IN THE SUPREME COURT OF IOWA
Supreme Court No. 19-1760

STATE OF IOWA,
Plaintiff-Appellee,

vs.

PRINCE G. PAYE,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
THE HONORABLE KEVIN PARKER, JUDGE (SUPPRESSION) &
CHRISTOPHER KEMP, JUDGE (TRIAL AND SENTENCING)

APPELLEE'S BRIEF

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Webster's 9th New Collegiate Dict. (1987)

II. Does Iowa Code section 814.7 preclude this Court from addressing on direct appeal the defendant's ineffective-counsel claim, which is itself an excuse for failing to preserve error on his claim that Iowa Code section 321.38 is void for vagueness?

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3 Crim. Proc. § 11.7(e) (4th ed.)
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Thomas A. Mayes & Anuradha Vaitheswaran, *Error Preservation in Civil Appeals in Iowa: Perspectives on Present Practice*, 55 Drake L. Rev. 39 (2006)

ROUTING STATEMENT

This case presents multiple issues of first impression. The primary issue is interpretation of Iowa Code section 321.38, which this Court has never done. Interpretation of this statute, however, would require application of existing legal principles. And the ineffective-counsel and plain-error issues all fail because section 321.38 is not vague—there is thus no prejudice or error.

Also, many cases addressing the ineffective-counsel and plain-error issues of first impression are already ahead of this case in line. *See, e.g.*, *State v. Boldon*, No. 19-1159 (addressing whether Iowa Code section 814.7 violates separation of powers, due process, or the right to counsel, and also whether, as a result of section 814.7, the Court should adopt plain-error review); *State v. Gay*, No. 19-1354 (same); *State v. Snook*, No. 19-2023 (same); *State v. Calhoun*, 19-0066 (addressing plain-error review); and *State v. Crews*, 19-1404 (same).

Transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

The defendant, Prince G. Paye, challenges denial of his motion to suppress evidence obtained from a traffic stop. The law

enforcement officer stopped Paye because he believed that Paye's partially obstructed, not completely readable license plate violated Iowa Code section 321.38. Paye, however, contends that section 321.38 does not prohibit displaying a partially obstructed license plate that an officer is unable to read while following a vehicle.

Paye alternatively contends that section 321.38 is void for vagueness. This claim was not made below, so Paye also asserts that counsel was ineffective for failing to make it. Yet, Iowa Code section 814.7 prohibits this Court from deciding ineffective-counsel claims on direct appeal. To avoid that prohibition, Paye says that section 814.7 violates the separation of powers, his right to counsel, and his right to due process. He also urges the Court to adopt a plain-error rule.

For the reasons below, the State urges that the Court affirm.

Course of Proceedings

The State of Iowa charged Defendant Prince G. Paye with driving while barred as a habitual offender in violation of Iowa Code section 321.561 (2019). Trial Information (08/14/2019); App. 7.

Paye filed a motion to suppress evidence on the basis that the police officer had no reasonable suspicion or probable cause for the

traffic stop. Mot. Suppress (09/17/2019); App. 9. The district court denied the motion. Ruling Mot. Suppress (10/10/2019); App. 11.

After a trial on the minutes, the district court found Paye guilty and sentenced him to a $625 fine plus surcharge. Ruling Trial Minutes & Sen. Order (10/18/2019); App. 16.

The State accepts the defendant's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

Facts

Altoona Police Officer Joshua Starkey stopped Defendant Prince G. Paye for having an obstructed license plate early in the morning hours of July 15, 2019. Mot. Suppress Tr. 5:20–6:12, 10:12–16. The trailer hitch ball on the bumper of the vehicle obstructed the third letter of the license plate. Mot. Suppress Tr. 5:20–6:12, 8:24–9:14; Paye Truck Photo, Ex. 1; App. Exs. 3. Starkey could not make out that third letter either when he followed Paye or when he parked immediately behind Paye's vehicle and within a few car lengths. Mot. Suppress Tr. 5:20–6:12, 8:24–9:14.

Paye drove a 1996 Ford Ranger pickup truck that night. Mot. Suppress Tr. 10:25–11:3. Ford Rangers of that vintage have a hole in the bumper for installation of ball hitch, just as it was installed on

Paye's bumper. Mot. Suppress Tr. 11:4–13, 12:1–10; Ford Ranger Photo, Ex. B; Ford Ranger Photo, Ex. C; App. Exs. 4, 5. Paye was not towing anything when Starkey stopped him. Paye Truck Photo, Ex. 1; App. Exs. 3. And the ball hitch was removeable. Mot. Suppress Tr. 26:23–24. If removed, it would not have obstructed the license plate. Mot. Suppress Tr. 26:17–27:2.

Officer Starkey was able to see the full license plate only after he exited his vehicle and observed Paye's truck from a sharp angle. Mot. Suppress Tr. 14:19–25. From that angle to the rear and left of Paye's vehicle, the entire license plate was unobstructed and finally fully readable. Mot. Suppress Tr. 15:4–8. Starkey relayed the full plate number to dispatch when he was able to see it. Mot. Suppress Tr. 15:9–11.

Officer Starkey approached Paye's window and asked for his license, registration, and proof of insurance. Mot. Suppress Tr. 19:13–16. Paye informed Starkey that his license was invalid. DashCam Video 1:00–5:00, Ex. A. An investigation led Starkey to learn that Paye was barred. DashCam Video 1:00–10:00, Ex. A. Starkey issued a warning for the obstructed license plate. Mot. Suppress Tr. 7:1–4. He arrested Paye and filed a complaint alleging driving while barred in

violation of Iowa Code section 321.561. Criminal Complaint; App. 4-66.

Paye submitted exhibits at the suppression hearing showing various vehicles with different objects attached obstructing the license plate—bicycle racks, a license plate frame, and a handicap ramp. Mot. Suppress Tr. 20:11–22:20; Vehicle Photos, Ex. E, F, G, H; App. Exs. 6–9. Starkey opined that each obstruction was a traffic code violation. Mot. Suppress Tr. 22:21–24:4.

ARGUMENT

I. The police officer did not unlawfully seize Paye's vehicle because Paye had an obstructed license plate in violation of Iowa Code section 321.38.

Preservation of Error

Paye preserved error on his argument that his seizure violated the Fourth Amendment to the United States Constitution. Mot. Suppress; Suppression Ruling; App. 9, 11.

Paye has not preserved his argument, however, that the seizure violated article I section 8 of the Iowa Constitution. Before the district court, he presented an argument based on *State v. Coleman*, 890 N.W.2d 284, 301 (Iowa 2017)—i.e., that once Starkey was able to read the plate, he could no longer detain Paye. Suppression Hr'g Tr. 39:5–21. Yet, here, his argument is different. Appellant Br. 37–42.

"Nothing is more basic in the law of appeal and error than the axiom that a party cannot sing a song to us that was not first sung in trial court." *State v. Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999). Paye did not make the article I section 8 argument below that he makes here, and it is thus unpreserved. *Id.*

The *Coleman* argument that he did make below is not made here, supported by authority, and is waived. Iowa R. App. P. 6.903(2)(g)(3).

