IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff–Appellee, v. BION BLAKE INGRAM, Defendant–Appellant.	)))))))))	S.CT. NO. 16–0736

APPEAL FROM THE IOWA DISTRICT COURT
FOR JASPER COUNTY
HONORABLE STEVEN J. HOLWERDA, JUDGE

APPELLANT'S BRIEF AND ARGUMENT AND REQUEST FOR ORAL ARGUMENT

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FINAL

CERTIFICATE OF SERVICE

On the 26th day of January, 2017, 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 Bion Blake Ingram, 639 S. 8th Street, Apt. #5, Chariton, IA 50049.

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ROUTING STATEMENT

The Iowa Supreme Court should retain this case because the issues raised involve substantial issues of first impression in Iowa. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(c). Specifically, it argues the Iowa Constitution provides more protection for individuals than the U.S. Constitution with regards to inventory searches and asks the Court to overrule State v. Roth, 305 N.W.2d 501 (Iowa 1981), to the extent it states the article I, section 8 of Iowa Constitution should be interpreted lockstep with the Fourth Amendment of the U.S. Constitution with regards to inventory searches. It also argues a positive result from a drug field testing kit is insufficient to establish proof beyond a reasonable doubt that the substance is an illegal drug when the record lacks any evidence regarding the reliability of the kit.

STATEMENT OF THE CASE

Nature of the Case: Defendant–Appellant Bion Blake Ingram appeals his conviction, sentence, and judgment following a bench trial on the minutes of testimony and verdict

finding him guilty of Possession of a Controlled Substance (Methamphetamine), Second Offense, an aggravated misdemeanor, in violation of Iowa Code section 124.401(5) (2016).

Course of Proceedings: On November 9, 2015, the State charged Ingram with Possession of a Controlled Substance (Methamphetamine), Second Offense, an aggravated misdemeanor, in violation of Iowa Code section 124.401(5) (2016). (Trial Information; Supplemental Trial Information) (App. pp. 6-7; 8-9).

Pursuant to a court order, the arraignment was scheduled for November 18, 2015. (Approval Trial Information & Order Arraignment) (App. pp. 18-19). It is not clear from the record that Ingram was ever arraigned. On November 18, 2015, an order states Ingram has not waived speedy and schedules a pretrial conference; however there is no entry indicating Ingram was arraigned on the charge. (Order Setting Hr'g) (App. pp. 20-21). A written arraignment was not filed.

On December 11, 2015, Ingram filed a motion to suppress seeking to exclude evidence obtained during his traffic stop on October 30, 2015. (Mot. Suppress) (App. pp. 22-23). The court heard the motion to suppress on January 28, 2016. (Suppress. Hr'g Tr. p.1 L.1–p.38 L.19). During the hearing, the State admitted photographs of the black bag and its contents and a vehicle inventory report. (Suppress. Hr'g Tr. p.13 L.19–p.16 L.5) (Ex. 1, 2, & 3) (App. pp. 24-26). Additionally, the State presented testimony from one of the officers involved, and Ingram testified on his own behalf. (Suppress. Hr'g Tr. p.4 L.4–p.33 L.1). Following the hearing, Ingram filed a memorandum in support of his motion, and the State filed a response. (Mem. Supp. Mot. Suppress.; Resp. Def.'s Mem.) (App. pp. 27-29; 30). On February 3, 2016, the district court issued a written ruling denying Ingram's Motion to Suppress. (Suppress Ruling) (App. pp. 31-35).

On March 30, 2016, Ingram waived his right to a jury trial[1] and stipulated to a bench trial on the minutes of testimony and the attached police reports. (Trial Tr. p.2 L.1–p.3 L.22). The court took the matter under advisement and subsequently issued written verdict finding Ingram guilty of Possession of a Controlled Substance (Methamphetamine), Second Offense, in violation of section124.401(5), and Possession of Drug Paraphernalia, in violation of section 124.414, on April 4, 2016. (Trial Tr. p.3 L.23–p.4 L.1) (Guilty Verdict) (App. pp. 36-38).

On April 27, 2016, the district court sentenced Ingram to sixty days in jail, with all but seven days suspended, and it placed Ingram on probation. (Sentencing Tr. p.6 L.11–14) (Sentencing Order) (App. pp. 39-41). The court imposed a fine of $625, the criminal penalty surcharge, the $125 Law Enforcement Initiative surcharge, and the $10 Drug Abuse Resistance Education surcharge. (Sentencing Tr. p.6 L.11–14)

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[1] No written waiver was filed in accordance with Iowa Rule of Criminal Procedure 2.17(1). The court did conduct an in-court colloquy with Ingram regarding the waiver. (Trial Tr. p.2 L.18–p.3 L.22).

(Sentencing Order) (App. pp. 39-41). It also ordered Ingram to pay the court costs and restitution for reimbursement of court-appointed attorney fees. (Sentencing Order) (App. pp. 39-41). Ingram's driver's license was revoked for one hundred and eighty days pursuant to Iowa Code section 901.5(10), and he was ordered to submit a DNA sample under section 81.2(1). (Sentencing Order) (App. pp. 39-41).

Ingram timely filed a notice of appeal on April 27, 2016. (Notice Appeal) (App. pp. 42-43).

Facts: For the bench trial, the parties stipulated to the minutes of testimony and attached police reports, which support the following facts:

At approximately 6:39 a.m. on October 30, 2015, Jasper County Sheriff Deputy Jeremy John Burdt observed a vehicle travelling north down Highway 14 in Jasper County. (Mins. Test.) (App. pp. 10-17). As the vehicle passed him, Deputy Burdt noticed the vehicle's license plate light was not properly illuminated. (Mins. Test.) (App. pp. 10-17). Deputy Burdt pulled the vehicle over for this violation, and he made contact

with Ingram, who was the car's driver and sole occupant. (Mins. Test.) (App. pp. 10-17).

After Deputy Burdt pulled over the vehicle, Bernard Eckert, an officer with the Newton Police Department, also responded. (Mins. Test.) (App. pp. 10-17). Both officers noticed the vehicle's registration sticker did not correspond with the vehicle's plate and was supposed to be on a different vehicle's plate. (Mins. Test.) (App. pp. 10-17). As a result of the registration violation, the officers decided to impound the vehicle. (Mins. Test.) (App. pp. 10-17).

Ingram told Deputy Burdt he had been previously given a citation for the license plate light and that he did not have the registration or insurance information because it was not his car. (Mins. Test.) (App. pp. 10-17). Ingram declined to search the vehicle for the registration and insurance, stating he had attempted to find them for the previous citation and could not locate them. (Mins. Test.) (App. pp. 10-17).

Deputy Burdt told Ingram the car would be towed for the registration violation. (Mins. Test.) (App. pp. 10-17). In

response to the officer's questioning whether anything of value was in the car, Ingram stated nothing and again informed the deputy he was only borrowing the car; Ingram also stated both he and his girlfriend drive the car. (Mins. Test.) (App. pp. 10-17). Ingram removed his work-related items from the vehicle. (Mins. Test.) (App. pp. 10-17).

Deputy Burdt requested Ingram go back with him to his patrol vehicle while he wrote the citations for the traffic violations. (Mins. Test.) (App. pp. 10-17). Deputy Burdt asked Officer Eckert to conduct an inventory of the car while they waited for the tow service to arrive. (Mins. Test.) (App. pp. 10-17). Ingram called a friend from his cell phone for a ride to work. (Mins. Test.) (App. pp. 10-17).

While inventorying the vehicle, Officer Eckert discovered a black cloth bag next to the gas pedal on the driver's side floorboard. (Mins. Test.) (App. pp. 10-17). Officer Eckert opened the bag and discovered a glass pipe with white residue and an Icebreakers container with several plastic bags. (Mins. Test.) (App. pp. 10-17). One of the plastic bags contained a

crystal substance. (Mins. Test.) (App. pp. 10-17). The officers placed Ingram under arrest and read him his Miranda rights. (Mins. Test.) (App. pp. 10-17).

When confronted about the substance and pipe by the officers, Ingram denied knowing that the items were in the car. (Mins. Test.) (App. pp. 10-17). Ingram asked the officers where and how much of the drug was found. (Mins. Test.) (App. pp. 10-17). When told by the officers that it was found by the gas pedal, Ingram indicated he did not notice anything and did not look at the floorboard. (Mins. Test.) (App. pp. 10-17).

Officer Eckert took the substance back to the Newton Police Department, where it field tested positive for methamphetamine. (Mins. Test.) (App. pp. 10-17).

Ingram was previously convicted of Possession of a Controlled Substance (Marijuana) in Lucas County, Iowa, on August 3, 2009.

Any other relevant facts will be discussed below.

