ELECTRONICALLY FILED JUN 05, 2020 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	S.CT. NO. 19-1760
	)	
PRINCE G. PAYE,	)	
	)	
Defendant-Appellant.	)	

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY HONORABLE KEVIN PARKER
(MOTION TO SUPPRESS) AND CHRISTOPHER KEMP
(TRIAL AND SENTENCING), JUDGES

APPELLANT'S BRIEF AND ARGUMENT
AND REQUEST FOR ORAL ARGUMENT

MARTHA J. LUCEY
State Appellate Defender

STEPHAN J. JAPUNTICH
Assistant Appellate Defender
sjapuntich@spd.state.ia.us
appellatedefender@spd.state.ia.us

STATE APPELLATE DEFENDER'S OFFICE
Fourth Floor Lucas Building
Des Moines, Iowa 50319
(515) 281-8841 / (515) 281-7281 FAX
ATTORNEYS FOR DEFENDANT-APPELLANT FINAL

CERTIFICATE OF SERVICE

On the 5th day of June, 2020, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Prince Paye, 2462 NW 152nd Street, Clive, IA 50325.

APPELLATE DEFENDER'S OFFICE

/s/ Stephan J. Japuntich

STEPHAN J. JAPUNTICH
Assistant Appellate Defender
sjapuntich@spd.state.ia.us
appellatedefender@spd.state.ia.us
State Appellate Defender's Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841

SJ/lr/2/20
SJJ/ls/05/20

TABLE OF CONTENTS

Page

Certificate of Service 2

Table of Authorities 4

Statement of the Issues Presented for Review 11

Routing Statement 19

Statement of the Case 20

Argument

I. The district court erred in denying Paye's motion to suppress; as neither reasonable suspicion, nor probable cause, existed to justify the stop of his vehicle as there was no traffic violation 26

II. Counsel was ineffective for failing to assert that Iowa code § 321.38 is unconstitutionally vague as it fails to provide notice of the prohibited conduct and is conducive to arbitrary and discriminatory enforcement 42

Conclusion 67

Request for Oral Argument 68

Attorney's Cost Certificate 68

Certificate of Compliance 69

TABLE OF AUTHORITIES

Cases: Page:

AFSCME Council No. 61 v. State, 928 N.W.2d 21 (Iowa 2019) 41

Baker v. State, 164 So.3d 151 (2015) 30

Breedlove v. State, 310 Kan. 56, 445 P.3d 1101 (2019) 48

City of Chicago v. Morales, 527 U.S. 41, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) 61

Douglas v. People of State of Cal., 372 U.S. 353, 83 S.Ct. 814 (1963) 51

Ellis v. State, 591 So. 2d 574 (Ala. Crim. App. 1991) 48

Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985) 49-51

Franklin v. Bonner, 207 N.W. 778 (Iowa 1926) 54

Gates v. State, 6298 Ga. 324, 781 S.E.2d 772 (2016) 48

Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) 49

Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585 (1956) 51

In re Chambers, 152 N.W.2d 818 (Iowa 1967) 57

In re Durant Comm. Sch. Dist., 106 N.W.2d 670 (Iowa 1960) 55

In re Guardianship of Matejski, 419 N.W.2d 576
(Iowa 1988) 55

Iowa Comprehensive Petroleum Underground Storage
Tank Fund Bd. v. Shell Oil Co.,
606 N.W.2d 376 (Iowa 2000) 34

Jones v. Barnes, 463 U.S. 745 (1983)................................ 56

Kimmelman v. Morrison, 477 U.S. 365,
106 S.Ct. 2574 (1986) 49

Klouda v. Sixth Judicial Dist. Dept. of Correctional
Services, 642 N.W.2d 255 (Iowa 2002)............................... 52

Laird Brothers v. Dickerson, 40 Iowa 665 (1875)................ 55

McKane v. Durston, 153 U.S. 684 (1894) 56

Medina v. California, 505 U.S. 437,
112 S.Ct. 2572 (1992) 49

Parks v. State, 2011 WY 19, 247 P.3d 857 (2011).............. 31

Planned Parenthood of the Heartland v. Reynolds ex rel.
State, 915 N.W.2d 206 (Iowa 2018) 53, 58-59

Redmond v. Ray, 268 N.W.2d 849 (Iowa 1978) 38

Schrier v. State, 573 N.W.2d 242 (Iowa 1997)..................... 55

State v. Allison, 576 N.W.2d 371 (Iowa 1998) 44

State v. Ambrose, 861 N.W.2d 550 (Iowa 2015) 58

State v. Brown, 930 N.W.2d 840 (Iowa 2019)................... 63-64

State v. Bueso, 225 N.J. 193, 137 A.3d 516 (2016)............. 48

State v. Cline, 617 N.W.2d 277 (Iowa 2000)........................ 65

State v. Coleman, 890 N.W.2d 284 (Iowa 2017) 28

State v. Freeman, 705 N.W.2d 286 (Iowa 2005) 28

State v. Gillespie, 530 N.W.2d 446 (Iowa 1995)................... 65

State v. Halverson, 857 N.W.2d 632 (Iowa 2015) 42

State v. Harrison, 846 N.W.2d 362 (Iowa 2014) 35-36

State v. Hoskins, 711 N.W.2d 720 (Iowa 2006) 28

State v. Hunter, 550 N.W.2d 460 (Iowa 1996).................. 60-61

State v. Johns, 454 P.3d 692 (2019).................................. 48

State v. Jones, 666 N.W.2d 142 (2003).............................. 38

State v. Lucas, 323 N.W.2d 228 (Iowa 1982)...................... 42

State v. McAdams, 594 A.2d 1273 (N.H. 1991) 48

State v. Musser, 721 N.W.2d 734 (Iowa 2006) 60, 62

State v. Nail, 743 N.W.2d 535 (Iowa 2007).......................... 60

State v. Naujoks, 637 N.W.2d 101 (Iowa 2001) 27

State v. Ochoa, 792 N.W.2d 260 (Iowa 2010)................. 42, 66

State v. Ortiz, 789 N.W.2d 761 (Iowa 2010) 43

State v. Pals, 805 N.W.2d 767 (Iowa 2011) 26, 29

State v. Phillips, 610 N.W.2d 840 (Iowa 2000) 52

State v. Predka, 555 N.W.2d 202 (Iowa 1996) 28

State v. Reed, 618 N.W.2d 327 (Iowa 2000) 61

State v. Risdal, 404 N.W.2d 130 (Iowa 1987) 43

State v. Robinson, 618 N.W.2d 306 (Iowa 2000) 60-61

State v. Rosensteil, 473 N.W.2d 59 (Iowa 1991) 65

State v. Rutledge, 600 N.W.2d 324 (Iowa 1999) 48

State v. Schoelerman, 315 N.W.2d 67 (Iowa 1982)............. 44

State v. Tague, 676 N.W.2d 197 (Iowa 2004) 29

State v. Tobin, 333 N.W.2d 842 (Iowa 1983) 27

State v. Tregeagle, 161 Idaho 763, 391 p.3d 21
(Ct. App. 2017) 31

State v. Truesdell, 679 N.W.2d 611 (Iowa 2004) 47, 51

State v. Tyler, 830 N.W.2d 288 (Iowa 2013) 29-30, 32, 35

State v. Vance, 790 N.W.2d 775 (Iowa 2010) 28-29, 44

State v. Wilkes, 756 N.W.2d 838 (Iowa 2008)...................... 27

State v. Worley, 836 S.E.2d 278 (Ct. App. 2019)................ 48

State v. Yaw, 398 N.W.2d 803 (Iowa 1987) 43

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) 44

Terry v. Ohio, 392 U.S. 1 (1968) 29

U.S. v. Cronic, 466 U.S. 648, 104 S.Ct. 2039 (1984) 50

U.S. v. Verdugo-Urquidez, 494 U.S. 259, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990) 66

Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009) 57

Waldon v. District Court of Lee County, 130 N.W.2d 728 (Iowa 1964) 57

Whren v. United States, 517 U.S. 806 (1996) 28

Wiborg v. U.S., 163 U.S. 632, 16 S.Ct. 1127, 41 L.Ed. 289 (1896) 46, 51

Wissenberg v. Bradley, 229 N.W. 205 (Iowa 1929) 56

Constitutional Provisions:

