IN THE SUPREME COURT OF IOWA
Supreme Court No. 20–0202

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RYAN JOSEPH HAHN,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR SCOTT COUNTY
THE HON. TAMRA ROBERTS, JUDGE (MOTION TO SUPPRESS)
& THE HON. PATRICK A. MCELYEA, JUDGE (TRIAL)

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. In litigation on his motion to suppress, Hahn agreed that it would be constitutionally permissible to seize and search his garbage, if his trash cans had been left at the curb for collection. Did the district court err in crediting the testimony from two deputies about the location of Hahn's trash cans?

Authorities

California v. Greenwood, 486 U.S. 35 (1988)
United States v. Dunn, 480 U.S. 294 (1987)
Meier v. Senecaut, 641 N.W.2d 532 (Iowa 2002)
State v. A Blue in Color, 1993 Chevrolet Pickup, 116 P.3d 800 (Mont. 2005)
State v. Henderson, 435 N.W.2d 394 (Iowa Ct. App. 1988)
State v. Kuutilla, No. 19–0283, 2020 WL 4814076 (Iowa Ct. App. Aug. 19, 2020)
State v. Lane, 726 N.W.2d 371 (Iowa 2007)
State v. Lewis, 675 N.W.2d 516 (Iowa 2004)
State v. MacKenzie, No. 14–1509, 2016 WL 6651866 (Iowa Ct. App. Nov. 9, 2016)
State v. Pals, 805 N.W.2d 767 (Iowa 2011)
State v. Skola, 634 N.W.2d 687 (Iowa Ct. App. 2001)
State v. Webster, 865 N.W.2d 223 (Iowa 2015)

II. Was error preserved for any argument that collecting garbage from trash cans that were placed at the curb for collection would violate the Fourth Amendment or Article I, Section 8 of the Iowa Constitution?

Authorities

Boyle v. Alum–Line, Inc., 710 N.W.2d 741 (Iowa 2006)
DeVoss v. State, 648 N.W.2d 56 (Iowa 2002)
Lamasters v. State, 821 N.W.2d 856 (Iowa 2012)
Otterberg v. Farm Bureau Mut. Ins. Co., 696 N.W.2d 24 (Iowa 2005)

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State v. Krogmann, 804 N.W.2d 518 (Iowa 2011)
State v. Rutledge, 600 N.W.2d 324 (Iowa 1999)
State v. Skola, 634 N.W.2d 687 (Iowa Ct. App. 2001)

III. Hahn argues his counsel was ineffective for failing to litigate the unpreserved claim. Section 814.7 prohibits this Court from resolving ineffective-assistance claims on direct appeal from criminal convictions. Is section 814.7 unconstitutional?

Authorities

Evitts v. Lucey, 469 U.S. 387 (1985)
Boomhower v. Cerro Gordo County Bd. of Adjustment,
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Cortez v. State, No. 19–0083, 2020 WL 2487951
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In re Guardianship of Matejski, 419 N.W.2d 576 (Iowa 1988)
James v. State, 479 N.W.2d 287 (Iowa 1991)
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Shortridge v. State, 478 N.W.2d 613 (Iowa 1991)
State v. Damme, 944 N.W.2d 98 (Iowa 2020)
State v. Doe, 927 N.W.2d 656 (Iowa 2019)
State v. Hinners, 471 N.W.2d 841 (Iowa 1991)
State v. McCright, 569 N.W.2d 605 (Iowa 1997)
State v. Rutledge, 600 N.W.2d 324 (Iowa 1999)

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State v. Wright, No. 16-0275, 2017 WL 1401475 (Iowa Ct. App. Apr. 19, 2017)
Iowa Code § 814.7
Iowa Code § 822.8
Iowa Const. Art. V, §

IV. If this Court can reach the broad constitutional claim, is it unconstitutional for police to seize and search garbage bags from trash cans that were left at the curb for collection and disposal?

Authorities

Abel v. United States, 362 U.S. 217 (1960)
California v. Greenwood, 486 U.S. 35 (1988)
California v. Rooney, 483 U.S. 307 (1987)
Carpenter v. United States, 138 S.Ct. 2206 (2018)
Ex parte Jackson, 96 U.S. 727 (1877)
Florida v. Jardines, 569 U.S. 1 (2013)
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United States v. Jackson, 448 F.2d 963 (9th Cir. 1971)
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Beltz v. State, 221 P.3d 328 (Alaska 2009)
Cooks v. State, 699 P.2d 653 (Okla. Ct. Crim. App. 1985)
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People v. Huddleston, 347 N.E.2d 76 (Ill. Ct. App. 1976)
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State v. Fassler, 503 P.2d 807 (Ariz. 1972)
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State v. Henderson, 435 N.W.2d 394 (Iowa Ct. App. 1988)
State v. Lowe, 812 N.W.2d 554 (Iowa 2012)
State v. McMurray, 860 N.W.2d 686 (Minn. 2015)
State v. Ranken, 25 A.3d 845 (Del. Super. Ct. 2010)
State v. Rydberg, 519 N.W.2d 306 (N.D. 1994)
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State v. Young, 863 N.W.2d 249 (Iowa 2015)
Wayne R. LaFave, 6 *Search & Seizure* § 11.3(f)
Kimberly J. Winbush, *Searches and Seizures: Reasonable Expectation of Privacy in Contents of Garbage or Trash Receptacle*, 62 A.L.R. 5th 1 (1998)

ROUTING STATEMENT

Hahn requests retention to determine if Article I, Section 8 of the Iowa Constitution prohibits "trash rips," or seizing and searching garbage bags that were placed out for collection. *See* Def's Br. at 18. Hahn is correct that this issue is before the Iowa Supreme Court on further review. *See State v. Wright*, No. 19-0180 (oral argument set for September 17, 2020); *see also State v. Kuutilla*, No. 19–0283, 2020 WL 4814076 (Iowa Ct. App. Aug. 19, 2020). But in this case, error was not preserved for any argument that trash rips, generally, are unconstitutional. *See* MTS Order (10/10/19) at 1; App. 10 ("The parties do not dispute the existing law in this matter, but believe there is only a factual issue in regard to the location of the trash can."). This appeal only involves application of well-established legal principles on error preservation, and it should be transferred to the Iowa Court of Appeals. *See* Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

This is Ryan Joseph Hahn's direct appeal from his convictions for possession of marijuana with intent to deliver, a Class D felony, in violation of Iowa Code section 124.401(1)(1); a drug tax stamp offense, a Class D felony, in violation of Iowa Code section 453B.12; and

possession of a controlled substance (second offense), an aggravated misdemeanor, in violation of Iowa Code section 124.401(5) (2017).

Hahn and his co-defendant, Danielle Grimm, lived together in the house where the drugs were found. Grimm and Hahn were tried together, and the jury found them both guilty of these offenses. The sentencing court imposed concurrent terms of incarceration on each count, then suspended those sentences and placed Hahn on probation for a period of two years. *See* Sentencing Order (1/31/20); App. 21.

In this appeal, Hahn only challenges the ruling on his motion to suppress. His home had been searched, pursuant to a search warrant. Before applying for that search warrant, officers had investigated by searching garbage bags that Grimm and Hahn had placed outside, in a trash can. While litigating his motion to suppress, Hahn agreed this would be constitutionally permissible if his trash had been placed out at the curb for collection (and he argued that, in fact, it had not been). But in this appeal, Hahn primarily argues that Article I, Section 8 of the Iowa Constitution extends special protections against seizing and searching his garbage that the Fourth Amendment does not provide. This argument was waived, and it was not raised or ruled upon below, so error was not preserved to raise that challenge on appeal.

Course of Proceedings

The State generally accepts Hahn's description of the relevant course of proceedings. *See* Iowa R. App. P. 6.903(3); Def's Br. at 19–21.

Statement of Facts

Around 10:30 or 11:00 p.m. on Monday, September 10, 2018, Scott County Sheriff's Office Deputy Dan Furlong and Deputy Eric Burton went to Grimm and Hahn's residence at 703 Davenport Street in Dixon, Iowa, to investigate a tip from DHS about drug activity. *See* MTS Tr. 7:23–8:14; Def's Ex. E; C-App. 14; MTS Tr. 19:12–20:16.

