding upon all federal courts by the Federal Rules of Criminal Procedure, what was allowed or required by Rule 52(b) remained unclear. The Supreme Court

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6. D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 780 (2007).

7. *Wiborg*, 163 U.S. at 658–59 (invoking the Court's ability to notice plain error in reviewing the evidence supporting several criminal convictions despite the fact that no motion for judgment as a matter of law was made at trial).

8. *See, e.g.*, N.Y. Cent. R.R. Co. v. Johnson, 279 U.S. 310, 318–19 (1929) ("The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict, uninfluenced by the appeals of counsel to passion or prejudice. Where such paramount considerations are involved, the failure of counsel to particularize an exception will not preclude this Court from correcting the error." (citations omitted)), *amended by* 49 S. Ct. 300 (1929) (mem.); Brasfield v. United States, 272 U.S. 448, 450 (1926) (holding that the Court could review unpreserved errors "especially . . . where the error, as here, affects the proper relations of the court to the jury, and cannot be effectively remedied by modification of the judge's charge after the harm has been done"); Weems v. United States, 217 U.S. 349, 362 (1910) (asserting the Court's right to review unpreserved error when it concerns constitutional issues); Crawford v. United States, 212 U.S. 183, 194 (1909) (finding it permissible to review the qualification of a juror in a criminal trial even though the scope of review exceeded the objection raised at trial).

9. FED. R. CRIM. P. 52(b).

10. FED. R. CRIM. P. 52(b) advisory committee's note to 1944 adoption ("This rule is a restatement of existing law. Rule 27 of the Rules of the Supreme Court, 28 U.S.C., formerly following § 354, provides that errors not specified will be disregarded, 'save as the court, at its option, may notice a plain error not assigned or specified.' Similar provisions are found in the rules of several circuit courts of appeals." (citations omitted)).

clarified the application of the rule in several key cases following its adoption. In *United States v. Olano*, the Court created a three-part test to determine if a particular circumstance called for plain error review.[11] First, an error must occur at the trial level, which the Court defined as a "[d]eviation from a legal rule" that was not waived.[12] Second, and perhaps unsurprisingly, the error must be plain, although aside from noting some synonyms of "plain" the Court did not elaborate on what errors satisfy this criteria.[13] Finally, the plain error must "affect substantial rights," and "in most cases [that] means that the error must have been prejudicial: It must have affected the outcome of the district court proceedings."[14] The defendant bears the burden of proving the prejudicial effect of the error.[15] In addition to describing the elements of a plain error for the purposes of Rule 52(b), the *Olano* Court also emphasized the discretionary nature of Rule 52(b), noting that Rule 52(b) "is permissive, not mandatory," and that it should only be invoked "if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'"[16]

Following *Olano*, the Court decided two cases that addressed the question of *when* an error must be "plain" in order for Rule 52(b) to apply. In *Johnson v. United States*, the Court held that plain error analysis could take place concerning a trial court decision that was correct at the time, but became erroneous by the time an appeal is heard due to a change in the law.[17] The Court subsequently held in *Henderson v. United States* that the law at the time an appeal is heard controls whether or not an error was plain, even if the law was uncertain at the time of the trial.[18]

State courts have, for the most part, adopted some version of the plain error rule—currently 48 states have recognized appellate review for some

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11. United States v. Olano, 507 U.S. 725, 732–35 (1993).

12. *Id.* at 732–33. Waiver is defined as "intentional relinquishment or abandonment of a known right." *Id.* at 733 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

13. *Id.* at 734.

14. *Id.* (alteration in original). The Court elaborated that although in most cases "affecting substantial rights" means that there must be prejudice, "[t]here may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome . . . ." *Id.* at 735.

15. *Id.* at 734. The Court conceded that it is possible that there could be a class of errors that should be presumed prejudicial regardless of whether or not the defendant can prove prejudice, but declines to address such errors. *Id.* at 735.

16. *Id.* at 736 (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936)).

17. Johnson v. United States, 520 U.S. 461, 467 (1997).

18. Henderson v. United States, 133 S. Ct. 1121, 1127 (2013) (reasoning that because Rule 52(b) applies to decisions at trial that were both clearly correct at the time of trial—due to the Court's holding in Johnson—and those that were clearly incorrect, it makes sense to treat all defendants equally and apply Rule 52(b) analysis in cases where the law is unclear at the time of trial but becomes clear before an appeal is heard).

errors that were not objected to at trial.[19] While most states recognize the plain error rule, they have adopted a variety of formulations of the rule, some far more lenient than others. In Arkansas, for example, a court may only review an unpreserved trial error under an extremely strict set of circumstances, specifically: (1) a court's failure to properly instruct the jury in a death penalty case;[20] (2) an error that is made "at a time when counsel is unaware and has no opportunity to object";[21] or (3) circumstances in which a court would be required to, but fails to, "correct a serious error either by an admonition to the jury or by ordering a mistrial."[22]

In contrast, Illinois has recognized a fairly flexible plain error rule. The Illinois rule "allows a reviewing court to consider unpreserved error when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence."[23] This formulation of the rule allows a relatively wide range of errors to be reviewed on appeal, and allows Illinois' courts to responsively address the fairness and integrity concerns discussed by Justice Breyer in *Henderson*,[24] although perhaps at the cost of a lower incentive for contemporaneous objection when compared to the rules used in other states.

As noted above, Iowa is one of only two states that fails to recognize any exceptions to the traditional rule requiring errors to be objected to at trial in order to preserve them for appeal.[25] In *State v. Rutledge*, the Iowa Supreme Court steadfastly reaffirmed its opposition to the plain error rule, stating:

> Nothing is more basic in the law of appeal and error than the axiom that a party cannot sing a song to us that was not first sung in trial court. We do not subscribe to the plain error rule in Iowa,

19. Morton Gitelman, *The Plain Error Rule in Arkansas—Plainly Time for A Change*, 53 ARK. L. REV. 205, 217 (2000) (noting that Iowa, New Hampshire, and Pennsylvania were the only states not to recognize any circumstances in which a court may review unpreserved trial error on appeal). New Hampshire subsequently adopted a plain error rule in 2004. N.H. SUP. CT. R. 16-A (adopted Sept. 10, 2004).

20. Gitelman, *supra* note 19, at 210.

21. *Id.* at 211.

22. *Id.* (quoting Wicks v. State, 606 S.W.2d 366, 369 (Ark. 1980)). The three exceptions to Arkansas' courts contemporaneous objection rule are strict to the point that the Arkansas Supreme Court maintained that it has no plain error rule in the same opinion in which it laid out the exceptions. *See Wicks*, 606 S.W.2d at 369. Because of the functional equivalence of this position with that of a state that recognizes an extremely strict plain error rule, for the purposes of this Note, Arkansas is included among the states recognizing the plain error rule.

23. Steven W. Becker, *To Review or Not to Review: The Plain Truth About Illinois' Plain Error Rule*, 37 LOY. U. CHI. L.J. 455, 468 (2006) (quoting People v. Herron, 830 N.E.2d 467, 479 (Ill. 2005)).

24. *See supra* note 18 and accompanying text.

25. *See supra* note 19 and accompanying text.

> have been persistent and resolute in rejecting it, and are not at all inclined to yield on the point.[26]

The facts of *Rutledge* involved an appeal in which the defendant claimed that the prosecution had engaged in misconduct during its closing statement.[27] The court agreed, calling the prosecutor's conduct "plainly out of bounds," and noting that "[a] timely objection would undoubtedly have prompted corrective steps by the presiding judge."[28] While the court recognized that there had been plain error at the trial level, it is unclear if any amount of prejudice to the defendant would have sufficed to compel review of the issue on appeal.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

The United States Supreme Court has established that criminal defendants have the right to counsel under the Sixth Amendment, that this right is incorporated under the Fourteenth Amendment, and that this right necessarily requires that counsel be effective.[29] In *Strickland v. Washington*, the Court laid down a two-part test to determine whether a defendant's counsel failed to pass Sixth Amendment muster.[30] First, "the defendant must show that counsel's representation fell below an objective standard of reasonableness."[31] The *Strickland* Court insisted that this first prong of the test be applied with a deference to the conduct of the defense counsel.[32]

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26. State v. Rutledge, 600 N.W.2d 324, 325 (Iowa 1999). The court continued to note that "simple justice demands rigid adherence to the [contemporaneous objection] rule" and that "error is waived unless preserved by a timely trial objection." *Id.* at 326.

27. *Id.* at 325.

28. *Id.* at 325, 327.