Iowa Const. art. I § 6 41

Iowa Const. art. I § 8 .... 26-27, 38

Iowa Const. art. I § 9 49

Iowa Const. art. I, § 10 58

Iowa Const. art. I § 24 38

Iowa Const. art. V, § 1 53

Iowa Const. art. V, § 4 54-55

Iowa Const. art. V, § 6 54

Iowa Const. art. XII, § I 37

U.S. Const. amend. IV 26-27, 38

U.S. Const. amend. VI 58

U.S. Const. amend XIV 26, 49, 58

Statutes and Court Rules:

Iowa Code § 321.166(2) 36

Iowa Code § 321.38 (2019) 30-32, 34-35, 40, 62-64

Iowa Code § 321.37(3) (2019) 36

Iowa Code § 602.4102(2) (2019)... 57

Iowa Code § 808.3 (2019) 65

Iowa Code § 808.4 (2019) 65

Iowa Code § 814.7 (2019) 27, 45, 50-52

Iowa R. Evid. 5.102 (2020) 47

Other State Statutes:

Fla. Stat. § 316.605(1) (2015) 30, 63

Idaho Code § 49-428(2) (2017)... 30

Other Authorities:

ABA Standards for Criminal Justice: Prosecution Function and Defense Function 4-1.2(e), at 120–21 (3d ed.1993) 44

Marc M. Arkin, Rethinking the Constitutional Right to an Appeal, 39 UCLA L. Rev. 503 (1992) 56

Black's Law Dictionary 517 (6th ed.1990) 34

Ex Parte Pritz, 9 Iowa 30 (1858) 38

Fed. Rules Crim. Proc. 52 46

Fed. Rules Evid. 103(e) (2020) 46

https://census.gov/search-results.html?q=population+by+state&search.x=0&search.y=0&page=1&stateGeo=&searchtype=web 38-39

https://www.fhwa.dot.gov/policyinformation/statistics/2012/mv9.cfm 39

Wesley MacNeil Oliver, With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling, 74 Tul. L. Rev. 1409 (2000) 63

Oxford Pocket Dictionary and Thesaurus 901 (American Ed. 1997) 62

Cassandra Burke Robinson, The Right to Appeal, 91 N.C.L.Rev. 1219 (2013) 56

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. WHETHER THE DISTRICT COURT ERRED IN DENYING PAYE'S MOTION TO SUPPRESS AS NEITHER REASONABLE SUSPICION, NOR PROBABLE CAUSE, EXISTED TO JUSTIFY THE STOP OF HIS VEHICLE?

Authorities

State v. Pals, 805 N.W.2d 767, 771 (Iowa 2011)

State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1983)

Iowa Code § 814.7 (2019)

U.S. Const. amend. IV

Iowa Const. art. I § 8

State v. Naujoks, 637 N.W.2d 101, 107 (Iowa 2001)

State v. Wilkes, 756 N.W.2d 838 (Iowa 2008)

State v. Predka, 555 N.W.2d 202, 205 (Iowa 1996)

Whren v. United States, 517 U.S. 806, 810 (1996)

State v. Coleman, 890 N.W.2d 284, 287-88 (Iowa 2017)

State v. Hoskins, 711 N.W.2d 720, 726 (Iowa 2006)

State v. Freeman, 705 N.W.2d 286, 297 (Iowa 2005)

State v. Vance, 790 N.W.2d 775, 781 (Iowa 2010)

Terry v. Ohio, 392 U.S. 1, 21 (1968)

State v. Tyler, 830 N.W.2d 288, 293 (Iowa 2013)

State v. Tague, 676 N.W.2d 197, 201

Baker v. State, 164 So.3d 151, 154 (2015)

Fla. Stat. § 316.605(1) (2015)

Iowa Code § 321.38 (2019)

Idaho Code § 49-428(2) (2017)

State v. Tregeagle, 161 Idaho 763, 767-68, 391 p.3d 21, 25-26 (Ct. App. 2017)

Parks v. State, 2011 WY 19, 247 P.3d 857 (2011)

1. There was no traffic offense warranting the stop of Paye's vehicle

Iowa Code § 321.38 (2019)

State v. Tyler, 830 N.W.2d 288, 294 (Iowa 2013)

Black's Law Dictionary 517 (6th ed.1990)

Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Shell Oil Co., 606 N.W.2d 376, 380 (Iowa 2000)

State v. Harrison, 846 N.W.2d 362 (Iowa 2014)

Iowa Code § 321.37(3) (2019)

Iowa Code § 321.166(2)

2. It is appropriate to analyze this case under the Iowa Constitution

Iowa Const. Art. XII, § I

Redmond v. Ray, 268 N.W.2d 849 (Iowa 1978)

Ex Parte Pritz, 9 Iowa 30, 32 (1858)

Iowa Const. Art. I § 8

U.S. Const. Amend. IV

State v. Jones, 666 N.W.2d 142, 145 (2003)

Iowa Const. Art I § 24

https://census.gov/search-results.html?q=population+by+state&search.x=0&search.y=0&page=1&stateGeo=&searchtype=web

https://www.fhwa.dot.gov/policyinformation/statistics/2012/mv9.cfm

Iowa Const. Art I § 6

AFSCME Council No. 61 v. State, 928 N.W.2d 21, 31 (Iowa 2019)

State v. Ochoa, 792 N.W.2d 260, 269-75 (Iowa 2010)

II. WAS TRIAL COUNSEL INEFFECTIVE FOR FAILING TO CHALLENGE IOWA CODE § 321.38 AS UNCONSTITUTIONALLY VAGUE?

Authorities

State v. Halverson, 857 N.W.2d 632, 634 (Iowa 2015)

State v. Lucas, 323 N.W.2d 228, 232 (Iowa 1982)

State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987)

State v. Yaw, 398 N.W.2d 803, 805 (Iowa 1987)

State v. Ortiz, 789 N.W.2d 761, 764 (Iowa 2010)

Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984)

State v. Schoelerman, 315 N.W.2d 67, 72 (Iowa 1982)

State v. Allison, 576 N.W.2d 371 (Iowa 1998)

State v. Vance, 790 N.W.2d 775, 786 (Iowa 2010)

ABA Standards for Criminal Justice: Prosecution Function and Defense Function 4-1.2(e), at 120–21 (3d ed.1993)

1. Is this claim of ineffective assistance of counsel appealable?

Iowa Code § 814.7 (2019)

Wiborg v. U.S., 163 U.S. 632, 658, 16 S.Ct. 1127, 1137, 41 L.Ed. 289 (1896)

Fed. Rules Crim. Proc. 52

Fed. Rules Evid. 103(e) (2020)

Iowa R. Evid. 5.102 (2020)

State v. Truesdell, 679 N.W.2d 611, 616 (Iowa 2004)

State v. McAdams, 594 A.2d 1273, 1275 (N.H. 1991)

Gates v. State, 6298 Ga. 324, 326, 781 S.E.2d 772, 775 (2016)

Breedlove v. State, 310 Kan. 56, 70 445 P.3d 1101, 1111 (2019)

State v. Johns, 454 P.3d 692, 697 (2019)

State v. Bueso, 225 N.J. 193, 202, 137 A.3d 516, 570 (2016)

State v. Worley, 836 S.E.2d 278, 283 (Ct. App. 2019)

Ellis v. State, 591 So. 2d 574, 575 (Ala. Crim. App. 1991)

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

U.S. Const. amend XIV

Iowa Const. art. I § 9

Medina v. California, 505 U.S. 437, 112 S.Ct. 2572 (1992)

Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S.Ct. 2574, 2582 (1986)

Gideon v. Wainwright, 372 U.S. 335, 344, 83 S.Ct. 792, 796, 9 L.Ed.2d 799 (1963)

Evitts v. Lucey, 469 U.S. 387, 394, 105 S.Ct. 830, 835 (1985)

U.S. v. Cronic, 466 U.S. 648, 654, 104 S.Ct. 2039, 2044 (1984)