Standard of Review

The Court reviews *de novo* when an appellant alleges a constitutional error occurred. *State v. Tague*, 676 N.W.2d 197, 201 (Iowa 2004). The Court makes an "independent evaluation of the totality of circumstances as shown by the entire record." *State v. Turner*, 630 N.W.2d 601, 606 (Iowa 2001). The court grants "considerable deference to the trial court's findings regarding the credibility of witnesses, but [is] not bound by them." *Tague*, 676 N.W.2d at 201.

Merits

A. The police officer lawfully stopped Paye's vehicle because he had probable cause and reasonable suspicion to believe Paye was violating Iowa Code section 321.38.

Paye argues that the traffic stop for an obstructed license plate violated his state and federal constitutional rights to be free from a warrantless seizure because, he contends, the obstruction of his license plate did not violate the statute, and, therefore, the stop was illegal. The obstruction, however, was a violation. The officer thus had probable cause and reasonable suspicion to believe that the plate was obstructed in violation of Iowa Code section 321.38. The seizure did not violate Paye's constitutional rights.

1. A traffic stop is legal if supported by probable cause or reasonable suspicion to believe a traffic violation has been committed.

An officer may stop a vehicle based on probable cause that the driver has committed or is committing a criminal offense. *State v. Harrison*, 846 N.W.2d 362, 365 (Iowa 2014). "Probable cause exists if the totality of the circumstances as viewed by a reasonable and prudent person would lead that person to believe that a crime has been or is being committed and that the arrestee committed or is committing it." *State v. Bumpus*, 459 N.W.2d 619, 624 (Iowa 1990).

If the State establishes that a traffic violation occurred and the officer witnessed it, there was probable cause. *State v. Tyler*, 830 N.W.2d 288, 292 (Iowa 2013).

An officer may also stop and briefly detain a person for investigative purposes if the officer has reasonable cause to believe that criminal activity is afoot. *Terry v. Ohio*, 392 U.S. 1 (1968); *State v. Mitchell*, 498 N.W.2d 691, 693 (Iowa 1993). "Under *Terry*, 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. Pals*, 805 N.W.2d 767, 774 (Iowa 2011). Reasonable suspicion to support an investigative stop is less than probable cause and less than a preponderance of the evidence. *United States v. Cortez*, 449 U.S. 411, 417 (1981); *State v. Richardson*, 501 N.W.2d 495, 496-97 (Iowa 1993). Reasonable suspicion does not require that the circumstances exclude the possibility that the suspect is not engaged in crime; the principal function of an investigative stop is to resolve the ambiguity as to whether criminal activity is afoot. There may be sufficient grounds for an investigatory stop even though conduct is subject to legitimate explanation and turns out to be entirely lawful. *Richardson*, 501 N.W.2d at 497; *State v. Vance*, 790

N.W.2d 775, 780 (Iowa 2010). When a peace officer observes any type of traffic offense, the violation establishes both probable cause to stop the vehicle and reasonable suspicion to investigate. *State v. McIver*, 858 N.W.2d 699, 702 (Iowa 2015).

Officer Starkey believed that the trailer hitch ball obstructing his view of one of the letters of Paye's license plate violated Iowa Code section 321.38. Iowa Code section 321.38 governs vehicles' license plates:

> 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). Starkey had probable cause and reasonable suspicion to believe that the license plate was obstructed by the ball hitch in violation of section 321.38. The stop was legal.

2. *The terms "clearly visible" and "clearly legible" are unambiguous and prohibit a vehicle's trailer hitch ball from obstructing its license plate.*

Paye contends that the statute, when it requires license plates to be "clearly visible" and "clearly legible," doesn't prohibit obstructing a plate with a trailer hitch ball. Appellant Br. 32–33. He argues that Officer Starkey did not have probable cause or reasonable suspicion because the obstructed license plate was not a violation. Yet the obstruction was a violation, and Starkey had probable cause for the stop.

The first step in interpreting a statute is to determine whether its language is ambiguous. *State v. Coleman*, 907 N.W.2d 124, 135 (Iowa 2018). If it is not ambiguous, the Court applies the plain language. *State v. Ross*, 941 N.W.2d 341, 346 (Iowa 2020). If, based on the statute's context, reasonable minds could differ about its meaning, only then does the analysis turn to canons of statutory construction. *State v. Iowa Dist. Ct.*, 889 N.W.2d 467, 471 (Iowa 2017). The primary objective is to honor the intent of the legislature. *Harrison*, 846 N.W.2d at 367.

When applied to Paye's trailer hitch ball, section 321.38 is unambiguous. The phrase "clearly visible" is unambiguous. *Parks v.*

State, 247 P.3d 857, 859 (Wyo. 2011); *People v. White*, 93 Cal.App.4th 1022, 1026 (Cal. Ct. App. 4 Dist. 2001). "The term 'clearly' means 'free from obscurity . . . unmistakable . . . unhampered by restriction or limitation, unmistakable." *Id.* (*citing Webster's 9th New Collegiate Dict.* (1987) p. 247). " 'Visible' means 'capable of being seen,' 'perceptible to vision,' 'exposed to view,' 'conspicuous.' " *Id.* (citing *Webster's* p. 1318). A plain language interpretation of "[e]very registration plate shall at all times be securely fastened in a horizontal position to the vehicle for which it is issued . . . in a place and position to be clearly visible" thus requires that a license plate be entirely readable and prohibits its obstruction in any manner. *Id.* The ball hitch obstructing Paye's license plate—making it not entirely readable—violated section 321.38's "clearly visible" requirement.

The phrase "clearly legible" is also unambiguous. *Parks*, 247 P.3d at 859–60; *People v. Duncan*, 160 Cal.App.4th 1014, 1019 (Cal. Ct. App. 4 Dist. 2008). Besides the above definition of clearly, it can also mean "without equivocation; decidedly." *Id.* (citing *Random House Unabridged Dict.* (2d ed. 1993) p. 384)). " 'Legible is defined as 'capable of being read or deciphered, esp. with ease . . . easily readable.' " *Id.* (citing *Random House* p. 1099). A plain language

interpretation of "[e]very registration plate . . . shall be maintained free from foreign materials and in a condition to be clearly legible" requires that the information on the plate "be read with ease and without doubt or mistake." *Id.* The ball hitch obstructing Paye's license plate made the plate not able to "be read with ease and without doubt or mistake," and violated section 321.38's "clearly visible" requirement.

Nearly every state or federal court to evaluate a materially identical, or even similar, state statutory requirement has come down against Paye's position. *See, e.g.*, *Parks*, 247 P.3d at 859–61 (concluding that a trailer hitch obstructing a license plate violated Wyo. Stat. Ann. § 31–2–205(a) with materially identical language to section 321.38 and also collecting cases); *State v. Tregeagle*, 391 P.3d 21, 24 (Idaho Ct. App. 2017) (concluding that I.C. § 49-428(2), with materially identical language to section 321.38, prohibits obstruction of a license plate by a trailer hitch ball); *White*, 93 Cal.App.4th at 1026 (concluding that a plate obscured by a ball hitch was not "clearly visible" and was a violation of Cal. Vehicle Code § 5201 with nearly the same requirements as section 321.38); *State v. Hill*, 34 P.3d 139, 147 (N.M. Ct. App. 2001) (concluding that a trailer hitch blocking the

