IN THE SUPREME COURT OF IOWA

STATE OF IOWA,	)	
	)	
Plaintiff–Appellee,	)	
	)	
v.	)	S. CT. NO. 16–1525
	)	
TIMOTHY ALVIN NEWTON,	)	
	)	
Defendant–Appellant.	)	

APPEAL FROM THE IOWA DISTRICT COURT
FOR RINGGOLD COUNTY
THE HONORABLE DUSTRIA A. RELPH, JUDGE

APPELLANT'S BRIEF AND ARGUMENT

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FINAL

CERTIFICATE OF SERVICE

On the 18th day of October, 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 Timothy Alvin Newton, 3030 Co. Hwy J55, Lamoni, IA 50140.

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ROUTING STATEMENT

The Iowa Supreme Court should retain this case because it raises an issue that involves a substantial issue of first impression and is of broad public importance. Iowa R. App. P. 6.903(2)(d) & 6.1101(2)(c), (d). Specifically, it argues that Iowa Code section 321J.2(1)(c), which allows an individual to be found guilty if he has any amount of controlled substance present in his person, violates due process.

In State v. Comreid, 693 N.W.2d 773 (Iowa 2005), the Supreme Court determined that Iowa Code section 321J.2(1)(c) created a per se ban, and it prohibited the operating of a motor vehicle with any amount of controlled substance in a person. In Comried, the defendant only argued that the statute's text of "any amount" incorporated the cutoff levels established by an administrative rule; he did not raise any constitutional due process challenges to section 321J.2(1)(c). State v. Comried, 693 N.W.2d 773,774–75 (Iowa 2005). See also Brief for the Appellant, State v. Comried, 693 N.W.2d 773 (Iowa 2005) (No. 03–1166). To the extent the Court in Comried

found the per se ban was reasonably related to the statute's purpose, Newton requests the Court overrule its decision. See Comried, 693 N.W.2d at 776.

Subsequently, in unpublished opinions, the Court of Appeals has rejected claims that Iowa Code section 321J.2(1)(c) violates due process. See State v. Hodges, 800 N.W.2d 755, 2011 WL 944378, at *5 (Iowa Ct. App. 2011) (unpublished table decision); State v. Davis, 884 N.W.222, 2016 WL 1677591, at *4–5 (Iowa Ct. App. 2016) (unpublished table decision). Pursuant to Iowa Rule of Appellate Procedure 6.904(2)(c), "[u]npublished opinions or decisions shall not constitute controlling legal authority." Iowa R. App. P. 6.904(2)(c) (2017). See also State v. Murray, 796 N.W.2d 907, 910 (Iowa 2011) (reciting that "unpublished court of appeals decisions do not constitute controlling legal authority for our court," but ultimately considering, and finding an unpublished Iowa Court of Appeals' opinion before finding it inapplicable). Therefore, review by the Supreme Court would be appropriate.

STATEMENT OF THE CASE

Nature of the Case: Defendant–Appellant Timothy Alvin Newton appeals his convictions, sentences, and judgment following a jury trial and verdict finding him guilty of Operating While Intoxicated – Second Offense and Child Endangerment, in Ringgold County District Court Case No. OWCR134514.

Course of Proceedings: On February 2, 2015, the State charged Defendant–Appellant Timothy Alvin Newton with Operating While Intoxicated – Second Offense, an aggravated misdemeanor, pursuant to Iowa Code sections 321J.2(1) and 321J.2(2)(b); and Child Endangerment, an aggravated misdemeanor, pursuant to Iowa Code sections 726.6(1)(a) and 726.6(7). (Trial Information) (App. pp. 4–6). See also Iowa Code §§ 321J.2(1), 321J.2(2)(b), 726.6(1)(a), & 726.6(7) (2015). The district court arraigned Newton in open court on February 9, 2015. (Arraignment Tr. p.1 L.1–p.14 L.9) (Order Following Arraignment) (App. pp. 7–9). Newton entered a plea of not guilty and waived his right to be tried within ninety days.

(Arraignment Tr. p.7 L.9–p.9 L.14) (Order Following Arraignment) (App. pp. 7–9).

On January 11, 2016, Newton appeared pro se at a pretrial hearing after his attorney withdrew. (Order 1/11/16) (App. pp. 10–12). A court order from that date states Newton waived his right to trial within one year to have additional time before trial in order to retain an attorney.[1] (Order 1/11/16) (App. pp. 10–12). After Newton applied for court-appointed counsel, which the court appointed, he filed a motion to suppress. (Mot. Suppress) (Confidential App. pp.14–21).

The motion to suppress argued that law enforcement did not have reasonable grounds to believe Newton was operating a motor vehicle while intoxicated in order invoke implied consent pursuant to Iowa Code section 321J.2. (Mot. Suppress; Amended Mot. Suppress) (Confidential App. pp.14–53). Newton also argued the State obtained the urine sample in violation of the federal and state constitutions. (Mot.

[1] The hearing was not reported. The order also states that Newton executed a written waiver of speedy trial, but none was ever filed electronically. (Order 1/11/16) (App. pp. 10–12).

Suppress; Amended Mot. Suppress) (Confidential App. pp.14–53). The State resisted the motion. (State's Resist. Mot. Suppress) (App. pp. 13–15). The district court held a hearing on the motion to suppress, and afterword the State filed a supplemental resistance to the motion. (State's Supplemental Resist.) (App. pp. 16–21). The district court denied the motion to suppress. (Ruling) (App. pp. 22–25).

A jury trial commenced on July 13, 2016. (Tr. p.2 L.2–7). On July 18, 2016, the jury found Newton guilty of Operating While Intoxicated and Child Endangerment. (Tr. p.818 L.12–p.820 L.24) (Order Re: Jury Verdict) (App. pp. 40–42). After the jury verdict, Newton admitted he had a previous conviction for Operating While Intoxicated on or about on February 2, 2007, in Polk County. (Tr. p.823 L.9–p.825 L.16) (Order Re: Jury Verdict) (App. pp. 40–42).

Prior to sentencing, Newton filed a renewed motion for judgment notwithstanding the verdict and for a new trial and a motion in arrest of judgment, which the State resisted. (Mot. New Trial & Mot. Arrest J.; State's Resist. Post-trial Mot.) (App.

pp. 43–45). On September 12, 2016, the district court denied Newton's post-trial motions and proceeded immediately into sentencing. (Sentencing Tr. p.2 L.9–p.7 L.2) (Order 9/12/16) (App. pp. 46–47).