29. Robert R. Rigg, *The T-Rex Without Teeth: Evolving* Strickland v. Washington *and the Test for Ineffective Assistance of Counsel*, 35 PEPP. L. REV. 77, 81–82 (2007); *see also* Strickland v. Washington, 466 U.S. 668, 685 (1984) ("That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results."); McMann v. Richardson, 397 U.S. 759, 771 (1970) ("[I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts."); Gideon v. Wainwright, 372 U.S. 335, 342 (1963) ("[A] provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment [and that] the Court in Betts was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights.").

30. *Strickland*, 466 U.S. at 687.

31. *Id.* at 688.

32. *Id.* at 689 ("Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the

The second prong of the *Strickland* ineffective counsel test requires that "any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution."[33]

Although appeals based on claims of plain error and claims of ineffective counsel both allow trial court results to be reversed when they are based on circumstances that show prejudice to a criminal defendant—prejudice being the final prong in the test for both plain error relief and for ineffective assistance of counsel—they can be usefully distinguished from one another by the policy goals motivating the application of the respective tests. As Justice Breyer's analysis in *Henderson* makes clear, the purpose of plain error review is to promote fairness and integrity in the judicial system, regardless of how clearly erroneous a trial court ruling was at the time it was made, and regardless of whether the law has changed between the trial and the appeal.[34] Certainly, review of potentially ineffective counsel also is motivated by a policy of seeking fairness in criminal trials, specifically by protecting the rights embodied in the Sixth Amendment.[35] The obvious difference, however, is that plain error relief is possible in cases where the error resulted from the conduct of the defense counsel, the court, or the prosecutor, and does not require that all errors at the trial level be assigned to the defense counsel. On the other hand, relief for ineffective assistance of counsel necessarily focuses on the conduct of the defense.

The Iowa Supreme Court, while citing *Strickland* as the source of its modern standard for ineffective assistance of counsel, consistently phrases the test in a manner that differs from *Strickland*. Numerous Iowa cases require a defendant to show that "counsel failed to perform an essential duty"[36] rather than "counsel's representation fell below an objective standard of reasonableness."[37] The court has also noted that "this unusual situation [ineffective assistance of counsel] justifies relaxation of the general rule that a party must raise his point in the trial court."[38] Thus, although Iowa courts are adamant in their refusal to engage in appellate review of

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circumstances, the challenged action 'might be considered sound trial strategy.'" (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955))).

33. *Id.* at 692. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

34. *See* Henderson v. United States, 133 S. Ct. 1121, 1126–27 (2013); *see also supra* note 18 and accompanying text.

35. *See Strickland*, 466 U.S. at 689.

36. *See, e.g.*, Rhoades v. State, 848 N.W.2d 22, 28 (Iowa 2014) (stating again that the same two prongs result from *Strickland*); State v. Dalton, 674 N.W.2d 111, 119 (Iowa 2004) (finding that *Strickland* test involved the same two prongs); State v. Stallings, 658 N.W.2d 106, 108 (Iowa 2003) (finding that under *Strickland* a defendant must show that "(1) his counsel failed to perform an essential duty, and (2) prejudice resulted"), *overruled on other grounds by* State v. Feregrino, 756 N.W.2d 700 (Iowa 2008).

37. *See* Strickland v. Washington, 466 U.S. 668, 688 (1984).

38. State v. Kellogg, 263 N.W.2d 539, 543 (Iowa 1978).

plain errors committed by courts,[39] they have historically been willing to consider unpreserved error related to the conduct of a defense attorney.

III. IOWA'S USE OF INEFFECTIVE ASSISTANCE OF COUNSEL AS A PROXY FOR PLAIN ERROR REVIEW

As previously noted, Iowa courts have steadfastly refused to adopt the plain error rule, or at least they have refused to overtly do so.[40] Instead, Iowa courts have adopted what at least two Iowa Supreme Court justices believe is a very broad conception of ineffective assistance of counsel claims that has little to do with whether or not defense counsel was deficient in the performance of his or her duties.[41] This Part discusses several Iowa cases in which trial counsel were found ineffective on appellate review, but arguably represented their clients in line with an "objective standard of reasonableness . . . under prevailing professional norms" required by *Strickland*[42] and without failing to perform an "essential duty,"[43] as required by the Iowa Supreme Court. Subpart III.B discusses a number of reasons why ineffective assistance of counsel claims are not an adequate substitute for adopting the plain error rule. It is worth noting that while the Iowa Code includes provisions providing for civil claims arising out of a finding of ineffective assistance of counsel,[44] the claims in each of the following cases were constitutional claims that defendants were denied their Sixth Amendment right to counsel.

A. *ANALYSIS OF RECENT CASES*

1. *Rhoades v. State*

In *Rhoades v. State*, the trial defendant, Nick Rhoades, was charged with and pled guilty to one count of criminal transmission of human immunodeficiency virus ("HIV").[45] The statute that Rhoades was charged under provided that a defendant was guilty if he or she was aware that he or she was HIV positive and engaged in "intimate contact," regardless of whether or not actual transmission of HIV occurred.[46] During the plea

39. *See supra* note 26 and accompanying text.

40. *See supra* note 26 and accompanying text.

41. Justice Edward Mansfield said as much in a recent concurring opinion that was joined by Justice Thomas Waterman. Rhoades v. State, 848 N.W.2d 22, 33–34 (Iowa 2014) (Mansfield, J., concurring specially).

42. *Strickland*, 466 U.S. at 688; *see also supra* notes 30–31 and accompanying text.

43. *See supra* note 35 and accompanying text.

44. *See* IOWA CODE § 815.10(6) (2015); *see also id.* §13B.9(2).

45. *Rhoades*, 848 N.W.2d at 26.

46. IOWA CODE § 709C.1 (2007) (repealed May 30, 2014). The Iowa General Assembly replaced this statute in 2014 with the Contagious or Infectious Disease Transmission Act, which created separate offenses depending on whether the infected person intended to transmit a

hearing, the trial judge engaged Rhoades, his defense counsel, and the prosecutor in a lengthy colloquy in which Rhoades, his defense counsel, and the prosecutor stated to the satisfaction of the court that there was a factual basis for the guilty plea.[47]

Following this colloquy, the trial court entered judgment against Rhoades and sentenced him to 25 years in prison, although the sentence was later reduced by the same court to five years of probation on Rhoades's motion to reconsider his sentence.[48] Rhoades chose not to file a direct appeal but petitioned for post-conviction relief, arguing that his trial counsel

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disease or simply acted with reckless disregard to the possibility of transmission. *See* IOWA CODE § 709D.3 (2015). In addition, the codified Act further subdivides the offenses based on whether or not a person actually transmits a disease to another person. *Id.* The Act also provides a definition of "exposes" that limits criminal liability to activity that carries a "substantial risk" of transmission, which is a marked difference from the standard employed in the statute in force when Rhoades was convicted. *Id.* § 709D.2. The previous statute criminalized activity that "could" result in transmission. *See* Iowa Code § 709C.1(2)(b) (2007) (repealed May 30, 2014).

47. The plea colloquy was as follows:

> THE COURT: What the state would have to prove is that on or about June 26th of 2008, here in Black Hawk County, Iowa, you did knowing that you had human—and I—I apologize. Have a hard time saying the word—immunodeficiency virus, that you knew that you had that, that you were positive for that and that you engaged in intimate contact with another person and you didn't acknowledge or that person didn't know that you had the virus.
>
> Do you understand what it is you would—the state would have to prove?
>
> THE DEFENDANT: I do.
>
> THE COURT: Were you here in Black Hawk County on June 26th?
>
> THE DEFENDANT: I was.
>
> THE COURT: And at that time were you positive for the human immunodeficiency virus?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: You were aware of that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And did you engage in intimate contact with another person?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And did that person not know that you had this virus?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Can the court rely upon the minutes for a factual basis, state?
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> MS. FANGMAN: Yes, Your Honor.
>
> . . . .
>
> THE COURT: Can the court rely upon the minutes, [defense counsel's name]?
>
> [DEFENSE COUNSEL]: Yes, sir.

Rhoades v. State, 848 N.W.2d 22, 29 (Iowa 2014) (alterations in original).