Deputy Furlong recalled that "[t]he trash receptacle was in the south side alley, directly behind the residence." *See* MTS Tr. 8:15–24. There were two cans, which usually meant "one's for garbage and the other's for recyclables." *See* MTS Tr. 8:25–9:4. Since the trash cans were placed in the alley for collection, the deputies searched them:

> The trash receptacles were opened, there was only one trash bag inside one of them, and we only collected one bag, and retrieved it and transported it to the other location and searched its contents.

MTS Tr. 9:5–12. When asked for details about the placement of the garbage can that contained a trash bag, Deputy Furlong said:

> It was next to the alleyway. I believe it was actually in the grass, but myself and Detective Burton were standing in the alleyway. We never made contact or stepped foot onto the property.

See MTS Tr. 18:23–19:8. Deputy Burton agreed: he recalled that the trash cans "were right on the alley"—they stood in that roadway while they collected the trash bag. *See* MTS Tr. 23:20–25:10; State's Ex. 6–7; Ex-App. 4–5; *see also* MTS Tr. 30:18–31:17.

Deputy Furlong described the protocol like this:

> [W]e'll locate where a specific target lives at and find out their trash collection date. On that date, the night before, or in the early morning hours we'll go to that address and see if the trash receptacle is out, either in front of the residence on the street or next to the street ready for disposal, or sometimes even in an alley adjacent to the residence ready for disposal. If it's out, ready for disposal, myself and my partners will collect that trash, transport it to another location, and search its contents there.

MTS Tr. 6:18–7:9. But if the trash can was not out for collection, they would leave without attempting to collect it. *See* MTS Tr. 7:10–22.

Deputy Burton estimated that he had performed about 50 to 75 trash surveys like this one. He explained: "We only do trash surveys on trash that we deem to be out for collection," which means garbage that is "out on the curb or in the alley, where a garbage truck or someone working for a garbage service would collect it." *See* MTS Tr. 22:8–23:6. Deputy Burton said that he had never stepped onto the actual residential property to retrieve garbage for a trash survey, and he never saw Deputy Furlong do that, either. *See* MTS Tr. 23:7–19.

Back in 2010, Deputy Furlong had put together a list of garbage collection days in rural parts of Scott County, which included Dixon. *See* MTS Tr. 9:11–11:9; State's Ex. 3; Ex-App. 3. Deputy Furlong knew that Dixon's garbage collection day was Tuesday, at least as recently as 2013, when he waved down a garbage truck on a Tuesday morning while conducting a different investigation. *See* MTS Tr. 11:24–13:12; State's Ex. 1; C-App. 11; *see also* MTS Tr. 13:14–15:19; State's Ex. 2; C-App. 13 (discussing garbage survey from in August 2018 in Dixon, and noting that trash cans in Dixon had been placed out for collection on Monday night). But at some point, Dixon's garbage collection day changed to Fridays. *See* MTS Tr. 11:16–23. Still, both deputies were sure that Hahn's trash cans were at the curb, on that particular day.

The defendants presented testimony from Christopher Owens, who was an operations manager for Republic Services; he testified that their collection truck had visited that address in Dixon on a collection route on Saturday, September 8, 2018 (one day later than usual, because of Labor Day) and on Friday, September 14, 2018. *See* MTS Tr. 33:14–37:7. But their records did not indicate where the garbage cans were located on those particular garbage collection days, or on any other day. *See* MTS Tr. 39:3–40:1.

Hahn also testified. He said that they kept the garbage cans near the house, and that he only put them out for collection on the morning that the garbage trucks came. He also said that he would always bring them back up to the house, within "a few hours." But he could not remember if that happened on Fridays or on Saturdays. *See* MTS Tr. 41:18–43:5. On rebuttal, the State presented photos of the garbage cans that were taken when the search warrant was executed—on Wednesday, September 19, 2018. *See* MTS Tr. 44:6–46:8; State's Ex. 9–10; Ex-App. 7–8. Deputy Furlong noted that these trash cans were not in the location that Hahn described, but they were also not in the alley-adjacent location where they had been on September 10, when the deputies collected the trash bag. *See* MTS Tr. 46:9–12.

Deputy Burton had gone back to that area on the day before the suppression hearing, which was a Tuesday—and he saw that there were trash cans out for collection. *See* MTS Tr. 27:17–28:21.

The district court understood this as a purely factual dispute. *See* MTS Order (10/10/19) at 1; App. 16 ("The parties do not dispute the existing law in this matter, but believe there is only a factual issue in regard to the location of the trash can."). The court made express credibility findings in its ruling:

> . . . The Court found the officer's testimony as credible. State's exhibits 6, 7, and 8 supported the distances and description of the property. The officer's testimony was consistent and they were careful to answer exactly and admit when they could not remember of if they did not know the answer.
>
> . . . The Court did not find the Defendant's testimony as credible. Pictures on September 19, 2018, show that one can was located on the back patio of the home, but another was located near the shed on the rear of the property next to the alley. September 19, 2018, was not a trash pickup day, so his testimony was inconsistent with photographic evidence on that date.

MTS Order (10/10/19) at 1; App. 16. It found that the garbage was in trash cans that had been placed out for collection, so the trash survey was not an unreasonable search or seizure. *See id.* at 1–2; App. 16–17.

Additional facts will be discussed when relevant.

ARGUMENT

I. The district court did not err in finding that the garbage cans were placed in the alley for collection.

Preservation of Error

Part of Hahn's challenge renews the argument that he made in his motion to suppress, and that the district court rejected. *See* Def's Br. at 34–42; *accord* MTS (3/5/19); App. 10; MTS Order (10/10/19); App. 16. Error is preserved to challenge the ruling on the arguments he actually made. *See, e.g.*, *State v. Webster*, 865 N.W.2d 223, 232 (Iowa 2015); *Meier v. Senecaut*, 641 N.W.2d 532, 539 (Iowa 2002).

Standard of Review

Review of rulings on constitutional issues is generally de novo. However, appellate courts still give "deference to the factual findings of the district court due to its opportunity to evaluate the credibility of the witnesses." *See State v. Pals*, 805 N.W.2d 767, 771 (Iowa 2011) (quoting *State v. Lane*, 726 N.W.2d 371, 377 (Iowa 2007)).

Merits

For the purposes of this preserved claim, the parties agree about the legal framework to apply. If the garbage cans were placed out for collection at the alleyway, then collecting the trash bag would not violate either the Fourth Amendment or Article I, Section 8 of the

Iowa Constitution. *See, e.g.*, *California v. Greenwood*, 486 U.S. 35, 39–40 (1988); *State v. Skola*, 634 N.W.2d 687, 690–91 (Iowa Ct. App. 2001); *State v. Henderson*, 435 N.W.2d 394, 396–97 (Iowa Ct. App. 1988). After all, "society's experience with trash left at the alley or curb for collection is anything but consistent with an objective expectation of privacy." *See State v. A Blue in Color, 1993 Chevrolet Pickup*, 116 P.3d 800, 804–05 (Mont. 2005); *accord Kuutilla*, 2020 WL 4814076, at *1 (rejecting call to overrule *Henderson* and *Skola*); *State v. MacKenzie*, No. 14–1509, 2016 WL 6651866, at 4 (Iowa Ct. App. Nov. 9, 2016) (recognizing "the validity of the warrantless search and seizure of garbage left out for collection").

Hahn argues that, even in applying that rule, the district court erred in believing Deputy Furlong and Deputy Burton when they both testified that the garbage cans had been placed at the curbside in the alleyway when they recovered that trash bag. *See* Def's Br. at 36–42.