ARGUMENT

I. THE COURT ERRED BY DENYING THE DEFENDANT'S MOTION TO SUPPRESS.

A. Preservation of Error: Trial counsel filed a motion to suppress, seeking the exclusion of the evidence found in the vehicle under the Fourth and Fourteenth Amendments to the United States Constitution and article I, section 8 of the Iowa Constitution and arguing the impoundment and inventory search of a closed bag were unlawful. (Mot. Suppress) (App. pp. 22-23). Error was preserved by the motion to suppress, and the court's denial of the motion. (Mot. Suppress; Suppress. Ruling) (App. pp. 22-23; 31-35). See State v. Wright, 441 N.W.2d 364, 366 (Iowa 1989) (citations omitted) (finding an adverse ruling on a pretrial suppression motion preserved error for appellate review when there was a stipulated trial on minutes of testimony).

To the extent this Court concludes error was not properly preserved for any reason, Ingram 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).

B. Standard of Review: The Court reviews alleged violations of constitutional rights de novo. State v. Hoskins, 711 N.W.2d 720, 725 (Iowa 2006) (citing State v. Freeman, 705 N.W.2d 293, 297 (Iowa 2005)). The Court makes "'an independent evaluation of the totality of the circumstances as shown by the entire record.'" State v. Turner, 630 N.W.2d 601, 606 (Iowa 2001) (quoting State v. Howard, 509 N.W.2d 764, 767 (Iowa 1993)). The Court gives deference to the district court's factual findings "due to its opportunity to evaluate the credibility of the witnesses," but it is not bound by the findings. State v. Lane, 726 N.W.2d 371, 377 (Iowa 2007).

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). Ingram challenged the inventory search of the vehicle under both federal and state constitutional provisions. (Mot. Suppress) (App. pp. 22-23).

To determine whether there has been a violation of the Fourth Amendment or article I, section 8, the Court has adopted a two-step approach. State v. Lowe, 812 N.W.2d 554, 567 (Iowa 2012) (citations omitted). First, the Court determines whether the individual has a legitimate expectation of privacy in the area searched. Id. (citing State v. Fleming, 790 N.W.2d 560, 564 (Iowa 2010)). If a legitimate expectation of privacy exists, the Court determines whether the State unreasonably invaded that protected interest. Id. at 567–68.

Generally, unless an exception applies, a search or seizure must be conducted pursuant to a warrant to be reasonable. State v. Huisman, 544 N.W.2d 433, 436 (Iowa 1996) (citations omitted). It is the State's burden to prove by a

preponderance of the evidence that a warrantless search falls into one of the exceptions. State v. McGrane, 733 N.W.2d 671, 676 (Iowa 2007) (citing State v. Gillespie, 619 N.W.2d 345, 350 (Iowa 2000)). An inventory search incident to a lawfully impounded vehicle is an exception to the warrant clause. Id. (citations omitted). "The legality of an inventory search depends on two overlapping inquiries: the validity of the impoundment and the scope of the inventory." Huisman, 544 N.W.2d at 436 (citing State v. Jackson, 542 N.W.2d 842, 845 (Iowa 1996)). If either of these factors is unreasonable then the Court must suppress the evidence discovered in the inventory search. See id.

First, Ingram had a legitimate expectation of privacy in the vehicle. "An expectation of privacy must be subjectively and objectively legitimate" and [is] determined 'on a case-by-case basis.'" State v. Lowe, 812 N.W.2d 554, 567 (quoting Naujoks, 637 N.W.2d at 106). The record establishes Ingram was the vehicle's driver and sole occupant. (Mins. Test.) (App. pp. 10-17). It was also undisputed that he was a regular

driver of the vehicle and borrowed it from the owner. (Mins. Test.) (App. pp. 10-17). Thus, Ingram had a legitimate expectation of privacy in the vehicle. See State v. Flanders, 546 N.W.2d 221, 223–24 (Iowa Ct. App. 1996) (finding non-owner driver had standing to challenge the search when the State presented no evidence showing the defendant did not have permission to use the vehicle). Cf. State v. Halliburton, 539 N.W.2d 339, 342–43 (Iowa 1995) (emphasizing the non-owner defendant was not the driver, was never was in control of the car, and never "asserted a right to control access to the vehicle during any of the searches" and that the owner was present).

1. The impoundment of the vehicle and subsequent inventory search violated Ingram's constitutional rights under the Fourth Amendment.

Before a valid inventory search can be conducted, as a preliminary matter, the State must establish the underlying impoundment was proper. Jackson, 542 N.W.2d at 845 (citations omitted). Whether an impoundment is reasonable, and therefore proper, depends on the existence of two factors:

"reasonable standardized procedures and a purpose other than the investigation of criminal activity." Huisman, 554 N.W.2d at 437. Ingram does not dispute that the State can establish an administrative reason for the impoundment. See id. at 439 (citations omitted) (concluding an investigatory purpose invalidates an inventory search only when the sole purpose of the search is investigation). However, the State failed to establish the impoundment was conducted pursuant to a reasonable standardized procedure.

On direct examination during the suppression hearing, Deputy Burdt testified the Sheriff's office had a standard operating procedure for inventory searches. (Suppress. Hr'g Tr. p.9 L.14-17). A written copy of the standard operating procedures was not entered into evidence. On cross examination, defense counsel had the following exchange with Deputy Burdt:

> Q. . . . Where is that policy found?
>
> A. In our SOP Manual at the sheriff's office.
>
> Q. And what does it say?

A. I can't recall it verbatim.

Q. Well, what is your policy?

A. It's common policy -- or common any time a vehicle is towed that we do a vehicle inventory for documentation of the vehicle being towed, where it's going, what's the contents of the vehicle, and where it is being towed to. That paperwork then is given to the tow company, with the driver, registered owner's information. It also has billing stuff for the tow service, and then we print a copy for our own case file and put with all of our other paperwork and documentation.

Q. So when is your inventory done? What part of the procedure here of impounding a vehicle?

A. Once we deem that the vehicle is not to be driven from the scene and we are not going to leave it on the scene, at that time we call for a tow service for time management, get them coming. We will do our inventory. Once the inventory is complete, then we give the paperwork to the tow service. Sometimes the tow service beats us there. Sometimes they have to sit and wait for us to finish our inventory. Other times we are waiting on the tow service.

Q. Okay.

A. In regards to Newton PD's policies, I do not know.

(Suppress. Hr'g Tr. p.21 L.19-p.22 L.18).

The record is devoid of any standardized procedures regarding when an officer would decide a vehicle should be impounded, as opposed to left on the side of the road or driven off the scene. For an impoundment to be reasonable, the State must show the decision to impound the vehicle was made "'according to standardized criteria . . . .'" Huisman, 544 N.W.2d at 437 (quoting Bertine, 479 U.S. at 375). The State did not enter the sheriff office's written manual into evidence, despite Deputy Burdt's testimony it contained standard operating procedures and it was presumably easy for the State to obtain a copy. See State v. Arellano, 863 N.W.2d 36, 2015 WL 105978, at *3 n.2 (Iowa Ct. App. 2015) (unpublished table decision) (citing People v. Walker, 980 N.E.2d 937, 940 (N.Y. 2012)) (noting it is best for the State to enter a copy of the written policy into evidence). While Deputy Burdt's testimony generally establishes the sheriff's office had a procedure for the *inventory search*, it does not establish any policy or standardized criteria for the *impoundment* of the vehicle. (Suppress. Hr'g Tr. p.3 L.10-p.23 L.16). Because the State

failed to establish the law enforcement officers impounded the vehicle following reasonable standardized criteria, the State failed to establish the impoundment was reasonable. See Huisman, 544 N.W.2d at 437; Arellano, 2015 WL 1054978, at *3 (citing United States v. Kennedy, 427 F.3d 1136, 1144 (8th Cir. 2005)) ("In the context of an inventory search, the State had to produce evidence that the impoundment and the inventory search procedures were in place and that law enforcement complied with those procedures."). Therefore, the district court erred in finding that "there were standardized procedures in place, Deputy Burdt followed those procedures, and [t]he impoundment of the car was reasonable." (Suppress. Ruling) (App. pp. 31-35). There is simply no evidence in the record to support these conclusions; thus, the court should have granted the motion to suppress.

In addition, the district court erred in denying the motion to suppress because the State also failed to establish the inventory search itself was reasonable. The inventory search itself must also be conducted according to reasonable

standardized criteria. Huisman, 544 N.W.2d at 440 (citations omitted). "Adherence to a standardized policy is critical for a valid inventory search because 'compliance tends to indicate that the inventorying was limited to that necessary to carry out the caretaking function." Id. (quoting Fair v. State, 627 N.E.2d 427, 432 (Ind. 1993)).