48. *Id.* at 26.

was ineffective for allowing him to plead guilty to criminal transmission of HIV when there was no factual basis to support the charge.[49]

After the district court denied Rhoades's application for post-conviction relief, the Iowa Court of Appeals affirmed the district court's denial.[50] According to the court of appeals, the Iowa Supreme Court's reasoning set forth in two prior cases involving the criminal transmission of HIV statute, *State v. Keene*,[51] and *State v. Stevens*,[52] indicated that because the minutes of testimony in Rhoades's case made clear that unprotected oral sex had taken place, there was a factual basis to support the "intimate contact" element of criminal transmission of HIV.[53]

The Iowa Supreme Court reversed the court of appeals' decision.[54] The court acknowledged that it had previously found "that . . . HIV may be transmitted through contact with an infected individual's blood, semen or vaginal fluid, and that sexual intercourse is one of the most common methods of passing the virus," and that this fact, combined with a record showing intercourse, including oral sex, had previously sufficed to provide a factual basis for the "intimate contact" requirement of the statute.[55] However, the court stated that advances in the medical understanding of HIV since its decisions in *Keene* and *Stevens* prevented the court from similarly taking notice of the fact that unprotected oral sex could transmit

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49. *Id.* In particular, Rhoades contended that there was no factual basis to support a finding that he had engaged in "intimate contact" under the statutory definition by "intentional exposure of the body of one person to a bodily fluid of another person in a manner that could result in the transmission of the human immunodeficiency virus." Rhoades v. State, No. 12–0180, 2013 WL 5498141, at *2 (Iowa Ct. App. Oct. 2, 2013), *vacated*, 848 N.W.2d 22 (Iowa 2014); *see also supra* note 46 and accompanying text.

50. *Rhoades*, 2013 WL 5498141, at *3.

51. State v. Keene, 629 N.W.2d 360, 365 (Iowa 2001) ("Over the past decade, our nation's understanding of possible methods of transmitting the HIV has increased dramatically. It is a well-known fact that an infected individual may possibly transmit the HIV through unprotected sexual intercourse with his or her partner. We take judicial notice of the fact that the HIV may be transmitted through contact with an infected individual's blood, semen or vaginal fluid, and that sexual intercourse is one of the most common methods of passing the virus." (citation omitted)).

52. State v. Stevens, 719 N.W.2d 547, 551 (Iowa 2006) ("*Keene* should be read as taking judicial notice of the very issue before this court, i.e., sexual intercourse may be committed through oral sex. In any event, oral sex is a well-recognized means of transmission of the HIV.").

53. *Rhoades*, 2013 WL 5498141, at *3 ("Applying the court's reasoning in *Keene* to the facts of this case, that Rhoades may not have ejaculated during the unprotected oral sex is irrelevant. Here, the minutes of testimony unequivocally establish Rhoades engaged in unprotected oral sex with A.P., and consequently, Rhoades's claim that he did not ejaculate provides no support to his argument there was a lack of a factual basis regarding the 'intent element' of 'intimate contact.'" (citation omitted)).

54. *Rhoades*, 848 N.W.2d at 33. The Iowa Supreme Court remanded the case to the district court for entry of judgment that trial counsel was ineffective, and ordered that the State be given the opportunity to provide a factual basis for the charge on remand. *Id.*

55. *Id.* at 30, 32 (quoting *Keene*, 629 N.W.2d at 365).

HIV in Rhoades's case.[56] Because the court no longer took notice of the fact that unprotected oral sex could transmit HIV,[57] the record in Rhoades's case did not contain a factual basis for the "intimate contact" element of criminal transmission of HIV, and the court found defense counsel ineffective for allowing Rhoades to plead guilty to the charge.[58] The court reached this conclusion despite the fact that at the time of the trial, an examination of the precedent case law would have revealed that the facts of Rhoades's case were similar to those the court had already addressed in *Keene* and *Stevens*, in which the court had held that the factual basis was sufficient.[59]

The Iowa Supreme Court's decision in *Rhoades* produced a concurring opinion and a dissent that both addressed the propriety of analyzing the factual basis of Rhoades's guilty plea within the framework of ineffective assistance of counsel.[60] In his concurrence, Justice Mansfield argued that while he agreed with the majority that there was not a sufficient factual basis to support Rhoades's guilty plea, he also believed that the court had used ineffective assistance of counsel as a proxy for the plain error rule, and that in Iowa ineffective assistance of counsel claims have little to do with the performance of trial counsel.[61] The concurrence concluded by making special note of the fact that because ineffective assistance of counsel claims in Iowa are in effect a "legal construct" allowing appellate review of convictions, courts should not appear to be critical of defense counsel, and that he believed defense counsel had performed competently in Rhoades's case.[62]

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56. *Id.* at 32 ("Today we are unable to take judicial notice that an infected individual can transmit HIV when an infected person engages in protected anal sex with another person or unprotected oral sex, regardless of the infected person's viral load. The evidence at the postconviction relief hearing shows there have been great strides in the treatment and the prevention of the spread of HIV from 2003 to 2008.").

57. *Id.* at 32–33.

58. *Id.* at 33.

59. *See supra* notes 50–51.

60. Rhoades v. State, 848 N.W.2d 22, 33–40 (Iowa 2014).

61. *Id.* at 33 (Mansfield, J., concurring specially) ("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. . . . In some respects, we are using ineffective assistance as a substitute for a plain error rule, which we do not have in Iowa. . . . One of those areas is guilty pleas, where we vacate a plea whenever the record does not contain a factual basis for each element of the crime, seemingly without regard to counsel's actual competence." (citations omitted)).

62. *Id.* at 34 ("[E]ven 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. . . . I join the majority opinion in this case, but I do so without finding fault in the performance of Rhoades's defense counsel."); *see also* State v. Clay, 824 N.W.2d 488, 504 (Iowa 2012) (Mansfield, J., concurring specially) ("I think a fair assessment of our recent precedents is that they recognize a rather broad concept of what constitutes a failure to perform an essential duty for ineffective-assistance-of-counsel purposes. . . . It seems to me unwise and unfair, therefore, to suggest that a criminal

The dissenting opinion authored by Justice Zager argued that there was a sufficient factual basis for the charge Rhoades pled guilty to, and that the majority, in holding that trial counsel was ineffective, went far beyond the conception of ineffective counsel outlined by the U.S. Supreme Court in *Strickland* and in the Iowa Supreme Court's own cases.[63] The dissent argued that it was inappropriate to find Rhoades's trial counsel ineffective for three reasons. First, the majority failed to heed the guidance of the *Strickland* Court that judicial review of the conduct of defense counsel should be "highly deferential" and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" in order to avoid judging counsel's conduct with the benefit of hindsight.[64]

Second, the dissent faulted the majority's willingness to conclude that counsel was ineffective based solely "on the cold record developed at the guilty plea hearing, without regard to other considerations an attorney might have when evaluating a criminal case."[65] The dissent further argued that such a conclusion ignored the legitimate strategic considerations that defense counsel faced in this case.[66] Because jurors at trial would be allowed to consider the facts in light of their common sense:

> It would be reasonable then for a defense attorney, in considering whether to advise his or her client to accept a guilty plea, to reflect on how a jury would likely use the fact A.P. performed unprotected oral sex on Rhoades, that there was a possibility of failed protection during anal sex, and that Rhoades later

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defense attorney who 'fails to perform an essential duty' under one of our precedents has committed a violation of [a rule of professional conduct]." (citations omitted)).

63. *Rhoades*, 848 N.W.2d at 34–40 (Zager, J., dissenting).

64. *Id.* at 35 (quoting Strickland v. Washington, 466 U.S. 668, 689 (1984)); *see also id.* ("This court benefits from the aggregated intellects of its members, a record developed in a postconviction relief proceeding, and time. Above all, we can authoritatively interpret the law. It is easy to see that with greater time and resources, this court could devise a different, perhaps better, defense strategy in nearly every criminal case. Likewise, in the context of a guilty plea, we have the benefit of being able to hypothesize a different fact investigation, test different potential outcomes, and debate different legal analyses under alternative constructions of the relevant legal standards. We can then look back and try to reconstruct what was going on in the mind of the attorney when he was advising his client to consider entering into a guilty plea and what the defendant was considering when making the ultimate decision to enter a plea of guilty to the criminal charge. But, comparing actual counsel's performance, given the realities of criminal defense practice, to imagined counsel's performance under abstract, sterile conditions is not our task.").

65. *Id.*

66. Rhoades v. State, 848 N.W.2d 22, 35 (Iowa 2014) ("[T]he majority implicitly perpetuates the view that considering an attorney's 'strategic reasons for permitting his [or her] client to plead guilty' would undermine 'the public's confidence in our criminal justice system.' I disagree with that assertion in this case because it undervalues attorneys' knowledge, skill, and experience. It also undervalues the client's knowledge and judgment in evaluating the case and making an informed decision about whether to plead guilty." (citation omitted) (quoting State v. Hack, 545 N.W.2d 262, 263 (Iowa 1996))).