Douglas v. People of State of Cal., 372 U.S. 353, 83 S.Ct. 814 (1963)

Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585 (1956)

Klouda v. Sixth Judicial Dist. Dept. of Correctional Services, 642 N.W.2d 255, 260 (Iowa 2002)

State v. Phillips, 610 N.W.2d 840, 842 (Iowa 2000)

Planned Parenthood of the Heartland v. Reynolds ex rel. State, 915 N.W.2d 206, 212 (Iowa 2018)

Iowa Const. art. V, § 1

Franklin v. Bonner, 207 N.W. 778, 779 (Iowa 1926)

Iowa Const. art. V, § 4

Iowa Const. art. V, § 6

In re Guardianship of Matejski, 419 N.W.2d 576, 577 (Iowa 1988)

Laird Brothers v. Dickerson, 40 Iowa 665, 670 (1875)

Schrier v. State, 573 N.W.2d 242, 244–45 (Iowa 1997)

In re Durant Comm. Sch. Dist., 106 N.W.2d 670, 676 (Iowa 1960)

Wissenberg v. Bradley, 229 N.W. 205 (Iowa 1929)

McKane v. Durston, 153 U.S. 684, 687–88 (1894)

Cassandra Burke Robinson, The Right to Appeal, 91 N.C.L.Rev. 1219, 1221 (2013)

Marc M. Arkin, Rethinking the Constitutional Right to an Appeal, 39 UCLA L. Rev. 503 (1992)

Jones v. Barnes, 463 U.S. 745, 756 n. 1 (1983)

In re Chambers, 152 N.W.2d 818, 820 (Iowa 1967)

Waldon v. District Court of Lee County, 130 N.W.2d 728, 731 (Iowa 1964)

Iowa Code § 602.4102(2) (2019)

Varnum v. Brien, 763 N.W.2d 862, 875–76 (Iowa 2009)

U.S. Const. amend. VI

U.S. Const. amend. XIV

Iowa Const. art. I, § 10

State v. Ambrose, 861 N.W.2d 550, 556 (Iowa 2015)

2. Counsel was ineffective for failing to challenge Iowa Code § 321.38 as unconstitutionally vague.

State v. Nail, 743 N.W.2d 535, 539 (Iowa 2007)

State v. Hunter, 550 N.W.2d 460, 463 (Iowa 1996) *overruled on other grounds by* State v. Robinson, 618 N.W.2d 306 (Iowa 2000)

State v. Musser, 721 N.W.2d 734, 745 (Iowa 2006)

City of Chicago v. Morales, 527 U.S. 41, 52, 119 S.Ct. 1849, 1857, 144 L.Ed.2d 67, 77–78 (1999)

State v. Reed, 618 N.W.2d 327, 332 (Iowa 2000)

Oxford Pocket Dictionary and Thesaurus 901 (American Ed. 1997)

Iowa Code § 321.38 (2019)

State v. Brown, 930 N.W.2d 840, 914 (Iowa 2019)

Wesley MacNeil Oliver, *With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 Tul. L. Rev. 1409, 1414 (2000)

State v. Rosensteil, 473 N.W.2d 59, 62 (Iowa 1991) *reversed on other grounds by* State v. Cline, 617 N.W.2d 277 (Iowa 2000)

State v. Gillespie, 530 N.W.2d 446, 448-49 (Iowa 1995)

Iowa Code § 808.3 (2019)

Iowa Code § 808.4 (2019)

U.S. v. Verdugo-Urquidez, 494 U.S. 259, 266, 110 S.Ct. 1056, 1061, 108 L.Ed.2d 222 (1990)

State v. Ochoa, 792 N.W.2d 260, 269-75 (Iowa 2010)

ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because the issue raised involves substantial issues of first impression in Iowa. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(c).

1. Can a bumper-mounted trailer ball provide justification for a traffic stop by virtue of the obscuring of one license plate character as viewed from directly behind the vehicle?

2. Can the legislature prohibit this Court from addressing ineffective assistance of counsel claims on appeal? If so, should this Court adopt the plain error standard of review? Does the statutory prohibition of raising ineffective assistance of counsel claims on appeal violate an appellant's constitutional guarantee of due process and the right to effective assistance of appellate counsel?

3. Is Iowa Code § 321.38, as applied in this case, unconstitutionally vague for failing to provide adequate notice

of the prohibited conduct and for being conducive to arbitrary and discriminatory enforcement?

STATEMENT OF THE CASE

Nature of the Case: This is an appeal, by Prince G. Paye, following conviction and sentencing for the offense of Driving While Barred in violation of Iowa Code §§ 321.561 (2019).

Course of Proceedings: A trial information was filed on August 4, 2019, charging Mr. Paye with the above-referenced offense. (Trial Information) (App. pp. 7-8).

On September 17, 2019, a motion to suppress was filed. (Motion to Suppress) (App. pp. 9-10).

A hearing on the motion to suppress was held on October 1, 2019, and on October 10, 2019, a ruling denying the motion to suppress was filed by the district court. (Motion to Suppress, Ruling on Motion to Suppress) (App. pp. 9-13).

On October 18, 2019, Mr. Paye waived his right to a jury trial and stipulated to the minutes of evidence. (Waiver of Jury Trial, Stipulation) (App. pp. 14-15).

Trial was held on October 18, 2019, and a verdict of guilty was rendered. Mr. Paye opted for immediate sentencing and the court ordered him to pay a fine of $625.00. (10/18/19 Ruling on Trial on the Minutes and Sentencing Order) (App. pp. 16-19).

Following trial, a notice of appeal was filed. (10/18/19 Notice of Appeal) (App. p. 19).

Facts: Officer Joshua Starkey, of the Altoona Police Department, testified that on July 15, 2019 he was traveling south on 17th Avenue SW when he observed a vehicle equipped with a trailer hitch on the bumper. The ball obscured one of the letters displayed on the license plate. He initiated a traffic stop, based upon the perceived obstruction, approached the vehicle and discussed the infraction with the driver. (Transcript of Motion to Suppress pp. 4 L 1-10, 5 L 3-25, 6 L 1-25, State's Exhibit 1 rear photo of truck) (Ex. App. p. 3).

Starkey issued the driver, Prince Paye, a warning ticket for "obstructed plate". (Transcript of Motion to Suppress p. 7 L 1-4).

According to Starkey, from his vantage point behind Paye's truck (a 1996 Ford Ranger), he was able to see all characters displayed on the plate other than the letter obscured by the ball. (Transcript of Motion to Suppress pp. 8 L 13-22, 10 L 21-25, 11 L 1-3, 18 L 20-22, State's Exhibit 1) (Ex. App. p. 3).

Starkey opined that the ball is used to tow a trailer and is easily removed from the bumper with the aid of a wrench. (Transcript of Motion to Suppress pp. 8 L 23-25, 9 L 1-1-9).

On cross-examination, Starkey was shown photographs of two Ford Rangers similar to Paye's truck. He agreed that all have a port for the trailer hitch built into the bumper. (Transcript of Motion to Suppress pp. 10 L 25, 11 L 1-25, 12 L 1-17, Exhibits B & C photos of Ford Ranger trucks) (Ex. App. pp. 4-5).

Starkey testified that upon exiting his vehicle, and prior to approaching Paye, he was able to see all characters appearing on the license plate. (Transcript of Motion to Suppress pp. 14 L 19-25, 15 L 1-17, 19 L 4-12).

Starkey did not recall the identity of the registered owner of the truck. Over the State's objection, the defense entered Defendant's Exhibit D, a license plate report indicating that the registered owner of the truck was Jennifer Jewell. (Transcript of Motion to Suppress pp. 15 L 18-25, 16-17 L 1-25, 18 L 1-19).

The defense entered Exhibits E, F, G and H. The exhibits consist of photographs depicting different vehicles. (Transcript of Motion to Suppress p. 20 L 6-9).