After hearing argument from both parties, the district court sentenced Newton to an indeterminate term not to exceed two years on each count, and it ordered Newton to placement in the Iowa Department of Corrections' Operating While Intoxicated Continuum Program, pursuant to Iowa Code sections 321J.2(2)(b) and 904.513, if eligible. (Sentencing Tr. p.28 L.18–p.29 L.11) (Sentencing Order) (App. pp. 48–50). The court ordered the sentences be run concurrently with one another. (Sentencing Tr. p.29 L.6–7) (Sentencing Order) (App. p. 50). Newton was ordered to pay a fine of $1875 on the OWI charge and a fine of $625 on the child endangerment charge, plus surcharges; the court then suspended the fine and surcharge on the child endangerment charge. (Sentencing Tr. p.29 L.12–22) (Sentencing Order) (App. pp. 49–50). The court also ordered Newton to take a drinking drivers course,

complete a substance abuse evaluation and any recommended treatment, and submit a DNA sample. (Sentencing Tr. p.29 L.16–24) (Sentencing Order) (App. p. 50). Lastly, it also ordered the Department of Transportation to revoke Newton's driver's license for one year. (Sentencing Tr. p.29 L.15–16) (Sentencing Order) (App. p. 50).

Newton timely filed a notice of appeal on September 12, 2016. (Notice) (App. p. 54–55).

Facts: On September 3, 2014, Eric Fell arrived home to find an SUV and trailer stuck in the mud in a ditch on his property and a boy, later identified as Newton's eleven-year-old son, standing outside the vehicle. (Tr. p.186 L.4–13; p.201 L.9–10; p.214 L.20–25). Fell's property is located on Highway 169 a few miles south of Mount Ayr. (Tr. p.184 L.4–p.185 L.6). Fell, concerned that someone had been hurt in the accident, called the sheriff's office to report it. (Tr. p.187 L.14–p.188 L.6). Fell talked with Newton, who was in the vehicle, and then Fell retrieved his tractor to attempt to pull the SUV and trailer out of the ditch. (Tr. p.188 L.7–p.190 L.5; p.192 L.1–

10). Fell testified he spoke with Newton several times and did not believe his speech was slurred, nor did he observe Newton falling over and having problems walking. (Tr. p.194 L.3–6; 17–20). Fell testified he did not smell alcohol or marijuana, nor did he witness Newton acting impaired. (Tr. p.197 L.10–16).

Ringgold County Sheriff's Deputy Samuel Pitt arrived as Fell was backing up his tractor to the ditch. (Tr. p.189 L.21–p.190 L.5; p.214 L.5–17). Pitt stopped Fell from pulling out the vehicle. (Tr. p.190 L.10–20; p. 214 L.5–17; p.219 L.14–17). Pitt then walked to the SUV, where he found Newton sitting in the driver's seat with it reclined down; Newton's son was standing outside the vehicle by the driver's side door. (Tr. p.215 L.1–10). The driver's side door was open, the front windows were down, the SUV's lights were on, and the engine was running. (Tr. p.215 L.1–8).

The ditch was extremely wet and muddy. (Tr. p.216 L.4; p.552 L.10–13). Pitt observed many ruts and gouge marks

that he believed were recent and stemmed from the SUV being driven through the ditch. (Tr. p.216 L.4–12).

As Pitt was talking with Newton, Newton told him that he was waiting for Fell to arrive with his tractor and pull him out. (Tr. p.217 L.9–10). Pitt found it strange that Newton was unaware that Fell had the tractor nearby because the tractor was loud and had bright lights; Pitt believed anyone near the SUV should have been aware the tractor was nearby. (Tr. p.217 L.11–25). Pitt also testified he suspected Newton was impaired almost immediately because Newton was "agitated, appeared to be disoriented, displayed slurred speech[2]" and had trouble maintaining his balance when he got out of the SUV. (Tr. p.218 L.8–14). Pitt, who had never met Newton prior to the incident, stated he knew Newton "was into

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[2] Deputy Landon White, who had known Newton for years, testified he did not believe Newton's speech was slurred and that was normally how Newton talked. (Tr. p.549 L.16–p.550 L.12). White testified that an individual who did not know that was how Newton typically talked might think his speech was slurred. (Tr. p.528 L.6–14).

prescription drugs and marijuana." (Tr. p.293 L.17–25; p.325 L.19–p.326 L.7; p.547 L.21–25).

Pitt also testified Newton told him that he did not have his driver's license with him; however Pitt pointed out Newton's wallet, which was lying on the driver's side floorboard in plain sight. (Tr. p.222 L.19–p.223 L.11). Pitt also observed Newton look through the wallet and pass by his driver's license two times before locating it. (Tr. p.223 L.9–17). Newton told Pitt it was Tuesday night, despite that it was actually Wednesday.[3] (Tr. p.224 L.15–24).

Deputy Landon White responded to the scene approximately twenty minutes after Pitt, and once White arrived he took over the investigation. (Tr. p.221 L.25–p.213 L.18; p.226 L.8–p.227 L.14; p.465 L.9–14; p.542 L.21–23). After talking with Pitt and before having contact with Newton, White attempted to contact a drug recognition expert, but

[3] The accident occurred the week following Labor Day. The defense explained Newton's confusion about the day being related to the holiday and Newton, who was in the garbage collection business, simply being off a day because of the holiday. (Tr. p.291 L.2–p.292 L.15; p.623 L.19–23).

none was available to assist. (Tr. p.294 L.12–21; p.468 L.21–p.470 L.23; p.548 L.7–24). Newton denied consuming any alcohol, and neither officer smelled any alcohol coming from Newton. (Tr. p.225 L.2–9; p.283 L.20–25; p.479 L.21–23).

White testified he had known Newton for fifteen to twenty years and Newton did not seem to be acting like his usual self. (Tr. p.477 L.23–p.478 L.4; p.497 L.20–p.498L.1). Newton told officers he did not feel well and had been sick about a day. (Tr. p.225 L.11–25; p.478 L.5–8). He also told the officers that he had not taken any medication. (Tr. p.225 L.10–12; p.498 L.3–4).

Newton told the officers he was backing out of the driveway when the trailer went off the south side of the driveway into the ditch. (Tr. p.219 L.20–p.220 L.2; p.228 L.10–16). Newton indicated the SUV drove into the north side of the ditch and the trailer detached from the truck. (Tr. p.229 L.1–5). Newton stated he was able to drive the SUV out of the ditch and onto the road but then entered the ditch with the vehicle again in order to hook up the trailer and pull it out.

(Tr. p.229 L.6–p.230 L.3). Both officers testified Newton had trouble explaining exactly how he had ended up in the ditch, and they believed it was strange Newton requested the officers ask his son to explain what happened. (Tr. p.230 L.4–11; p.302 L.23–p.303 L.1; p.476 L.11–p.477).