This argument starts from a disadvantage, because two deputies testified to the operative fact at issue, and the district court believed their testimony. *See* MTS Order (10/10/19) at 1; App. 16; MTS Tr. 18:23–19:8; MTS Tr. 23:20–25:10. It had good reason to believe them: each deputy gave testimony that matched the other's testimony, and

they both admitted when they did not know the answer to a question. *See, e.g.*, MTS Tr. 19:4–11; MTS Tr. 31:10–25; *accord* MTS Order (10/10/19) at 1; App. 16. And the Court had good reason to reject Hahn's testimony as not credible: if Hahn had been meticulous about putting out the garbage cans at the curb, just before collection, and bringing them back to the house within a few hours (as he testified), he would surely remember that he would perform that routine on a specific day of the week—but he could not remember whether it was Fridays or Saturdays. *See* MTS Tr. 42:11–43:2. And his testimony was disproven by the pictures that showed the trash cans in locations that did not match his testimony, on days when garbage was not collected. *Compare* State's Ex. 9–10; Ex-App. 7–8, *and* MTS Tr. 44:6–46:8 (noting that one of the trash cans was behind the shed, not behind the house), *with* MTS Tr. 41:22–43:5 (Hahn testifying that the trash cans were always kept just behind the house, at all times, except for the half-day when they were out at the alley for collection).

Owens was a disinterested witness, and his testimony about the trash collection schedule for Dixon was supported with records that showed that the actual garbage collection day for Dixon was Friday, not Tuesday. *See* MTS Tr. 33:14–37:7. But this does not disprove any

part of either deputy's testimony. If Hahn or Grimm put the trash can at the curb in the alleyway and *brought trash out* to dispose of it, then Deputy Furlong and Deputy Burton would still find their garbage can at that location, even though they were mistaken about the schedule for garbage collection. Indeed, when Hahn was unable to remember when garbage collection occurred, that supported an inference that those trash cans were often left at the curb in the alleyway, by default. That way, he would never miss a scheduled collection, even if he had no idea when it was coming (which appeared to be the case). *See* MTS Tr. 40:18–41:1 (noting Republic Services does not pick up trash from cans that are not next to the roadway). If Hahn had been carting his trash cans to the curb on the wrong day, there likely would have been more than one garbage bag when Deputy Furlong and Deputy Burton looked inside. MTS Tr. 19:4–8 (testifying there was "just the one bag" in these trash cans); *see also* MTS Tr. 31:18–20 (same). It was likely that Hahn left his trash cans at the alleyway for days at a time—which was apparently common in Dixon. *See* MTS Tr. 27:17–28:21. None of Hahn's attacks defeat that explanation, which aligns with all of the evidence and testimony (except for Hahn's, which the district court did not find credible). *See* MTS Order (10/10/19) at 1; App. 16.

Hahn argues that it is more likely that the trash cans were in a different location—not where he testified that they were, but in the location depicted in State's Exhibit 10—which would still be "within the curtilage of Hahn's home" under the curtilage analysis described in *State v. Lewis*, 675 N.W.2d 516 (Iowa 2004) and *United States v. Dunn*, 480 U.S. 294 (1987). *See* Def's Br. at 34–35, 39–41. But the testimony from Deputy Furlong and Deputy Burton was unequivocal, and the district court believed them. *See* MTS Order (10/10/19) at 1; App. 16; MTS Tr. 18:23–19:8; MTS Tr. 23:20–25:10. There did not need to be a particular explanation for *why* the trash cans were located in that specific location (although it would make sense if Hahn simply decided to leave them at the curb, as their default location).

If Deputy Furlong and Deputy Burton had attempted to do this trash survey, but then discovered that these trash cans had not been placed out for collection at the curb in the alleyway, they would not have tried to complete it. They were very clear about their protocol. *See* MTS Tr. 6:18–7:22; MTS Tr. 22:8–23:19. Hahn notes that the record does not contain any photos of the trash cans in the alleyway at the moment when the trash survey was conducted. *See, e.g.*, Def's Br. at 38. For future investigations, it would make sense for officers to

wear and use body cameras when retrieving trash, to avoid disputes like this one. But that lack of foresight certainly does not mean that the deputies are lying, especially when there is no evidence that they were facing any particular pressure to expedite their investigation. This search warrant was not executed until September 19, 2018—nine days after this trash survey. *See* MTS Tr. 44:6–25. If they had discovered that the trash cans had not been placed out for collection, the deputies would have just kept checking, night after night, until they found trash that was "ready for disposal." *See* MTS Tr. 6:21–7:15. There is no reason to think that the deputies would have trespassed onto Hahn and Grimm's property to collect their garbage, and then lied about it (which would create a risk that their sworn statements in an ensuing warrant application could subsequently be disproven by security camera footage or testimony from a disinterested neighbor).

The district court found Deputy Furlong and Deputy Burton were credible, and nothing in the record undercuts their testimony. Grimm cannot establish that the district court erred in finding that the trash cans were at the curbside in the alleyway for collection when Deputy Furlong and Deputy Burton retrieved the trash bag, and that means his challenge fails.

II. Error is not preserved for any other challenge.

Hahn's motion to suppress was very clear: he was not arguing that it is unconstitutional to seize garbage from trash cans that have been placed out for collection. He conceded the validity of that rule—he was only arguing that it did not apply to the facts of his case.

> 3. The Supreme Court upheld the validity of the warrantless search and seizure of garbage left out for collection. Its decision did not rely upon the surveillance of garbage. *State v. Skola*, 634 N.W.2d 687, 690 (Iowa Ct. App. 2001).
>
> 4. This case is different in that the trash can was not located at or near the curb on a day designated for trash pickup; the trash can was located up near the house and not on a trash pick up day.

MTS (3/5/19) at 1; App. 10. The district court understood that, and it confirmed that Hahn's counsel shared that understanding:

> **THE COURT**: Before the Court begins, I do want to note that, when I read through the motion and the resistance, it looks like some of the areas of the law aren't disputed but maybe this is more of a factual dispute; is that correct?
>
> **DEFENSE**: That is correct, Your Honor.
>
> **THE STATE**: Yes, Your Honor.
>
> **THE COURT**: All right. Just want to make sure everyone is on the same page.

MTS Tr. 4:16–24. Accordingly, its eventual ruling did not mention the Iowa Constitution or resolve any claim about the proper scope of constitutional protections for garbage. Instead, the court explained

that "[t]he parties do not dispute the existing law in this matter, but believe there is only a factual issue in regard to the location of the trash can"—which it resolved, by reviewing the evidence presented, assessing witness credibility, and making findings of fact. *See* MTS Order (10/10/19) at 1–2; App. 16–17.

Hahn argues that error was preserved because his motion to suppress, in the first paragraph, included "Article I, Section 8 of the Iowa Constitution" in its list of authority. *See* Def's Br. at 30 (citing MTS (3/5/19) at 1; App. 10). But his motion cited that provision to argue that Article I, Section 8 of the Iowa Constitution prohibited this seizure and search of his garbage *because* it had not been placed out for collection—he agreed that he had no grounds to challenge "the warrantless search and seizure of garbage left out for collection." *See* MTS (3/5/19) at 1; App. 10. And if Hahn wanted to preserve error for this argument that challenged that point of law, he needed to get a ruling that considered it. *See, e.g.*, *Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012). He did the opposite—he agreed with the court that this was only a factual dispute, and he did not seek a ruling on any argument that resembles the challenge in his appellate brief. *See* MTS Tr. 4:16–24; *see also Boyle v. Alum–Line, Inc.*, 710 N.W.2d 741,

751 n.4 (Iowa 2006) ("When a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal."); *accord State v. Krogmann*, 804 N.W.2d 518, 524 (Iowa 2011) (finding error was not preserved for a constitutional challenge to asset freeze where "Krogmann was aware the district court had failed to rule on his objection to the asset freeze before granting it," but "never sought out the court and requested a ruling on that objection").

This error-preservation issue is analogous to *State v. Grady*, where the Iowa Court of Appeals rejected an attempt to leverage a purely factual challenge into different kind of challenge on appeal.