plate's registration sticker from some angles made it not clearly visible or clearly legible in violation of N.M. Stat. § 66-3-18 with materially identical language to section 321.38); *State v. Smail*, No. 99COA1339, 2000 WL 1468543, at *2 (Ohio Ct. App. Sept. 27, 2000) (unpublished) (holding plate was not "clearly visible" because a trailer hitch blocked the two middle numbers); *State v. McCue*, No. 29554-7-II, 2003 WL 22847338, at *3 (Wash. Ct. App. Dec. 2, 2003) (concluding a trailer hitch blocking one number of the plate, except when the vehicle turned a corner, violated the state's law requiring the plate be "plainly seen and read at all times"); *Burris v. State*, 954 S.W.2d 209, 212, 330 Ark. 66, 72 (Ark. 1997) (concluding that materially identical language of Ark.Code Ann. § 27–14–716(b) (Repl.1994) prohibited a trailer plate from either being partially obscured or flipping up in the wind); *State v. Hayes*, 660 P.2d 1387, 1389 (Kan. Ct. App. 1983) (requiring that all of the plate be legible and holding that an obscured state name was a violation of K.S.A. 8-133, which has language materially identical to section 321.38); *United States v. $45,000.00 in U.S. Currency*, 749 F.3d 709, 716 (8th Cir. 2014) (interpreting Nebraska statute N.R.S. § 60-399(2) stating that plate must be "plainly visible" as requiring the plate be "generally

readable for law enforcement and identification purposes from within a reasonable distance," and concluding that there was no violation because the officer was able to read the plate despite a back-up camera covering part of the state name); *Duncan*, 160 Cal.App.4th at 1019 (concluding that an upside license plate was not "clearly legible" because it was not readily readable); *United States v. Ledesma*, 447 F.3d 1307, 1313 (10th Cir. 2006) (concluding that temporary registration behind tinted window was not "clearly visible" in violation of K.S.A. § 8-133).

On the other side, functionally alone, is the Supreme Court of Illinois. *People v. Gaytan*, 32 N.E.3d 641, 644 (Ill. 2015). *Gaytan* addresses a stop for a trailer hitch ball partially obstructing at least one number of the license plate. *Id.* at 646. To decide whether there was a violation, the *Gaytan* court interprets section 3–413(b) of the Illinois Vehicle Code, 625 ILCS 5/3–413(b), which has a lot of the same language as Iowa Code section 321.38:

> 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 5 inches from the ground, measuring from the bottom of such plate, in a place and position to be clearly visible and shall be maintained in a condition to be clearly legible,

> free from any materials that would obstruct the visibility of the plate, including, but not limited to, glass covers and plastic covers.

625 ILCS 5/3–413(b) (West 2010). Unlike this Court searching for legislative intent, the Illinois Supreme Court initially considers not only the statute's language but also the law's purpose and necessity, as well as consequences that will flow from a particular construction. *Gayton,* 32 N.E.3d at 647, 649–50. More importantly, the Illinois court put great weight on the "materials clause" of section 3–413(b)—i.e., the final clause that prohibits any materials obstructing the plate's visibility and gives examples: glass and plastic covers. The court concluded that the materials clause informed both "clearly visible" as well as "clearly legible" with "great force." *Id.* at 649.

Here, section 321.38 has no materials clause. Like Illinois, Iowa does have a prohibition on license plate frames but in a different section. *See Harrison,* 846 N.W.2d at 368 (interpreting Iowa Code section 321.37(3)). Section 321.38 simply begins with the requirement that the plate be mounted in a manner to be clearly visible. Iowa Code § 321.38. Mounting the plate behind a trailer hitch ball would not make it clearly visible, so Paye's plate was not clearly visible. In addition, section 321.38 says license plates "shall be maintained free

from foreign materials and in a condition to be clearly legible." *Id.* Paye suggests that the foreign materials clause informs "clearly legible." Yet, the "and" offsetting the two imperatives—free from foreign materials and kept clearly legible—tells us that they are independent requirements. It does not say the plate shall be kept free from foreign materials in a condition to be clearly legible. *Id.* If it said that, the foreign materials clause might inform the clearly legible clause. Instead, section 321.38 says the plate shall be kept free from foreign materials and kept clearly legible. *Id.* The "and" separating the two imperatives does heavy lifting in section 321.38. Thus, Iowa's "clearly visible" and "clearly legible" requirements are not limited in the way that *Gayton* is limited.

The only other case taking an arguably contrary position was later abrogated. *Harris v. State*, No. 2D08-571, 2009 WL 188049, at *2 (Fla. Ct. App. Jan. 23, 2009), *abrogated by, English v. State*, 191 So.3d 448, 450–51 (Fla. 2016). *Harris* adopted the minority position on obstructions, concluding that under Fla. Stat. § 316.605, a trailer hitch is not "other obscuring matter." *English* abrogated *Harris* and concluded that a tag light hanging in front of a plate was "other obscuring matter." 191 So.3d at 450–51. These Florida cases

interpreted language among the furthest from the language used in section 321.38. Yet despite the lower appellate court's contrary interpretation, the Florida Supreme Court in *English* said that the Florida statute was not ambiguous, implicitly holding that the contrary interpretation in *Harris* was not a reasonable one. *Id.* This is persuasive authority that statutes of this type, whatever their language, prohibit obstructing license plates. *Gayton* is the exception that proves the rule.

What unites the interpretations of each other state's law, whether the specific law says that a license plate be "clearly visible," "clearly legible," "plainly visible," "unobscured," or something similar, is that the plate must be readable. *See In re $45,000*, 749 F.3d at 716 (interpreting "plainly visible" to mean "generally readable for law enforcement and identification purposes from within a reasonable distance"); *see also White*, 113 Cal. Rptr. 2d at 586 (interpreting "clearly visible" to require a plate to "be read with ease and without doubt or mistake); *Duncan*, 34 P.3d at 147 (construing "clearly legible" to mean easily readable without doubt or mistake). "License plates need to be easily read in order to facilitate law enforcement and ordinary citizens in reporting and investigating hit-and-run accidents,

traffic violations, gas-pump drive offs, and other criminal activity." *Parks*, 247 P.3d at 860.

The plain language of section 321.38, and interpretations from sister states, demonstrate that the terms "clearly visible" and "clearly legible" are unambiguous. Together, they mean that a plate must be at all times unobstructed and easily readable from a reasonable vantage point without doubt or mistake. *Parks*, 247 P.3d at 859; *White*, 113 Cal. Rptr. 2d at 586; *In re $45,000.00*, 749 F.3d at 716. This Court should interpret section 321.38 in this manner.

3. Ejusdem generis *does not apply, even if using tools of statutory construction is appropriate.*

Paye argues that 321.38 is ambiguous and the Court should use canons of statutory construction, specifically *ejusdem generis*, to resolve the ambiguity. Appellant Br. 33-34. Paye argues that this interpretive principle restricts the scope of the terms "clearly visible" and "clearly legible." Even if section 321.38 were ambiguous, *ejusdem generis* does not apply.

> The rule of Ejusdem generis is that 'where specific words of the same nature in a statute are followed by general words the latter take their meaning from the specific words and comprehend only those things of the same kind as the specific ones.'

Hoyt v. Chicago, R.I. & P.R. Co., 206 N.W.2d 115, 121 (Iowa 1973) (quoting *Federated Mutual Imp. & H. Ins. Co. v. Dunkelberger*, 172 N.W.2d 137, 140 (Iowa 1969)).