White also testified Newton was confused as to where he was; Newton said he was turning around because he had missed the turn to his destination, but in actuality Newton had another three and a half miles until the turn. (Tr. p.473 L.4–p.475 L.7). Newton told White he was just following his GPS. (Tr. p.475 L.16–18).

After White informed Newton he thought he was impaired, Newton offered to perform field sobriety tests. (Tr. p.304 L.6–20; p.478 L.9–14). Both Pitt and White testified they observed nystagmus in both of Newton's eyes and a lack of smooth pursuit when White conducted the horizontal gaze nystagmus test, indicating Newton was under the influence of some alcohol or drug. (Tr. p.231 L.1–p.232 L.4; p.310 L.18–23; p.489 L.5–490 L.15). Because White was aware Newton

had previous injuries to his legs, the officer did not request Newton take the one-leg-stand or the walk-and-turn tests. (Tr. p.304 L.21–p.305 L.4; p.478 L.16–p.479 L.12). Pitt had been unaware Newton had problems with his legs. (Tr. p.218 L.19–21).

White conducted a vertical nystagmus test, which Newton passed; White also found a lack of convergence, which also could indicate impairment, but not in all individuals. (Tr. p.309 L.7–p.310 L.9; p.416 L.4–23; p.492 L.1–p.494 L.3; p.575 L.19–p.576 L.17; p.668 L.6–23). Newton also performed well on the Romberg test. (Tr. p.313 L.5–p.314 L.4; p.494 L.7–19; p.578 L.13–p.p.579 L.5). Newton took a preliminary breath test, which did not test positive for alcohol. (Tr. p.233 L.6–25; p.496 L.6–11).

Officers transported Newton and his son to the sheriff's office to invoke implied consent and complete additional testing. (Tr. p.234 L.2–20; p.503 L.7–9). While being transported, Newton made a comment to White that made him believe Newton did not know the location of where the accident

was. (Tr. p.505 L.2–p.506 L.24). While at the jail, Newton laid down on a wooden bench. (Tr. p.508 L.9–13). After being read implied consent, Newton agreed to give a urine sample after initially asking to give blood instead. (Tr. p.522 L.13–p.525 L.9). After providing the sample, Pitt took Newton and his son home. (Tr. p.526 L.6–10).

White delivered the urine sample to the DCI laboratory. (Tr. p.531 L.25–p.532 L.13). The DCI lab conducted a preliminary screening test, which indicated the presence of multiple controlled substances. (Tr. p.533 L.7–20) (Ex. 28) (Ex. App. pp. 8–9). After the screening tests had been performed, Newton went to the DCI laboratory with a letter from an attorney revoking his consent to provide urine and requesting the lab return the specimen. (Tr. p.533 L.17–p.534 L.1). White then got a search warrant to seize the sample and finish the testing. (Tr. p.534 L.2–20). The DCI laboratory conducted confirmatory tests, which confirmed the presence of controlled substances and/or their metabolites in Newton's urine. (Tr. p.535 L.1–5) (Exs. 29, 30, 31, & 32) (Ex. App. pp.

10–13). After the tests came back, White charged Newton with Operating While Intoxicated and Child Endangerment. (Tr. p.318 L.22–p.319 L.8; p.536 L.20–p.537 L.22).

Newton's wife testified Newton was lethargic and throwing up on September 2nd through the 3rd. (Tr. p.715 L.18–24). On September 3rd, Newton left with their son to deal with an emergency issue at work. (Tr. p.716 L.6–24). His wife stated when Newton returned that night he was even more exhausted and was still sick. (Tr. p.718 L.4–10). Newton's son also testified he was sick. (Tr. p.721 L.6–8).

Newton's son testified he and Newton picked up Newton's father, who then drove the SUV and trailer because Newton was not feeling well. (Tr. p.721 L.11–18). Newton's son stated they pulled into the driveway before getting the SUV and trailer stuck in the ditch. (Tr. p.722 L.11–23). Newton's father testified he was driving to drop the trailer off when the GPS told them to turn around; he put the trailer in the ditch and went to get a truck to pull everything out. (Tr. p.731 L.12–p.734 L.2).

Both Newton's son and father testified Newton's father then caught a ride with someone who happened to be passing on the road to go get a garbage truck to pull out the SUV and trailer. (Tr. p.722 L.24–p.723 L.8). Newton's son testified his father then tried to drive the Blazer out of the ditch but was unable to do so. (Tr. p.729 L.10–25). Newton's father testified when he got to the garbage truck, it had a flat tire. (Tr. p.734 L.2–4). Newton's father changed the tire and went back to where the SUV and trailer were stuck, but no one was there so he eventually went home. (Tr. p.734 L.5–p.735 L.1).

Fell never heard Newton say that anyone else was the driver of the vehicle when it went into the ditch or that someone else had gone to help him get the vehicle pulled out of the ditch; however, Fell also testified he did not hear Newton say anything to the contrary either. (Tr. p.193 L.7–18; p.197 L.23–p.198 L.8). Pitt testified Newton never told him Newton's father had been driving the vehicle when it went in the ditch or that he had left to get a truck to pull them out. (Tr. p.247 L.20–p.248 L.14). When Newton's son told White what had

happened when they were on scene, his son also did not mention anyone else was driving; however the son testified no one asked him if anyone else was there. (Tr. p.627 L.16–23; p.724 L.4–6).

Newton's son was not scared and did not appear to be mentally or physically harmed in any way with regards to the accident that had occurred. (Tr. p.553 L.5–16). Newton's son also testified he never felt that he was in danger either physically, emotionally, or mentally. (Tr. p.724 L.13–18).

Several witnesses, including all of law enforcement officers, indicated it was not uncommon to get a vehicle stuck in a ditch and that they themselves had put vehicles into a ditch. (Tr. p.282 L.14–20; p.285 L.8–17; p.442 L.23–p.443 L.14; p.551 L.14–21; p.680 L.1–22). Fell testified he had gotten his lawn mower stuck in that particular ditch a few times. (Tr. p.194 L.7–16).

Any additional relevant facts will be discussed below.

ARGUMENT

I. THE SUBMISSION OF THE PER SE ALTERNATIVE OF OPERATING WHILE INTOXICATED, PURSUANT TO IOWA CODE SECTION 321J.2(1)(c), WHICH ALLOWED THE JURY TO FIND NEWTON GUILTY IF ANY AMOUNT OF CONTROLLED SUBSTANCE WAS PRESENT IN HIS URINE VIOLATED HIS DUE PROCESS RIGHTS.