> Deputy Lee Vellema was on routine patrol during the late night hours. He ran a license plate check of a car that was in front of him and "discovered that the only registered owner of the vehicle was suspended in the State of Iowa." [Based on that, Deputy Vellema initiated a traffic stop. Grady had a valid license, but she was intoxicated.] . . .
>
> Grady moved to suppress any and all evidence seized as a result of the search and seizure because there was no probable cause to stop her car. Grady admitted,
>
> > the arresting officer followed the correct procedures and the applicable law in arresting Ms. Grady. . . .
>
> But she asserted, "unbeknownst to Vellema, Ms. Grady was in fact driving on a valid driver's license but due to a clerical mistake of the Iowa DOT, Vellema was not aware of this." She argued the Iowa DOT's clerical error rendered the traffic stop illegal and, therefore, her rights under article 1,

> section 8 of the Iowa Constitution were violated. Grady's motion to suppress was overruled. The parties agreed to a bench trial on the minutes of testimony. Grady was found guilty as charged. Grady appeals.
>
> Stung by defeat in the district court, Grady abandons her discrete clerical-error argument. On appeal, she rolls out a brand-spanking-new argument asserting "that the investigatory stop of her vehicle lacked the proper predicated reasonable suspicion under the Iowa Constitution because the only information the officer relied upon was the fact that the registered owner of the vehicle has a suspended license without any knowledge of the actual driver of the vehicle." And she asks us to hold "that when an officer only knows that a registered vehicle owner has a revoked license, but has no other factors to stop a vehicle, there is insufficient reasonable suspicion for an investigatory stop under article I, § 8 of the Iowa Constitution." This is not the same song she sung to the district court. Error preservation rules prevent Grady for singing a new song to us. *See State v. Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999) . . . . Our error preservation rules preserve judicial resources by allowing the district court the first opportunity to address an issue. It would be unfair to fault a district court on an issue it never had the opportunity to consider. *See Otterberg v. Farm Bureau Mut. Ins. Co.*, 696 N.W.2d 24, 28 (Iowa 2005); *DeVoss v. State*, 648 N.W.2d 56, 60 (Iowa 2002). . . . Grady did not preserve error on this issue.

State v. Grady, 19–0865, 2020 WL 1049833, at *1 (Iowa Ct. App. Mar. 4, 2020). Just like the constitutional claim in *Grady*, this is a "brand-spanking new argument"—it was not raised or ruled upon during the proceedings below. It is wholly unpreserved, and this Court should decline to consider it.

III. Section 814.7, which prohibits Iowa appellate courts from resolving ineffective-assistance-of counsel claims on direct appeal from a conviction, is constitutional.

Hahn's response to concerns about error preservation is to reframe his challenge as a claim that trial counsel was ineffective for failing to make the constitutional arguments in his brief. But he also recognizes that section 814.7 would prohibit this Court from reaching any ineffective-assistance claim on direct appeal, because judgment was entered after July 1, 2019. *See* Sentencing Order (1/31/20); App. 21; *State v. Damme*, 944 N.W.2d 98, 108–09 (Iowa 2020). Because of that, Hahn argues that section 814.7 is unconstitutional for three reasons: **(1)** it violates separation-of-powers principles; **(2)** it violates the Equal Protection Clause; and **(3)** it violates his due process rights by depriving him of effective assistance of appellate counsel.

A. Reallocating the authority to hear these claims in the first instance is a constitutional exercise of legislative power to prescribe the manner of exercise of jurisdiction.

The Iowa Constitution establishes the Iowa Supreme Court as a tribunal for the correction of errors at law, "under such restrictions as the general assembly may, by law, prescribe." Iowa Const. Art. V, § 4. "[T]he power is clearly given to the General Assembly to restrict this appellate jurisdiction." *See Lampson v. Platt*, 1 Iowa 556, 560 (1855)

(construing pre-1857 version); *accord James v. State*, 479 N.W.2d 287, 290 (Iowa 1991) (citing *Boomhower v. Cerro Gordo County Bd. of Adjustment*, 163 N.W.2d 75, 76 (Iowa 1968)) ("[T]he right of appeal is not an inherent or constitutional right; it is a purely statutory right that may be granted or denied by the legislature as it determines."). Limiting appellate jurisdiction does not violate separation of powers.

Hahn seems to agree that Article V, section 4 of the Iowa Constitution "provides that limitations on the manner of the Court's jurisdiction can be prescribed by the legislature." *See* Def's Br. at 67 (citing Iowa Const. Art. V, § 4). But then, he cites *In re Guardianship of Matejski*, 419 N.W.2d 576, 577 (Iowa 1988) to support his claim that "the legislature cannot deprive the courts of their jurisdiction." *See* Def's Br. at 68 (citing *Matejski*, 419 N.W.2d at 577). This makes no sense because *Matejski* is about Article V, section 6, and it is about the subject matter jurisdiction of *district courts*—not appellate courts. *See Matejski*, 419 N.W.2d at 576–80. That issue is markedly different, because depriving Iowa district courts of subject matter jurisdiction over a class of disputes has the effect of "remov[ing] the present issue from the decisional process provided by our law and judicial system."

See id. at 579.[1] Limits on appellate jurisdiction, where the claim can still be litigated and resolved in a district court, do not implicate the same constitutional text or the same separation-of-powers concerns.

The Iowa Supreme Court has repeatedly held that appellate jurisdiction in Iowa is "statutory and not constitutional." *See State v. Hinners*, 471 N.W.2d 841, 843 (Iowa 1991). If no statute authorizes appeal, this Court cannot acquire or exercise jurisdiction. *See Crowe v. De Soto Consol. Sch. Dist.*, 66 N.W.2d 859, 860 (Iowa 1954) ("It is our duty to reject an appeal not authorized by statute."). Note that those authorizing statutes can be modified, and the authority to hear a particular class of appellate cases "may be granted or denied by the legislature as it determines." *See James*, 479 N.W.2d at 290. Under Iowa's constitutional structure, the role of the judiciary is to decide controversies, but the General Assembly decides which "avenue of appellate review is deemed appropriate"—if any—for each particular kind of case or claim. *See Shortridge v. State*, 478 N.W.2d 613, 615 (Iowa 1991), *superseded by statute on other grounds*.

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[1] Hahn also cites *Schrier v. State*, which is also about Iowa district courts: it explained that "[t]he Iowa district court is a court of general jurisdiction," and is "empowered by the Iowa Constitution to hear all cases in law, equity, or special proceedings." *See Schrier v. State*, 573 N.W.2d 242, 244 (Iowa 1997).

Hahn argues that, "[b]y removing the court's consideration of ineffective-assistance-of-counsel claims, the legislature is intruding on Iowa appellate courts' independent role in interpreting the constitution and protecting Iowans' constitutional rights." *See* Def's Br. at 70. However, section 814.7 does not remove these claims from Iowa courts, or deprive Iowa appellate courts of their eventual role in reviewing rulings that resolve them. Instead, it prescribes a route through the judicial system: such claims must be litigated on PCR and presented to a district court for a ruling. Then, Iowa appellate courts can review that ruling. There is no constitutional usurpation here.

B. Section 814.7 does not violate equal protection. The legislature had a rational basis for drawing a distinction between litigants raising claims where error was preserved, and litigants raising claims where there is no lower court ruling to review.

"To allege a viable equal protection claim, plaintiffs must allege that the defendants are treating similarly situated persons differently." *See State v. Doe*, 927 N.W.2d 656, 662 (Iowa 2019) (quoting *King v. State*, 818 N.W.2d 1, 24 (Iowa 2012)). Hahn argues "section 814.7 has singled out those defendants who were provided ineffective assistance of counsel for disparate treatment." *See* Def's Br. at 72–75. But the real distinction is that Hahn's appeal is being treated differently from

a hypothetical appeal where error was preserved on specific claims that Hahn's counsel declined to raise—but these appeals are different. In that hypothetical appeal, the district court had an opportunity to consider the claim and grant the requested relief. If it did not, the record would contain a ruling that could be reviewed to determine if the district court's analysis was valid or somehow invalid. But Hahn's situation is different: there is no lower court ruling to review yet, nor should there be. *See State v. Trane*, 934 N.W.2d 447, 464 (Iowa 2019) ("Ineffective-assistance claims typically require additional record development. Allowing them to be litigated in posttrial motions would likely delay judgment and sentencing in many cases.").