> The doctrine applies when five conditions are met: '(1) the statute contains an enumeration by specific words; (2) the members of the enumeration constitute a class; (3) the class is not exhausted by the enumeration; (4) a general term follows the enumeration; and (5) there is not clearly manifested an intent that the general term be given a broader meaning than the doctrine requires.'

Id. (quoting 2 Sutherland, Statutory Construction, § 4910 at 400 (Third Ed. 1943)).

Ejusdem generis analysis finishes where it starts—on the first condition. There is not an enumeration—i.e., a list—of specific terms before either general term "clearly visible" or "clearly legible." Thus, the first of five required elements is not present. Before "clearly visible" there are specific requirements governing how to mount a license plate, but it is not a list of similar items. Before "clearly visible," as discussed above, there is a requirement that the plate be kept free from foreign materials. But this is a separate imperative clause from the "clearly visible" requirement. Each of the other

factors rely on there being an enumeration or list; thus, *ejusdem generis* does not apply here.

Iowa Code section 321.38 contains no enumeration of a specific class of things under which *ejusdem generis* would constrain the meaning of general terms that follow the list. *Hoyt*, 206 N.W.2d at 121. Paye has identified no other interpretive canon in his favor, and the plain language should prevail. The Court should thus interpret Iowa's statute in the same manner as the courts in *Parks*, 247 P.3d at 859, *White,* 113 Cal. Rptr. 2d at 586, and *Hill*, 34 P.3d at 147, which each analyzed provisions materially identical to section 321.38.

4. Officer Starkey had probable cause and reasonable suspicion to believe that the unreadable license plate violated section 321.38.

Paye contends that a license plate with a trailer hitch ball obstructing it is visible and legible. Yet section 321.38 requires that the plate be *clearly* visible and *clearly* legible. Merely visible and merely legible will not do. As shown above, to satisfy section 321.38, a license plate must be at all times unobstructed and easily readable from a reasonable vantage point without doubt or mistake. *White*, 113 Cal. Rptr. 2d at 586; *In re $45,000.00*, 749 F.3d at 716; *Parks*, 247 P.3d at 859.

Officer Starkey stopped Paye because his license plate was obstructed and unreadable. Mot. Suppress Tr. 5:20–6:12, 10:12–16. The ball hitch prevented Starkey from deciphering the third letter of the license plate. Mot. Suppress Tr. 5:20–6:12, 8:24–9:14; DashCam Video 1:00, Ex. A.; Truck Photo, Ex. 1, App. Exs. 3. The license plate was not easily readable because Starkey had a doubt as to the third letter. *See White*, 93 Cal.App.4th at 1026 (concluding a ball hitch obstructing a plate made it not clearly visible); *In re $45,000.00*, 749 F.3d at 716. Due to the hitch, the plate was not clearly visible or clearly legible. *Parks*, 247 P.3d at 859; *Hill*, 34 P.3d at 147.

Only after Starkey exited his vehicle and observed Paye's vehicle from a sharp angle was he able to observe and read the full license plate. Mot. Suppress Tr. 14:19–25. From this angle to the rear and left of Paye's vehicle, the entire license plate was unobstructed. Mot. Suppress Tr. 15:4–8. Starkey did not relay the full plate number to dispatch until he was able to see it from this viewpoint. Mot. Suppress Tr. 15:9–11. This was not a reasonable vantage point—if a license plate is readable from an unreasonable vantage point, it is not easily readable. *Contra In re $45,000.00*, 749 F.3d at 716 (concluding that there was no reasonable suspicion that plate was not plainly visible

because the officer was able to read the temporary tag from 100 feet directly behind the vehicle). Starkey only being able to read the plate from that sharp angle demonstrates that the plate was obstructed and not easily readable. *See Smail*, 2000 WL 1468543, at *2 (concluding trailer hitch blocking two numbers made plate not clearly visible); *McCue*, 2003 WL 22847338, at *3 (holding that a plate was not "plainly seen and read at all times" despite being readable when the vehicle made a turn). A plate that an officer cannot fully read except from a specific, unusual, and inconvenient angle is not easily readable and thus not clearly visible or clearly legible.

Officer Starkey had probable cause and reasonable suspicion to seize Paye's vehicle to issue him a section 321.38 warning or citation for an unreadable license plate. Mot. Suppress Tr. 7:1–4. Starkey was thus justified in approaching Paye's window and asking for his license, registration, and proof of insurance. Mot. Suppress Tr. 19:13–16. Paye almost immediately informed the officer that he did not have a valid license. Dashcam Video 1:00–5:00, Ex. A. This resulted in the driving-while-barred charge and conviction.

B. Evaluation under the Iowa Constitution leads to the same result—there was probable cause and reasonable suspicion for the stop.

As explained above, Paye did not preserve the article I section 8 argument he makes here. The Court should thus ignore it. Yet, if the Court decides error is preserved, Paye does not make a persuasive constitutional argument. The Court should deny relief.

In arguing that article I section 8 prohibits the stop here, Paye never explains why. He cites interesting premises—that the Iowa Constitution contains a provision governing agricultural leases, that Illinois has fewer trucks per capita than Iowa, and that trucks are used for agriculture. Appellant Br. 38–39. But he doesn't articulate what they have to do with article I section 8 or why that provision prohibits besides the stop here. He simply contends that the stop was unreasonable. Yet, if the stop was for a violation of section 321.38, his reasonableness argument must fail unless he contends that stops based on probable cause to believe a crime has been committed are unreasonable. He is certainly not arguing this, so it remains unclear what he is arguing.

The strongest of Paye's interesting premises is that the *Parks*/*White*/*Hill* interpretation of "clearly visible" and "clearly

legible" urged above would prohibit a truck from hauling a trailer. Appellant Br. 39–40. Paye contends that this would effectively give law enforcement general warrant power to seize any truck hauling a trailer. *Id.* at 40. The trailer issue is not before the Court, of course. Nonetheless, it would be problematic to interpret section 321.38 as prohibiting a trailer from obstructing a vehicle's plate. That interpretation would conflict with many traffic code provisions that regulate hauling trailers. *See e.g.*, Iowa Code § 321.105 (requiring yearly registration of trailers operated on public highways); *id.* at § 321.123 (setting registration fees for trailers and truck-trailer combinations); *id.* at § 321.166 (requiring that trailers have license plates attached to their rear).

If the issue were before the court, section 321.38 would be ambiguous in respect to whether it prohibits a trailer obstructing a vehicle's license plate. "When more than one statute is relevant, we consider the statutes together and try to harmonize them." *State v. Snyder*, 634 N.W.2d 613, 615–16 (Iowa 2001). An interpretation generally prohibiting hauling a trailer, conflicting with many provisions seemingly allowing trailers on public highways, can be avoided by reading section 321.38 to require that the combination of

vehicles comply with the "clearly visible" and "clearly legible" requirements. *See* Iowa Code § 321.1 (" 'Combination' or 'combination of vehicles' shall be construed to mean . . . a group consisting of a motor vehicle and one or more trailers . . . which are coupled or fastened together for the purpose of being moved on the highways as a unit.") In other words, if the rear plate required to be displayed on a trailer complies with section 321.38, there is no violation even if the truck's rear plate is not easily readable.