A. Preservation of Error: Before the start of trial, defense counsel raised an objection to the constitutionality of Iowa Code section 321J.2(c) and argued this alternative theory of guilt of Operating While intoxicated should not be submitted to the jury. (Tr. p.168 L.19–p.170 L.9). The parties agreed to address the issue at a later time. (Tr. p.170 L.10–15). During the presentation of evidence, Newton objected to the DCI reports as not relevant because a blood sample was the only way to establish "impairment of an individual at a certain time." (Tr. p.352 L.2–8). The court overruled the objection and admitted Exhibits 28, 29, 30, 31, 32 and 33. (Tr. p.352 L.7–8). At the conference regarding jury instructions, defense counsel objected to the jury instructions that allowed the jury to find Newton guilty of Operating While Intoxicated if any

controlled substance was present in his urine and the related instructions. (Tr. p.706 L.23–p.707 L.15). Newton objected that the law violated his due process rights under both the federal and state constitutions. (Tr. p.706 L.23–p.707 L.15). The objections were overruled. (Tr. p.707 L.17–18). Thus, error on this issue has been preserved.

To the extent, counsel properly failed to preserve this issue, trial counsel was ineffective and Newton 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 the constitutionality of a statute de novo. State v. Groves, 742 N.W.2d 90, 92 (Iowa 2007) (citing State v. Seering, 701 N.W.2d 655, 661 (Iowa 2005). The Court "presume[s] statutes are constitutional and the challenger bears the burden to prove the unconstitutionality beyond a reasonable doubt." Id.

When a defendant asserts an ineffective-assistance-of-counsel claim, the reviewing Court makes an independent

evaluation of the totality of the circumstances, which is the equivalent of a de novo review. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984).

C. Discussion: The Fourteenth Amendment to the Constitution of the United States provides: No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1. Likewise, Article I, section 9 of the Iowa Constitution states that "no person shall be deprived of life, liberty, or property, without due process of law." Iowa Const. art. 1, § 9. The Iowa Supreme Court has generally found "the federal and state due process clauses to be identical in scope, import, and purpose." Bruns v. State, 503 N.W.2d 607, 611 (Iowa 1993) (citing Harden v. State, 434 N.W.2d 881, 886 (Iowa 1989)). "Due process is designed to ensure fundamental fairness in interactions between individuals and the state." State v. Nail, 743 N.W.2d 535, 539 (Iowa 2007).

In present case, Justin Grodnitzky, a Ph.D. and criminalist in the toxicology section of the Division of Criminal

Investigations (DCI) Laboratory, testified for the State. Grodnitzky testified the DCI lab did not conduct drug testing on blood specimens because they did not have enough resources in September of 2015; instead, it strictly did urine toxicology testing because it was easier to collect and less expensive. (Tr. p.345 L.3–25; p.385 L.25–p.387 L.6; p.395 L.25–p.396 L.11). Through his testimony, the State admitted a series of reports from the DCI laboratory regarding the testing of Newton's urine. (Tr. p.348 L.25–p.352 L.8) (Exs. 28, 29, 30, 31, & 32) (Ex. App. pp. 8–13). Grodnitzky testified a person's body metabolizes a drug the entire time it is in the body, but then it dumps or pools the drug's metabolites into a person's urine. (Tr. p.385 L.10–18). He further testified that drugs are expelled from a person's blood much quicker than urine. (Tr. p.389 L.9–11). Grodnitzky stated a person could use drugs days prior to a urine sample and the urine could test positive for the drug or its metabolites. (Tr. p.388 L.25–p.389 L.25).

Grodnitzky testified a blood test was more reliable than urine for showing impairment, but was still limited based on how fast the drug metabolized out of the bloodstream, how quickly a blood draw was taken, and the individual's personal tolerance. (Tr. p.389 L.12–21). Grodnitzky also testified "If you want to correlate back to impairment, blood is much better than urine." (Tr. p.395 L.21–24). Grodnitzky explained:

> So if you take a drug, you'll feel the effects. You'll get high; right? But your body will metabolize it and it will take time to get into the bladder, right, and into the urine. So you'll have a low level. And you could be really high at that point. But as your body metabolizes that and you're no longer high and it's all sitting in your bladder, your urine, then you urinate. You get a really high level. But the person is not high at all because that's past use.

(Tr. 400 L.25–p.401 L.8).

The defense also presented expert testimony regarding toxicology testing from Ronald Henson, a Ph.D., whose work focused on drug testing. (Tr. p.406 L.6–p.407 L.16). Henson also testified that only blood testing would be able to confirm an individual's possible impairment. (Tr. p.418 L.17–20; p.422 L.19–p.423 L.6).

In this case, Newton's due process rights were violated because the jury was allowed to find Newton guilty of Operating While Intoxicated solely because he had the presence of metabolites of controlled substances in his urine, pursuant to Iowa Code section 321J.2(1)(c). Iowa Code section 321J.2(1)(c) provides that a "person commits the offense of operating while intoxicated if the person operates a motor vehicle" while "any amount of a controlled substance is present in the person, as measured in the person's blood or urine." Iowa Code § 321J.2(1)(c) (2015). This subsection is unconstitutionally vague, and it is not rationally related to the purpose of the statute.

1. Void for vagueness

One of the evils the due process clauses protect individuals against is the enforcement of vague statutes. Nail, 743 N.W.2d at 539. The Court has recognized there "are three generally cited underpinnings of the void-for-vagueness doctrine." Id.

> 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.

Id. (citations omitted). The third consideration is not relevant in as-applied challenges under the void-for-vagueness doctrine. State v. Heinrichs, 845 N.W.2d 450, 454–55 (Iowa Ct. App. 2013).

"[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so he may act accordingly." State v. Bower, 725 N.W.2d 435, 441 (Iowa 2006) (quoting Grayned v. City of Rockford, 408 U.S. 104, 108–109 (1972)). A statute may be unconstitutional on its face as impermissibly vague if "it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of

liberty interests." City of Chicago v. Morales, 527 U.S. 41, 52 (1999) (citing Kolender v. Lawson, 461 U.S. 352, 358 (1983)).

In this case, Iowa Code section 321J.2(1)(c) is impermissibly vague because it fails to give individuals fair notice of when their conduct is prohibited and it leads to arbitrary or discriminatory enforcement. As both the State and the defense's experts in this case testified, it is possible for a urine sample to contain the metabolites or derivatives of a controlled substance days after use. A person of ordinary intelligence would not be aware that a controlled substance remains in his urine for days after his impairment from the drug ends. Thus, a person of ordinary intelligence would not have adequate notice that driving days after his impairment of the drug has ended would still be a violation of Iowa Code section 321J.2(1)(c) simply because all of the substance's metabolites and derivatives have not been expelled by the individual's body yet. Because the traces of these drugs remain in the body long after the use of the drug, the individual would never be certain of when he would be

permitted to drive without facing punishment. In addition, it may lead to exercise of power in an arbitrary or discriminatory fashion, allowing the prosecution of some individuals who have controlled substances present in their urine but not others, depending on other factors, such as here when the officer was aware Newton used prescription drugs and marijuana prior to making any contact with him. See (Tr. p.293 L.17–25; p.325 L.19–p.326 L.7; p.547 L.21–25).