> apologized to the victim. Having so reflected, a seasoned lawyer might have reasonably concluded jurors would use their common sense and experience to infer a fluid exchange or intentional exposure from the unprotected oral sex; thus, the attorney could have reasonably concluded a jury was likely to convict Rhoades.
>
> Considering the high likelihood of a guilty verdict based on these facts, counsel might reasonably advise his client to plead guilty, allow his client to plead guilty, and not find it necessary to supplement the record with additional, specific facts regarding the intimate contact.[67]

Finally, the dissent argued that the majority failed to take into account the fact that, at the time of the trial, a competent attorney examining the law in Iowa as it stood at the time could reasonably have found that the circumstances of Rhoades's conduct would have supported the factual basis of a guilty plea.[68] When Rhoades's original trial took place, "the factual basis for a guilty plea . . . could be established without any showing of fluid exchange or intentional exposure of fluid. Even being mindful of the limitations of this record, it does show A.P. performed unprotected oral sex on Rhoades. Under *Keene*, that was enough."[69] According to the dissent, not only had the majority ignored its precedent cases when determining if there was a factual basis for a guilty plea in Rhoades's case, it had failed to take into account the influence that those cases would have had on an attorney representing Rhoades at the time of his trial.

The decision in *Rhoades* may be the clearest example of the Iowa Supreme Court's willingness to find defense counsel ineffective under circumstances where the attorney's conduct appeared to be well within the normal bounds of attorney representation. Any attorney examining the facts and circumstances of the case at the time of the trial could have rationally concluded that a factual basis existed to support a guilty plea based on the court's decisions in *Keene* and *Stevens*. Furthermore, legitimate trial strategy considerations could easily have led an attorney to conclude that a guilty plea was likely to be the wisest course of action for Rhoades. In the federal court system, this exact circumstance would have been easily handled with plain error review, particularly in light of the United States Supreme Court's holding in *Johnson*, which dealt with trial court actions that appeared to be correct, but which had become plainly erroneous by the time of appeal due to changes in the law.[70] However, because of Iowa's failure to adopt the plain error rule, the fact that the Iowa Supreme Court saw fit to update the state's HIV transmission jurisprudence years after Rhoades's original trial

67. *Id.* at 36–37.
68. *Id.* at 37.
69. *Id.*
70. *See* Johnson v. United States, 520 U.S. 461, 467 (1997).

meant the court had little choice but to find Rhoades's trial counsel ineffective, despite what appears to be an entirely rational trial strategy.

2. *State v. Ross*

State v. Ross involved a criminal defendant's appeal of their conviction on five of a possible seven charges of intimidation with a dangerous weapon with intent to injure or provoke.[71] At trial, defense counsel moved to dismiss six of the seven because the prosecution had failed to establish a sufficient factual basis to support seven individual charges, and was overruled by the trial judge.[72] The defense objected two additional times during the course of the trial, and was overruled both times.[73] Subsequently, the jury convicted Ross of five counts of intimidation with a dangerous weapon with intent to injure or provoke.[74] Ross appealed, alleging among other things, that his defense counsel was ineffective for "failing to properly move for a judgment of acquittal at the close of the evidence on the intimidation counts on the basis there was insufficient evidence to submit all seven charges."[75]

On appeal, the Iowa Supreme Court agreed with Ross and held that defense counsel had been ineffective.[76] In so finding, the court determined that defense counsel's failure to specifically raise the issue of the factual basis for seven individual counts of intimidation with a dangerous weapon with intent in its motion for judgment of acquittal resulted in the defendant's conviction.[77] In the court's view, there was no question that the trial court would have overturned three of Ross's five intimidation convictions if defense counsel had raised the issue of the factual basis for individual charges in the defense's motion for judgment of acquittal.[78] This, despite the fact that the trial court overruled the defense's motion to dismiss—which specifically called into question the factual basis for multiple

71. State v. Ross, 845 N.W.2d 692, 696 (Iowa 2014) ("The State . . . charged Ross with one count of murder in the first degree and seven counts of intimidation with a dangerous weapon with intent.").

72. *Id.*

73. *Id.* ("At the close of the State's case, Ross moved for a directed verdict on the ground the State failed to provide sufficient evidence to support the charges. The court overruled this motion on the ground the State provided sufficient evidence to support the first-degree murder charge and the intimidation-with-a-dangerous-weapon-with-intent charges. Ross renewed his motion for directed verdict at the end of the case. The court overruled this motion for the same reasons it overruled the prior motion.").

74. *Id.* at 697.

75. *Id.*

76. *Id.* at 706.

77. State v. Ross, 845 N.W.2d 692, 706 (1997) ("[H]ad trial counsel made the proper motion, the court would have only upheld two counts of intimidation with a dangerous weapon with intent. Failing to make the proper motion prejudiced Ross by allowing the jury to convict Ross of three additional felonies.").

78. *Id.*

intimidation charges—and that the trial court overruled the defense motion for a directed verdict following the close of the State's case "on the ground the State provided sufficient evidence to support the first-degree murder charge and the intimidation-with-a-dangerous-weapon-with-intent *charges*."[79]

In determining that the State's evidence only supported a conviction on two counts of intimidation with a dangerous weapon with intent, rather than five, the Iowa Supreme Court relied in large part on law that was unavailable to the defense counsel or the trial court during Ross's trial. The court, in the *Ross* appeal itself, interpreted the applicable statute and concluded that the Iowa Legislature did not intend that individual gunshots would be the unit of prosecution under the statute.[80] In addition, the court placed significant weight on its discussion of how to determine the proper unit of prosecution in *State v. Velez*,[81] which was decided in 2013, nearly two years after Ross was convicted.[82] Finally, the court set forth a multifactor test in its *Ross* decision to determine whether conduct constituted one act or a series of distinct acts[83] and applied this test to the record from the *Ross* trial to determine if the evidence supported five separate convictions for intimidation with a dangerous weapon with intent.[84] In short, the Iowa Supreme Court placed a tremendous amount of confidence in Ross's original trial court in concluding that if Ross's defense counsel had only raised the issue of the factual basis of the individual intimidation counts for a third time, the trial court "would have only upheld two counts of intimidation with a dangerous

79. *Id.* at 696 (emphasis added).

80. *Id.* at 705 ("The Iowa general assembly could have said that each shot in and of itself is the unit of prosecution for Iowa Code section 708.6. The general assembly chose not to define the unit of prosecution in that way. In other words, the general assembly chose to allow the fact finder to determine how many separate and distinct acts of intimidation with a dangerous weapon with intent a defendant committed based upon the evidence presented.").

81. State v. Velez, 829 N.W.2d 572, 580–84 (Iowa 2013).

82. *Trial Court [Statewide]*, IOWA CTS. ONLINE SEARCH, https://www.iowacourts.state.ia.us/ESAWebApp/TrialSimpFrame (last visited Mar. 20, 2017) (input "Ross" in the last name field and "Aki" in the first name field; search; then select the entry with Case ID "07821 FECR328810").

83. *See Ross*, 845 N.W.2d at 705 ("[The factors to aid the fact finder in determining if the defendant's assaultive conduct is one continuous act or a series of separate and distinct acts] are (1) the time interval occurring between the successive actions of the defendant, (2) the place of the actions, (3) the identity of the victims, (4) the existence of an intervening act, (5) the similarity of defendant's actions, and (6) defendant's intent at the time of his actions.").

84. *Id.* at 705–06 ("In applying these factors . . . [w]e cannot find any evidence to support a finding the first set of shots and the second set of shots were nothing more than two continuous acts. The record is devoid of any evidence that Ross changed his position while shooting his weapon. The record also indicates that Ross aimed all his shots at the assembly of people in the street. The record does not show any intervening act occurred during the first set of continuous shots or during the second set of continuous shots. Therefore, the evidence was not substantial to convince a rational jury that Ross was guilty beyond a reasonable doubt on all five counts of intimidation with a dangerous weapon with intent.").

weapon with intent,"[85] particularly when the law leading the Iowa Supreme Court to that conclusion did not yet exist at the time of Ross's trial.

Here again, it is difficult to question the conduct of Ross's trial counsel without the benefit of the Iowa Supreme Court's decision in *Velez*, which was unavailable to Ross's trial counsel. Ross's trial counsel objected multiple times to the number of counts brought against Ross, and was denied by the trial court each time. Here again, the law that would inform the Iowa Supreme Court's decision that there was no factual basis for seven counts did not exist at the time of Ross's trial. Utilizing plain error review to correct the convictions under a *Johnson*-like rationale seems far more appropriate than holding Ross's trial counsel responsible despite their concerted efforts to challenge the number of intimidation counts, and the trial court's consistent failure to correct the error when it was raised.

3. *State v. Gines*

State v. Gines was another case in which the Iowa Supreme Court found defense counsel ineffective for allowing a client to plead guilty to a charge that was not supported by a factual basis.[86] It also presents another example of the court finding that the factual basis for the guilty plea was lacking based on an interpretation of the law that was unavailable to defense counsel at the time of the original trial.