This interpretation validates the legislature's clear intent to allow people to haul trailers on state highways as well its intent to require those vehicles to be registered and readily identifiable. *See Burris*, 954 S.W.2d at 212 (applying statute materially identical to section 321.38 to a trailer's license plate). The seeming conflict with the *Parks*/*White*/*Hill* no-obstructions interpretation is not a conflict at all. And frankly, if the legislature didn't intend section 321.38 to apply to the combination, there is no reasonable interpretation of "clearly visible" and "clearly legible" that would prevent a violation for obscuring the truck's rear plate when the truck is pulling a trailer.

Paye also contends that the State's proposed *Parks*/*White*/*Hill* interpretation would prevent a driver from attaching a bicycle rack or

even a wheelchair carrier to the back of a vehicle if doing so obscures the plate. For these items, however, the undersigned finds no provisions in the traffic code that demonstrate that the legislature meant to allow them. And just because a product is commercially available does not mean it complies with the law. *See Harrison*, 846 N.W.2d at 368 (concluding that license plate frames, although ubiquitous, violate section 321.37(3) if they obscure any number or letter on the plate, even the county name). Even if a commercially available product is rendered unusable in any manner by a statute, its commercial availability does not render a statute unreasonable and unconstitutional.

With the "combination" interpretation of 321.38, the main thrust of Paye's article I section 8 argument is lost. Nothing remains that is at all convincing. The Court should reject Paye's article I section 8 argument.

II. Section 321.38 is not void for vagueness as applied to Paye, and Paye's unpreserved claim that it is cannot be addressed.

Preservation of Error

Paye did not make a void-for-vagueness claim in district court. Appellant Br. 42 (asserting ineffective-counsel as an excuse for not

preserving error). Paye contends that counsel was ineffective for failing to do so. This argument cannot excuse failure to preserve error because this Court cannot consider ineffective-counsel claims on direct appeal. Iowa Code § 814.7. Error is not preserved.

Standard of Review

Constitutional claims are reviewed *de novo*. *Tague*, 676 N.W.2d at 201.

A. The Iowa General Assembly revoked this Court's authority to address ineffective-counsel claims on direct appeal.

Paye contends that this Court can address his claims that counsel was ineffective for failing to assert that section 321.38 is void for vagueness as applied to Paye. On July 1, 2019, legislation went into effect that alters the Court's direct-appeal authority to rule on ineffective-counsel claims. *See* 2019 Iowa Acts ch. 140, § 31 ("the Act") (modifying procedures for addressing ineffective-counsel claims); *see also* Iowa Code § 3.7(1) (establishing an effective date when none is provided). The Act amended Iowa Code section 814.7 to state that claims of ineffective counsel "shall not be decided on direct appeal from the criminal proceedings." 2019 Iowa Acts ch. 140, § 31. Instead, these claims must be brought in postconviction relief actions.

Id. This change precludes Paye from excusing his error-preservation failure because the Act revoked the Court's authority to decide ineffective-counsel claims.

Cases with judgment and sentence entered prior to July 1, 2019, were not subject to the new rule. *See State v. Macke*, 933 N.W.2d 226, 228 (Iowa 2019) (declining to apply amendments to cases in the hopper). But Paye was convicted on October 18, 2019. Ruling Trial Minutes Testimony & Sen. Order, App. 16. The new rule applies to Paye. *State v. Trane*, 934 N.W.2d 447, 464-65 (Iowa 2019); *State v. Draine,* 936 N.W.2d 205, 206 (Iowa 2019).

Error is not preserved and cannot be excused.

B. Paye does not have a due process right to have ineffective-counsel claims decided on direct appeal.

Paye claims that applying section 814.7 to him denies him due process in violation of the Fourteenth Amendment to the United States Constitution and article I section 9 of the Iowa Constitution. Appellant's Br. 49–52. He contends that not being able to address ineffective trial counsel on direct appeal violates his right to due process because it limits his appellate lawyer's effectiveness, thus infringing his right to effective appellate counsel. *Id.* His primary

complaint is that he cannot immediately present his void-for-vagueness argument to an appellate court.

Paye thus claims section 814.7 as amended is unconstitutional. Yet all "statutes are cloaked with a presumption of constitutionality." *State v. Hernandez-Lopez*, 639 N.W.2d 226, 233 (Iowa 2002). To invalidate a statute, the "challenger bears a heavy burden" and "must prove the unconstitutionality beyond a reasonable doubt." *Id.* Specifically, Paye "must refute every reasonable basis upon which the statute could be found to be constitutional." *Id.* (internal citation and quotation marks omitted). Under the Iowa or Federal Constitution, the analysis is the same. *Hernandez-Lopez*, 639 N.W.2d at 237. "The federal and state Due Process Clauses are nearly identical in scope, import and purpose, and our analysis in this case applies to both claims." *Id.*

Narrowing the claims that Paye's appellate counsel can make on direct appeal does not infringe his right to counsel because no state or federal constitutional provision provides a right to appeal a criminal conviction. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956); *State v. Olsen*, 162 N.W. 781, 782 (Iowa 1917). "[A] State is not required by the Federal Constitution to provide appellate courts or a right to appellate

review at all." *Griffin*, 351 U.S. at 18. "In Iowa the right of appeal is statutory and not constitutional." *State v. Hinners*, 471 N.W.2d 841, 843 (Iowa 1991)). Paye only has a right to effective appellate counsel because he has a statutory right to appeal. Narrowing that statutory right to appeal simply narrows the accordant right to counsel. Many other jurisdictions proscribe ineffective-counsel claims on direct appeal. *E.g.*, *State v. Spreitz*, 39 P.3d 525, 527 (Ariz. 2002); *State v. Van Cleave*, 716 P.2d 580, 582 (Kan. 1986); *State v. Leecan*, 504 A.2d 480, 493–94 (Conn. 1986); *Knappenberger v. State*, 647 S.W.2d 417, 417–18 (Ark. 1983); 3 Crim. Proc. § 11.7(e) (4th ed.).

Paye still has the opportunity to obtain post-judgment review of trial counsel's effectiveness. He can file a postconviction relief action, which is appealable. *See contra* Place, *Deferring Ineffectiveness Claims to Collateral Review: Ensuring Equal Access and a Right to Appointed Counsel*, 98 Ky.L.J. 301 (2009–2010) (expressing concern about right to counsel when a state does not provide counsel for a collateral attack). By statute, Paye is also entitled to counsel in postconviction proceedings in district court and appellate court. Iowa Code § 822.5.

If Paye has no due process right to appeal his conviction, he surely has no due process right to raise an ineffective-trial-counsel claim on direct appeal—especially when he could raise it in postconviction review while his appeal is pending. But even if he could not file a postconviction relief application until his appeal ended, due process does not prohibit putting hard choices to defendants. *See State v. Gay*, 526 N.W.2d 294, 297 (Iowa 1995) (holding that it did not violate due process to require a defendant to choose between waiving his right to an extradition hearing or face conviction for failing to appear at trial). This scheme of review does not deprive Paye of his constitutional right to counsel at any stage and thus satisfies due process.

C. The requirement that Paye pursue ineffective-counsel claims in postconviction does not contravene the separation of powers.