2. Substantive due process

The due process clauses of the federal and state constitutions also confer substantive rights to individuals. See Schmitt v. Jenkins Truck Lines, Inc., 149 N.W.2d 789, 792 (Iowa 1967) (noting substantive rights exist for their own stake, such as the rights to life, liberty, property, and reputation). When an individual raises a challenge to a statute that it violates his substantive due process rights, the Court engages in a two-part analysis. Groves, 742 N.W.2d at 92 (citing In re Detention of Cubbage, 671 N.W.2d 442, 446 (Iowa 2003)). First, the Court "'identif[ies] the nature of the

individual right involved' and determine[s] whether that right is fundamental." Id. (quoting Cubbage, 671 N.W.2d at 446). Second, the Court applies the appropriate level of review. Id. at 93.

If a non-fundamental right is implicated, such in this case, the Court applies a rational basis review. Id. (citing State v. Hernandez-Lopez, 639 N.W.2d 226, 238 (Iowa 2002)). See also State v. Hartog, 440 N.W.2d 852, 855 (Iowa 1989) (noting the ability to drive is not a fundamental right). Therefore, there must only "be a 'reasonable fit' between the legislature's purpose and the means chosen to advance that purpose." King v. State, 818 N.W.2d 1, 31 (Iowa 2012) (citing Zaber v. City of Dubuque, 789 N.W.2d 634, 640 (Iowa 2010)).

Iowa Code Chapter 321J embodies the legislative enactments that attempt to lessen the numerous deaths and injuries created by dangerous, impaired drivers on the State's highway. This Court has often cited the State's interest in decreasing the "holocaust on the highways" caused by drivers impaired by the consumption of intoxicants in addressing

challenges to Chapter 321J. See, e.g., State v. Demaray, 704 N.W.2d 60, 62 (Iowa 2005) ("[T]he general purpose of chapter 321 J is to reduce the holocaust on our highways due to drunk drivers . . . .") (internal quotation marks omitted) (citations omitted); State v. Comried, 693 N.W.2d 773, 775 (Iowa 2005).

First of all, it is important to note that Chapter 321J does not require that a person's driving to be faulty in any way. It is the operation of the motor vehicle at a time when the individual's status meets the definition of intoxication that constitutes the offense. Experience and research has shown, that for the general population, an individual whose blood alcohol level exceeds 0.08 is impaired. See, e.g., Berning et al., Nat'l Highway Traffic Safety Admin., Results of the 2013–2014 National Roadside Survey of Alcohol and Drug Use by Drivers 4 (Feb. 2015), available at https://www.nhtsa.gov/staticfiles/nti/pdf/812118-Roadside_Survey_2014.pdf. It does not matter that there may be some in the general population who would be able to continue to function at a high level

despite that amount of alcohol in the person's system. A blood alcohol level of 0.08 therefore is a legitimate standard on which to base a definition of intoxicated. As such the statutory level of 0.08 is rationally related to the statute's goal of keeping impaired drivers off of the road. It is also important to note that the human body breaks down the alcohol in the system fairly quickly and the blood alcohol level will drop over a short period of time.

For a variety of reasons, one may not relate the trace amount of a controlled substance in a person's urine as covered by subsection 321J.2(1)(c)'s language of "any amount" with the impaired functioning of the individual. Like alcohol, the use of a controlled substance does produce impairment, a "buzz", or "high." As testified to by the experts in this case, the impairment can be related to the presence of the drug in the individual's *blood*. (Tr. p.389 L.12–21; p.395 L.21–24; p.418 L.17–20; p.422 L.19–p.423 L.6). However, the human body does not process the controlled substance in the same manner or in the same time frame as it does alcohol; therefore

the use of a urine sample does not measure impairment of an individual. (Tr. p.389 L.12–21; p.395 L.21–24; p.418 L.17–20; p.422 L.19–p.423 L.6). Although a "high" may last only a short time, traces of the drug, such as marijuana remain in the individual's urine for days and weeks after the individual's use. Consequently, days or potentially even weeks after an individual has used a controlled substance, the person would be sober, fully functional, and unimpaired, but would still meet the statutory definition of intoxicated because a urine test would be positive for "any amount" of the controlled substance. See People v. Derror, 715 N.W.2d 822, 846 (2006) (Cavanaugh, J., dissenting), overruled by People v. Feezel, 783 N.W.2d 67 (Mich. 2010).

In Comried, the Court determined that because there was no accepted scientific agreement as to the quantity of a controlled substance that would cause an individual to be impaired, the legislature could have reasonably prohibited any amount of a controlled substance. See Comried, 693 N.W.2d at 776. However, the Court in Comried did not ever state it

was considering a due process claim, nor did it explicitly apply the rational basis analysis. See id. To the extent that the Court in Comried applied a rational basis test to Iowa Code section 321J.2(1)(c), the Court should find the statute as it pertains to the testing of urine no longer rationally relates to a legitimate government purpose. See Groves, 742 N.W.2d at 93 (citing Bierkamp v. Rogers, 293 N.W.2d 577, 581 (Iowa 1980)). Considering the expert testimony in the record, the use of urine testing is not constitutional because it does not establish any kind of impairment, only prior use at some point in the past; therefore, there is no rational relationship between the subsection allowing a conviction for any amount of controlled substance present in the defendant's urine and the purpose of the statute—highway safety. See Derror, 475 N.W.2d at 846 (Cavanaugh, J., dissenting) ("Plainly there is no rational reason to charge a person who passively inhaled marijuana smoke at a rock concert a month ago and who now decides to drive to work. There is no rational reason to charge a person who inhaled marijuana two weeks ago and who now decides to

drive . . . . While I certainly agree with the Legislature's position that a person should be punished for driving while under the influence of a controlled substance because of the potential for tragic outcomes, the majority's interpretation of the statute is arbitrary and wholly unrelated in a rational way to the objective of the statute.").