Exhibit E is a photo of a Des Moines Area Regional Transit Authority (DART) Ride Share van. (Exhibit E photo of Ride Share van) (Ex. App. p. 6). On the rear of the van a rack for bicycles, or perhaps wheelchairs, had been installed. The rear license plate of the DART vehicle is visible from the side,

but is not visible from behind. (Transcript of Motion to Suppress pp. 20 L 11-25, 21 L 1-12, Defendant's Exhibit E) (Ex. App. p. 6).

Defendant's Exhibit F depicts an SUV with a bicycle rack attached to the rear of the vehicle. Starkey testified that although the license plate characters are visible from the side, from behind one would be unable to see all of the numbers and letters. (Transcript of Motion to Suppress p. 21 L 13-23, Defendant's Exhibit F photo of SUV) (Ex. App. p. 7).

Defendant's Exhibit G is a photograph of a Honda Pilot with a handicap platform attached to the rear of the vehicle. The plate may be read from the side. However, from behind the vehicle, none of the characters of the license plate are visible. (Transcript of Motion to Suppress pp. 21 L 24-25, 22 L 1-9, Defendant's Exhibit G photo of Honda Pilot) (Ex. App. p. 8).

Defendant's Exhibit H depicts a view from behind another SUV with a bicycle rack obscuring the characters

appearing on the license plate. (Transcript of Motion to Suppress pp. 22 L 10-14).

After viewing the exhibits, Starkey testified that, in his opinion, the bicycle racks, wheelchair carrier and handicap platform were violations of the Iowa Code provision prohibiting obstruction of one's view of license plates. (Transcript of Motion to Suppress pp 22 L 19-25, 23 L 1-25, 24 L 1-4).

Following the stop, Starkey learned that Paye's license was barred. He issued warning citations for the obstructed license plate and for failure to provide proof of insurance. Next, he placed Paye under arrest for driving while barred. (08/14/19 Minutes of Testimony pp. 3-4, 07/15/19 Iowa Incident Report, Altoona Police Department) (Conf. App. pp. 4-5; App. pp. 4-6).

Additional relevant facts will be discussed below.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DENYING PAYE'S MOTION TO SUPPRESS AS NEITHER REASONABLE SUSPICION, NOR PROBABLE CAUSE, EXISTED TO JUSTIFY THE STOP OF HIS VEHICLE AS THERE WAS NO TRAFFIC VIOLATION.

A. Standard of Review: Search and seizure issues are constitutional in nature, Paye asserts that the denial of his motion to suppress constitutes a breach of his rights under amendments IV and XIV to the United States Constitution and article I § 8 of the Iowa Constitution, therefore, review is de novo. State v. Pals, 805 N.W.2d 767, 771 (Iowa 2011).

B. Preservation of Error: Error was preserved by virtue of Paye's motion to suppress, seeking the exclusion of the evidence found in the vehicle (i.e. evidence of Paye's license barment) under the Fourth Amendment to the United States Constitution and article I, section 8 of the Iowa Constitution, the subsequent hearing and the court's adverse ruling. (09/17/19 Motion to Suppress, 10/10/19 Ruling on Motion to Suppress) (App. pp. 9-13).

To the extent this Court concludes error was not properly preserved for any reason, Paye respectfully requests that this issue be considered under the Court's familiar ineffective-assistance-of-counsel framework. *See* State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1983). Paye incorporates by reference all authorities cited, and arguments advanced in §II below, regarding ineffective assistance of counsel and this Court's jurisdiction pursuant to Iowa Code § 814.7 (2019).

C. Discussion: The Fourth Amendment to the United States Constitution and article I, section 8 of the Iowa Constitution both protect individuals from unreasonable searches and seizures. U.S. Const. amend. IV; Iowa Const. art. I § 8; see also State v. Naujoks, 637 N.W.2d 101, 107 (Iowa 2001) (*citation omitted*). The Fourth Amendment of the U.S. Constitution applies to the states through incorporation by the Fourteenth Amendment. State v. Wilkes, 756 N.W.2d 838 (Iowa 2008) (*citation omitted*). "When the police stop a car and temporarily detain an individual, the temporary detention

is a 'seizure'" which is subject to the requirement of constitutional reasonableness. State v. Predka, 555 N.W.2d 202, 205 (Iowa 1996) (*citing* Whren v. United States, 517 U.S. 806, 810 (1996)); State v. Coleman, 890 N.W.2d 284, 287-88 (Iowa 2017) (*citation omitted*).

Unless an exception to the warrant requirement exists, warrantless searches and seizures are per se unreasonable. Hoskins, 711 N.W.2d at 726 (*citing* Freeman, 705 N.W.2d at 297).

The State bears the burden of proving, by a preponderance of the evidence, that such an exception applies. Hoskins, 711 N.W.2d at 726 (*citation omitted*). "One well-established exception allows an officer to briefly stop an individual or vehicle for investigatory purposes when the officer has a reasonable, articulable suspicion that a criminal act has occurred, is occurring, or is about to occur." State v. Vance, 790 N.W.2d 775, 781 (Iowa 2010) (*citations omitted*). Reasonable suspicion exists when law enforcement has

"specific and articulable facts that, taken together with rational inferences from those facts, would lead the officer to reasonably believe criminal activity is afoot." Vance, 790 N.W.2d at 781 (Iowa 2010) (citing Terry v. Ohio, 392 U.S. 1, 21 (1968)).

In distinguishing between a probable cause and reasonable suspicion, this Court noted that when a member of law enforcement observes a traffic violation, probable cause to stop a motorist exists. State v. Tyler, 830 N.W.2d 288, 293 (Iowa 2013) (*citing* State v. Tague, 676 N.W.2d 197, 201).

The existence of probable cause is not always a prerequisite for stopping a vehicle as "'…police may stop a moving automobile in the absence of probable cause to investigate a reasonable suspicion that its occupants are involved in criminal activity.'" State v. Tyler, 830 N.W.2d 288, at 298 (*quoting* State v. Pals, 805 N.W.2d 767, 771 (Iowa 2011)).

The main difference between probable cause and reasonable suspicion consists of purposes of each. A Terry

stop allows criminal investigation. The purpose of a probable cause stop is to seize an individual, or individuals, responsible for committing a crime. *Id.* at 293.

Other jurisdictions have addressed the issue now before this Court. In Baker v. State, a Florida appellate court found that a trailer hitch partially blocking a license plate provided a basis for police to stop a motorist. Baker v. State, 164 So.3d 151, 154 (2015). However, the statute relied upon for the stop differs from Iowa Code § 321.38:

> "…the registration decal, and the alphanumeric designation shall be clear and distinct and free from defacement, mutilation, grease, and **other obscuring matter…"**

Fla. Stat. § 316.605(1) (2015) (*emphasis added*).

The Baker court found that the language "other obscuring matter" applied to the trailer hitch and that the alphanumeric designation must be readable. *Id.* This language does not appear in the Iowa statute.

The relevant Idaho statute is similar to Iowa Code § 321.38. I.C. § 49-428(2) (2017). In State v. Tregeagle, the

Idaho Court of Appeals found that a trailer hitch obstructing two characters displayed on defendant's license plate provided reasonable suspicion to stop defendant's vehicle. State v. Tregeagle, 161 Idaho 763, 767-68, 391 p.3d 21, 25-26 (Ct. App. 2017). The reasoning behind the decision lay in the Court's belief that the term "clearly visible" in the statute prohibits any obstruction of the plate. State v. Tregeagle, 161 Idaho 763 at 767, 391 p.3d 21 at 25. The Wyoming Supreme Court, interpreting another statute similar to Iowa's, came to the same conclusion based upon the words "legible" and "visible". Parks v. State, 2011 WY 19, 247 P.3d 857 (2011). These are not reasonable interpretations of the plain meaning of the operative words according to the doctrine of ejusdem generis as explained below.

1. There was no traffic offense warranting the stop of Paye's vehicle: The district court found that Officer Starkey had probable cause to stop Paye's vehicle based upon a violation of Iowa Code § 321.38 (2019). In particular, the

court found that Starkey "… did not see the entire registration plate due to a trailer ball partially obstructing the letters and numbers." (Ruling on Motion to Suppress pp. 1-2) (App. pp. 11-12).