Paye contends that the Iowa General Assembly has violated the separation-of-powers doctrine by impairing the Iowa Supreme Court in exercising a constitutional duty. Appellant's Br. 52–59. Yet the Iowa Constitution provides that the Iowa Supreme Court is 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. As

discussed above, appellate jurisdiction in Iowa is thus "statutory and not constitutional." *Hinners*, 471 N.W.2d at 843. So, "when the Legislature prescribes the method for the exercise of the right of appeal or supervision, such method is exclusive, and neither court nor judge may modify these rules without express statutory authority, and then only to the extent specified." *Home Sav. & Tr. Co. v. Dist. Court*, 95 N.W. 522, 524 (Iowa 1903). "[T]he power is clearly given to the General Assembly to restrict this appellate jurisdiction." *Lampson v. Platt*, 1 Iowa 556, 560 (1855) (comma omitted).[1]

Being "purely statutory," the grant of "appellate review is . . . subject to strict construction." *Iowa Dep't of Revenue v. Iowa Merit Employment Comm'n*, 243 N.W.2d 610, 614 (Iowa 1976). Absent a statute authorizing an appeal, this Court cannot acquire 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.").

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[1] *Lampson* interpreted a materially identical predecessor provision of the 1846 Constitution. The only difference between the 1846 and 1857 provisions is that the commas setting off "by law" were added. *See* Iowa Const. art. V, § 3 (1846) (not setting off "by law" with commas). Adding commas did not change the provision's meaning.

The Iowa Supreme Court's territorial predecessor also had its jurisdiction "limited by law." *See United States ex rel James Davenport & Pet. for Mandamus to Cty. Commissioners of Dubuque Cty.*, Bradf. 5, 11 (Iowa Terr. 1840), 1840 WL 4020.

Such authorizing statutes can be modified, and the authority to hear a particular class of appellate cases "may be granted or denied by the legislature as it determines." *James v. State*, 479 N.W.2d 287, 290 (Iowa 1991). Under Iowa's constitutional structure, the role of the judiciary is to decide controversies, but the General Assembly is the arbiter of which "avenue of appellate review is deemed appropriate" for a particular class of cases. *Shortridge v. State*, 478 N.W.2d 613, 615 (Iowa 1991), *superseded by statute on other grounds*.

The legislative branch in Iowa thus possesses nearly limitless authority to regulate appellate jurisdiction. *E.g*. *James*, 479 N.W.2d at 290; *Olsen*, 162 N.W. at 782; *Johnson*, 2 Iowa at 549. Acts of the General Assembly are the source of the Court's authority to hear criminal appeals, not the Iowa Constitution. Legislation narrowing the Court's authority to decide issues in criminal appeals is the legislature's power to exercise and does not intrude on any constitutional power of the Court. The change to 814.7 is thus consistent with the separation of powers.

Demonstrating this constitutional power to regulate the Court's appellate criminal jurisdiction, the General Assembly has added and subtracted from it many times:

- **1838 into the early years of statehood**: The Territorial Legislature and General Assembly authorized the supreme court to hear writs of error for non-capital criminal defendants "as a matter of course," but the Court only had authority to hear writs in capital cases upon "allowance" of a Judge of the supreme court. Iowa Code § 3088, 3090–91 (1851); Iowa Code ch. 47, §§ 76–77 (Terr. 1843); Iowa Code ch. Courts, §§ 76–77, p. 124 (Terr. 1839).

- **Late 19th and early 20th Century:** The district court had authority to hear all appeals from inferior tribunals, often as a trial anew. *See*, *e.g.*, Iowa Code § 6936 (1919) (providing district court had original and appellate jurisdiction of criminal actions), § 9241 (1919) (allowing "trial anew" for appeals from justice court); § 161 (1873) (giving district court original and appellate jurisdiction of criminal actions). The criminal decisions of the district court were, in turn, reviewable by the supreme court. *E.g.*, Iowa Code § 9559 (1919); Iowa Code § 4520 (1873).

- **1924 until 1971 (approximately)**: The General Assembly granted the supreme court authority to review "by appeal" "any judgment, action, or decision of the district court in a criminal case," for both indictable and non-indictable offenses. *See* Iowa Code § 793.1 (1966) (governing all criminal cases); § 762.51 (1966) (addressing non-indictable cases); ch. 658, § 13994 (1924) (governing all criminal cases); ch. 627, § 13607 (1924) (addressing non-indictable cases).

- **1972**: The General Assembly established the modern unified court system and revoked the supreme court's authority to review non-indictable criminal cases, other than by discretionary review. *See* 1972 Iowa Acts, ch. 1124 (64th Gen. Assem., 2nd Sess.); *id.* at § 73.1 ("No judgment of conviction of a nonindictable misdemeanor . . . shall be appealed to the supreme court except by discretionary review as provided herein."); *id.* at § 275 (amending 793.1); *id.* at § 282 (repealing 765.51). The General Assembly also

revoked the supreme court's appellate authority governing acquittals in non-indictable cases. *Id.* at § 73.1.

- **1979:** Following substantial revisions to criminal provisions of the Iowa Code, the General Assembly granted the appellate courts authority to hear appeals from all "final judgment[s] of sentence" but continued to prohibit the supreme court from reviewing simple-misdemeanor, and ordinance-violation, convictions except by discretionary review. Iowa Code § 814.6 (1979).

- **2019**: The General Assembly revoked appellate courts' authority to decide appeals from guilty pleas to non-Class A felonies. *See* 2019 Iowa Acts ch. 140, § 28 (88th Gen. Assem.). Of course, it also took the action at issue here.

The Act is the latest in this long line of legislation narrowing or expanding appellate jurisdiction. Like these earlier examples, the General Assembly has exercised its prerogative to regulate appellate jurisdiction; using that power again, the Act revokes appellate court jurisdiction. This is consistent with the allocation of powers contemplated by the framers of the Iowa Constitution. Iowa Const. art. V, § 4. When it separated powers between branches, the Iowa Constitution gave the legislative branch the power at issue.

Paye asserts that while the legislature can "prescribe the manner of jurisdiction" that "should not be confused with an ability to remove jurisdiction from the court." Appellant's Br. at 55. But the Iowa Constitution allows the General Assembly to "prescribe" the

"manner" of *district court* jurisdiction. Iowa Const. art. V, § 6. The Iowa Supreme Court, however, "shall constitute a court for the correction of errors at law, under such restrictions as the general assembly may, by law, prescribe." *Id.* at art. V, § 4. Paye builds his argument upon the wrong constitutional provision. When the General Assembly prescribes this Court's jurisdiction, it may prescribe less than it has in the past. A historical prescription of appellate jurisdiction by one General Assembly does not rescind the power of a future General Assembly to prescribe less appellate jurisdiction. A transfer of this prescriptive power from the legislative to the judicial branch is what would violate the Iowa Constitution's separation of powers.

Paye's reliance on *Matter of Guardianship of Matejski*, 419 N.W.2d 576 (Iowa 1988), also erroneously argues from rules governing district court jurisdiction. Appellant's Br. at 45. *Matejski* addresses a district court's authority to order sterilization when no legislation was on point. 419 N.W.2d at 576–80. *Matejski* does not apply here because the Act narrowed appellate court jurisdiction, not district court jurisdiction. The *Matejski* court properly analyzed district court jurisdiction under article V, section 6 of the Iowa

Constitution, not supreme court jurisdiction under Article V, section 4. Paye does not explain why "in such manner" would mean the same thing as "under such restrictions." *Compare id.* art. V, § 6, *with id.* art. V, § 4. Nor does he acknowledge the different jurisdictional grants. *Id.* Paye's argument must fail because article V, section 6 governs district court jurisdiction, not supreme court jurisdiction.