Hahn argues that his exercise of a fundamental right to counsel is the basis for any distinction, necessitating strict scrutiny. *See* Def's Br. at 73–74. Hahn is incorrect. Section 814.7 draws a distinction between different kinds of *claims*, to reflect different elements and different requirements of proof. Indeed, Hahn could retain any attorney he wanted, switch attorneys if necessary, and contribute to his own defense in whatever way he chose—none of those exercises of his fundamental right to counsel would change the fact that he cannot raise a new claim on direct appeal by alleging ineffective assistance.

In another part of his brief, Hahn quotes *In re Chambers* for the proposition that "[o]nce the right to appeal has been granted, however, it must apply equally to all" and "[i]t may not be extended to some and not to others." *See* Def's Br. at 28 (quoting *In re Chambers*, 152 N.W.2d 818, 820 (Iowa 1967)). Hahn still has a right to appeal from his conviction, and is entitled by statute to an appeal where he can identify alleged errors and urge the appellate court to correct them. But Iowa appellate courts have always recognized a difference between claims where error was preserved and claims where it was not, for practical reasons. *See, e.g.*, *State v. Rutledge*, 600 N.W.2d 324, 326 (Iowa 1999). Indeed, even when failure to preserve error at trial results in forfeiture of an otherwise valid challenge to a first-degree murder conviction, that result *still* does not violate equal protection. *See, e.g.*, *State v. Wright*, No. 16–0275, 2017 WL 1401475, at *1–4 (Iowa Ct. App. Apr. 19, 2017) (explaining legally significant difference between "cases on direct appeal" when *Heemstra* was decided "in which the defendant objected to the felony-murder instruction and those cases in which the defendant did not object to the felony-murder instruction," and reversing grant of relief because "[t]he equal protection clause does not require that these dissimilar cases be treated the same").

Hahn's argument is nothing less than a full-throated attack on the constitutionality of error preservation requirements in Iowa appellate courts. Iowa courts have repeatedly rejected such attacks:

> We have adequate procedure, if followed, to properly determine the constitutional questions involved and there is a legitimate interest and a sound public policy to be served by a procedural rule which requires that the trial court be apprised of the questions of law involved.

State v. Wisher, 217 N.W.2d 618, 620–21 (Iowa 1974); *see also State v. McCright*, 569 N.W.2d 605, 607 (Iowa 1997) ("In short, we do not recognize a 'plain error' rule which allows appellate review of constitutional challenges not preserved at the district court level in a proper and timely manner."). Re-routing these repackaged versions of unpreserved claims to PCR does not violate equal protection.

Finally, Hahn argues that some PCR claims can be decided on direct appeal, if the record is sufficient, so there is no rational basis for section 814.7. *See* Def's Br. at 74–75. But the point is to expedite direct appeals by eliminating the need to consider the issue. Also, it avoids subsequent claims that appellate counsel was ineffective for raising such claims on direct appeal and obtaining a binding ruling, before further record could be built on PCR. *See, e.g.*, *Rodriguez v. State*, No. 15–0991, 2016 WL 4543714, at *2 (Iowa Ct. App. Aug. 31,

2016) ("Rodriguez also claims he received ineffective assistance because appellate counsel raised the issue in the direct appeal, when he did not have expert testimony to support his claims."); *Cortez v. State*, No. 19–0083, 2020 WL 2487951, at *2 (Iowa Ct. App. May 13, 2020) ("As a preliminary matter, we must decide whether the issue was decided on direct appeal because, if it was, Cortez was foreclosed from relitigating it in the postconviction-relief proceeding.").

C. Section 814.7 does not violate any right to effective assistance of counsel. If anything, it makes appellate counsel more effective.

Hahn argues section 814.7 violates due process "by interfering with appellate counsel's ability to effectively represent him." *See* Def's Br. at 75–77. This logic is circular. If there were a constitutional right to litigate any unpreserved claims through an ineffective-assistance framework on direct appeal, then section 814.7 would violate it, and there would be no reason to discuss effectiveness of appellate counsel. But that sort of right does not exist, and appellate counsel cannot be ineffective for not raising a claim that cannot be raised.

Evitts v. Lucey, which was about dismissal of an appeal for counsel's failure to follow appellate rules, is inapposite. *See* Def's Br. at 70–71 (quoting *Evitts v. Lucey*, 469 U.S. 387, 399 (1985)). And *Evitts*

noted that "a postconviction attack on the trial judgment" can provide an alternative route to constitutionally meaningful review of claims that cannot be litigated on direct appeal, by operation of state rules. *See id.* Here, PCR provides that alternative route, satisfying *Evitts*.

Requiring appellate counsel to focus on claims where error was preserved can only improve their effectiveness. Ineffective-assistance claims need not be raised on direct appeal; they are automatically preserved for PCR. *See* Iowa Code § 814.7. But preserved claims *do* need to be renewed on a direct appeal; otherwise, the district court's ruling on those issues becomes binding and subsequent PCR actions cannot resurrect them without establishing "sufficient reason" for not renewing them on direct appeal. *See* Iowa Code § 822.8. Certainly, appellate counsel can make their own strategic and tactical decisions about which claims of error to press on appeal. *See, e.g.*, *Morgan v. State*, 469 N.W.2d 419, 427 (Iowa 1991); *Cuevas v. State*, 415 N.W.2d 630, 633 (Iowa 1987). But it is almost always unproductive to choose unpreserved claims which would have stayed fresh for PCR, in place of preserved claims that will only deteriorate after the appeal ends. And taking ineffective-assistance claims off the table for direct appeal will keep appellate counsel from saddling their clients with binding rulings

that foreclose development of those claims in subsequent PCR actions. *See, e.g.*, *Rodriguez*, 2016 WL 4543714, at *2; *accord Holmes v. State*, 775 N.W.2d 733, 734–35 (Iowa Ct. App. 2009).

Essentially, by directing appellate counsel to focus exclusively on demonstrating error in something that the *lower court did* (rather than something trial counsel did not do), section 814.7 has the effect of re-focusing appellate briefing and argument on the proper subject of the direct appeal and raising the bar for appellate advocacy in Iowa. This neutralizes Hahn's final constitutional argument, and it also offers a bonus benefit to help satisfy rational-basis review.

IV. Hahn's broader challenge under Article I, Section 8 of the Iowa Constitution would fail because placing trash out for collection is an act of intentional abandonment.

Preservation of Error

Error was not preserved, as explained in Division II.

Standard of Review

"Constitutional issues are reviewed de novo, but when there is no factual dispute, review is for correction of errors at law." *State v. Young*, 863 N.W.2d 249, 252 (Iowa 2015). Competing interpretations of the Iowa Constitution are evaluated through "exercise of our best, independent judgment of the proper parameters of state constitutional commands." *See State v. Short*, 851 N.W.2d 474, 490 (Iowa 2014).

Merits

In *Greenwood*, the United States Supreme Court rejected a similar Fourth Amendment challenge to evidence from the seizure and search of curbside trash. *Greenwood* started by observing that "warrantless search and seizure of the garbage bags left at the curb outside the Greenwood house would violate the Fourth Amendment only if respondents manifested a subjective expectation of privacy in their garbage that society accepts as objectively reasonable." *See Greenwood*, 486 U.S. at 39. The *Greenwood* Court assumed, for the sake of argument, that people who placed trash bags out for collection might still have a subjective expectation of privacy in the contents of those trash bags—but that "does not give rise to Fourth Amendment protection . . . unless society is prepared to accept that expectation as objectively reasonable." *See id.* at 39–40. The biggest problem was that the defendants had "placed their refuse at the curb for the express purpose of conveying it to a third party, the trash collector," and had no expectation of control over whether that third party "sorted through respondents' trash or permitted others, such as the police, to do so." *See id.* at 40. But it was not just garbage collectors who were known to have access to a trash can at the curb—it was

"common knowledge" that any garbage in curbside trash cans is "readily accessible to animals, children, scavengers, snoops, and other members of the public." *See id.* (footnotes omitted). Indeed, the garbage was removed from the house and placed outside "for the express purpose of having strangers take it"—which meant that any expectation of privacy in those garbage bags was necessarily forfeited or rendered unreasonable. *See id.* at 40–41 (quoting *United States v. Reicherter*, 647 F.2d 397, 399 (3d Cir. 1981)).