The statute reads as follows:

> "Every registration plate shall at all times be securely fastened in a horizontal position to the vehicle for which it is issued so as to prevent the plate from swinging and at a height of not less than twelve inches from the ground, measuring from the bottom of the plate, in a place and position to be clearly visible and shall be maintained free from foreign materials and in a condition to be clearly legible. An imitation plate or plates imitating or purporting to imitate the official registration plate of any other state or territory of the United States or of any foreign government shall not be fastened to the vehicle."

Iowa Code § 321.38 (2019).

The court appears to be focusing on the "clearly visible" requirement of the statute. Foreign materials would presumably apply to substances such as dirt, mud and snow. (*See* State v. Tyler, 830 N.W.2d 288, 294 (Iowa 2013)). Illegibility could be the product of the presence of foreign

materials on the plate, or the condition of the plate itself in the event of bending, cracking or other damage.

There were no foreign materials upon Paye's license plate, nor were there any assertions that the plate was damaged. The placement and position of the plate were not at issue.

Paye's license plate was visible and legible. The fact that the trailer ball partially obstructed the view of one of the characters on the plate does not render it illegible, nor does it mean that the plate is not visible. This reality is demonstrated by the pictorial evidence as well as by Defendant's Exhibit A which consists of footage taken from the police car camera and from Starkey's body camera. (State's Exhibit 1 photo of Paye's truck, Defense Exhibit A Video from police car and officer body camera, Transcript of Motion to Suppress pp. 7 L 8- 16, 24 L 5-25, 225 L 1-25, 26 L 1-10) (Ex. App. p. 3).

Ejusdem generis ("of the same type or kind") is a rule of statutory construction which is defined as follows:

> "The ejusdem generis rule is that, where general words follow an enumeration of persons or things by words of a particular and specific meaning, such general words are not to be construed in their widest extent but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned. The rule, however, does not necessarily require that the general provision be limited in its scope to the identical things specifically named. Nor does it apply when the context manifests a contrary intention."

Black's Law Dictionary 517 (6th ed.1990).

"Under the doctrine of ejusdem generis, general words which follow specific words are tied to the meaning and purpose of the specific words." Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Shell Oil Co., 606 N.W.2d 376, 380 (Iowa 2000) (*citations omitted*).

The general words "clearly visible" are tied to the language specifying the fastening of the plate, its position and the height at which the plate is to be located. Iowa Code § 321.38 (2019).

The general words "clearly legible" refer to the directive to keep the plate free from foreign materials and in a condition conducive to legibility. Iowa Code § 321.38 (2019).

Iowa Code § 321.38 does not proscribe the display of a bumper-mounted trailer ball, even when a trailer is not in tow. No law was violated justifying the stop.

While a reasonable mistake of fact may justify a traffic stop, a reasonable, a mistake of law will not. When an officer has instigated a traffic stop based upon a mistake of law, all fruits emanating from the stop must be suppressed. State v. Tyler, 830 N.W.2d 288, 294 (Iowa 2013) (*citation* omitted).

In this case, Officer Starkey was mistaken as to the interpretation of Iowa Code § 321.38. Paye's license plate was visible and legible. Starkey could make out all but one of the characters from where he viewed the plate, but a different angle would have allowed him to see all of the characters. Starkey testified that he could see the entire plate from the rear left of the truck following his exit from the squad car. (Transcript of Motion to Suppress pp. 14 L 19-25, 15 L 1-14).

Contrast this case with State v. Harrison, 846 N.W.2d 362 (Iowa 2014) which dealt with whether a license plate

frame completely covering the display of the county of issuance was a violation of Iowa Code § 321.37(3) which prohibits the use of a license plate frame which "…does not permit full view of all numerals and letters printed on the registration plate." Iowa Code § 321.37(3) (2019).

The Harrison Court found that the frame was in violation of the plain wording of the statute which does not differentiate between the characters identifying the vehicle and the county of issuance. This interpretation becomes even more evident when § 321.37(3) is considered in pari materia with Iowa Code § 321.166(2) (mandating the display of the county of issuance). State v. Harrison, 846 N.W.2d 362 at 366-69.

The "full view" admonition in § 321.37(3) is confined to the frame, which is directly attached to, and surrounding, the license plate. In Harrison, the police were unable to view the county of issuance from any angle. Presumably, the letters were completely covered. *Id.* at 364.

In this case, the complained-of obstruction was not attached to the plate. Additionally, according to Starkey, the characters on Paye's plate could be viewed in their entirety from certain angles. (Transcript of Motion to Suppress pp. 14 L 19-25, 15 L 1-11).

Paye's vehicle displayed no legal infraction. Officer Starkey was mistaken in his understanding of the law. This matter should be reversed and remanded with directions to grant Paye's motion to suppress.

2. It is appropriate to analyze this case under the Iowa Constitution:

The State Constitution holds:

> This constitution shall be the supreme law of the state, and any law inconsistent therewith, shall be void. The general assembly shall pass all laws necessary to carry this constitution into effect.

Iowa Const. Art. XII, § I.

Ascertaining the framer's intent is this Court's purpose when construing a provision of the state constitution.

Redmond v. Ray, 268 N.W.2d 849 (Iowa 1978) (citing Ex Parte Pritz, 9 Iowa 30, 32 (1858)).

Both Article I § 8 of the Iowa Constitution and Amendment IV to the U.S. Constitution serve the purpose of imposing "…a standard of 'reasonableness' upon the exercise of discretion by government officials … in order 'to safeguard the privacy and security of individuals against arbitrary invasion."' State v. Jones, 666 N.W.2d 142, 145 (2003).

Stopping citizens for driving a vehicle equipped with towing equipment is not reasonable.

Iowa is an agricultural state. The state constitution even has a provision limiting the duration of agricultural leases and grants for a period of 20 years. Iowa Const. Art I § 24. As an agricultural state, pickup trucks are a common sight.

The United States Census Bureau estimates Iowa's population to be 3,155,070. To the east of Iowa, Illinois has a population of 12,671,821. https://census.gov/search-

results.html?q=population+by+state&search.x=0&search.y=0&page=1&stateGeo=&searchtype=web.

According to the most recent U.S. Department of Transportation statistics on numbers of farm trucks per state, there were 794,986 pickup trucks in Iowa in 2012. The data reveal that there were 33,915 farm trucks in Iowa that year. While Illinois reported a higher number of pickup trucks than Iowa (1,244,064), the number of farm trucks was 30,606, or 3,309 fewer than Iowa, despite having a population four times as large.
https://www.fhwa.dot.gov/policyinformation/statistics/2012/mv9.cfm.

There are potentially hundreds of thousands of pickup trucks displaying trailer hitches, and the accompanying towing balls, at any given time in the State of Iowa. Some will be towing at the time, some won't. What is to stop law enforcement from stopping trucks towing trailers with farm implements? For that matter, what is to stop law

enforcement from stopping vehicles towing anything? Although trailers must display license plates, they make it impossible to see the rear plate of the towing vehicle.

An analysis under article I, section 8 balances individual privacy interests legitimate state interests. "The test to decide the validity of a warrantless search under article I, section 8 is one of reasonableness." *Id.* (Cady, Justice concurring specially).

Iowa Code § 321.38, as applied in this case, opens the door to arbitrary enforcement of traffic laws. Application of the law in this fashion is tantamount to providing the police with general warrants, the modern equivalent of the seventeenth century English general warrants and writs of assistance. *Id.* at 268-271.

This application of the law does not lend itself to fair and evenhanded treatment of the citizenry as demanded by the Iowa Constitution:

> "All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any

> citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens."

Iowa Const. Art I § 6.

A legitimization of this situation opens the door to selective enforcement of the law. Individuals who driver older vehicles (as in this case), who are presumably poorer, can be targeted for "driving while poor." Members of racial minorities, as in this case (Paye is black), will be stopped for "driving while black."

Recently, this Court held that "…if the statute is capable of being construed in more than one manner, one of which is constitutional, we must adopt that construction." AFSCME Council No. 61 v. State, 928 N.W.2d 21, 31 (Iowa 2019) (*citations omitted*).

The framers of the Iowa Constitution "…placed considerable value on the sanctity of private property…" and emphasized the importance of individual liberties by placing the Iowa Bill of Rights at the beginning of the constitution."