The legislature could not seriously or rationally conclude that a trace amount, included in the scope of the "any amount" language of section 321J.2(1)(c), of a controlled substance, as revealed by a chemical test of a person's urine, would be related to the impaired driving ability of the individual, and therefore, related to preventing dangerous drivers on the road. Defining intoxication to include "any amount" of a controlled substance as measured by its presence in urine does not rationally relate to the purpose of the statute, which is to protect the citizens of this state from the dangers created by drivers who are impaired and unable to function fully because of the over-use of alcohol or the use of a controlled substance. The punishment of an individual for

driving while having "any amount" of a controlled substance in the individual's urine violates the substantive due process rights of the individual. See Derror, 715 N.W.2d at 846 (Cavanaugh, J., dissenting). But see State v. Hodges, 800 N.W.2d 755, 2011 WL 944378, at *5 (Iowa Ct. App. 2011) (unpublished table decision) (rejecting the argument that Iowa Code section 321J.2(1)(c) violated the defendant's substantive due process rights); State v. Davis, 884 N.W.222, 2016 WL 1677591, at *4–5 (Iowa Ct. App. 2016) (unpublished table decision) (same). Consequently, the State's ability to convict Newton for Operating While Intoxicated based upon the presence of any amount of controlled substance as measured in his urine violated the defendant's right of substantive due process.

Defendant concedes that the State has, in addition to the concern over drunk drivers, a legitimate concern over drivers who are impaired because of the use of illegal drugs or controlled substances. Such concern is embodied in Iowa Code section 321J.2(1)(a), which allows for the prosecution of

individuals who drive *while under the influence* of a controlled substance. See Iowa Code § 321J.2(1)(a) (2015). Defendant does not challenge the relationship between the state's interest in keeping impaired drivers off the road and that specific code subsection. However, defendant asserts that there is no rational relationship between that specific state interest and subsection 321J.2(1)(c) which prohibits the operation of a motor vehicle while having any amount of a controlled substance in one's urine. Because there is no rational relationship between the stated purpose of the statute and the language of the enactment, this submission of this alternative to the jury for consideration of Newton's guilt violates Newton's right to substantive due process. See (Jury Instruction No. 16) (App. p. 39). Because this alternative theory of guilt was impermissibly submitted to the jury over Newton's objections, he is entitled to a new trial. See State v. Tyler, 873 N.W.2d 741, 753–54 (Iowa 2016) (finding a new trial necessary when a theory of guilt should not have been submitted to the jury).

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

Newton 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 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, 821 N.W.2d at 866). Newton hereby incorporates

by reference the argument outlined above. As the argument is legally meritorious, defense counsel breached an essential duty by failing to specifically make the above argument. See State v. Clay, 824 N.W.2d 488, 496 (Iowa 2012) (stating counsel has a duty to know the law). Cf. State v. Greene, 592 N.W.2d 24, 29 (Iowa 1999) (stating counsel is not incompetent for failing to pursue a meritless issue.).

If error was not preserved, Newton was prejudiced by counsel's failure to adequately argue the applicable law. As argued above, the submission of the alternative under Iowa Code section 321J.2(1)(c) that allowed the jury to find Newton guilty of Operating While Intoxicated because any amount of controlled substance was present in his urine violated his due process rights. If trial counsel had been more specific in his argument, the district court should have sustained his objections to submitting that alternate theory of guilt to the jury. See State v. Leckington, 713 N.W.2d 208, 218 (Iowa 2006) (citing Strickland v. Washington, 466 U.S. 668, 694 (1984)) (finding prejudice if "'there is a reasonable probability

that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'"). The jury was allowed to use that per se theory of intoxication to convict Newton. See (Jury Instruction No. 16) (App. p. 39). Although the State presented some independent evidence of impairment, it was not overwhelming. In addition, Newton presented evidence that he was not impaired at the time of the operation of the vehicle. There is a substantial probability that if the jury did not consider the per se alternative of Operating While Intoxicated that it would have found Newton not guilty. See id.

D. Conclusion: Defendant–Appellant Timothy Alvin Newton respectfully requests the Court vacate convictions and remand the case to district court for a new trial.

II. THE DEFENDANT'S STIPULATION TO THE PRIOR OFFENSE WAS INVALID BECAUSE IT WAS UNKNOWING AND INVOLUNTARY.

A. Preservation of Error: In the context of a habitual offender proceeding, the Iowa Supreme Court has held a defendant must raise challenges to any deficiencies in the

proceeding by filing a motion in arrest of judgment in order to preserve a challenge to the proceeding on appeal. State v. Harrington, 893 N.W.2d 36, 43 (Iowa 2017). See also Iowa R. Crim. P. 2.24(3)(a) (2015). However, in setting forth this clear requirement in State v. Harrington, the Court noted it "only appli[ed] this rule of law prospectively." Id. Therefore, the Court can directly review Newton's challenge to the stipulation because his appeal was already pending when the Court determined he was obligated to file a motion in arrest of judgment to challenge the defects in his stipulation proceeding.

Alternatively, the Iowa Supreme Court has found the district "court must inform the offender that challenges to an admission based on defects in the [prior offense] proceedings must be raised in a motion in arrest of judgment" and "that the failure to do so will preclude the right to assert them on appeal." Harrington, 893 N.W.2d 36, 46 (Iowa 2017) (citing Iowa R. Crim. P. 2.8(2)(d)). In the present case, Newton did file a motion in arrest of judgment; however the motion did not

challenge his stipulation to the prior offense. (Mot. New Trial & Mot. Arrest J.) (App. pp. 43–45). Nonetheless, such failure does not preclude a challenge to his stipulation on direct appeal because the district court failed to advise Newton of either (1) of the right to challenge defects *in his stipulation* by filing a motion in arrest of judgment or (2) that the failure to file a motion in arrest of judgment would preclude him from challenging his stipulation on appeal, as required under Rule 2.8(2)(d) and Harrington. See (Tr. p.823 L.9–p.825 L.16). See also Harrington, 893 N.W.2d 36, 46 (Iowa 2017); Iowa R. Crim. P. 2.8(2)(d)). Rather, the only mention of post-trial motions by the court came after the jury verdict and neither the district court's oral remarks nor written order satisfied the court's duty to advise Newton of his right and the necessity of filing a motion in arrest of judgment to preserve issues for his appeal. (Tr. p.823 L.9–p.825 L.16) (Order Re: Jury Verdict) (App. pp. 40–42). Thus, Newton is not prevented from directly challenging deficiencies in the proceeding.

B. Standard of Review: Claims of error in guilty plea proceedings are reviewed for correction of errors at law. See Iowa R. App. P. 6.907 (2015). See also State v. Meron, 675 N.W.2d 537, 540 (Iowa 2004). Since the prior-offense stipulation procedure is analogous to guilty plea proceedings, review is also for correction of errors at law. See State v. Brady, 442 N.W.2d 57, 58 (Iowa 1989) (holding that a defendant's admission of prior felony convictions which provide the predicate for sentencing as an habitual offender is so closely analogous to a plea of guilty that it is appropriate to refer to our rules governing guilty pleas).