Greenwood is still good law, even after *United States v. Jones* held that evidence obtained as a result of a common-law trespass was obtained in violation of the Fourth Amendment. *See United States v. Jones*, 565 U.S. 400, 406–11 (2012). Hahn argues that, even under the Fourth Amendment, this was impermissible because the deputies committed two acts of trespassing: they "opened his closed garbage can when it was located in his yard on his own private property," and "then removed and opened a second closed contained: the garbage bag." *See* Def's Br. at 43–46. Those acts would each be common-law trespass—if not for the fact that the garbage bags were placed out for collection, in trash cans that had been placed at the curbside to enable collection. The Seventh Circuit Court of Appeals has recognized the difference:

> If the garbage is placed at the curb, the public has ready access to it from the street, and in fact can be expected to utilize that ability. On the other hand, garbage cans placed next to the house or the garage are not so accessible to the public that any privacy expectations are objectively unreasonable.

United States v. Hedrick, 922 F.2d 396, 400 (7th Cir. 1991). Because the collection of garbage bags from curbside garbage cans is conduct that is "explicitly or implicitly permitted by the homeowner," without much concern about who happens to collect it, this is not a trespass—just as garbage collectors are not trespassing when they do the same, each and every week. *See Florida v. Jardines*, 569 U.S. 1, 6–8 (2013); *accord United States v. Jackson*, 728 F.3d 367, 373–74 (4th Cir. 2013).

The Maryland Court of Appeals noted that this approach has the benefit of affording some expectation of privacy in garbage cans *until* they are placed in publicly accessible areas for pickup. *See State v. Sampson*, 765 A.2d 629, 635 (Md. 2001). But whenever "the trash is placed for collection at a place that is readily accessible, and thus exposed, to the public, the person has relinquished any reasonable expectation of privacy" to the point where "it matters not whether that area is technically within or without the boundary of the curtilage." *See id.* at 636. Any curtilage-based approach would ignore the reality that people place their garbage cans to *enable* public access, for collection:

> To suggest that the concept of curtilage has any meaning to people in the context of placing their trash for collection is absurd. They put their trash containers where they must put them if they wish the collector to take them. If there is no sidewalk or curb, the containers are likely to be placed on the lawn, close to the street or alley; if there is a strip between a sidewalk and the street, they are likely to be placed there; if the street immediately abuts a sidewalk, they may well be placed, as respondent did, on the lawn at the edge of the sidewalk, to avoid obstructing pedestrian traffic on the sidewalk. If there is a common area serving several residential units, they will be placed in that area. We have been referred to no empirical evidence that people have different privacy expectations depending on whether the place they put their trash for collection is within or without what, in hindsight, a court later finds to be the curtilage. Nor would it be reasonable to give credence to any such different expectations.

Id.; *see also State v. Fisher*, 154 P.3d 455, 472 (Kan. 2007) (focusing on "whether the garbage was so readily accessible to the public that its contents were exposed to the public for Fourth Amendment purposes"); *accord United States v. Long*, 176 F.3d 1304, 1308 (10th Cir. 1999); *People v. Hillman*, 834 P.2d 1271, 1277 (Colo. 1992). The core holding from *Greenwood*—that placing a garbage bag in a curbside trash can forfeits any reasonable expectation of privacy in its contents because it is placed there "for the express purpose of having strangers take it"—is unaffected by *Jones* or *Jardines*, because that act of abandonment is an open invitation for anyone to collect and remove that trash. *See Greenwood*, 486 U.S. at 40–41 (quoting *Reicherter*, 647 F.2d at 399).

Understandably, Hahn's focus is on the Iowa Constitution. He urges the Iowa Supreme Court to hold that Article I, Section 8 of the Iowa Constitution prohibits police from seizing and inspecting trash that was put out for collection, because (in Hahn's view) it violates objectively reasonable expectations of privacy. *See* Def's Br. at 46–60.

For a claim under Article I, Section 8 of the Iowa Constitution, "an individual challenging the legality of a search has the burden of showing a legitimate expectation of privacy in the area searched" that is also "one that society considers reasonable." *See State v. Lowe*, 812 N.W.2d 554, 567 (Iowa 2012) (quoting *State v. Fleming*, 790 N.W.2d 560, 564 (Iowa 2010)). That contains two distinct inquiries: Hahn must establish "(1) a subjective expectation of privacy and (2) this expectation of privacy was [objectively] reasonable." *State v. Brooks*, 888 N.W.2d 406, 411 (Iowa 2016) (quoting *State v. Tyler*, 867 N.W.2d 136, 168 (Iowa 2015)). Hahn does not push for adoption of a different approach under Article I, Section 8. Instead, he argues that there is an objectively reasonable expectation of privacy in trash that has been placed in garbage bags, and he urges this Court to reject the premise that potential *future* acts that would expose his garbage to the public could negate a *present* expectation of privacy. *See* Def's Br. at 52–53.

Hahn's argument is unpersuasive because placing garbage out for collection is a *present* act of abandonment—his act of placing the garbage out at the curbside, where anyone could remove it without notifying him or causing any concern, is the act that transforms that property from private to abandoned. A person has no real expectation of privacy in abandoned property, because anyone may take it. *See Greenwood*, 486 U.S. at 40–41 (quoting *Reicherter*, 647 F.2d at 399); *accord United States v. Dunkel*, 900 F.2d 105, 106–07 (7th Cir. 1990) ("Someone who tosses documents into a dumpster to which hundreds of people have ready access has no legitimate expectation of privacy in the dumpster or its contents."), *vacated on other grounds*, 498 U.S. 1043 (1991). Abandonment relinquishes any expectations of privacy.

The *Greenwood* dissent said that the majority opinion "rejects the State's attempt to distinguish trash searches from other searches on the theory that trash is abandoned and therefore not entitled to an expectation of privacy." *See id.* at 51 (Brennan, J., dissenting). But the majority opinion did no such thing. There is a footnote in the dissent that criticizes the majority for citing cases that "rely entirely or almost entirely on an abandonment theory that, as noted *infra*, at 1629, the Court has discredited." *See id.* at 49 n.2. But nothing like that appears

in the majority opinion—least of all at page 1629, where it stated that "respondents could have had no reasonable expectation of privacy in the inculpatory items that they discarded." *Id.* at 41 (majority opinion); *see also United States v. Redmon*, 138 F.3d 1109, 1119 (7th Cir. 1998) (Coffey, J., concurring) (observing that *Greenwood* "never expressly, nor impliedly for that matter, rejected the abandonment theory," and that "[t]ry as one might, no one is able to point to a single passage in the *Greenwood* majority opinion that suggests otherwise"); *Redmon*, 138 F.3d at 1125–26 (Flaum, J., concurring) ("In fact, the page cited by Justice Brennan for this proposition demonstrates that abandonment was an important component of the [majority opinion]'s holding that Greenwood's garbage was readily accessible."); *United States v. Scott*, 975 F.2d 927, 930 n.1 (1st Cir. 1992). The key to *Greenwood*'s rationale is that police had seized and searched garbage that was (1) abandoned, and (2) in a publicly accessible space, where it was "common sense" that any needy vagabond or hungry animal could scrounge through it, once the owner had effectively disclaimed any interest in its contents. *See Greenwood*, 486 U.S. at 41–42 (stating "conclusion" that "society would not accept as reasonable respondents' claim to an expectation of privacy in trash left for collection in an area accessible to the public").