State v. Ochoa, 792 N.W.2d 260 at 274. Documents relating to the state constitutional conventions stress "…the need to restrain arbitrary government power." *Id.*

This matter should be reversed and remanded with instructions to grant Paye's motion to suppress and exclude the fruits of the illegal traffic stop in this case as a mistake of law and as violative of the above-cited portions of the Iowa Constitution.

II. COUNSEL WAS INEFFECTIVE FOR FAILING TO ASSERT THAT IOWA CODE § 321.38 IS UNCONSTITUTIONALLY VAGUE AS IT FAILS TO PROVIDE NOTICE OF THE PROHIBITED CONDUCT AND IS CONDUCIVE TO ARBITRARY AND DISCRIMINATORY ENFORCEMENT.

A. Standard of Review: A claim of ineffective assistance of counsel is constitutional in nature and, therefore, review is de novo. State v. Halverson, 857 N.W.2d 632, 634 (Iowa 2015).

B. Preservation of Error: Ineffective assistance of counsel claims are an exception to the error preservation rule. State v. Lucas, 323 N.W.2d 228, 232 (Iowa 1982).

C. Discussion: A criminal defendant is entitled to the effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, section 10 of the Iowa Constitution. If counsel fails to provide professionally competent service or assistance, the defendant's right to counsel is violated. State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987); State v. Yaw, 398 N.W.2d 803, 805 (Iowa 1987). To establish a claim of ineffective assistance of counsel, a defendant must demonstrate, by a preponderance of the evidence, that: (1) trial counsel failed to perform an essential duty; and (2) counsel's failure resulted in prejudice to the defendant. State v. Ortiz, 789 N.W.2d 761, 764 (Iowa 2010).

The defendant's legal representative has a duty to know the law and to be aware of changes in the law. In addition to counsel's duty to advocate his cause, consult with the defendant and to keep him informed regarding critical developments during the legal process, "Counsel also has a

duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984).

This Court has held counsel to be ineffective for failing to challenge an improperly charged offense State v. Schoelerman, 315 N.W.2d 67, 72 (Iowa 1982) and the improper aggregation of credit card charges for purposes of enhancing a theft prosecution. State v. Allison, 576 N.W.2d 371 (Iowa 1998).

> "Because the law is a learned profession, lawyers must take pains to guarantee that their training is adequate and their knowledge up-to-date in order to fulfill their duty as advocates."

State v. Vance, 790 N.W.2d 775, 786 (Iowa 2010) *(citing comments to ABA Standards for Criminal Justice: Prosecution Function and Defense Function 4-1.2(e), at 120–21 (3d ed.1993)).*

1. Is this claim of ineffective assistance of counsel appealable?

Prior to engaging in Paye's ineffective assistance of counsel claim, it is incumbent upon the defense to address the restrictions placed upon such claims by Iowa Code § 814.7 (2019) as this matter occurred subsequent to July 1, 2019.

a. This Court should adopt the plain error rule in the interests of fairness and eliminating protracted, expensive litigation:

Is Paye precluded of raising an ineffective assistance of counsel claim on direct appeal? As amended in 2019, Iowa Code § 814.7 states:

> "An ineffective assistance of counsel claim in a criminal case shall be determined by filing an application for postconviction relief pursuant to chapter 822. The claim need not be raised on direct appeal from the criminal proceedings in order to preserve the claim for postconviction relief purposes, and the claim shall not be decided on direct appeal from the criminal proceedings."

Iowa Code § 814.7 (2019).

Mr. Paye respectfully requests that this Court find this issue justiciable by adopting the plain error rule.

The plain error rule has long been part of our federal jurisprudence. "…if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it." Wiborg v. U.S., 163 U.S. 632, 658, 16 S.Ct. 1127, 1137, 41 L.Ed. 289 (1896).

Both the Federal Rules of Criminal Procedure and the Federal Rules of Evidence provide that a court may take notice of plain error despite that fact that the issue has not been preserved. Fed. Rules Crim. Proc. 52; Fed. Rules Evid. 103(e) (2020).

Admittedly, the Iowa Rules of Evidence and Criminal Procedure contain no such provisions. However, the stated purpose of the rules of evidence contains a statement of purpose which is consistent with the adoption of the plain error standard:

> Rule 5.102 Purpose. These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination

Iowa R. Evid. 5.102 (2020).

Promoting fairness, while limiting expense and delay, are byproducts of the application of the plain error rule in cases that have no deficiencies of record upon which to make a decision. Postconviction relief proceedings would not add anything critical to this Court's decision as to whether § 321.38 is unconstitutionally vague. Declining to address the issue creates the potential for the expenses involved in a postconviction relief, and possibly appellate, litigation with the participation of court-appointed attorneys, while placing unnecessary burdens upon the State and the Iowa judiciary. This Court has previously taken notice of the potential inefficiencies associated with postconviction relief proceedings. "Preserving ineffective-assistance-of-counsel claims that can be resolved on direct appeal wastes time and resources." State v. Truesdell, 679 N.W.2d 611, 616 (Iowa 2004).

A 1991 case decided by the Supreme Court of New Hampshire asserted that at that time only 13 jurisdictions had

not adopted the plain error standard. State v. McAdams, 594 A.2d 1273, 1275 (N.H. 1991). Thirteen state cases were cited for this proposition. *Id.*

Since that time, some of the states referenced have adopted the plain error rule. These states include Georgia Gates v. State, 6298 Ga. 324, 326, 781 S.E.2d 772, 775 (2016), Kansas, Breedlove v. State, 310 Kan. 56, 70 445 P.3d 1101, 1111 (2019), Montana, State v. Johns, 454 P.3d 692, 697 (2019), New Jersey, State v. Bueso, 225 N.J. 193, 202, 137 A.3d 516, 570 (2016) and North Carolina, State v. Worley, 836 S.E.2d 278, 283 (Ct. App. 2019).

One state, Alabama, makes an exception for cases in which the death penalty has been imposed. Ellis v. State, 591 So. 2d 574, 575 (Ala. Crim. App. 1991).

This Court has previously rejected the plain error rule in no uncertain terms. State v. Rutledge, 600 N.W.2d 324, 325 (Iowa 1999). However, this refusal to embrace the plain error doctrine was prior to the enactment of legislation which

essentially denies appellate redress to criminal defendants who have suffered the consequences of their trial counsel's failure to properly advance and protect their legal interests.

b. Iowa Code § 814.7 is a violation of Paye's due process rights and the right to effective assistance of appellate counsel:

Both the Iowa Constitution and the United States Constitution ensure criminal defendants are accorded due process of law. U.S. Const. amend XIV; Iowa Const. art. I § 9. In the realm of criminal law, however, the Due Process Clause has limited operation beyond the rights guaranteed in the Bill of Rights. Medina v. California, 505 U.S. 437, 112 S.Ct. 2572 (1992).

The right to counsel is a fundamental right. Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S.Ct. 2574, 2582 (1986) (citing Gideon v. Wainwright, 372 U.S. 335, 344, 83 S.Ct. 792, 796, 9 L.Ed.2d 799 (1963)). It is so fundamental to due process that it has been made obligatory on the states. Evitts v. Lucey, 469 U.S. 387, 394, 105 S.Ct. 830, 835 (1985). The

right to counsel means the right to effective counsel. U.S. v. Cronic, 466 U.S. 648, 654, 104 S.Ct. 2039, 2044 (1984). This guarantee extends to the first appeal as of right. Evitts v. Lucey, 469 U.S. at 396, 105 S.Ct. at 836.

"A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." Id. An appellate attorney need not submit every argument urged by an appellant, but "the attorney must be available to assist in preparing and submitting a brief to the appellate court … and must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim." Id. at 394, 105 S.Ct. at 835.