In 2011, defendant Tommy Gines, Jr. was charged with five counts, and subsequently pled guilty to three counts, of intimidation with a dangerous weapon with intent, in violation of Iowa Code section 708.6.[87] Gines appealed, claiming that his trial counsel was ineffective for allowing him to plead guilty to three counts of intimidation with a dangerous weapon with intent when there was no factual basis to support such a plea.[88]

On appeal to the Iowa Court of Appeals, the court determined that there was a sufficient factual basis to support three individual counts of intimidation with a dangerous weapon with intent.[89] In order to arrive at this conclusion, the court of appeals interpreted the relevant statute and determined that because Iowa Code section 708.6 does not prohibit a

85. *Id.* at 706.

86. State v. Gines, 844 N.W.2d 437, 441 (Iowa 2014).

87. *Id.* at 439; IOWA CODE § 708.6 (2015) ("A person commits a class 'C' felony when the person, with the intent to injure or provoke fear or anger in another, shoots, throws, launches, or discharges a dangerous weapon at, into, or in a building, vehicle, airplane, railroad engine, railroad car, or boat, occupied by another person, or within an assembly of people, and thereby places the occupants or people in reasonable apprehension of serious injury or threatens to commit such an act under circumstances raising a reasonable expectation that the threat will be carried out.").

88. *Gines*, 844 N.W.2d at 440.

89. State v. Gines, No. 11-1272, 2013 WL 1749734, at *3 (Iowa Ct. App. Apr. 24, 2013), *vacated*, 844 N.W.2d 437 (Iowa 2014).

course of conduct, but rather "an act," including shooting or discharging a weapon, and that the act of shooting or discharging a weapon is complete following the firing of a single shot, the Iowa Legislature intended to prohibit each individual act of shooting or discharging a weapon.[90] As a result, the information the court solicited from Gines during his plea colloquy was sufficient to establish the factual basis for three separate charges.[91] It is noteworthy that in reaching this conclusion the court of appeals relied upon an interpretation of the law that was available to a competent defense attorney at the time of the original trial, as it simply resulted from a close reading of the relevant statute.[92]

Gines subsequently appealed to the Iowa Supreme Court, which granted further review and held that there was no factual basis to support three individual charges of intimidation with a dangerous weapon with intent, and as a result, Gines's trial counsel was ineffective for allowing him to plead guilty to the charges.[93] As a rationale for its holding, the court explained that in *State v. Ross* it had set forth a multifactor test to determine whether a group of gunshots constituted a single act or multiple independent acts.[94] Because the record did not disclose facts indicating that the trial court considered the factors of the *Ross* test when establishing the factual basis for Gines's guilty plea, the factual basis for the plea was insufficient and the Iowa Supreme Court found trial counsel ineffective for allowing Gines to plead guilty under such circumstances.[95]

In addition, the outcome of the Iowa Supreme Court appeal had serious potential implications for Gines on remand to the district court. The case was remanded to the district court to allow the State the opportunity to supply the factual basis for three individual counts of intimidation with a dangerous weapon with intent.[96] However, the court held that if the State was unable to supply the factual basis for three individual counts, it "did not get the benefit of its plea bargain in exchange for dismissing two counts of intimidation with a dangerous weapon with intent and not seeking [a] habitual-offender sentencing enhancement," and accordingly "may reinstate any charges or sentencing enhancements dismissed from the first amended

90. *Id.* ("Here . . . the legislature intended each discharge of a dangerous weapon into a building or assembly of people, which thereby places the occupants in reasonable apprehension of serious injury, could constitute a separate count.").

91. *Id.* ("In questioning Gines, the district court stated that 'each of Counts I, II, and III are based on an individual shot of the weapon. Did you shoot the weapon three times at least?' Gines admitted, 'Yes.' He also admitted that the people nearby when he was firing these shots were put in reasonable apprehension of serious injury and that it was his intent to injure or provoke fear or anger in them.").

92. *See id.*

93. *Gines*, 844 N.W.2d at 441.

94. *Id.*; *see also* State v. Ross, 845 N.W.2d 692, 705 (Iowa 2014).

95. *Gines*, 844 N.W.2d at 441.

96. *Id.* at 442.

information[,] . . . file any additional charges supported by the available evidence, and proceed against Gines on all charges and sentencing enhancements contained in the first amended information and on any new charges it wishes to file."[97] Thus, it seems at least theoretically possible that Gines could have ended up facing a more severe sentence than he would have under his original plea bargain. The fact that the court's holding placed Gines in a position that could subject him to additional charges calls to mind the *Rhoades* dissent's concern for considering legitimate trial strategies.[98]

What the Iowa Supreme Court failed to note when chiding Gines's defense counsel for failing to object based on the test set forth in *Ross*, was that the court issued its decision in *Ross* on the *same day* as the *Gines* decision.[99] As a result, the Iowa Supreme Court held that trial counsel was ineffective for failing to notice that the factual basis of his client's guilty plea did not consider the factors of a test that would be set forth nearly three years in the future.[100] Indeed, the rule could only have been a part of Iowa law for a matter of days—and known only to the members of the court—when the court applied it to the facts of Gines's appeal.

4. *State v. Rutledge* and *State v. Graves*

This Subpart briefly compares two cases that both involve similar instances of prosecutorial misconduct that were not objected to at trial in order to further demonstrate the extent to which ineffective assistance of counsel claims serve as a substitute for plain error review in Iowa.

In *State v. Rutledge*, decided in 1999, the defendant appealed her conviction, claiming that the prosecutor's "unfair and unprofessional" comments denied her a fair trial, but did not claim that her defense counsel was ineffective for failing to object.[101] The Iowa Supreme Court agreed that the prosecutor's conduct was "plainly out of bounds,"[102] but refused to

97. *Id.*

98. *See supra* notes 65–67 and accompanying text.

99. Both cases were decided on March 21, 2014. *Gines*, 844 N.W.2d at 437; *Ross*, 845 N.W.2d at 692.

100. *Gines*, 844 N.W.2d at 441. Gines pled guilty on July 7, 2011. *Id.* at 439.

101. State v. Rutledge, 600 N.W.2d 324, 325–26 (Iowa 1999).

102. *Id.* at 325; *see also id.* at 325–26 ("The prosecutor . . . mounted an attack on Rutledge's alibi witnesses that was plainly out of bounds. In arguing the case to the jury he called defense witnesses a 'pack of liars,' 'druggees,' and 'a gang that couldn't shoot straight.' He said [one witness] 'can't tell the truth on the stand,' and was 'creating reality as he speaks.' He said defense witnesses 'couldn't be candid with you if they tried,' and that they 'outright lied . . . through their teeth.' He told the jury that '[t]hese people would lie to save their own hides.'" (alteration in original)).

consider Rutledge's appeal because defense counsel did not object to the prosecutor's conduct at trial.[103]

In *State v. Graves*, decided in 2003, the defendant appealed, in part, because at trial the prosecutor cross-examined the defendant regarding the truth of another witness' testimony.[104] Graves argued that this line of questioning constituted prosecutorial misconduct, thereby denying him a fair trial.[105] Unlike the appellant in *Rutledge*, Graves did couch his appeal in an ineffective assistance of counsel claim,[106] and the Iowa Supreme Court proceeded to reach the merits of the appeal. The court found that Graves's trial counsel was ineffective for failing to object to the prosecutor's line of cross-examination.[107]

The court found Graves's trial counsel ineffective despite having held in a prior case that defense counsel was *not* ineffective for failing to object to a substantially similar line of cross-examination.[108] In *State v. Bayles*, decided in 1996, the defendant appealed, claiming that trial counsel was ineffective for not objecting when he was cross-examined regarding the truthfulness of the testimony of other witnesses, including several police officers (the exact same situation that the *Graves* court considered ineffective assistance of counsel).[109] The *Bayles* court held unequivocally that failure to object in such a situation was not ineffective assistance of counsel.[110]

Thus, it appears that in appeals involving unpreserved error, particularly when that error involves prosecutorial misconduct or the factual

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103. *Id.* at 326–27 ("We are unwilling to accept Rutledge's request. To establish such a precedent would apply the plain-error rule. . . . A timely objection would undoubtedly have prompted corrective steps by the presiding judge, or lacking that, a far different scope of review on appeal. But, because error was not preserved, we reject Rutledge's sole assignment.").

104. State v. Graves, 668 N.W.2d 860, 867–68 (Iowa 2003).

105. *Id.* at 868 ("Although defense counsel did not object to this questioning, the defendant now claims it was improper for the State to force him to comment on the veracity of another witness.").

106. *Id.* ("Because objection was not made at trial, Graves's claim of prosecutorial misconduct is raised on appeal in the context of an ineffective-assistance-of-counsel claim.").

107. *Id.* at 883 ("Defense counsel could not reasonably have concluded that objections to the county attorney's conduct were not worth making. In addition, trial counsel's failure to object cannot be attributed to sound trial strategy. Therefore, a determination can be made . . . that counsel did not perform within a reasonable range of competency.").