The point that the *Greenwood* dissent wanted to make was that, by analyzing whether there was a reasonable expectation of privacy in abandoned items that were put in trash bags and put out for collection, the majority opinion implicitly concluded that abandonment *alone* is not enough to render the Fourth Amendment inapplicable, by its text; it rejects suggestions that "their . . . effects" should be read to require an ongoing possessory interest in the property. *See id.* at 51 (quoting *California v. Rooney*, 483 U.S. 307, 320 (1987) (White, J., dissenting)). But that is different from disclaiming the significance of abandonment in determining whether any subsequent assertion of privacy interests is authentic or reasonable. *See Rooney*, 483 U.S. at 322–23 (White, J., dissenting) (finding no reasonable expectation of privacy in property because respondent had "exposed his betting papers to the public by depositing them in a trash bin which was accessible to the public," and where "he no longer exercised control over them"). Putting trash out for collection in publicly accessible areas is a *unique* abandonment that forecloses any reasonable expectation of privacy in its contents. *See id.* at 321–22 (noting "[i]t is common knowledge that trash bins and cans are commonly visited by animals, children, and scavengers looking for valuable items, such as recyclable cans and bottles, and

serviceable clothing and household furnishings," which means that "any expectation of privacy respondent may have had in the contents of the trash bin was unreasonable"); *accord Greenwood*, 486 U.S. at 40–41 (majority opinion); *Henderson*, 435 N.W.2d at 396 (quoting and incorporating *Greenwood*'s discussion of "common knowledge").

Because abandonment of property is a critical ingredient in *Greenwood*'s holding, recent decisions on the third-party doctrine have limited relevance. *See, e.g.*, *Carpenter v. United States*, 138 S.Ct. 2206 (2018). Hahn relies on the *Greenwood* dissent's observation that entrusting a letter to a postal carrier does not cause the sender to lose any reasonable expectation of privacy in the contents of the letter. *See* Def's Br. at 54–55 (quoting *Greenwood*, 486 U.S. at 55 (Brennan, J., dissenting)). But society has markedly different expectations for that mail carrier: it is reasonable to expect a postman to deliver a letter to its intended recipient without reading it (or letting anyone else read it), but there is no expectation that garbage collectors will maintain any privacy or confidentiality in the garbage that is "entrusted" to them. Sending a letter does not abandon it—the sender seals the envelope, entrusts it to a mail carrier, and expects it to be opened by a recipient (and nobody else). Unsurprisingly, the United States Supreme Court

has always recognized that letters in the mail are "intended to be kept free from inspection" and are "as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles." *See Ex parte Jackson*, 96 U.S. 727, 732–33 (1877); *accord United States v. Jacobsen*, 466 U.S. 109, 114 (1984) ("Letters and other sealed packages [in transit] are in the general class of effects in which the public at large has a legitimate expectation of privacy; warrantless searches of such effects are presumptively unreasonable."). But when a letter arrives, the sender loses any privacy interest in its contents, because they have given the letter away to the ultimate recipient. *See United States v. Dunning*, 312 F.3d 528, 531 (1st Cir. 2002) ("[I]f a letter is sent to another, the sender's expectation of privacy ordinarily terminates upon delivery."); Wayne R. LaFave, 6 *Search & Seizure* § 11.3(f), at n.441 (updated Oct. 2019) (collecting similar cases). Trash is already "given away" when placed at the curb for collection—unlike a sealed letter, it is *abandoned* to third parties, not *entrusted* to them.

The chief problem with *Greenwood*'s dissent is that it ignores the critical distinction between a reasonable expectation of privacy in property that is *entrusted* to third parties for safekeeping or transfer

to an intended recipient, and the common understanding that items lose their private character when *abandoned* to third parties as junk. The New Jersey Supreme Court made the same mistake in *Hempele*, which Hahn cites. *See State v. Hempele*, 576 A.2d 793 (N.J. 1990); Def's Br. at 57. Other courts have recognized the critical distinction:

> When one "relinquishes possession" of mail to the postal service, it is with the implicit understanding that it will be delivered safely and unopened to the addressee or, if delivery cannot be effected, returned unopened to the sender. We are unaware of any custom or practice wherein citizens expect that their trash be returned to them in the event that the trash collector finds the landfill closed. While we could write pages pointing out the defects in the mail-garbage analogy, . . . we decline to join those who see no significant difference between the garbage and the mail.

People v. Stage, 785 N.E.2d 550, 552 (Ill. Ct. App. 2003); *see also State v. Ranken*, 25 A.3d 845, 860 (Del. Super. Ct. 2010) ("This Court declines to equate the protected contents of a federally protected mailbox to the contents of a garbage bag or can on the curb."), *aff'd sub nom. Ranken v. State*, 21 A.3d 597 (Del. 2011). And comparisons to expectations of privacy in the words spoken during telephone calls and contents of bank records have also been rejected as inapposite:

> Hillman urges this court to follow two distinct lines of authority interpreting article II, § 7, in the contexts of numbers dialed from a telephone and of bank records, wherein we recognized expectations of privacy in transactions involving third parties. . . . We find that these

> lines of authority are distinguishable and thus do not govern the instant case because individuals do not generally know that *members of the public* might inspect or snoop in and around their telephone or bank records.

Hillman, 834 P.2d at 1277 n.14. Even after Colorado emphatically rejected the third-party doctrine under the analogous provision of its state constitution, that did not compel the Colorado Supreme Court to find a subjective or objectively reasonable expectation of privacy in trash that had been left out for collection in publicly accessible spaces. *See id.* at 1276–77 & n.14. Property that is entrusted to another party for safekeeping can potentially remain private, but property that has been discarded in curbside garbage cans for collection is abandoned—in every possible sense of the word. *See State v. Schmalz*, 744 N.W.2d 734, 741 (N.D. 2008) (quoting *State v. Rydberg*, 519 N.W.2d 306, 310 (N.D. 1994)) ("By placing her garbage on or against the public alley, where it was exposed to the general public, and with the express purpose of abandoning it to the trash collector, Rydberg waived any privacy interest she may have had in the garbage."); *see also People v. Huddleston*, 347 N.E.2d 76, 80–81 (Ill. Ct. App. 1976) ("When defendant placed the trash at curbside for collection, he relinquished control and possession and abandoned it in the sense that he demonstrated an unequivocal intention to part with it forever.").

Such an act of abandonment is inconsistent with any ongoing expectations of privacy. "Implicit in the concept of abandonment is a renunciation of any 'reasonable' expectation of privacy in the property abandoned." *See Huddleston*, 347 N.E.2d at 80 (quoting *United States v. Mustone*, 469 F.2d 970, 972 (1st Cir. 1972)). "When individuals voluntarily abandon property, they forfeit any expectation of privacy in it that they might have had." *See United States v. Thomas*, 864 F.3d 843, 645 (D.C. Cir. 1989) (quoting *United States v. Jones*, 707 F.2d 1169, 1172 (10th Cir. 1983)). Indeed, abandoning trash by taking it to the curb for collection is usually a renunciation of *any* expectations about what will happen to those specific items. There is a general lack of knowledge or concern about the identity of garbage collectors, the specific landfills where local trash is taken, and the sorting processes used before final disposal. "The owner wants and expects the trash to go away, and who removes it is normally a matter of indifference." *See Litchfield v. State*, 824 N.E.2d 356, 363 (Ind. 2005). Most courts find such abandonment relinquishes any remaining expectation of privacy. *See, e.g.*, *Abel v. United States*, 362 U.S. 217, 241 (1960) ("[P]etitioner had abandoned these articles. He had thrown them away. So far as he was concerned, they were bona vacantia. There can be nothing unlawful

in the Government's appropriation of such abandoned property."); *United States v. Veatch*, 674 F.2d 1217, 1220 (9th Cir. 1981) ("[U]pon abandonment, the party loses a legitimate expectation of privacy in the property and thereby disclaims any concern about whether the property or its contents remain private."); *State v. Fassler*, 503 P.2d 807, 814 (Ariz. 1972) (quoting *United States v. Jackson*, 448 F.2d 963, 971 (9th Cir. 1971)) ("When defendants placed articles in this public trash can outside the room, they surrendered their privacy with regard to those articles."). The Wyoming Supreme Court said it plainly:

> Mr. Barekman placed the trash in the barrel for it to be taken away and deposited in the city landfill. Other than placing his trash in a bag as the collector required, Mr. Barekman took no precautions to keep his trash private. Under these circumstances, it is difficult for us to conclude that he had either an actual subjective expectation of privacy or a reasonable expectation of privacy that society is prepared to recognize. . . .
>
> [. . .]
>
> [O]nce Mr. Barekman placed his trash in the barrel at the curb on the public roadway for someone else to take it away, he evidenced the intent to relinquish any expectation of privacy he had in the contents.