In Florida v. Wells, the U.S. Supreme Court considered the same issue on appeal here---whether a law enforcement officer could open a closed container during an inventory search. The Court concluded the record did not establish the law enforcement agency had a policy "with respect to the opening of closed containers encountered during an inventory search;" therefore, the search of a closed container was "not sufficiently regulated to satisfy the Fourth Amendment." Florida v. Wells, 495 U.S. at 4–5 (1990). The present case is indistinguishable from Florida v. Wells.

While Deputy Burdt indicated the sheriff's office had a standard operating procedure and gave a general overview of the process, he did not address any standardized criteria

concerning the scope of the search. (Suppress. Hr'g Tr. p.21 L.19–p.22 L.18). This general testimony is insufficient to establish the required standardized procedure under the Fourth Amendment. See Wells, 495 U.S. at 4–5. See also State v. Molder, 337 S.W.3d 403 (Texas Ct. App. 2011) (finding the officer's testimony was too sparse to establish any particular standardized criteria or routine concerning the scope of the inventory and suppressing the evidence found in a closed container during an inventory search). Nor did the State enter any written policies into evidence at the hearing. In addition, contrary to the district court's ruling, Deputy Burdt never even testified that he followed his department's procedures; he simply testified as the existence of the procedures. (Suppress. Hr'g Tr. p.4 L.10–p.23 L.11) (Suppress. Ruling) (App. pp. 31-35). *Importantly, the record establishes Deputy Burdt did not conduct the inventory search; Newton Police Officer Eckert did.* (Suppress. Hr'g Tr. p.13 L.2–4) (Mins. Test.) (App. pp. 10-17). There is no evidence in the record regarding any procedures or standardized criteria the Newton

Police Department uses; rather, the State's sole witness, Deputy Burdt, testified he did not know what the Newton Police Department's procedures were. (Suppress. Hr'g Tr. p.22 L.5–L.18).

Because the record contains no evidence regarding either the Jasper County Sheriff Officer's or the Newton Police Department's standardized criteria with regards to a closed container found during an inventory search, the search was insufficiently regulated to satisfy the Fourth Amendment. See Wells, 495 U.S. at 4–5. See also Briscoe v. State, 30 A.3d 870, 878 (Md. 2011) ("In the absence of evidence that [a policy concerning the opening of containers during an inventory] existed, it is impossible to distinguish a valid inventory search from a general investigatory search."); State v. Molder, 337 S.W.3d 403, 409 (Texas Ct. App. 2011) (citations omitted) ("Thus, opening closed containers while conducting an inventory is lawful only when there is evidence of a policy or established procedure that allows for such."); State v. Shamblin, 763 P.2d 425, 427–28 (Utah Ct. App. 1988) ("[T]he

Fourth Amendment is violated if closed containers are opened during a vehicle inventory search in the absence of a standardized, specific procedure mandating their opening."). Thus, the district court erred in denying the motion to suppress.

2. The inventory search violated Ingram's constitutional rights under article 1, section 8 of the Iowa Constitution.

A warrantless inventory search also violates Ingram's constitutional rights under article 1, section 8 of the Iowa Constitution. When independently evaluating the Iowa Constitution's guarantee against unreasonable searches and seizures, the Iowa Supreme Court has generally examined several factors, including related decisions from other states, the rationale of the federal decisions, the scope and meaning of Iowa's search and seizure clause, and whether the federal interpretation is consistent with Iowa law. State v. Cline, 617 N.W.2d 277, 285 (Iowa 2000), overruled on other grounds by State v. Turner, 630 N.W.2d 601, 606 n.2 (Iowa 2001); State v. Ochoa, 792 N.W.2d 260, 268–91 (Iowa 2010).

In State v. Roth, 305 N.W.2d 501 (Iowa 1981), the Iowa Supreme Court considered whether the search of a paper bag during an inventory search violated Roth's constitution rights. In Roth, the Court, with two Justices dissenting, stated: "we see no reason to impose a different rule under the state constitution." Id. at 508 (citing State v. Davis, 304 N.W.2d 432, 434 (Iowa 1981)). See also id. at 510 (McCormick, J., dissenting) ("Even if the court were right that the fourth amendment was not violated in this case, I would hold that Ia.Const.Art. I, s 8 was violated."). However, the Court in Roth clearly believed that an individual could have a reasonable expectation of privacy in a closed container in a vehicle, and under certain circumstances an officer must inventory a closed container as a unit. Id. The Roth Court believed whether or not the officer could look inside a closed container depended on the nature of the container. Id. at 507–08 (citations omitted) (noting there was a reasonable expectation of privacy in a briefcase, suitcase, travel truck, but not a paper

bag, and thus allowing the officer to open the paper bag and inventory its contents).

Subsequently, the U.S. Supreme Court rulings in Colorado v. Bertine and Florida v. Wells, overruled the Roth Court's holding under the Fourth Amendment and authorized the opening of closed containers during inventory searches. Jackson, 542 N.W.2d at 845–46 (citations omitted). To the extent that the Court in Roth determined article I, section 8 should be interpreted lockstep with the Fourth Amendment, Ingram requests the Court overrule State v. Roth, and revisit the question of whether the Iowa Constitution offers greater protections to individuals in the context of inventory searches, in particular because the Court in Roth was mistaken about the protections offered by the Fourth Amendment.

Several courts have rejected the U.S. Supreme Court's Fourth Amendment analysis and concluded that under similar circumstances, a warrantless search of a closed container during an inventory search of a vehicle violates their respective state constitutions. See, e.g., State v. Daniel, 589 P.2d 408,

417–18 (Alaska 1979) ("[W]e hold that a warrantless inventory search of closed, locked or sealed luggage, containers or packages contained within a vehicle is unreasonable and thus an unconstitutional search under the Alaska Constitution."); State v. Opperman, 247 N.W.2d 673, 675 (S.D. 1976); State v. Sawyer, 571 P.2d 1131, 1134 (Mont. 1977), overruled on other grounds by State v. Long, 700 P.2d 153 (Mont. 1985) (restricting warrantless inventory searches of automobiles to articles within plain view of the officer under the state constitution); State v. Wisdom, 349 P.3d 953, 965 (Wash. App. 2015); State v. Lucas, 859 N.E.2d 1244 (Ind. Ct. App. 2007); People v. Scigliano, 241 Cal. Rptr. 546, 549–50 (Cal. Ct. App. 1987) (noting that the search of a closed container during an inventory violated California law, but was still admissible under a constitutional provision that eliminated independent state grounds for the exclusion of evidence). Other states have concluded such searches do not violate their state constitutions. See, e.g., Johnson v. State, 137 P.3d 903 (Wyo. 2006) (citations omitted) ("Consonant with the Fourth

Amendment, the opening of closed containers during an inventory search is permissible if conducted in good faith, pursuant to a standardized police policy, and as long as the search is not a ruse for general rummaging for evidence of a crime."); People v. Parks, 370 P.3d 346, 351–52 (Colo. App. 2015) ("[T]he State and Federal Constitutions are coextensive in the context of inventory searches."). Still other states have constructed separate rules regarding inventories under their state constitutions. See, e.g., State v. Hite, 338 P.3d 803, 809 (Oregon Ct. App. 2014) (citations omitted) (noting during an inventory that property is generally to be listed by outward appearance with no closed, opaque container to be opened unless the container is designed or likely to contain valuables); State v. Mangold, 414 A.2d 1312, 1318 (N.J. 1980) (finding that once a lawful impoundment has occurred the owner or permissive user must be given the option to consent to an inventory search or make arrangements for the safekeeping of the vehicle's property; without either of these no inventory may be taken).

In departing from the federal constitution, many state courts examined the federal courts' rationale for the procedure of inventorying an automobile's contents, which was developed in response to three needs: (1) "the protection of the owner's property while it remains in police custody"; (2) "the protection [of] the police against claims or disputes over lost or stolen property"; and (3) "the protection of the police from potential danger." South Dakota v. Opperman, 428 U.S. 364, 369 (1976). State courts have criticized these justifications for a search, especially when considering the countervailing force of an individual's right to privacy and freedom from unreasonable searches. See, e.g., State v. White, 958 P.2d 982, 987 (Wash. 1998) ("While we recognized inventory searches may serve legitimate government interests, these interests are not limitless and do not outweigh the privacy interests of Washington citizens.").

For example, the Montana Supreme Court questioned whether the first rationale—the need protect the owner's property—was necessary if the owner was present, noting he

could be questioned if there were any valuable items in the vehicle and make arrangements for their care. Sawyer, 571 P.2d at 1133. It stated:

> It would be anomalous to justify a search of an automobile to be for the owner's benefit, when the owner is available but does not consent to the search. Surely the property owner is an adequate judge of the treatment of the property that would most benefit him.

Id. See also Mangold, 414 A.2d at 1318 (requiring under state law that the officer actually ask the owner to consent to inventory, make arrangements for valuables prior to an inventory, or no inventory can be conducted).