Paye contends Iowa Code § 814.7 violates his right to counsel on appeal and, therefore his right to due process, by interfering with appellate counsel's ability to effectively represent him. Iowa Code § 814.7 purports to prohibit an appellate court from deciding his claims of ineffective

assistance of counsel on direct appeal even though the issue of unconstitutional vagueness could be decided on direct appeal. State v. Truesdell, 679 N.W.2d 611, 616 (Iowa 2004); Wiborg v. United States, 163 U.S. 632, 658, 16 S.Ct. 1127, 1137 (1896). Where a state provides an appeal as of right but refuses to allow a defendant a fair opportunity to obtain an adjudication on the merits of his appeal, the "right" to appeal does not comport with due process. Evitts v. Lucey, 469 U.S. at 405, 105 S.Ct. at 841 (citing Douglas v. People of State of Cal., 372 U.S. 353, 83 S.Ct. 814 (1963); Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585 (1956)).

> A system of appeal as of right is established precisely to assure that only those who are validly convicted have their freedom drastically curtailed. A State may not extinguish this right because another right of the appellant-the right to effective assistance of counsel-has been violated.

Id. at 399-400, 105 S.Ct. at 838.

Precluding Paye's ineffective assistance of counsel claim extinguishes his right to contest an unconstitutionally vague statute without unnecessary delay. Accordingly, § 814.7

denies Paye due process and should be determined to be unconstitutional.

c. Iowa Code § 814.7 improperly restricts the role and jurisdiction of Iowa's appellate courts:

Iowa Code § 814.7 improperly interferes with the separation of powers, with this Court's jurisdiction, and with the Court's role in addressing constitutional violations. "The separation-of-powers doctrine is violated 'if one branch of government purports to use powers that are clearly forbidden, or attempts to use powers granted by the constitution to another branch.'" Klouda v. Sixth Judicial Dist. Dept. of Correctional Services, 642 N.W.2d 255, 260 (Iowa 2002) (quoting State v. Phillips, 610 N.W.2d 840, 842 (Iowa 2000)). The doctrine means that one branch of government may not impair another branch in "the performance of its constitutional duties." Id. Recently, the Iowa Supreme Court examined the judicial branch's role within Iowa's "venerable system of government":

> The Iowa Constitution, like its federal counterpart, establishes three separate, yet equal, branches of government. Our constitution tasks the legislature with making laws, the executive with enforcing the laws, and the judiciary with construing and applying the laws to cases brought before the courts.
>
> Our framers believed "the judiciary is the guardian of the lives and property of every person in the State." Every citizen of Iowa depends upon the courts "for the maintenance of [her] dearest and most precious rights." The framers believed those who undervalue the role of the judiciary "lose sight of a still greater blessing, when [the legislature] den[ies] to the humblest individual the protection which the judiciary may throw as a shield around [her]."

Planned Parenthood of the Heartland v. Reynolds ex rel. State, 915 N.W.2d 206, 212 (Iowa 2018) (internal citations omitted) (alteration in original).

All judicial power in Iowa is vested in the Iowa Supreme Court and its inferior courts. Iowa Const. art. V, § 1. "Courts constitute the agency by which judicial authority is made operative. The element of sovereignty known as judicial is vested, under our system of government, in an independent department, and the power of a court and the various subjects over which each court shall have

jurisdiction are prescribed by law." Franklin v. Bonner, 207 N.W. 778, 779 (Iowa 1926).

Article V, sections 4 and 6 are related to the jurisdiction of the courts. Article V, section 4 provides the jurisdiction of the Iowa Supreme Court. Iowa Const. art. V, § 4. It states:

> The supreme court shall have appellate jurisdiction only in cases in chancery, and shall constitute a court for the correction of errors at law, under such restrictions as the general assembly may, by law, prescribe; and shall have power to issue all writs and process necessary to secure justice to parties, and shall exercise a supervisory and administrative control over all inferior judicial tribunals throughout the state.

Iowa Const. art. V, § 4. Likewise, Article V, section 6 provides for the jurisdiction of the district court. It states:

> The district court shall be a court of law and equity, which shall be distinct and separate jurisdictions, and have jurisdiction in civil and criminal matters arising in their respective districts, in such manner as shall be prescribed by law.

Iowa Const. art. V, § 6.

Notably, the Iowa Constitution provides that limitations

on the manner of the Court's jurisdiction can be prescribed by the legislature. See Iowa Const. art. V § 4. But the ability of the legislature to "prescribe" the "manner" of jurisdiction should not be confused with an ability to remove jurisdiction from the Court. Subject matter jurisdiction is conferred upon Iowa's courts by the Iowa Constitution. In re Guardianship of Matejski, 419 N.W.2d 576, 577 (Iowa 1988). They have general jurisdiction over all matters brought before them and the legislature can only prescribe the manner of its exercise; the legislature cannot deprive the courts of their jurisdiction. Id. (quoting Laird Brothers v. Dickerson, 40 Iowa 665, 670 (1875)); Schrier v. State, 573 N.W.2d 242, 244–45 (Iowa 1997).

The Iowa Supreme Court has previously recognized statutory limitations placed on the right to appeal, for example. *See* In re Durant Comm. Sch. Dist., 106 N.W.2d 670, 676 (Iowa 1960) (citations omitted) ("We have repeatedly held the right of appeal is a creature of statute.

It was unknown at common law. It is not an inherent or constitutional right and the legislature may grant or deny it at pleasure."); see also Wissenberg v. Bradley, 229 N.W. 205 (Iowa 1929). The United States Supreme Court has held similarly. McKane v. Durston, 153 U.S. 684, 687–88 (1894) ("A review by an appellate court of the final judgment in a criminal case, however grave the offence of which the accused is convicted, . . . is not now a necessary element of due process of law."). However, these holdings are subject to criticism. See Cassandra Burke Robinson, The Right to Appeal, 91 N.C.L.Rev. 1219, 1221 (2013) (arguing U.S. Supreme Court has relied on "nineteenth century dicta" for the proposition that due process does not require a right of appeal and expressing concerns that states will attempt to eliminate appeals as of right "in order to save fiscal and administrative resources."); Marc M. Arkin, Rethinking the Constitutional Right to an Appeal, 39 UCLA L. Rev. 503 (1992); Jones v. Barnes, 463 U.S. 745, 756 n. 1 (1983)

(Brennan, J. dissenting) (predicting that if the court were squarely faced with the issue, it would hold that due process requires a right to appeal a criminal conviction).

"Once the right to appeal has been granted, however, it must apply equally to all. It may not be extended to some and denied to others." In re Chambers, 152 N.W.2d 818, 820 (Iowa 1967) (citing Waldon v. District Court of Lee County, 130 N.W.2d 728, 731 (Iowa 1964)). Iowa Code section 602.4102 contemplates the Iowa Supreme Court handling criminal appeals, the amendment to section 814.7 would make claims of ineffective assistance of counsel unreviewable on direct appeal. Iowa Code § 602.4102(2) (2019). This is an encroachment upon the Court's inherent jurisdiction. The Iowa Supreme Court has both the jurisdiction and the duty to invalidate state actions that conflict with the state and federal constitutions. See Varnum v. Brien, 763 N.W.2d 862, 875–76 (Iowa 2009) (noting the courts have an obligation to protect the

supremacy of the constitution). One of the rights enumerated in both the United States and Iowa Constitutions is the assistance of counsel. U.S. Const. amends. VI, XIV; Iowa Const. art. I, § 10. Having a constitutional right to counsel means the having a right to *effective* assistance of counsel. State v. Ambrose, 861 N.W.2d 550, 556 (Iowa 2015) (citations omitted).

A statute that seeks to divest Iowa's appellate courts of their ability to decide and remedy claimed deprivations of constitutional rights improperly intrudes upon the jurisdiction and authority of the judicial branch. The Iowa Supreme Court has eloquently stated:

> No law that is contrary to the constitution may stand. "[C]ourts must, under all circumstances, protect the supremacy of the constitution as a means of protecting our republican form of government and our freedoms." Our framers vested this court with the ultimate authority, and obligation, to ensure no law passed by the legislature impermissibly invades an interest protected by the constitution.

Planned Parenthood, 915 N.W.2d at 212–13 (internal citations

omitted) (alteration in original). "The obligation to resolve this grievance and interpret the constitution lies with this court." Id.