Barekman v. State, 200 P.3d 802, 808–09 (Wyo. 2009).

In this case, that abandonment is the only probative evidence of Hahn's subjective expectations. In the State's view, that is sufficient to foreclose any claim that he held a subjective expectation of privacy.

Abandonment is also probative as to whether expectations of privacy in curbside trash would be objectively reasonable, by the same logic. *See Blue Pickup*, 116 P.3d at 804–05 ("[S]ociety's experience with trash left at the alley or curb for collection is anything but consistent with an objective expectation of privacy."). Shared attitudes and expectations about curbside trash are informed by the common understanding that any garbage awaiting collection is abandoned. That is why people leave their garbage bins unguarded in publicly accessible spaces; it is why people are generally unconcerned that third parties will collect their garbage and will never return it to them or report back on its status; and it is why people readily accept that materials in their garbage will be sorted and used for the public good.

Hahn takes refuge in the idea that plastic garbage bags are usually opaque, and he argues that they are evidence of a subjective expectation of privacy because an observer cannot see through them. *See* Def's Br. at 55–56. This record does not actually indicate whether Hahn's garbage bags were opaque or transparent. More importantly, nobody uses trash bags in their homes as a way to preserve privacy—people use trash bags as a convenient way to transfer garbage without handling any unsavory contents or leaving any putrid residue behind.

Opaque trash bags are typically marketed and bought for *durability*; opacity is often both a by-product of multiple layering of materials and a signal to consumers that bags are thick enough to resist any strain or puncture. *See Hempele*, 576 A.2d at 818–19 (Garibaldi, J., dissenting) (noting that concerns about condition of garbage bags in curbside trash cans are "less, I suspect, for privacy reasons, than for the inconvenience of having the contents of their garbage strewn on the sidewalk in front of their residence"). Finally, abandoning trash inside a bag is *still* abandoning it, relinquishing all privacy interests.

> When plastic trash containers and their contents are picked up by the collector and carted to a public waste disposal area, common experience teaches that the former owner obtains no implicit assurance that the trash will remain inviolate or free from examination. Indeed, once the trash is discarded the former owner rarely has any further interest in it other than to be assured that it will not remain at his doorstep. . . . We do not view the mere use of taped opaque containers as indicating an intent to retain a privacy interest; these containers, apparently the most commonly-available type sold, are obviously designed to assure tidiness in appearance rather than privacy.

United States v. Terry, 702 F.2d 299, 309 (2d Cir. 1983). And even when placed inside opaque trash bags, any trash awaiting collection at the curbside is necessarily left exposed to forces of nature and to members of the public—which means, in common experience, it is reasonable to expect it might be taken, picked through, or scattered.

> While garbage bags oftentimes remain intact until their contents are collected by a designated hauler, it is also common to see homeless people, stray pets and wildlife, curious children, and scavengers rummaging through trash set out for collection, in hope of finding food, salvageable scrap, or deserted treasure. The wind and the elements are also factors, particularly in Montana. Routinely, cans are knocked over, bags are exposed to the predations of dogs and raccoons, and garbage is found strewn across streets and alleyways.

Blue Pickup, 116 P.3d at 804–05; *see also State v. Donato*, 20 P.3d 5, 8 (Idaho 2001) ("Whether in rural or suburban Idaho or New York City, garbage left at the curb for collection, outside the curtilage of a home, faces the same intrusion by neighbors, dogs, and children, and is turned over to a third party to be placed in a dump accessible to the public. The rural nature of Idaho does not change the analysis."); *accord Beltz v. State*, 221 P.3d 328, 334 (Alaska 2009).

If common knowledge and experience forecloses any reasonable expectation of privacy in curbside garbage, and leads ordinary people to treat occasional scavenging or exposure as mundane occurrences, that ends the inquiry: the garbage is not private. Police need not wait around for a raccoon, a child, a gust of wind, a recycling enthusiast, or a student driver—the garbage bin is publicly accessible and is located in a publicly accessible place, so police may access it. Courts reject the premise that something can be public, except as to law enforcement:

> When the defendant placed his garbage at the curb in front of his house for collection by the garbage collector, a myriad of intruders, purposeful or errant, could legally have sorted through his garbage. . . . It is also a matter of common knowledge that garbage placed at the curb is subject to intrusion by a variety of people, with a variety of purposes, including bottle and coupon collecting, antique hunting, food searching and snooping. Finally, we regard it to be common knowledge among citizens of this state that dogs, raccoons, or other creatures may intrude upon and expose the contents of garbage that has been placed for collection in an accessible area.
>
> In light of our recognition of these potential intrusions on garbage placed at the curb for collection, the defendant's argument for state constitutional protection against police searches of his garbage devolves into an argument that a person may harbor different expectations of privacy, all of which are reasonable, as to different classes of intruders. We cannot countenance such a rule. A person's reasonable expectations as to a particular object cannot be compartmentalized so as to restrain the police from acting as others in society are permitted or suffered to act. . . . A person either has an objectively reasonable expectation of privacy or does not; what is objectively reasonable cannot, logically, depend on the source of the intrusion on his or her privacy.

State v. DeFusco, 620 A.2d 746, 751–53 (Conn. 1993); *see also State v. McMurray*, 860 N.W.2d 686, 695 (Minn. 2015) (holding that, under Article I, Section 10 of the Minnesota Constitution, "a person has no reasonable expectation of privacy in garbage set out for collection on the side of a public street because such garbage is readily accessible to scavengers and other members of the public" and rejecting argument that local anti-scavenging ordinances created any other expectation).

Expectations of privacy are developed "either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Rakas v. Illinois*, 439 U.S. 128, 144 n.12 (1978). Curbside trash is known to be publicly accessible. As a result, "[t]he vast majority of courts have ruled that when garbage is located in a place accessible to the public, the individual who placed that garbage for collection either abandoned it or has no reasonable expectation of privacy therein, thus rendering any search and seizure of that trash lawful." *Rikard v. State*, 123 S.W.3d 114, 120 (Ark. 2003) (quoting Kimberly J. Winbush, *Searches and Seizures: Reasonable Expectation of Privacy in Contents of Garbage or Trash Receptacle*, 62 A.L.R. 5th 1 (1998)); *see also Barekman*, 200 P.3d at 808 & n.2 (noting that "[a] majority of state courts have reached this conclusion under their own constitutions"); *accord Cooks v. State*, 699 P.2d 653, 656 (Okla. Ct. Crim. App. 1985) ("We join those other jurisdictions holding curbside trash is abandoned property, over which appellant has no reasonable expectation of privacy."). Because Hahn's trash was abandoned for collection in a publicly accessible alley—where anyone could view it, expose it to public view, scavenge through it, or seize it—any expectation of privacy in its contents would be unreasonable.

To remain private, an item must be kept private—which means that, as a necessary precondition, it must be kept. *See, e.g.*, *Schmalz*, 744 N.W.2d at 741 (quoting *Rydberg*, 519 N.W.2d at 310) (explaining that disposal of garbage through public collection "waived any privacy interest she may have had in the garbage."). Abandonment of garbage for curbside collection effectively relinquishes any real expectation of control over what happens to it. That occurred at the moment that Hahn put that garbage bag in the trash can and left it at the alleyway. He may have presumed that it would be collected by someone who was employed by the municipal trash contractor—but he did not have any objectively reasonable expectation that it would remain shielded from anyone else who could walk down that alleyway and look at what he was abandoning into the public waste disposal stream. *See Skola*, 634 N.W.2d at 690 (quoting *Henderson*, 435 N.W.2d at 396–97). Thus, if this Court reaches this unpreserved and unreachable claim, it should hold that Hahn's broader challenge under Article I, Section 8 would have been meritless, and his trial counsel was not ineffective for declining to raise this challenge below.

CONCLUSION

The State respectfully requests that this Court reject Hahn's challenges and affirm his convictions.

REQUEST FOR NONORAL SUBMISSION

This case should be set for nonoral submission. In the event argument is scheduled, the State asks to be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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