Whether an inventory search actually prevents or lessens claims of theft is also questionable. See State v. Wisdom, 349 P.3d 953, 963 (Wash. Ct. App. 2015) ("An inventory reduces false charges only when both parties are present and participate in the inventory. Officers rarely wish for the arrestee to participate in any inventory."). While the Montana Supreme Court called the protection of officers from claims of lost property "a reasonable concern," it believed any duty owed

to the vehicle under law only required "taking an inventory of any valuable items in plain view from outside the vehicle, rolling up the windows, locking the doors, and returning the keys to the owner." Sawyer, 571 P.2d at 1133. At least one court has addressed this concern by simply presuming the vehicle owner assumes the risk for lost property or theft stemming from the impoundment if he refuses to allow the officer to conduct an inventory. See Mangold, 414 A.2d at 1318.

It is also unclear how an inventory search might prevent danger to an officer. If the inventory occurs after arrest, Gaskins indicated a warrantless search incident to arrest might be permissible for officer safety or some other exigency. See Gaskins, 866 N.W.2d at 15. No such exigency was present in this case, and Ingram was confined within the officer's vehicle when the inventory search was conducted, posing no threat to the safety of either officer. (Mins. Test.) (App. pp. 10-17).

While article I, section 8 uses nearly identical language as the Fourth Amendment and was generally designed with the same scope, import and purpose, the Iowa Supreme Court jealously protects its authority to follow an independent approach under the Iowa Constitution. Ochoa, 792 N.W.2d at 267 (citations omitted). This Court's approach to independently construing provisions of the Iowa Constitution that are nearly identical to the federal counterpart is supported by Iowa's case law. See, e.g., id.; State v. Cline, 617 N.W.2d at 285. The Iowa Supreme Court has held: "The linguistic and historical materials suggest the framers of the Fourth Amendment, and by implication the framer of article I, section 8 of the Iowa Constitution intended to provide a limit on arbitrary searches and seizures." Ochoa, 792 N.W.2d at 273. "As a general matter, the drafters of the Iowa Constitution placed the Iowa Bill of Rights at the beginning of the constitution, for apparent emphasis." Id. at 274. "This priority placement has led one observer to declare that, more than the United States Constitution, the Iowa Constitution

'emphasizes rights over mechanics.'" State v. Baldon, 829 N.W.2d 785, 809–10 (Iowa 2013) (Appel, J., concurring) (quoting Donald P. Racheter, The Iowa Constitution: Rights over Mechanics, in The Constitutionalism of American States 479, 479 (George E. Connor & Christopher W. Hammons eds., 2008)).

The federal interpretation of the Fourth Amendment with regards to inventory searches is not consistent with Iowa law. The Iowa Constitution has a "strong emphasis on individual rights." State v. Short, 851 N.W.2d 474, 482 (Iowa 2014). The Iowa Supreme Court has stated that warrantless searches and seizures that did not fall within one of the "jealously and carefully drawn exceptions" are unreasonable. Ochoa, 792 N.W.2d at 285; State v. Strong, 493 N.W.2d 834, 836 (Iowa 1992). It has also repeatedly determined the Iowa Constitution provides significant protection of individual rights in the context of warrantless searches. Short, 851 N.W.2d at 506 (holding a valid warrant is required for law enforcement's search of a home under the Iowa Constitution); Cline, 617

N.W.2d at 292–93 (holding the good faith exception is incompatible with the Iowa Constitution); Fleming, 790 N.W.2d at 567–568 (finding the search of a rented room violated the Iowa Constitution when the warrant for that area was not supported by probable cause); Baldon, 829 N.W.2d at 802 (finding a parole agreement containing a prospective search provision was insufficient to establish voluntary consent); Ochoa, 792 N.W.2d at 291 (holding the warrantless search of a parolee's room by a general law enforcement officer without particularized suspicion violated the state constitution); State v. Tague, 676 N.W.2d 197, 206 (Iowa 2004) (finding a traffic stop did not meet the reasonableness test of article I, section 8); State v. Kern, 831 N.W.2d 149, 177 (Iowa 2013) (finding the warrantless search of a parolee's home unconstitutional under Iowa Constitutions). The application of the Iowa Constitution to the present case will provide Ingram a "fundamental guarantee" of protection against unreasonable searches. See Cline, 617 N.W.2d at 292.

An individual has an actual, reasonable expectation of privacy to objects that are placed within the vehicle, but outside of view of prying eyes. State v. Elison, 14 P.3d 456, 469 (Mont. 2000) (citing Sawyer, 571 P.2d at 1134). The Montana Supreme Court explained:

> [W]hen persons leave the privacy of their home and expose themselves and their effects to the public and its independent powers of perception, it is clear that they cannot expect to preserve the same degree of privacy for themselves or their affairs as they could expect at home. However, when a person takes precautions to place items behind or underneath seats, in trunks or glove boxes, or uses other methods of ensuring that those items may not be accessed and viewed without permission, there is no obvious reason to believe that any privacy interest with regard to those items has been surrendered simply because those items happen to be in an automobile. Furthermore, there is no reason to believe that the "pervasive and continuing governmental controls and regulations" of automobiles could serve to reduce someone's expectation of privacy in items so stowed. Although the State may have a legitimate interest in securing compliance with safety and traffic regulations, there is absolutely no logical connection between prohibitions such as driving with expired registration stickers or a noisy muffler, and the State's need to conduct a warrantless search behind the seat of an automobile.

Id. at 470. This is especially true when the individual places said objects into an opaque, closed container. See Wells, 495 U.S. at 9 (Brennan, J. concurring) ("Opening a closed container constitutes a great intrusion into the privacy of its owner even when the container is found in an automobile.").

"[T]he Iowa framers placed considerable value on the sanctity of private property. Ochoa, 792 N.W.2d at 274–75. It is also clear that an individual does not give up his rights solely because a vehicle is involved. See Gaskins, 866 N.W.2d at 16 (quoting Coolidge v. New Hampshire, 403 U.S. 443, 461 (1971)) ("'The word "automobile" is not a talisman in whose presence the [constitutional protections against warrantless searches and seizures] fades away and disappears.'"). In addition, prior to the U.S. Supreme Court's decisions in Colorado v. Bertine and Florida v. Wells, Iowa courts recognized the reasonable expectation of privacy an individual has in a closed container in a vehicle:

> In recognizing that there is a greater expectation of privacy in closed or sealed containers found inside a vehicle than there is in a vehicle itself, we are balancing the need of the government (here, those

> relating to inventory searches) against the right of people to be free of warrantless intrusions into their personal effects. The balance tips in favor of the privacy of personal effects because the purpose of an inventory can be adequately served by inventorying a container as a closed unit. It is thereby secure from theft, and exposure to claims of loss is reduced. Therefore, in conducting an inventory search of a vehicle, police officials may not open or search the contents of closed containers which could alternatively be removed from the vehicle and inventoried as a unit.

State v. Roth, 305 N.W.2d 501, 506–07 (Iowa 1981) (internal citation omitted); State v. Casteel, 392 N.W.2d 168, 173 (Iowa Ct. App. 1986) ("We conclude that the safekeeping purpose of the inventory could have been fully accomplished by noting the containers as a Comtrex bottle and a tin box.").

Furthermore, Iowa courts have long been concerned "'about giving police officers unbridled discretion to rummage at will among a person's private effects.'" Gaskins, 866 N.W.2d at 10 (quoting Arizona v. Gant, 556 U.S. 332, 345 (2009)). However, under the current Fourth Amendment analysis, the impoundment and subsequent inventory must be done according to standardized criteria, *set forth by the law*

enforcement agency itself. See Wells, 495 U.S. at 4–5; Huisman, 544 N.W.2d at 437. It is problematic that whether or not a police officer is able to rummage through an individual's private effects contained in closed container within the vehicle is dependent on the rules of law enforcement agency itself, which is "engaged in the often competitive enterprise of ferreting out crime." See State v. Post, 286 N.W.2d 195, (Iowa 1979) (internal citations and quotation marks omitted). Placing the power to appropriately limit an inventory search and protect the sanctity of private property and an individual's right to privacy in their effects provides law enforcement agencies with a convenient method of bypassing the warrant requirement, or even the requirement of probable cause, as illustrated in this case. This is incompatible with the Iowa Constitution's strong emphasis on individual rights and the significant protection of those rights in the context of warrantless searches. See Short, 851 N.W.2d at 482.

The Iowa Constitution affords its citizens significant protections against warrantless searches and seizures. While

there may be legitimate governmental interests for conducting full inventory searches, those interests are outweighed by the privacy interests and rights afforded to Iowa citizens under the state constitution. See White, 958 P.2d at 987. The Court should find that article I, section 8 limits warrantless inventory searches and provides greater protections for individual privacy than the Fourth Amendment. The Court should follow other state's approaches in fashioning a rule limiting law enforcement's ability "to rummage at will among a person's private effects" during an inventory search. See Gaskins, 866 N.W.2d at 10 (quoting Gant, 556 U.S. at 345). Regardless of which rule the Court adopts, the Court should find the search of the black bag pursuant to an inventory search violated Ingram's rights under the Iowa Constitution, and thus, the district court erred in denying the motion to suppress.