A claim that a stipulation was not knowingly and intelligently made implicates the Due Process Clause of the federal and state constitutions; therefore, review is de novo. Harrington, 893 N.W.2d at 41. See also State v. Loye, 670 N.W.2d 141, 150 (Iowa 2003) (citing State v. Thomas, 659 N.W.2d 217, 220 (Iowa 2003)) (applying to claims a guilty plea was unknowing and unintelligent).

C. Discussion: When a defendant is alleged to be subject to enhanced punishment based on prior offenses, the defendant must first be convicted of the underlying offense and then, if found guilty, is entitled to a second trial on the prior convictions. State v. Kukowski, 704 N.W.2d 687, 691 (Iowa 2005). The State is held to the same "beyond a reasonable doubt" burden of proof in the trial on the enhancement as in the trial on the underlying conviction. Id. In addition to establishing that "the defendant is the same person named in the convictions" the "State must also establish that the defendant was either represented by counsel when previously convicted or knowingly waived counsel." Id.

Iowa Rule of Criminal Procedure 2.19(9) provides that "the offender shall have the opportunity in open court to affirm or deny that the offender is the person previously convicted, or that the offender was not represented by counsel and did not waive counsel." Iowa R. Crim. P. 2.19(9) (2015). Thus, the rule "gives the defendant an opportunity to affirm or deny the allegations the State is obligated to prove at the second trial."

Kukowski, 704 N.W.2d at 692. However, "[a]n affirmative response by the defendant under [Rule 2.19(9)] . . . does not necessarily serve as an admission to support the imposition of an enhanced penalty as a multiple offender." Id. Rather, "[t]he court has a duty to conduct a further inquiry, similar to the colloquy required under rule 2.8(2), prior to sentencing to ensure that the affirmation is voluntary and intelligent." Kukowski, 704 N.W.2d at 692.

In State v. Harrington, the Iowa Supreme Court outlined the procedure the district court must follow prior to accepting a defendant's admission of a prior offense, which will be used in a sentencing enhancement. Harrington, 893 N.W.2d at 45–47. First, the district court must ensure the defendant knows the nature of the enhanced charge and that the prior conviction may only be used if the defendant was represented by an attorney or knowingly waived his right to an attorney; the court must also determine "a factual basis exists to support the admission to the prior convictions." Id. at 45–46. Next, the district court must tell the defendant the maximum

possible punishment of the enhanced charge, including any mandatory minimum punishment. Id. at 46. "Third, the court must inform the offender of the trial rights enumerated in Iowa Rule of Criminal Procedure 2.8(2)(b)(4)." Id. In addition, the court must also ensure the defendant understands that if he admits the prior offense, he waives a trial on the enhancement. Id.

In the present case, the district court did ensure a factual basis existed when Newton admitted he had been previously convicted of Operating While Intoxicated in Polk County on February 2, 2007. (Tr. p.824 L.18–21). However, the court did not inform Newton of the nature of the charge of an OWI second offense, nor did the court did not inform Newton his prior conviction was only valid if he had counsel or knowingly waived it.[4] See Harrington, 893 N.W.2d at 45. See also (Tr. p.823 L.15–p.825 L.16). In addition, the district court failed to advise Newton that the second-offense sentencing

[4] By the documents included in attachments to the Minutes of Testimony, it does appear that Newton was represented by counsel in his prior offense.

enhancement would increase the penalty for the charge of Operating While Intoxicated to an aggravated misdemeanor that carried a maximum sentence of two years in prison and a maximum fine of $6250. See Iowa Code § 321J.2(2)(b), (4)(b) (2015). Nor did the court inform him that the enhanced offense also had an increased mandatory minimum incarceration of at least seven days in jail and a larger minimum fine of $1875. See Iowa Code § 321J.2(4).

The district court did not explain to Newton by admitting the requisite prior offense he would not have a jury trial on whether he had the conviction and a sentencing enhancement would apply, although the record suggests Newton may have understood this. (Tr. p.153 L.20–p.154 L.11; p.823 L.15–p.825 L.16). Nonetheless, the court failed to inform Newton he had all the same trial rights during the enhancement proceeding as he did on the underlying offense and that Newton was giving up these trial rights by stipulating to the enhancement. See Iowa R. Crim. P. 2.8(2)(b)(4)–(5). See also Harrington, 893 N.W.2d at 46.

Therefore, because the district court failed to adequately advise Newton, as discussed above, his stipulation to the prior offense was void as it was neither voluntary nor intelligent. See Harrington, 893 N.W.2d at 45–48. See also Kukowski, 704 N.W.2d at 692; State v. Sisco, 169 N.W.2d 542, 546 (Iowa 1969) (finding if an admission of guilt "is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void"). Thus, Newton's due process rights were violated. Id.

Because Newton did not knowingly and voluntarily admit the prior conviction and the trial court failed to inform him of motion in arrest of judgment rights or obligations, reversal on direct appeal is not precluded by Newton's failure to file such motion in the district court. Therefore, proper remedy is to reverse his stipulation to the second offense and remand to the district court for further stipulation proceedings pursuant to Rule 2.19(9) and 2.8(2)(b) or a trial on the second-offense sentencing enhancement. See Harrington, 893 N.W.2d at 48.

D. Conclusion: Defendant–Appellant Timothy Alvin Newton respectfully requests the Court vacate his second-offense sentencing enhancement and remand the case to district court.

III. THE DEFENDANT IS ENTITLED TO A NEW SENTENCING HEARING BECAUSE THE SENTENCING COURT CONSIDERED UNPROVEN OFFENSES WHEN DETERMINING THE SENTENCE.

A. Preservation of Error: The Court may review a defendant's argument that the district court considered improper factors during his sentencing on direct appeal, even in the absence of an objection in the district court. State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994); State v. Young, 292 N.W.2d 432, 434–35 (Iowa 1980) (reviewing an improper factor claim reviewed despite lack of objection at sentencing).

B. Standard of Review: Review of a sentence imposed in a criminal case is for correction of errors at law. Iowa R. App. P. 6.907 (2017); State v. Formaro, 638 N.W.2d 720, 724 (Iowa 2002). "A sentence will not be upset on appellate review

unless the defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure such as the trial court's consideration of impermissible factors." State v. Witham, 583 N.W.2d 677, 678 (Iowa 1998) (citing State v. Wright, 340 N.W.2d 590, 592 (Iowa 1983)).