108. *See* State v. Bayles, 551 N.W.2d 600, 609–10 (Iowa 1996).

109. *Id.* at 609 ("Bayles contends his trial counsel were ineffective because counsel failed to object to instances of what he alleges was prosecutorial misconduct. Bayles thinks the prosecutor engaged in improper methods to obtain Bayles' conviction by 'forcing' Bayles, on cross-examination, to 'comment[ ] on the veracity of other witnesses to the proceeding.' He points to the line of questions the prosecutor asked Bayles regarding J.W.'s truthfulness and also the truthfulness of the five officers who responded to Mary's and the neighbor's calls for help." (alteration in original)).

110. *Id.* at 610 ("Bayles' trial counsel were not ineffective. Defense counsel were under no duty to object to the prosecutor's line of questioning on the truth or veracity of other witnesses.").

basis supporting a charge, the magic words for an Iowa appellant are indeed "ineffective assistance of counsel." Those words allow an appeal of unpreserved trial error to be heard, while their absence will lead to the court reminding the appellant that to review unpreserved trial error would constitute adoption of the plain error rule, a course of action that Iowa courts have no intention of pursuing. But should they?

B. IOWA'S USE OF INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IS AN INADEQUATE SUBSTITUTE FOR PLAIN ERROR REVIEW

Having observed a number of cases in which Iowa appellate courts appear to use constitutional ineffective assistance of counsel claims as a substitute for the plain error rule in order to allow review of unpreserved trial error,[111] it seems worthwhile to ask whether this is a productive path forward for Iowa courts. This Subpart argues that, for several reasons, the current use of ineffective assistance of counsel claims in Iowa is ill-conceived and negatively impacts defense counsel, defendants, and Iowa's judicial system in general.

1. Iowa's Current Use of Ineffective Assistance of Counsel Claims is Unfair to Defense Counsel

The U.S. Supreme Court, in *Strickland*, set the standard for defense counsel performance that meets the requirements of the Sixth Amendment right to effective counsel.[112] The Iowa Supreme Court has repeatedly stated that Iowa follows the *Strickland* standard to determine whether counsel was ineffective.[113] The cases discussed in Subpart III.A, however, ask much more of defense counsel than what could be considered "reasonably effective assistance" measured by "prevailing norms of practice." These cases require that trial counsel object based not only on what the law was at the time of the trial, but to accurately predict future developments in the law and to object at trial based on this knowledge of future events.[114] In his dissent in

111. *See supra* Part III.A.

112. Strickland v. Washington, 466 U.S. 668, 687 (1984). "[T]he proper standard for attorney performance is that of reasonably effective assistance." *Id.* In addition, "[i]n any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, *e.g.*, ABA Standards for Criminal Justice . . . are guides to determining what is reasonable." *Id.* at 688 (citation omitted).

113. *See supra* note 35 and accompanying text.

114. *See* Rhoades v. State, 848 N.W.2d 22, 29–33 (Iowa 2014) (holding that defense counsel was ineffective for failing to object to the factual basis of a guilty plea according to an interpretation of the elements of the crime first articulated by the court during the same appeal and contrary to the interpretation found in precedent cases); State v. Ross, 845 N.W.2d 692, 696–706 (Iowa 2014) (holding that counsel was ineffective for failing to object a third time to the sufficiency of evidence after twice being overruled on the grounds that the State had

Rhoades, Justice Zager argued that such a conception of effective assistance was directly contrary to the guidance the Iowa Supreme Court had given attorneys regarding their conduct.[115] Perhaps unsurprisingly, the Iowa Rules of Professional Conduct require that an attorney keep abreast of changes in the law to maintain competence,[116] but such a requirement is a far cry from requiring an attorney to competently predict and argue based on future changes in the law. In Iowa, it is quite possible for an attorney to be forever labeled—by the state's highest court no less—as having contributed to the violation of a client's Sixth Amendment rights simply for having an insufficiently developed ability to predict the future. This requirement is in direct conflict with the *Strickland* Court, which stressed that attorney performance must be considered within the framework of the circumstances in place at the time of the trial, and detailed the negative consequences for the judicial system that would likely follow from overly strict standards of attorney performance.[117]

In addition, using ineffective assistance of counsel as a method to reach unpreserved error is inappropriate in cases where the attorney's conduct

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presented sufficient evidence to support the charges it had filed, and holding that the charges should have been objected to based on legal analyses not promulgated by the court until its decision on Ross's appeal); State v. Gines, 844 N.W.2d 437, 441 (Iowa 2014) (holding that defense counsel was ineffective for failing to object to the factual basis of a guilty plea that did not address the factors in a legal test articulated by the court in a decision handed down on the same day as its decision in Gines's appeal); State v. Graves, 668 N.W.2d 860, 883 (Iowa 2003) (holding that counsel was ineffective for failing to object to cross-examination asking the defendant to opine on the truthfulness of prior witnesses despite the existence of precedent case law holding that defense counsel had no duty to object to such cross-examination).

115. *Rhoades*, 848 N.W.2d at 40 (Zager, J., dissenting) ("We once assured attorneys that they need not 'know what the law will become in the future to provide effective assistance of counsel.' . . . Today's decision must leave counsel with the distinct feeling of having a rug yanked out from under him." (quoting Snethen v. State, 308 N.W.2d 11, 16 (Iowa 1981))); *see also* State v. Schoelerman, 315 N.W.2d 67, 72 (Iowa 1982) (recognizing "that an attorney need not be a 'crystal gazer' who can predict future changes in established rules of law in order to provide effective assistance to a criminal defendant"); *Snethen*, 308 N.W.2d at 16 ("Trial counsel['s] . . . understanding was consistent with the existing state of our case law. . . . Counsel need not be a crystal gazer.").

116. IOWA R. PROF'L CONDUCT 32:1.1 cmt. 6 ("To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.").

117. *Strickland*, 466 U.S. at 690 ("The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client. Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.").

met the *Strickland* standard because a finding of ineffectiveness may expose an attorney to financial liability. While opinions such as Justice Mansfield's concurrences in *Rhoades*[118] and *Clay*[119] may provide some reassurance to defense attorneys who worry that Iowa's broad conception of ineffective assistance of counsel may cost them in the form of civil liability, the sentiments expressed in Justice Mansfield's concurrences have yet to find their way into a majority opinion. As a result, such sentiments are necessarily limited in their persuasiveness.

Of particular concern to appointed defense counsel is Iowa Code section 13B.9(2), which specifically contemplates civil financial liability for appointed counsel when: (1) a court finds that a conviction occurred because of ineffective assistance of counsel; and (2) the ineffective counsel is the proximate cause of the damage.[120] The holdings in many of Iowa's constitutional ineffective assistance of counsel cases appear to neatly package the outcome of those cases in a manner that would make it extremely easy for a plaintiff to establish the two elements required for a civil claim under section 815.10(6).[121] Iowa law also recognizes a common law legal malpractice claim that can be asserted against any attorney whose

118. *Rhoades*, 848 N.W.2d at 34 (Mansfield, J., concurring) ("[E]ven 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. . . . I join the majority opinion in this case, but I do so without finding fault in the performance of Rhoades's defense counsel.").

119. State v. Clay, 824 N.W.2d 488, 504 (Iowa 2012) ("It seems to me unwise and unfair, therefore, to suggest that a criminal defense attorney who 'fails to perform an essential duty' under one of our precedents has committed a violation of rule 32:1:1.").

120. IOWA CODE § 815.10(6) (2015) ("An attorney appointed under this section is not liable to a person represented by the attorney for damages as a result of a conviction in a criminal case unless the court determines in a postconviction proceeding or on direct appeal that the person's conviction resulted from ineffective assistance of counsel, and the ineffective assistance of counsel is the proximate cause of the damage. In juvenile or civil proceedings, an attorney appointed under this section is not liable to a person represented by the attorney for damages unless it has been determined that the attorney has provided ineffective assistance of counsel, and the ineffective assistance of counsel is the proximate cause of the damage.").