3. To the extent the Court believes error was not adequately preserved, trial counsel was ineffective.

Ingram asserts the previous arguments are preserved. See Lamasters v. State, 821 N.W.2d 856, 864 (Iowa 2012) (citations omitted) ("If the court's ruling indicates the court *considered* the issue and necessarily ruled on it, even if the court's reasoning is 'incomplete or sparse,' the issue has been preserved."). See also State v. Paredes, 775 N.W.2d 554, 561 (Iowa 2009) (citing State v. Williams, 695 N.W.2d 23, 27–28 (Iowa 2005)) ("We have previously held that where a question is obvious and ruled upon by the district court, the issue is adequately preserved."). However, to the extent the Court believes trial counsel needed to specifically draw the district court's attention to the State's complete failure to establish standardized procedures for both the impoundment and the inventory search or concludes error was not preserved for any reason, counsel was ineffective.

To prevail on an ineffective-assistance-of-counsel claim, a defendant must establish (1) counsel failed to perform an

essential duty and (2) the defense was prejudiced as a result. State v. Brothern, 832 N.W.2d 187, 192 (Iowa 2013) (quoting Lamasters v. State, 821 N.W.2d 856, 866 (Iowa 2012)). Ingram hereby incorporates the law regarding ineffective-assistance-of-counsel claims discussed in Division III.C.

It is clear under the current law that both the impoundment and the inventory search must be conducted pursuant to standardized procedures. Huisman, 544 N.W.2d at 436–37; Jackson, 542 N.W.2d at 845. Counsel had a duty to know the law and alert the district court to the correct standards and lack of evidence established by the State in the suppression hearing. Clay, 824 N.W.2d at 496. The district court should have then granted the motion to suppress on those bases. See Wells, 495 U.S. at 4–5. Therefore, Ingram was prejudiced by trial counsel's failure to alert the district court to the lack of evidence concerning the standardized procedures for both the impoundment and inventory. See State v. Leckington, 713 N.W.2d 208, 218 (Iowa 2006) (citing Strickland, 466 U.S. at 694) (finding prejudice if "'there is a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'").

II. THE DISTRICT COURT ERRED IN FINDING THERE WAS SUFFICIENT EVIDENCE THAT THE DEFENDANT KNOWINGLY POSSESSED A CONTROLLED SUBSTANCE.

A. Preservation of Error: In a bench trial, a criminal defendant does not have to file a motion for judgment of acquittal in order to preserve a challenge to the sufficiency of the evidence. State v. Abbas, 561 N.W.2d 72, 74 (Iowa 1997).

B. Standard of Review: The Court reviews challenges to the sufficiency of the evidence for corrections of errors at law. State v. Sanford, 814 N.W.2d 611, 615 (Iowa 2012).

C. Discussion: A district court's finding of guilt in binding on the appellate court unless the appellate court determines the record lacked substantial evidence to support the finding of guilt. Abbas, 561 N.W.2d at 74 (citing State v. Torres, 495 N.W.2d 678, 681 (Iowa 1993)). "In reviewing challenges to the sufficiency of evidence supporting a guilty verdict, the Court considers all of the record evidence viewed

'in the light most favorable to the State, including all reasonable inferences that may be fairly drawn from the evidence.'" Sanford, 814 N.W.2d at 615 (quoting State v. Keopasaeuth, 645 N.W.2d 637, 639–40 (Iowa 2002)). The Court should uphold the verdict only if it is supported by substantial evidence in the record as a whole. Id. "Evidence is substantial if it would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt." State v. Kemp, 688 N.W.2d 785 (Iowa 2004) (citing State v. Webb, 648 N.W.2d 72, 75 (Iowa 2002)). However, consideration must be given to all of the evidence, not just the evidence supporting the verdict. State v. Petithory, 702 N.W.2d 854, 856–57 (Iowa 2005) (citation omitted). "The evidence must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture." Webb, 648 N.W.2d at 76 (citing State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981)).

The State has the burden of proving "every fact necessary to constitute the crime with which the defendant is charged." Webb, 648 N.W.2d at 76 (citing State v. Gibbs, 239 N.W.2d

866, 867 (Iowa 1976)). See also State v. Limbrecht, 600 N.W.2d 316, 317 (Iowa 1999) (citing State v. Harrison, 325 N.W.770, 772–73 (Iowa Ct. App. 1982)) ("That record must show that the State produced substantial evidence on each of the essential elements of the crime."). Possession of a controlled substance under Iowa Code section 124.401(5) requires proof that the defendant: (1) "exercised dominion and control . . . over the contraband," (2) had knowledge of its presence, and (3) had knowledge the material was a controlled substance. State v. Reeves, 209 N.W.2d 18, 21 (Iowa 1973).

1. There was insufficient evidence that the defendant possessed the contraband or had knowledge of its presence.

Possession can be either actual or constructive. State v. Maghee, 573 N.W.2d 1, 10 (Iowa 1997) (citing State v. Padavich, 536 N.W.2d 743, 751 (Iowa 1995)). Actual possession occurs when "the contraband is found on [the defendant's] person or when substantial evidence supports a finding it was on his or her person 'at one time.'" State v. Thomas, 847 N.W.2d 438, 442 (Iowa 2014) (quoting State v.

Vance, 790 N.W.2d 775, 784 (Iowa 2010)). Whereas constructive possession is a judicial construct that allows one to infer a defendant possessed the contraband based on the location and other circumstances. Id. at 443.

"The existence of constructive possession turns on the peculiar facts of each case." Webb, 648 N.W.2d at 79 (citing State v. Harris, 647 So.2d 337, 339 (La. 1994)). There are several factors that the Court examines to determine whether a defendant had constructive possession of contraband. Kemp, 688 N.W.2d at 789. These factors are:

> (1) incriminating statements made by the defendant, (2) incriminating actions of the defendant upon the police's discovery of drugs among or near the defendant's personal belongings, (3) the defendant's fingerprints on the packages containing the drugs, and (4) any other circumstances linking the defendant to the drugs.

Id. (citing State v. Cashen, 666 N.W.2d 566, 571 (Iowa 2003)). In cases that involve motor vehicles, the Court also considers the following factors:

> (1) was the contraband in plain view, (2) was it with the defendant's personal effects, (3) was it found on the same side of the car seat or next to the defendant, (4) was the defendant the owner of the

> vehicle, and (5) was there suspicious activity by the defendant.

Id. (citing State v. Atkinson, 620 N.W.2d 1, 4 (Iowa 2000)). No one factor is dispositive; the Court considers all of the facts and circumstances in the case. See Cashen, 666 N.W.2d at 571 ("Even if some of these facts are present, we are still required to determine whether all of the facts and circumstances . . . allow a reasonable inference that the defendant knew of the drugs' presence and had control and dominion over the contraband.").

The district court did not consider all the facts and circumstances in its decision. It tersely stated:

> Although the Defendant denied knowledge of the bag or its contents, given the location of the bag and the fact that the Defendant was driving the vehicle and its sole occupant at the time of the stop, the Court finds that the State has proved beyond a reasonable doubt that the Defendant knowingly and intentionally possessed a controlled substance.

(Guilty Verdict) (App. pp. 36-38). When one considers all the facts and circumstances within the stipulated minutes of testimony and police reports and weighs the factors set forth

by the Court in State v. Kemp, there is insubstantial evidence to prove Ingram knowingly possessed a controlled substance.

First, Ingram did not make any incriminating statements to the police officers. Rather, he denied knowledge of the crystal substance and the pipe's presence in the car; when told of its presence in the car he asked the officer what it was and where it was found. (Mins. Test.; Guilty Verdict) (App. pp. 10-17; 36-38). Nor did Ingram conduct himself in an incriminating matter after Officer Eckert discovered the drugs. (Mins. Test.) (App. pp. 10-17).

Ingram's fingerprints were not found on the bag itself or any of the bag's contents. It actually appears that neither the bag nor its contents were ever even attempted to be fingerprinted, as the officer did not circle the "P" to "check for fingerprints" on the property sheet. (Mins. Test.) (App. pp. 10-17). Nor is there anything in the record that specifically links either the bag itself or its contents to Ingram.