By removing the court's consideration of ineffective-assistance-of counsel claims on direct appeal, the legislature is intruding on Iowa appellate courts' independent role in interpreting the constitution and protecting Iowans' constitutional rights. This action by the legislature has violates the separation of powers and impermissibly interferes with the inherent jurisdiction of the Court. Accordingly, this Court should invalidate the statutory changes prohibiting the Court from ruling upon claims of ineffective assistance of counsel that are presented on direct appeal.

2. Counsel was ineffective for failing to challenge Iowa Code § 321.38 as unconstitutionally vague.

Due process prohibits the enforcement of overly vague statutes. "First, a statute cannot be so vague that it does not give persons of ordinary understanding fair notice that certain

conduct is prohibited. Second, due process requires that statutes provide those clothed with authority sufficient guidance to prevent the exercise of power in an arbitrary or discriminatory fashion. Third, a statute cannot sweep so broadly as to prohibit substantial amounts of constitutionally-protected activities, such as speech protected under the First Amendment." State v. Nail, 743 N.W.2d 535, 539 (Iowa 2007).

A defendant charged with the violation of a statute has standing to claim the statute is unconstitutionally vague as applied to him or her." State v. Hunter, 550 N.W.2d 460, 463 (Iowa 1996) *overruled on other grounds by* State v. Robinson, 618 N.W.2d 306 (Iowa 2000). With a vague-as-applied challenge, the question is "whether the defendant's conduct clearly falls within the proscription of the statute under any construction." State v. Musser, 721 N.W.2d 734, 745 (Iowa 2006) (quoting State v. Hunter, 550 N.W.2d 460, 465 (Iowa 1996) (citation omitted), *overruled on other grounds by* State v.

Robinson, 618 N.W.2d 306, 312 (Iowa 2000)) (internal quotation marks omitted).

A criminal statute may be facially vague "…because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests." City of Chicago v. Morales, 527 U.S. 41, 52, 119 S.Ct. 1849, 1857, 144 L.Ed.2d 67, 77–78 (1999) (citations omitted).

"In Hunter, we recognized that 'a facial challenge is permitted if a statute reaches a 'substantial amount' of protected conduct' under the First Amendment." State v. Reed, 618 N.W.2d 327, 332 (Iowa 2000) (citing State v. Hunter, 550 N.W.2d 460, 463 (Iowa 1996).

To meet constitutional requirements, the statute must "provide sufficiently specific limits on the enforcement discretion of the police." City of Chicago v. Morales, 527 U.S. 41 at 64, 119 S. Ct. 1849 at 1863 (1999).

This Court has held that a statute can be impermissibly

vague if it fails to provide people of ordinary intelligence a what conduct it prohibits, or if it allows enforcement that is arbitrary and discriminatory. State v. Musser, 721 N.W.2d 734, 745 (Iowa 2006).

Iowa Code § 321.38 fails both inquiries. It does not specify what equipment is prohibited. Definitions are not provided for critical terms like "visible" and "legible". The plain meaning of these terms cannot be construed so as to validate the reason for the stop in this case?

The applicable dictionary definition of "visible" is that which can be "...seen with the eye." *Oxford Pocket Dictionary and Thesaurus* 901 (American Ed. 1997).

"Legible" is defined as "clear enough to read; readable." Id. at 453.

Synonyms given for this word are "plain, distinct; decipherable, intelligible."

The record clearly establishes that the plate in question was "visible" and "legible". (Transcript of Motion to Suppress

pp. 14 L 19-25, 15 L 1-17, 19 L 4-12, State's Exhibit 1 Defendant's Exhibit A) (App. p. 3).

Had the legislature intended to subject such a large portion of the driving population to investigatory stops, surely it would have provided more specificity in the statute as in the case of the State Florida statute prohibiting "…other obscuring matter…" around license plates. Fla. Stat. § 316.605(1) (2015).

Iowa Code § 321.38, as interpreted by the district court, opens the door to arbitrary and discriminatory enforcement. "'If several, or in the case of traffic offenses, most, persons are committing the same offense and practical realities preclude an officer from stopping them all, then probable cause does not meaningfully limit an officer's discretion.'" State v. Brown, 930 N.W.2d 840, 914 (Iowa 2019) (Appel, J., dissenting) *quoting* Wesley MacNeil Oliver, *With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 Tul. L. Rev. 1409, 1414 (2000).

“A general warrant authorized law enforcement to engage in wide-open, discretionary stops without particularized reasons for conducting the stop.” *Id.* at 915.

As the evidence in this case demonstrates, it is common for motorists to engage in conduct which violates the district court’s interpretation of Iowa Code § 321.38. Bicycle racks, wheelchair racks and handicap platforms are among the activities giving rise to potentially being stopped and cited for obstructing one’s rear license plate.

The district court’s interpretation of Iowa Code § 321.38 as providing the legal justification for the stop in this case is tantamount to authorizing general and/or anticipatory warrants.

There are countless devices used for transporting bicycles, wheelchairs, handicap scooters and lift devices which are affixed to the rear of vans and SUVs. These devices also violate Iowa Code § 321.38 as it was interpreted by Officer Starkey, and the district court, in this case. (Transcript of

Motion to Suppress pp. 22 L 19-25, 23 L 1-25, 24 L 1-4, Ruling on Motion to Suppress) (App. pp. 11-13).

Are all of these vehicles subject to being stopped and the drivers potentially prosecuted for obstructing the view of their respective license plates? (Defendant's Exhibits B, C, E, F, G & H) (Ex. App. pp. 4-9). Would such interpretation of the law be reasonable?

Reasonable suspicion does not allow officers to rely "…just on circumstances which describe a very broad category of predominantly innocent persons." State v. Rosensteil, 473 N.W.2d 59, 62 (Iowa 1991) *reversed on other grounds by* State v. Cline, 617 N.W.2d 277 (Iowa 2000).

Anticipatory search warrants are foreclosed by Iowa's statutory scheme. State v. Gillespie, 530 N.W.2d 446, 448-49 (Iowa 1995); Iowa Code §§ 808.3, 808.4 (2019). Probable cause must exist at the time of the issuance of a search warrant. Likewise, probable cause must exist at the time of a traffic stop and investigation.

The late Chief Justice of the U.S. Supreme Court, the Hon. William Rehnquist, noted that the impetus for the adoption of amendment IV to the U.S. Constitution was the "…widespread hostility among the former colonists to the issuance of writs of assistance empowering revenue officers to search suspected places for smuggled goods, and general search warrants permitting the search of private houses, often to uncover papers that might be used to convict persons of libel." U.S. v. Verdugo-Urquidez, 494 U.S. 259, 266, 110 S.Ct. 1056, 1061, 108 L.Ed.2d 222 (1990).

This Court has recognized the need to prevent arbitrary enforcement of the law and provisions in the state and federal constitutions promulgated to that end. Additionally, this Court has analyzed the historical evolution of those provisions from seventeenth century English caselaw, through the founding of this nation to Iowa's achievement of statehood. State v. Ochoa, 792 N.W.2d 260, 269-75 (Iowa 2010).

The framers of the Iowa Constitution "…placed considerable value on the sanctity of private property…" and emphasized the importance of individual liberties by placing the Iowa Bill of Rights at the beginning of the constitution." State v. Ochoa, 792 N.W.2d 260 at 274. Documents relating to the state constitutional conventions stress "…the need to restrain arbitrary government power." *Id.*

CONCLUSION

WHEREFORE, Defendant-Appellant Prince Paye, respectfully requests that this Court reverse and remand this matter with directions to grant Paye's motion to suppress based upon law enforcement's mistake of law and based upon constitutional infirmity of the district court's decision, or, in the alternative, to find the issue of constitutional vagueness justiciable on appeal, and reverse and remand this matter for dismissal based upon the unconstitutional vagueness of Iowa Code § 321.38 for the reasons asserted above.

REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $3.79, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR BRIEFS

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

> [X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 7,975 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

*/s/ Stephan J. Japuntich*________ Dated: 06/05/20_______

STEPHAN J. JAPUNTICH
Assistant Appellate Defender
sjapuntich@spd.state.ia.us
appellatedefender@spd.state.ia.us
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841