121. *See* State v. Ross, 845 N.W.2d 692, 706 (Iowa 2014) ("[H]ad trial counsel made the proper motion, the court would have only upheld two counts of intimidation with a dangerous weapon with intent. Failing to make the proper motion prejudiced Ross by allowing the jury to convict Ross of three additional felonies. We find trial counsel was ineffective for failing to make the proper motion."); State v. Graves, 668 N.W.2d 860, 883–84 (Iowa 2003) ("Defense counsel could not reasonably have concluded that objections to the county attorney's conduct were not worth making. In addition, trial counsel's failure to object cannot be attributed to sound trial strategy. Therefore, a determination can be made on the present record that counsel did not perform within a reasonable range of competency. Due to the pervasiveness of the prosecutor's misconduct, its effect on the central issues in the case, and the weakness of the State's evidence in the absence of the tainted testimony, the defendant has shown a reasonable probability that, *but for counsel's errors, the result of his trial would have been different.* In conclusion, the defendant has established he received ineffective assistance from his trial counsel." (emphasis added)).

breach of duty results in "actual loss," so the potential for civil liability as a result of constitutional ineffective assistance of counsel claims is certainly not limited to appointed counsel.[122]

2. Using Ineffective Assistance of Counsel Claims as a Substitute for Plain Error Ignores the Differing Goals of Each Doctrine

Ineffective assistance of counsel claims are intended to ensure that those who are entitled to effective representation by the Sixth Amendment are not denied that right.[123] The plain error rule has a broader purpose—to prevent the toleration of trial error, regardless of its source, of a severity that would undermine "the fairness, integrity or public reputation of judicial proceedings."[124] Thus, it is clear that while many claims of ineffective assistance of counsel that denied a defendant his or her Sixth Amendment rights would fall within the scope of issues reviewable under the plain error rule, due to the plain error rule's broader purpose, there are a number of conceivable errors arising from attorney or judicial conduct that would (or should) be difficult to shoehorn into an ineffective assistance of counsel appeal, because they do not implicate a defendant's Sixth Amendment right to counsel.

In effect, the course currently pursued by the Iowa Supreme Court makes defense counsel the ultimate gatekeeper of all error at the trial level. Prosecutorial misconduct becomes the defense counsel's failure to object to prosecutorial misconduct.[125] A court's acceptance of a guilty plea without a factual basis becomes the defense's failure to object to a court's acceptance of a guilty plea without a factual basis.[126] Errors of all parties to a criminal trial become attributable to defense counsel, and where they are not attributed to the defense, they cannot be reviewed.[127]

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122. *See* Vossoughi v. Polaschek, 859 N.W.2d 643, 649–50 (Iowa 2015) ("To establish a prima facie claim of legal malpractice, the plaintiff must produce evidence showing the attorney's breach of duty caused 'actual injury, loss, or damage.'" (quoting Ruden v. Jenk, 543 N.W.2d 605, 610 (Iowa 1996))).

123. *See supra* notes 29–30 and accompanying text.

124. United States v. Olano, 507 U.S. 725, 736 (1993) (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936)).

125. *See Graves*, 668 N.W.2d at 883 ("The prosecutor engaged in misconduct when he asked the defendant whether the police officer had 'made up' his testimony. Additional misconduct occurred in the prosecutor's closing argument when he accused the defendant of calling the officer a liar and again in the prosecutor's rebuttal argument when he repeatedly characterized the defendant as lying. This misconduct permeated the entire trial . . . ."). Despite the *Graves* court's finding that prosecutorial misconduct "permeated the entire trial," it ultimately held that defense counsel was responsible for the trial errors. *Id.*

126. *See* Rhoades v. State, 848 N.W.2d 22, 33 (Iowa 2014) ("[T]here was not a sufficient factual basis for the district court to accept the plea. Therefore, trial counsel was ineffective for allowing the district court to accept the plea without a factual basis.").

127. *See* State v. Rutledge, 600 N.W.2d 324, 325 (Iowa 1999). In *State v. Rutledge*, prosecutorial conduct that was labeled "plainly out of bounds" by the court was not reviewable

One significant problem with Iowa's use of ineffective assistance of counsel claims to challenge the validity of guilty pleas in particular, is that the "prevailing norms of practice" cited by *Strickland* to determine "reasonably effective assistance"[128] place responsibility for ensuring that a guilty plea is supported by a sufficient factual basis squarely in the hands of the trial judge.[129] Placing the ultimate responsibility for the sufficiency of the factual basis supporting a guilty plea in the hands of defense counsel ignores the "prevailing norms" set forth by the Iowa Legislature and the ABA, which emphasize the primary role of the court. Furthermore, the ABA Standards for Criminal Justice specify a number of "responsibilities of defense counsel" in the plea process, which include notifying the defendant of plea offers, adequately investigating the case before recommending a plea, and advising the defendant of his or her options and any collateral consequences of accepting a plea, but do not assign any responsibility for the adequacy of the factual basis to defense counsel.[130] Iowa's current approach, making ineffective assistance of counsel the sole avenue to review unpreserved error, ignores the important responsibilities borne by the court and the prosecution.

The fact that the right to counsel does not extend to all criminal defendants presents another important argument against the suitability of ineffective assistance of counsel claims to substitute for plain error review. In Iowa, the right to counsel in misdemeanor cases extends to cases in which the accused may face incarceration.[131] As a result, there is a class of criminal

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when the unpreserved error had not been couched in the framework of ineffective assistance of counsel. *See id.* ("The prosecutor . . . mounted an attack on Rutledge's alibi witnesses that was plainly out of bounds."). The specific conduct that concerned the court in *Rutledge* was cited in support of a holding that counsel was ineffective for failing to object to prosecutorial misconduct in *State v. Graves*. *Graves*, 668 N.W.2d at 876 ("More recently, . . . we condemned similar statements by a prosecutor, finding them 'clearly improper.' . . . In *Rutledge*, the prosecutor not only characterized the defense witnesses as 'liars' and 'druggees,' but also stated that these witnesses 'can't tell the truth,' 'couldn't be candid with you if they tried,' 'outright lied . . . through their teeth,' and 'would lie to save their own hides.'" (second omission in original)).

128. *See supra* note 112 and accompanying text.

129. *See* IOWA R. CRIM. PRO. 2.8(2)(b) (2012) ("The court may refuse to accept a plea of guilty, and *shall not accept* a plea of guilty without first determining that the plea is made voluntarily and intelligently and has a factual basis." (emphasis added)); ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY, Standard 14—1.6(a) (1997) ("In accepting a plea of guilty or nolo contendere, the court should make such inquiry as may be necessary to satisfy itself that there is a factual basis for the plea. As part of its inquiry, the defendant may be asked to state on the record whether he or she agrees with, or in the case of a nolo contendere plea, does not contest, the factual basis as proffered.").

130. ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY, Standard 14—3.2 (1997).

131. State v. Young, 863 N.W.2d 249, 281 (Iowa 2015) ("[A]n accused in a misdemeanor criminal prosecution who faces the possibility of imprisonment under the applicable criminal statute has a right to counsel.").

defendants in Iowa for which an ineffective assistance of counsel claim is not available, and who thus face the possibility of serious errors during trial that simply cannot be addressed on appeal if error is not preserved at trial. Furthermore, the unavailability of plain error review in Iowa means that a *pro se* defendant will be expected to preserve error at trial, and that unpreserved error in such trials will not be reviewable on appeal regardless of its prejudicial effect on the outcome.

3. Plain Error Review Is Better Equipped to Deal with Temporal Issues

Finally, introduction of the plain error rule would better allow courts to fairly address some of the temporal issues that arise as a result of the slow pace with which appeals proceed through the judicial system. First, the general rule in Iowa is that claims of ineffective assistance of counsel will not be addressed until post-conviction relief proceedings.[132] Accordingly, a defendant who was convicted as a result of unpreserved trial error in Iowa may be unjustly deprived of their liberty or property interests for a longer period of time than a defendant facing similar circumstances in a state that has adopted the plain error rule. By more consistently allowing review of unpreserved errors on direct appeal, the plain error rule minimizes the time a wrongfully convicted defendant will be deprived of their liberty or property interests. For example, the federal courts, and a number of state courts have shown a willingness to review the adequacy of the factual basis of a guilty plea on direct appeal via application of the plain error rule.[133]

The plain error rule is also better equipped to handle changes in the law. Iowa's current practice frequently finds defense counsel inadequate for failing to anticipate future changes in the law,[134] a practice that must be considered beyond the bounds of *Strickland*'s requirement of "reasonably effective assistance." Recent Supreme Court precedent regarding the federal use of the plain error rule could prove extremely helpful for Iowa courts were the plain error rule to be adopted in Iowa. The Court's holding in *Johnson* justifies plain error review of trial court actions that appeared to be correct at the time, but had become plain error due to changes in the law at the time of appeal,[135] and in *Henderson* the Court held that when the law at the time of a decision is unclear, it may still be reviewed under plain error if

132. *See* State v. Atley, 564 N.W.2d 817, 833 (Iowa 1997) ("[C]laims of ineffective assistance of counsel raised on direct appeal are ordinarily reserved for postconviction proceedings to allow full development of the facts surrounding counsel's conduct.").