The bag itself was found on the driver's side floorboard near the gas pedal. (Mins. Test.) (App. pp. 10-17). The

minutes of testimony and police reports do not describe the bag itself, other than it was black, small, and made of cloth. (Mins. Test.) (App. pp. 10-17). There is nothing in the record or description of the bag that indicates it was identifiable as holding narcotics or paraphernalia. In fact, the opposite is true; Officer Eckert had to open it and search the contents before discovering the alleged controlled substance and paraphernalia. (Mins. Test.) (App. pp. 10-17). In addition, there is nothing in the record that suggests Ingram should have or did know the bag was anything other than an item that would not be out of the ordinary to be found in a vehicle, such as a coin a container holding a pair of sunglasses. Cf. State v. Carter, 696 N.W.2d 31, 40 (Iowa 2005) (noting the plastic baggie was located underneath the ashtray—an odd location for it). While the bag was found on the driver's side floorboard, this fact alone is not dispositive. See id. (citing Cashen, 666 N.W.2d at 572) ("Constructive possession cannot rest on mere proximity to the controlled substance."). The bag easily could have been located in elsewhere in the car and fell

onto the floorboard as Ingram braked to pull the vehicle over for the traffic stop. It could have also just been lying on the floor, unnoticed by Ingram, who told the deputy he was unaware it was there because he did not look at the floorboard of the vehicle. (Mins. Test.) (App. pp. 10-17).

The record is also unclear as to what other items were in the vehicle. While the Officer Eckert's report states that Ingram was able to remove his work-related property, there is no indication of what that property consisted of or whether that property was located in the vehicle. (Mins. Test.) (App. pp. 10-17). In addition, the record is without a description of any other items in the vehicle, except the inventory sheet, which listed a power converter and various tools as items of value in the vehicle. (Mins. Test.) (App. pp. 10-17). It is unclear whether Ingram had any other property in the vehicle or who the owner of the power converter and tools listed on the inventory sheet was.

The vehicle did not belong to Ingram, but rather an individual named Holly Snyder.[2] (Mins. Test.) (App. pp. 10-17). In addition to not being the owner of the vehicle, Ingram was not the only driver of the vehicle. (Mins. Test.) (App. pp. 10-17). Ingram stated both he and his girlfriend drove the vehicle. (Mins. Test.) (App. pp. 10-17). There is nothing in the record that establishes Ingram was the primary driver of the vehicle or anything other than he sporadically borrowed and drove it. See State v. Taylor, 763 N.W.2d 276, 2009 WL 139502, at *3 (Iowa Ct. App. 2009) (unpublished table decision) (noting the defendant did not have exclusive access to the vehicle, despite being the sole occupant at the time of the stop). But see State v. Maxwell, 743 N.W.2d 185, 195 (Iowa 2008) (considering that the defendant was the most recent driver of the vehicle).

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[2] The police report lists "Holly Snyder" as the registered owner. (Mins. Test.) (App. pp. 10-17). It is unclear from the minutes of testimony if the owner and Ingram's girlfriend are the same person, but Ingram testified his girlfriend, "Holly Schneider," was the registered owner at the suppression hearing. (Suppress. Hr'g Tr. p.29 L.20–22).

There was no other suspicious activity by Ingram. The record indicates nothing out of the ordinary occurred for a traffic stop until Officer Eckert discovered the black bag. Officer Eckert's report states Ingram was able to remove his work related items from the car prior to Eckert's inventory search. (Mins. Test.) (App. pp. 10-17). Ingram did not attempt to remove the black bag or its contents. Ingram also did not take an abnormally long time to pull over, make furtive movements as to hide something or remove unlawful objects from his person, or immediately exit the vehicle. Cf. Carter, 696 N.W.2d at 40 (noting the defendant's suspicious activity when he failed to immediately pull over, rummaged to the right side of him, and quickly exited the vehicle upon stopping); Maxwell, 743 N.W.2d at 194 (considering the defendant continued to drive an additional one hundred feet before pulling over, immediately exited the vehicle, and attempted to go inside a residence). Neither officer indicated that Ingram was overly nervous, exhibited strange behavior, or became belligerent after learning the vehicle would be

searched. Cf. Carter, 696 N.W.2d at 40 (noting the defendant acted nervous); State v. Henderson, 696 N.W.2d 5, 9 (Iowa 2005) (noting the defendant's "defiant opposition" to the police's presence "implied guilty knowledge"). There was no evidence of drugs on Ingram's person or that he was under the influence of drugs. See Webb, 648 N.W.2d at 80 (noting no drugs were found on the defendant's person and he was not under the influence). Ingram did not attempt to give the officer a false name. Cf. Thomas, 847 N.W.2d at 439 (noting the defendant gave the officer a false name); Carter, 696 N.W.2d at 35 (same).

Rather, the record only establishes that Ingram exhibited normal behavior for a traffic stop and fully cooperated with the officers throughout the duration of the stop. Cf. Thomas, 847 N.W.2d at 443 (finding there was no other logical explanation for the defendant's behavior when he ran into the room containing the contraband, tried to hold the door shut so the officers could not enter, gave a false name, and claimed he ran because he had an outstanding warrant, where there was

none). Additionally, there is no evidence in the record that tends to exclude Ingram's girlfriend from responsibility of the alleged contraband. Cf. id. at 444 (noting there was other evidence that tended to exclude the room's two other users).

Because the State relied on solely on circumstantial evidence to establish the essential elements of knowledge and possession, in order to support the guilty verdict the circumstances had to be "entirely consistent with [the] defendant's guilt, wholly inconsistent with any rational hypothesis of his innocence, and so convincing as to exclude any reasonable doubt that the defendant was guilty of the offense as charged." See Reeves, 209 N.W.2d at 21. Such is not the case here. Based on this record, any finding that Ingram knowingly or intentionally possessed the baggie of methamphetamine discovered in the black bag on the floorboard of the vehicle would be based on nothing more than speculation, suspicion, or conjecture. See Webb, 648 N.W.2d at 76 (citing Hamilton, 309 N.W.2d at 479). The evidence presented was insufficient to find Ingram knew of the presence

of any controlled substance in the vehicle and/or exercised control and dominion over any controlled substance; thus, the court erred in finding Ingram knowingly possessed a controlled substance.

2. There was insufficient evidence that the substance was a controlled substance.

Even if the Court determines there was sufficient evidence to establish Ingram knowingly possessed the black bag and its contents, there is insufficient evidence that the substance inside was actually a controlled substance.

The minutes of testimony provide that Jess Dunn, of the Iowa Division of Criminal Investigation Laboratory, would testify:

> that the evidence was received from the Newton Police Department marked with the agency case number 15-31482, and the name Bion Blake Ingram. Witness or designees will testify as the chain of custody of the evidence received from the Agency. Witness or designees will testify that the evidence was weighed and analyzed in accordance with any D.C.I. Criminalistics Laboratory report that will be provided to defendant or defendant's counsel upon receipt by the Jasper County Attorney's Office. Witness or designees will testify further in the matter.

(Mins. Test.) (App. pp. 10-17). There is no information either in the minutes above or in any attached D.C.I. report that indicates the found substance was ever tested in a laboratory and confirmed to be a controlled substance, nor did the prosecutor enter such a report into evidence for the stipulated bench trial. Rather, it appears from the property sheet attached to the minutes of testimony that the substance was never even sent to the laboratory, as the "L" was not circled by the officer. (Mins. Test.) (App. pp. 10-17).

The only information in the record that indicates the substance was methamphetamine was the attached police report, which states there was a positive result for methamphetamine in the field test. (Mins. Test.) (App. pp. 10-17). There is no information on the reliability of the field test. The officer also described the substance as a "crystal substance," but he did not make any other observations, such as its odor or appearance was consistent with what he recognized as methamphetamine from his training and experience. (Mins. Test.) (App. pp. 10-17).

Several courts have found that when the State fails to establish the reliability and proper administration of a field test, the field test is insufficient to prove beyond a reasonable doubt that the substance is an illegal drug. See, e.g., People v. Hagberg, 733 N.E.3d 1271, 1274 (Ill. 2000); State v. Jackson, 161 468 N.W.2d 431, 431 (Wis. 1991) ("The [field test] presented by the state may have been sufficient for a finding of probable cause. However, it does little to prove beyond a reasonable doubt an element of a crime which would be necessary for a valid conviction, *i.e.*, that the substance recovered was cocaine."); State in Interest of J.W., 597 So.2d 1056, 1058–59 (La. Ct. App. 1992) (finding that the state failed to prove the substance was cocaine beyond a reasonable doubt when there was no laboratory testing admitted and the officer testified he presumed the rocks were cocaine); L.R. v. State, 557 So.2d 121, 122 (Dist. Ct. App. Florida 1990) (reversing for insufficient evidence when an officer testified the substance appeared to be rock cocaine and it field tested positive for cocaine but did not testify as to the reliability of the field test

and no laboratory reports were introduced); People v. Jason, 694 N.Y.S.2d 908, 910 (N.Y. Justice Ct. 1999) (finding the defendant not guilty when the state presented no laboratory testing evidence and failed to establish "evidence that [the field test] results arise from the proper use and certification of a field test that is generally accepted as scientifically reliable").