The General Assembly did not remove this Court's ability to hear appeals from ineffective-counsel claims. It simply made postconviction review the exclusive path to litigate such claims. Postconviction applicants can still appeal ineffective-counsel claims to this Court but only after they present the claims in a postconviction relief action in district court. Iowa Code § 822.9. Section 814.7 does not violate the separation of powers.

D. Plain error review should not be adopted without the General Assembly's input.

If this Court concludes that section 814.7 bars consideration of Paye's ineffective-counsel claim on direct appeal, he invites the Court to adopt the plain error rule. Appellant's Br. pp. 45–49; *see* Fed. R. Crim. P. 52(b); Fed R. Evid. 103(c). Yet, the Court has repeatedly refused to do so and all but declared that it would not in the future. *See e.g., Rutledge*, 600 N.W.2d at 325 ("We do not subscribe to the

plain error rule in Iowa, have been persistent and resolute in rejecting it, and are not at all inclined to yield on the point.") (citing *State v. McCright*, 569 N.W.2d 605, 607 (Iowa 1997)); *Hernandez-Lopez*, 639 N.W.2d at 234 ("We reject the defendants' suggestion that the importance and gravity of an unpreserved constitutional issue creates an exception to our error preservation rules."); *State v. Miles*, 344 N.W.2d 231, 233 (Iowa 1984) ("We do not have a plain error rule."); *see also State v. Martin,* 877 N.W.2d 859, 866 (Iowa 2016) (collecting cases). The Court should continue to decline to adopt plain-error review.

The primary reason not to adopt plain error here is that there was no error below. Under a plain error standard an appellant must establish (1) an error; (2) the error is "clear or obvious, rather than subject to reasonable dispute;" (3) such error "affected the appellant's substantial rights," meaning "it affected the outcome" of the trial court proceedings; and (4) "the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *United States v. Marcus,* 560 U.S. 258, 262 (2010) (citations omitted). There was no error, as will be discussed in the next subsection; thus, adopting plain error here is unnecessary.

Also, the 2019 change to section 814.7 does not support adopting a plain-error rule. The statutory change addressed a problem recognized by this Court—litigating unpreserved errors on direct appeal is almost always premature. *See State v. Straw*, 709 N.W.2d 128, 138 ("In only rare cases will the defendant be able to muster enough evidence to prove prejudice without a postconviction relief hearing."). The statutory change also prevents the Court from substituting a finding of attorney professional misconduct when ineffective-counsel has become a replacement for the repeatedly rejected plain-error rule. *See Rhoades v. State*, 848 N.W.2d 22, 33 (Iowa 2014) (Mansfield, J. specially concurring) (suggesting that Iowa's view of ineffective-counsel claims is expansive and, in some circumstances, treated as a substitute for plain-error review, a standard of review the court has rejected). Under a plain-error analysis, the defense lawyer would be subject to a finding that his or her misstep was "obvious" or "clear under the current law at the time it was made," which is essentially the same criticism of counsel's judgment or performance. *United States v. Olano*, 507 U.S. 725, 734 (1993). Counsel ought to have the opportunity to weigh in. *See State v. Bentley*, 757 N.W.2d 257, 264 (Iowa 2008) ("Even a lawyer is

entitled to his day in court, especially when his professional reputation is impugned.")

The statutory change does not create a gap in the Court's ability to redress failures to preserve prejudicial error. All ineffective-counsel claims that were previously asserted on direct appeal remain cognizable in postconviction review. Iowa Code § 822.2(1)(a). And the results of those postconviction relief actions may be appealed. Iowa Code § 822.9. Convicted criminal defendants still have adequate remedies for wrongs sustained as a result of ineffective counsel.

Iowa's ineffective-counsel framework already resembles the plain-error framework that Paye proposes—it requires a showing of error (breach) and substantial resultant effect (prejudice). *See*, *e.g.*, *State v. Yaw*, 398 N.W.2d 803, 805 (Iowa 1987) (rejecting plain error standard, and suggesting that if true, "failure to lodge the confrontation objection constituted deficient performance by counsel and resulted in prejudice to the defendant, the issue would be properly raised and preserved by a post-trial claim of ineffective assistance of counsel"). And, unlike the plain-error standard, success on an ineffective-counsel claim does not require showing an impact on "the fairness, integrity or public reputation of judicial

proceedings." This nebulous, almost discretionary aspect of the plain-error rule is not part of ineffective-counsel framework and does not introduce the same potential to frustrate an ineffective-counsel claim. *Olano*, 507 U.S. at 732, 736-37. So, Iowa's current ineffective-counsel framework makes relief more accessible and predictable by simplifying the required showing. Also, a plain-error claim with this extra required showing that fails on direct review would likely not be cognizable in postconviction relief.

Citing the purpose statement of the Iowa Rules of Evidence, Paye urges that justice delayed may be justice denied. Appellant's Br. p. 46. That rule teaches that the Iowa Rules of Evidence "should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay . . . ." Iowa R. Evid. 5.102. Paye does not challenge an evidentiary ruling, however, and does not explain how the purpose statement for the rules of evidence applies to his case.

Building on his "rules of evidence" argument, however, Paye suggests that postconviction proceedings may drag on for extended periods of time, frustrating the evidence rules' purpose statement. Appellant's Br. pp. 45–49. As support, he quotes this Court's

statement: "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). This statement was made in respect to a system that, at the time, required ineffective-counsel claims to be raised on direct appeal to be preserved. Yet, there is no inherent reason for a slow-moving postconviction case. A parallel postconviction review action may proceed more rapidly than waiting for ineffective-counsel claims to clear the appellate courts. It will at least not be slower for the great majority of ineffective-counsel claims that end up preserved for postconviction proceedings by the appellate courts. Nothing in chapter 822 prevents the expeditious resolution of a postconviction claim, and some claims can be resolved within a matter of months. Plus, with postconviction courts no longer waiting on ineffective-counsel claims to clear appeal, there are fewer reasons, if any, to stay postconviction cases pending appeal. Asserting plain error on direct review for a claim that can also be couched as an ineffective-counsel claim requires participating in the oft-lengthy appellate process.

The change to section 814.7 ensures that defendants will proceed directly to postconviction proceedings, and the appellate

court will have the benefit of a developed record when deciding those claims on appeal. The district court is "the forum best suited to developing the facts necessary to determining the adequacy of representation during an entire trial." *Massaro v. United States*, 538 U.S. 500, 505 (2003) (emphasis added). A postconviction relief action is the best forum for evaluating ineffective-counsel claims. The new legislation is not a reason to adopt plain-error review in Iowa.

This Court should also refuse to adopt a plain-error standard for a more fundamental reason. The General Assembly should be involved. Respecting the long tradition of requiring error preservation to reach claims on appeal, the General Assembly has now acted to ensure that unpreserved claims will be fully litigated in postconviction proceedings rather than on direct appeal. The legislation mandated a process that was followed in the great majority of cases already. *Straw*, 709 N.W.2d at 138.