133. *See generally* United States v. Vonn, 535 U.S. 55 (2002) (holding that an unobjected to defect in a plea colloquy could only be reviewed under the plain error rule); United States v. Garcia-Paulin, 627 F.3d 127 (5th Cir. 2010) (reviewing factual basis under plain error rule); People v. Bedell, No. 12 DV 74659, 2014 WL 992025 (Ill. App. Ct. Mar. 12, 2014) (reviewing an insufficient factual basis claim for plain error); Kiet Hoang Nguyen v. State, 299 P.3d 683 (Wyo. 2013) (reviewing an insufficient factual basis claim for plain error).

134. *See supra* notes 99–100 and accompanying text.

135. *See supra* note 17 and accompanying text.

the law at the time of appeal indicates the trial court erred.[136] While these holdings would not be binding upon Iowa courts were they to adopt the plain error rule, they would certainly provide a more useful justification for invalidating trial court actions based on changes in law that occur well after trial than the current approach of holding defense counsel ineffective for failing to anticipate future interpretations of the law.

IV. A LEGISLATIVE SOLUTION

The simplest and most straightforward way to address Iowa's increasingly broad application of ineffective assistance of counsel doctrine would be for the Iowa Supreme Court to reverse course and decide to adopt plain error review. However, the court's intransigence on the subject gives little reason for optimism that such a development is likely in the foreseeable future.[137] This being the case, the most plausible method of introducing plain error review to Iowa's appellate system is via legislative action. This Part offers a suggested course of action for the Iowa Legislature that would encourage Iowa courts to use plain error review when appropriate, and as a result remove the incentive to shoehorn appellate claims into an ineffective assistance of counsel framework.

First, although it would certainly be possible for the Iowa Supreme Court, in recognition of the fact that it has dramatically increased the scope of ineffective assistance of counsel claims, to break from its precedent and adopt the plain error rule in Iowa, there is little reason to believe such an about face is likely. While Justice Mansfield has explicitly expressed the view that the court is using ineffective assistance of counsel as a substitute for plain error review,[138] and Justice Zager has recognized that there is little relationship between a finding of ineffective assistance in Iowa and a lawyer's professional responsibilities,[139] none of the justices have gone as far as to suggest that the court adopt plain error review as a means of course correction. When even the justices that recognize the expanded scope of ineffective assistance of counsel claims in Iowa do not appear inclined to alter the court's approach in such cases, it seems tremendously optimistic to think that the court is likely to adopt plain error review of its own volition. Thus, legislative action is the most likely path to the adoption of plain error review in Iowa.

The Iowa Legislature is no stranger to changing Iowa law in response to perceived problems with a law's judicial application. In 2014, the legislature amended Iowa Code section 709.15(1)(f), which addresses sexual

136. *See supra* note 18 and accompanying text.
137. *See supra* notes 26 and 102–03 and accompanying text.
138. *See supra* note 61 and accompanying text.
139. *See supra* note 63 and accompanying text.

exploitation by school employees, in response to an Iowa Supreme Court decision narrowly construing the previous version of the statute.[140] In *State v. Nicoletto*, the Iowa Supreme Court interpreted the relevant statute narrowly, holding that persons holding coaching authorizations were not licensed professionals, and as a result were not subject to prosecution under Iowa's statute criminalizing sexual relationships between students and certain school employees.[141] In response, the Iowa Legislature drafted and passed an amendment to the statute within two weeks of the date of the *Nicoletto* decision.[142] Clearly, the legislature is capable of taking swift corrective action when existing law provides inadequate guidance to the judicial branch.

Since legislative action is the most plausible path to the introduction of plain error review in Iowa, it would be prudent to analyze the provisions of Iowa law governing appellate review and offer a suggested change that would incentivize the use of plain error review in Iowa courts when appropriate. In most cases, the Iowa Rules of Appellate Procedure are promulgated by the Iowa Supreme Court, pursuant to the authority granted to the court by the legislature in Iowa Code section 602.4201(1)–(2).[143] However, the Iowa Legislature has reserved for itself the power to make changes to the State's judicial rules, and stated explicitly that such changes supersede the rules set forth by the court.[144] As a result, the most effective way for the legislature to introduce plain error in Iowa would likely be an amendment to the Iowa Rules of Appellate Procedure, specifically Rule 6.907, which addresses the scope of review for Iowa's appellate courts.[145]

The changes to the Iowa Rules of Appellate Procedure needed to introduce plain error review need not be extensive. Rule 6.907 currently reads as follows:

> Rule 6.907 Scope of review. Review in equity cases shall be de novo. In all other cases the appellate courts shall constitute courts for correction of errors at law, and findings of fact in jury-waived cases shall have the effect of a special verdict.[146]

To introduce plain error review, the Iowa Legislature should amend Rule 6.907 to read:

> Rule 6.907 Scope of review.

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140. *See* H. FILE 2474, 85th Gen. Assemb., Reg. Sess. (Iowa 2014).

141. State v. Nicoletto, 845 N.W.2d 421, 432 (Iowa 2014).

142. The *Nicoletto* decision was issued on April 11, 2014. *Id.* at 421. The Iowa House and Senate had both passed an amended version of IOWA CODE § 709.15(1)(f) by April 24, 2014. *See* H. JOURNAL 85-102, 2d Sess., at 794 (Iowa 2014) (referring to H. FILE 2474, 85th Gen. Assemb., Reg. Sess. (Iowa 2014)).

143. IOWA CODE § 602.4201(1)–(2) (2015).

144. *Id.* § 602.4202(4).

145. IOWA R. APP. P. 6.907.

146. *Id.*

> 6.907(1) *Equity cases.* Review in equity cases shall be de novo.
>
> 6.907(2) *Other cases.* In all cases other than equity cases the appellate courts shall constitute courts for correction of errors at law, and findings of fact in jury-waived cases shall have the effect of a special verdict.
>
> 6.907(3) *Review of plain error.* A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

The suggested amendment to Rule 6.907 simply incorporates the language of Federal Rule of Criminal Procedure 52(b).[147] Such an alteration to the Iowa rules would provide an appropriate relief valve for the State's appellate courts. The Iowa Supreme Court would no longer be faced with the decision of whether or not to overturn extensive precedent prohibiting the use of plain error review in Iowa, because the legislature's change to the rules would abrogate the court's precedent cases stating that plain error may not be used in Iowa.

This amendment would be a more desirable solution than other potential statutory remedies, such as adding a section to the Iowa Code setting forth criteria under which ineffective assistance claims may be heard. First of all, a statutory restriction on the availability of relief for ineffective assistance of counsel enacted in the absence of reform intended to make plain error review available could further restrict the options of a defendant whose trial involved substantial unpreserved error. Such a statutory restriction might treat defense counsel more fairly, but could also exacerbate the issues currently faced by defendants in addressing unpreserved error. In addition, the Supreme Court has already set forth in *Strickland* as specific a standard as is likely useful in evaluating ineffective assistance claims.[148] The *Strickland* Court astutely recognized that "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant."[149] The difficulty faced by any legislature attempting to create a concrete list of circumstances in which an ineffective assistance claim is cognizable would be extreme, if not insurmountable.

Although this amendment would not force Iowa courts to invoke their authority to review plain error, it is far more reasonable to think that the court would do so after the legislature expressly granted the power to do so. One possible interpretation of the Iowa Supreme Court's steadfast refusal to

147. FED. R. CRIM. P. 52(b).

148. *See* Strickland v. Washington, 466 U.S. 668, 688–89 (1984).

149. *Id.*

adopt plain error is that the court feels that although there is an obvious precedent problem preventing the overt adoption of plain error review, it recognizes that review of unpreserved error is nonetheless necessary in some circumstances. If the legislature were to step in and fix the precedential issue currently preventing plain error review, Iowa courts and appellants would no longer find it necessary to use ineffective assistance of counsel claims as a vehicle for such review, and Iowa courts would be free to consider ineffective assistance claims only under the more reasonable standard set forth in *Strickland*.

V. CONCLUSION

In recent years, Iowa courts appear to have adopted an approach toward ineffective assistance of counsel jurisprudence that aims to substitute ineffective assistance of counsel claims for the plain error rule in order to allow review of unpreserved trial error, rather than reserving such claims for circumstances in which defense counsel's performance falls below the bar set forth in *Strickland*. Because the use of ineffective assistance of counsel claims as a proxy for plain error review is unfair to defense counsel, ignores the important responsibilities of courts and prosecutors at trial, deprives some defendants of an avenue to review of unpreserved error, and because the plain error rule provides a more timely correction for wrongfully convicted defendants and more reasonably allows review in the face of changing law, the Iowa Legislature should amend the Iowa Rules of Appellate Procedure to adopt the plain error rule embodied in Federal Rule of Criminal Procedure 52(b), allowing Iowa courts to reserve ineffective assistance of counsel claims for cases in which defense counsel's conduct truly earns the court's scrutiny.