States that take this approach recognize that field testing is imperfect. The field tests themselves can be easily contaminated by the tester, and the results can be misinterpreted caused by human error and imperfect testing conditions. See Alan Harris, A Test of a Different Color: The Limited Value of Presumptive Field Drug Tests and Why That Value Demands Their Exclusion from Trial, Southwestern Law Review 531, 541–42 (2011) [hereinafter Harris, Southwestern Law Review]; Ryan Gabrielson & Topher Sanders, How a $2 Roadside Drug Test Sends Innocent People to Jail, New York Times Magazine, (July 7, 2016), http://www.nytimes.com/2016/07/10/magazine/how-a-2-roadside-drug-test-sends-innocent-people-to-jail.html?_r=0

[hereinafter Gabrielson & Sanders, NYT Magazine] (noting the error rate depends on the tester and testing conditions). At least one court has distinguished a field test done on scene by a law enforcement officer with a field test conducted by a trained scientist in a laboratory setting. See State v. Dye, 572 N.W.2d 524, 528 (Wis. Ct. App. 1997) (distinguishing from a case where the evidence the substance was "cocaine based only upon from a *field* test of a small portion of the seized substance *conducted by police*" as opposed to the same test conducted by a trained chemist in a laboratory) (emphasis in original).

In addition, there can be a wide range of potential false positives. See Harris, Southwestern Law Review, at 541–42. The New York Times reported:

> There are no established error rates for the field tests, in part because their accuracy varies so widely depending on who is using them and how. Data from the Florida Department of Law Enforcement lab system show that 21 percent of evidence that the police listed as methamphetamine after identifying it was not methamphetamine, and half of those false positives were not any kind of illegal drug at all.

Gabrielson & Sanders, NYT Magazine. In Las Vegas, a review of three years of data revealed approximately one third of the field testing kits had produced false positives for controlled substances. Editorial: Drug field tests unreliable, The News Star (July 26, 2016, 5:04 a.m.), http://www.thenewsstar.com/story/opinion/editorials/ 2016/07/26/editorial-drug-field-tests-unreliable/87537392. "Some forensic scientists have estimated that field tests average between 30% and 40% false positives." Field Tests: Scientists say, "Useless!" Courts say, "Not Always!", 2 No. 5 Criminal Practice Guide 4 (June 2001) (citing Giannelli & Imwinkelried, Scientific Evidence § 22-2(B) at 355 (3rd ed. 1999)); State v. Martinez, 59 A.3d 975, 990 (Conn. App. Ct. 2013), overruled on other grounds by State v. Martinez, 127 A.3d 164 (Conn. 2015) (citation omitted) ("[L]eading treatises on scientific evidence offer no clear consensus on the reliability of field tests.").

There are several examples in the news highlighting the various different and innocuous substances that have field tested positive for an illegal drug, including vitamins, sage,

chocolate chip cookies, motor oil, spearmint, soap, tortilla dough, deodorant, billiards chalk, patchouli, flour, eucalyptus, breath mints, tea, Jolly Ranchers candy, chocolate, and rosemary. Radley Balko, A partial list of things that field testing drug kits have mistakenly identified as contraband, The Washington Post (Feb. 26. 2015), https://www.washingtonpost.com/news/the-watch/wp/2015 /02/26/a-partial-list-of-things-that-field -testing-drug-kits-have-mistakenly-identified-as-contraband; See Mimi Hall, False results put drug tests under microscope, USA Today (Nov. 11, 2008, 9:15 p.m.), http://usatoday30.usatoday.com/news/nation/2008-11-03-drugkits_N.htm [hereinafter Hall, USA Today]; Chad Mills, Kershaw County gets new drug testing device, wistv.com (July 30, 2016, 9:01 a.m.), http://www.wistv.com/story/32578266/kershaw-county-gets-new-drug-testing-device. Recently, a man was arrested for drug possession after white flakes in his car field tested positive for methamphetamine despite the man's insistence that the substance was sugar flakes from a Krispy Kreme doughnut;

later testing confirmed the substance was not an illegal drug and the drug possession charges were dropped. See Cleve R. Wootson Jr., Florida man arrested when officer mistakes Krispy Kreme doughnut glaze for meth (July 29, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/07/29/florida-man-arrested-when-officer-mistakes-krispy-kreme-donut-glaze-for-meth/.

Furthermore, both law enforcement agencies and the makers of the kits recognize the limits of the kits and admit the tests are not definitive. See Hall, USA Today; Chad Mills, Kershaw County gets new drug testing device, wistv.com (July 30, 2016, 9:01 a.m.), http://www.wistv.com/story/32578266/kershaw-county-gets-new-drug-testing-device; U.S. Department of Justice, Law Enforcement and Corrections Standards and Testing Program, Color Test Reagents/Kits for Preliminary Identification of Drugs of Abuse: NIJ Standard–0604.01 p.7 (July 2000), available at https://www.ncjrs.gov/pdffiles1/nij/183258.pdf. ("[T]he kit is intended to be used for presumptive identifications purposes only, and that all

substances tested should be subjected to more definitive examination by qualified scientist in a properly equipped crime laboratory."). One of the manufacturers of the field testing kits includes a warning on its instructions stating that the test's results must be confirmed by a laboratory. See Gabrielson & Sanders, NYT Magazine.

Forensic scientists also criticize the use of field tests for any other purposes other than as a preliminary screening tool. See State v. Martinez, 59 A.3d 975, 990 (Conn. App. Ct. 2013), overruled on other grounds by State v. Martinez, 127 A.3d 164 (Conn. 2015) (citing 5 D. Faigman et al., Modern Scientific Evidence: The Law and Science of Expert Testimony (2011 Ed.) § 42.5, p.555) ("Field tests outside the laboratory would seem to be the most suspect form of testing."). The National Bureau of Standards has stated the field test kits "'should not be used as sole evidence for the identification of a narcotic or drug of abuse." See Gabrielson & Sanders, NYT Magazine. "Field drug test kits are presumptive in nature. They do not provide any structural information and are subject to false

positives." Kurt M. Grates et al., National Forensic Science Technology Center, Conclusion of Validation Study of Commercially Available Field Test Kits for Common Drugs, available at http://www.nfstc.org/wp-content/files//FIDOAAFS2008_21. pdf.

Forensic scientists, law enforcement officials, and the manufacturers of the field tests themselves have indicated the field tests are not conclusive and should only be used as presumptive screening tools, not for a criminal conviction. See Harris, Southwestern Law Review, at 544–45; Martinez, 59 A.3d at 990 (citations omitted); Hall, USA Today. As discussed, this is based unestablished reliability of these tests and the frequent false positives. Acknowledging these valid concerns, other courts have refused to find that a positive field tests proves beyond a reasonable doubt that the substance is an illegal drug, especially in the absence of any evidence regarding the reliability of the tests and the testing procedures. Therefore, the Court should find that the positive field test indicating the substance was methamphetamine is

insufficient to sustain the State's burden of proving Ingram possessed methamphetamine beyond a reasonable doubt.

However, the failure of the State to establish the correct procedure was used for the testing and the field test's reliability is not automatically fatal to proving the substance was a controlled one beyond a reasonable doubt, because "[the State is not required to test the purported drug." State v. Brubaker, 805 N.W.2d 164, 172 (Iowa 2011) (citing In the Interest of C.T., 521 N.W.2d 754, 757 (Iowa 1994)). While the factfinder is allowed to use circumstantial evidence to determine the substance is a controlled one, there is no additional circumstantial evidence that raises this case to the proof beyond a reasonable doubt. See id.

The only other evidence presented on the issue was the substance's appearance was described as "crystal," and it was found in the same bag as a glass pipe with white residue. (Mins. Test.) (App. pp. 10-17). Simply being consistent in appearance with an illegal substance is insufficient. See Brubaker, 805 N.W.2d at 172–73. The presence of the pipe

found with a substance is also insufficient to conclude it is an illegal drug, particularly when there is no evidence establishing how methamphetamine is used. See id. at 173 (noting the pills were found with a pipe and syringe but there was no testimony regarding how an individual would use Clonazepam). Nothing about the bag itself indicated the identity of its contents. See id.

The evidence presented in this case was insufficient to prove the substance was methamphetamine. In particular, there is no evidence on the administration of the field test or on its reliability, nor did the State prove the substance was methamphetamine using other circumstantial evidence. See Brubaker, 805 N.W.2d at 172–73; Hagberg, 733 N.E.3d at 1274; Jackson, 468 N.W.2d at 431; State in Interest of J.W., 597 So.2d at 1058–59; L.R. v. State, 557 So.2d at 122; People v. Jason, 694 N.Y.S.2d 908, 910 (N.Y. Justice Ct. 1999). See also Harris, Southwestern Law Review, at 547. Because the State failed to present sufficient evidence to establish the substance was methamphetamine beyond a reasonable doubt,

the district court erred in finding Ingram possessed methamphetamine.

III. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE THE ADMISSIBILITY OF THE RESULTS OF THE FIELD TEST KIT.

A. Preservation of Error: The traditional rules of preservation of error do not apply to claims of ineffective assistance of counsel. State v. Ondayog, 722 N.W.2d 778, 784 (Iowa 2006) (citing State v. Lucas, 323 N.W.2d 228, 232 (Iowa 1982)).

B. Standard of Review: "The right to assistance of counsel under the Sixth Amendment to the United States Constitution and article I, section 10 of the Iowa Constitution is the right to 'effective' assistance of counsel." State v. Ambrose, 861 N.W.2d 550, 556 (Iowa 2015) (citations omitted). Because they involve a constitutional right, the Court reviews claims of ineffective assistance of counsel de novo. State v. Clay, 824 N.W.2d 488, 494 (Iowa 2012) (citing State v. Brubaker, 805 N.W.2d 164, 171 (Iowa 2011)).

C. Discussion: The U.S. Constitution and the Iowa Constitution both guarantee defendants of criminal cases the right to effective assistance of counsel. U.S. Const. amends. VI, XIV; Iowa Const. art. 1, § 10; Ambrose, 861 N.W.2d at 555. To prevail on an ineffective-assistance-of-counsel claim, a defendant must establish (1) counsel failed to perform an essential duty and (2) the defense was prejudiced as a result. State v. Brothern, 832 N.W.2d 187, 192 (Iowa 2013) (quoting Lamasters v. State, 821 N.W.2d 856, 866 (Iowa 2012)); State v. Maxwell, 743 N.W.2d 185, 195 (Iowa 2008) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)). The defendant must show both elements by a preponderance of the evidence. Id. (citing State v. Straw, 709 N.W.2d 128, 133 (Iowa 2006)).

The Court examines whether counsel breached a duty by measuring the attorney's "'performance against the standard of a reasonably competent practitioner.'" Clay, 824 N.W.2d at 495 (quoting Maxwell, 743 N.W.2d at 195). The Iowa Supreme Court has stated:

> There is a presumption the attorney performed his duties competently. The claimant successfully

> rebuts this presumption by showing a preponderance of the evidence demonstrates counsel failed to perform an essential duty. A breach of an essential duty occurs when counsel makes such serious errors that he or she was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. We do not find such a breach by second-guessing or making hindsight evaluations.

Id. (citations omitted). The Court examines the attorney's performance by objectively determining whether his actions were reasonable under the prevailing professional norms. Id. (citing State v. Lyman, 776 N.W.2d 865, 878 (Iowa 2010)). Counsel's performance is reviewed by examining the totality of the circumstances. State v. Lane, 743 N.W.2d 178, 181 (Iowa 2007) (citing State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987)).

"Competent representation requires counsel to be familiar with the current state of the law." Clay, 824 N.W.2d at 496 (citing State v. Hopkins, 576 N.W.2d 374, 379–80 (Iowa 1998)). Trial counsel is not expected to predict changes in the law, but counsel must "exercise reasonable diligence in deciding whether an issue is 'worth raising.'" State v.

Westeen, 591 N.W.2d 203, 210 (Iowa 1999) (citing State v. Schoelerman, 315 N.W.2d 67, 72 (Iowa 1982)). However, counsel does not have a duty to raise an issue that is meritless. Brubaker, 805 N.W.2d at 171 (citing State v. Greene, 595 N.W.2d 24, 29 (Iowa 1999)). The Iowa Supreme Court has stated "that 'failure to preserve error may be so egregious that it denies a defendant the constitutional right to effective assistance of counsel.'" State v. Hrbek, 336 N.W.2d 431, 435–36 (Iowa 1983) (quoting Washington v. Scurr, 304 N.W.2d 231, 235 (Iowa 1981)).

Once the Court has determined the attorney failed to perform an essential duty, it must examine whether prejudice resulted by that failure. Clay, 824 N.W.2d at 496 (citations omitted). There is prejudice to the defendant if "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" State v. Leckington, 713 N.W.2d 208, 218 (Iowa 2006) (citing Strickland, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome

of the proceeding." State v. Carrillo, 597 N.W.2d 497, 500 (Iowa 1999) (citing Osborn v. State, 573 N.W.2d 917, 922 (Iowa 1998)). In examining whether prejudice exists, the Court "'must consider the totality of the evidence, what factual findings would have been affected by counsel's errors, and whether the effect was pervasive or isolated and trivial.'" Maxwell, 743 N.W.2d at 196 (quoting Bowman v. State, 710 N.W.2d 200, 203 (Iowa 2006)).

While the Court usually considers claims alleging ineffective assistance of counsel in postconviction relief proceedings, the Court will address ineffective-assistance-of-counsel claims on direct appeal when the record is sufficient. Iowa Code § 814.7(2)–(3) (2016); Clay, 824 N.W.2d at 494 (citations omitted). The Court also considers ineffective-assistance-of-counsel claims when the trial attorney's actions, or lack thereof, cannot be explained by plausible strategic or tactical considerations. Hopkins, 576 N.W.2d at 378 (citing State v. Ceron, 573 N.W.2d 587, 590 (Iowa 1997)).

"The unreliability of reagent field tests has led to their exclusion at trial as evidence of guilt in the majority of U.S. courts." Jack King, 'False Positives' Report Calls Drug Field Tests Useless; 'Untold Thousands of Wrongful Arrests' 33 APR Champion 12, 15 (National Association of Criminal Defense Lawyers 2009); Gabrielson & Sanders, NYT Magazine ("Field tests in use today remain inadmissible at trial in nearly every jurisdiction; instead, prosecutors must present a secondary lab test using more reliable methods."). In Iowa, "field tests are generally not admissible . . . ." Loggins v. State, No. 13–1587, 2015 WL 567002, at *2 n.2 (Iowa Ct. App. Feb. 11, 2015) (publication decision pending). In addition, because the State failed to establish any evidence regarding the reliability of the field testing kit used in this case, defense counsel should have objected to the inclusion of the field testing results in the minutes of testimony. See Doolin v. State, 970 N.E.2d 785, 789 (Ind. Ct. App. 2012) (finding the district court erred in admitting the results of a field test when the State failed to establish the test's reliability); State v. McClennen,

192 P.3d 1255, 1259 (N.M. Ct. App. 2008), overruled on other grounds by State v. Tollardo, 275 P.3d 110 (N.M. 2012) ("Before the results of a field test can be introduced to prove the identity of contraband, the state must establish the scientific reliability of the test and the validity of the scientific principles on which the field test is based."). Galbraith v. Commonwealth, 446 S.E.2d 633, 740 (Va. Ct. App. 1994) (finding the trial court erred in allowing an officer to testify to the results of a field test kit when the prosecution introduced no evidence as to the accuracy of the test). But see Fortune v. State, 696 S.E.2d 120, 124 (Ga. Ct. App. 2010) (finding the field test results are admissible at trial and defense counsel can engage in a "thorough and sifting cross-examination" regarding the tests reliability).

The failure of counsel to object to otherwise inadmissible evidence in a bench trial may allow the district court to consider the evidence. See State v. Brown, 656 N.W.2d 355, 360 (Iowa 2003) ("Generally a stipulation to the admission of testimony at trial constitutions waiver of any objection to the

testimony . . . ."). Because a reasonably competent attorney would be aware that evidence of field testing is inadmissible under these circumstances, counsel had a duty to object to the inclusion of the field testing results as evidence in the bench trial. See Clay, 824 N.W.2d at 496.

Ingram was prejudiced by the inclusion of the results of the field testing. There was little evidence presented other than the positive field test that indicated the substance was methamphetamine. (Mins. Test.) (App. pp. 10-17). There was no laboratory testing results from a DCI criminalist included, nor did the minutes of testimony indicate she would testify the substance was in fact methamphetamine. (Mins. Test.) (App. pp. 10-17). Had trial counsel properly objected and gotten the field testing results excluded from evidence, the remaining evidence was indistinguishable from that in Brubaker, where the Court found the evidence was insufficient to support a conviction. See Brubaker, 805 N.W.2d at 172–73. Therefore, if counsel had ensured the field test was properly excluded,

the result of the proceeding would have been different. See Leckington, 713 N.W.2d at 218.

CONCLUSION

Defendant–Appellant Bion Blake Ingram respectfully requests the Court reverse his conviction for Possession of a Controlled Substance (Methamphetamine), Second Offense, and remand to the district court for dismissal of the charge. Alternatively, Ingram requests the Court reverse his conviction and remand for new trial.

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 $ 7.56, and that amount has been paid in full by the Office of the Appellate Defender.

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