If Iowa adopts plain-error review, the process should involve the General Assembly, whether through the regular course of legislation or through this Court's rulemaking, which itself involves legislative branch approval. Turning again to article V, section 4, the Iowa Constitution establishes this Court as one "for the correction of

errors at law, under such restrictions as the general assembly may, by law, prescribe[.]" Iowa Const. art. V, § 4. Its appellate jurisdiction is statutory. The governmental branch responsible for both enacting statutes and determining the court's appellate jurisdiction should decide whether this Court may review a criminal defendant's conviction and sentence for plain error.

To adopt a plain-error rule here would be judicial legislation and directly contravene the legislature's intent in enacting section 814.7. *See Webster County Bd. Of Supervisors v. Flattery*, 268 N.W.2d 869, 873–74 (Iowa 1978) ("We have repeatedly declined to legislate."). Judicial adoption of plain-error review appropriates "the prerogative of the legislature to declare what the law shall be." *State ex. rel. Lankford*, 508 N.W.2d 462, 463 (Iowa 1993). This Court has required error preservation, in one form or another, since at least 1855. *Danforth, Davis & Co. v. Carter*, 1 Iowa 546, 553 (1855); Thomas A. Mayes & Anuradha Vaitheswaran, *Error Preservation in Civil Appeals in Iowa: Perspectives on Present Practice*, 55 Drake L. Rev. 39, 43 (2006). It should continue to refuse to legislate plain-error review.

At root, however, this case is not even a vehicle for deciding whether to adopt plain-error review because there was no error. For the reasons that follow, Section 321.38 is not void for vagueness. There is thus no reason to consider adopting plain-error review.

E. Alternatively, Iowa Code section 321.38 is not void for vagueness, there is thus no plain error, and an ineffective-counsel claim would fail for lack of prejudice.

Even if the court can address the issue, whether through ineffective counsel or plain error, Paye cannot prevail on a void-for-vagueness claim. Paye contends that Iowa Code section 321.38 is unconstitutionally vague because it failed to give him notice that a license plate obstructed by a ball trailer hitch is a violation. Section 321.38 is not vague, and his claim should thus fail on its merits. Paye could not show prejudice needed to support an ineffective-counsel claim. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984) (requiring that an offender show a reasonable probability of a different outcome). He could also not show error necessary to support a plain-error claim. *See Marcus,* 560 U.S. at 262 (requiring error).

The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits states from enforcing vague statutes. *State v. Musser*, 721 N.W.2d 734, 745 (Iowa 2006). "[T]he

void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *State v. Reed*, 618 N.W.2d 327, 332 (Iowa 2000) (internal quotations omitted). The doctrine "simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." *State v. Price*, 237 N.W.2d 813, 816 (Iowa 1976).

Paye contends section 321.38 is vague as it was applied to him. Appellant's Br. 59–67. When considering a "vague-as-applied" challenge, the Court is to consider whether a defendant's conduct "clearly falls 'within the proscription of the statute under any construction.' " *Musser*, 721 N.W.2d at 745 (quoting *State v. Hunter*, 550 N.W.2d 460, 465 (Iowa 1996). If a standard of conduct can be reasonably ascertained by reference to prior judicial decisions, statutes, the dictionary, or other common generally accepted usage, then the statute satisfies constitutional due process requirements. *State v. Gonzalez*, 718 N.W.2d 304, 310 (Iowa 2006). Vagueness challenges are decided by referring to pertinent law and not the

subjective expectations of a particular defendant. *State v. Seering*, 701 N.W.2d 655, 661 (Iowa 2005). And, when considering vagueness challenges, Iowa courts apply an "avoidance theory"—the Court presumes the statute is constitutional and utilizes "any reasonable construction" to uphold it. *State v. Nail,* 743 N.W.2d 535, 539-40 (Iowa 2007). Paye cannot prevail, therefore, unless he refutes all reasonable bases that might uphold section 321.38. *Seering* 701 N.W.2d at 661.

A statute can be unconstitutionally vague in a number of ways:

> 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.

Nail, 743 N.W.2d at 539. The third component is not applicable to an as-applied challenge, which is all that Paye has standing to make. *Id.* The ultimate question is whether "the defendant's conduct clearly falls within the proscription of the statute under any construction." *Musser*, 721 N.W.2d at 745 (internal quotations omitted). If the

statute "gave the defendant fair warning" that his actions "fell within the statutory prohibition," it is not vague. *Id.*

There is no vagueness problem here. For the reasons articulated Section I.A.2, the interpretation of the statute supported in that section is a reasonable construction. Under that construction, a license plate must be at all times unobstructed and easily readable from a reasonable vantage point, without doubt or mistake. *Parks*, 247 P.3d at 859; *White*, 113 Cal. Rptr. 2d at 586; *In re $45,000.00*, 749 F.3d at 716. That construction is supported by section 321.38's language as well as by the multitude of other jurisdictions, string cited in Section I.A.2 above, interpreting materially identical language in the same manner. Applying that reasonable construction, an obstructed license plate is a violation of section 321.38. Paye had fair warning and clear notice that an obstructed, not easily readable license plate would violate section 321.38 because, in that condition, it is not "clearly visible" or "clearly legible."

Paye strays again to application of section 321.38 to license plate obstructions besides his own—bicycle racks, wheelchair lifts, and trailers. Yet, the way that section 321.38 would apply in different situations is not relevant to an as-applied challenge. *Reed*, 618

N.W.2d at 332. And Paye only has standing to make an as-applied challenge. *Id.* Paye's arguments about other obstructions are thus irrelevant to his as-applied challenge. The Court must wait for another day to determine whether the statute is vague as applied to license plates obstructed in a different manner.

Paye has not established that the *Parks*/*White*/*Hill* construction of section 321.38 is unreasonable. That construction applies to his obstructed license plate. The statute is thus not unconstitutionally vague, and Paye is not entitled to relief. *Seering*, 701 N.W.2d at 661.

CONCLUSION

For the reasons articulated above, Paye is not entitled to relief, and the Court should affirm the judgment supporting his conviction and sentence.

REQUEST FOR NONORAL SUBMISSION

Oral argument may assist the Court because there are multiple issues of first impression in this appeal. Yet all of those issues, save the interpretation of section 321.38, are already pending in multiple cases ready for oral argument. *State v. Boldon*, No. 19-1159 (addressing whether Iowa Code section 814.7 violates separation of

powers, due process, or the right to counsel, and also whether the Court should adopt plain-error review); *State v. Gay*, No. 19-1354 (same); *State v. Snook*, No. 19-2023 (same); *State v. Calhoun*, 19-0066 (addressing plain-error review); and *State v. Crews*, 19-1404 (addressing plain-error review). The State believes that interpretation of section 321.38 is straightforward and that oral argument addressing that issue would not greatly assist the Court. And the other issues of first impression are likely to have been argued, or perhaps even decided, by the time this matter is ready for argument. Argument in this matter would likely be unnecessarily repetitive. The State thus requests nonoral submission.

Respectfully submitted,

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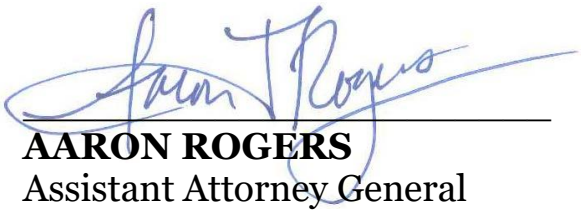

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Dated: June 9, 2020

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