C. Discussion: When sentencing a defendant, a court may not consider facts, allegations, or offenses that are not established by the evidence or admitted by the defendant. Witham, 583 N.W.2d at 678 (citations omitted); State v. Black, 324 N.W.2d 313, 316 (Iowa 1982). Thus, offenses and allegations that are not proven by the State or admitted to by the defendant, but considered by the court, amount to improper sentencing considerations. See Black, 324 N.W.2d at 315–17; State v. Gonzalez, 582 N.W.2d 515, 517 (Iowa 1998).

"'[W]hen a challenge is made to a criminal sentence on the basis that the court improperly considered unproven criminal activity, the issue presented is simply one of the sufficiency of the record to establish the matters relied on."

State v. Grandberry, 619 N.W.2d 399, 401 (Iowa 2000) (quoting State v. Longo, 608 N.W.2d 471, 474 (Iowa 2000)). In order to establish reversible error, the defendant must show that the court was not just "merely aware" of the improper sentencing factor, but that the sentencing court "relied" on it in rendering its sentence. State v. Ashley, 462 N.W.2d 279, 282 (Iowa 1990) (citations omitted). Where such a showing is made, however, the reviewing court "cannot speculate about the weight a sentencing court assigned to an improper consideration." Gonzalez, 582 N.W.2d at 517 (citations omitted). "If a court in determining a sentence uses any improper consideration, resentencing of the defendant is required . . . This is true even if it was merely a secondary consideration." Grandberry, 619 N.W.2d at 401 (citations omitted) (internal quotation marks omitted).

At the sentencing hearing, the district court stated:

> I have determined that this is not a case in which probation would be appropriate, Mr. Newton. The reason for that is that I find that probation would unduly depreciate the seriousness of this offense. I find that it is unwarranted because of the need to protect the public from further criminal activity by

> you because you keep going and keep going. You get probation, and it has not taught you anything. I have no reason to believe that probation would teach you to not offend again. *After you were arrested for this and facing convictions and possibly prison, you reoffended in Clarke County -- or allegedly did. You picked up new charges in Clarke County.*

(Sentencing Tr. p.28 L.1–14) (emphasis added). The charges in Clarke County were pending prior to Newton's sentencing in this case and had not yet been resolved. (Sentencing Tr. p.28 L.1–14) (PSI p.4) (Confidential App. p. 64). Thus, because these offenses were unproven, there was no basis to allow the sentencing court to consider and rely on them. See Black, 324 N.W.2d at 315–16 (citing State v. Messer, 306 N.W.2d 731, 733 (Iowa 1981)).

In addition to the court's remarks above, the sentencing order also establishes the court considered unproven offenses in fashioning Newton's sentence. The sentencing order gives one of the reasons for the sentence as: "Defendant's extensive prior record of convictions, including 8 offenses for substance related crimes and 4 of them involving operating a motor

vehicle under the influence of substances." (Sentencing Order) (App. p. 51). However the PSI only lists two prior convictions for offenses that could be considered operating under the influence. While the first of these is listed as a conviction for Operating While Intoxicated - Second Offense on March 10, 1998, in Warren County, no prior conviction for an OWI offense is listed in the PSI. (PSI p.3) (Confidential App. p. 63). It appears the PSI writer incorrectly listed the crime as a second offense.[5] The only other prior conviction for an OWI listed in the PSI is the prior offense charged in this case—the OWI conviction from Polk County in 2007. (PSI p.4) (Confidential App. p. 64). Because the record only shows two prior OWI convictions rather than the four the court stated in the sentencing order, the district court relied on other charges

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[5] The PSI states Newton was sentenced to two days in jail and a fine of $500 for this offense. (PSI p.3) (Confidential App. p. 63). This disposition suggests Newton was only convicted of Operating While Intoxicated – First Offense, which carried a mandatory minimum of two days in jail and a minimum fine of $500. See Iowa Code § 321J.2(2)(a) (1997). In contrast, in 1998, an OWI – Second Offense carried a mandatory minimum of seven days in jail and a minimum fine of $750. Iowa Code § 321J.2(2)(b) (1997).

contained in the PSI, but of which Newton was not convicted at the time of sentencing. These include a pending Operating While Intoxicated – Third Offense still pending in Clarke County and a driving under the influence charge from Charleston, Illinois on January 15, 1999, for which the PSI writer listed the disposition as unknown. (PSI pp. 3–4) (Confidential App. pp. 63–64). Similarly, when examining the PSI it is clear the court must have considered unproven offenses in order to find Newton had committed eight offenses related to substance abuse.

This Court sets "aside a sentence and remands [the] case to the district court for resentencing if the sentencing court relied upon charges of an unprosecuted offense that was neither admitted to by the defendant nor otherwise proved." State v. Sailer, 587 N.W.2d 756, 762 (Iowa 1998) (quoting Black, 324 N.W.2d at 315) (internal quotation marks omitted). Here, the record establishes the district court specifically referred to and considered unproven, unprosecuted offenses

that were not admitted by Newton[6] or otherwise proven. Therefore, the district court considered an improper factor and abused its discretion when sentencing Newton. See State v. Jose, 636 N.W.2d 38, 43 (Iowa 2001) (distinguishing that case from others where the sentencing court "made specific reference to unproven charges"). See also State v. Fuqua, 723 N.W.2d 451, 2006 WL 2265458, at *2 (Iowa Ct. App. 2006) (unpublished table decision) (remanding for new sentencing hearing when the court considered a pending charge); State v. Moore, 864 N.W.2d 553, 2015 WL 1546459, at *3–4 (Iowa Ct. App. 2015) (unpublished table decision). Given the district court's comments regarding Newton's prior record of four offenses related to driving under the influence and his pending cases in Clarke County, the record firmly establishes that the sentencing judge was not "merely aware" of the unproven offenses but expressly "relied" on them in rendering the sentence. Ashley, 462 N.W.2d at 282. See also (Sentencing

[6] According to the PSI, the driving under the influence charge out of Illinois was specifically denied by Newton. (PSI p. 3) (Confidential App. p. 63).

Tr. p.28 L.1–14) (Sentencing Order) (App. pp. 48–53). Accordingly, Newton's sentence should be vacated and his case remanded for resentencing in front of a different judge. See State v. Lovell, 857 N.W.2d 241, 242–43 (Iowa 2014) (citing Black, 324 N.W.2d at 316).

D. Conclusion: Defendant–Appellant Timothy Alvin Newton respectfully requests that this Court vacate his sentence and remand to the district court for resentencing.

REQUEST FOR NONORAL SUBMISSION

Counsel requests this case be submitted without 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 $5.38, and that amount has been paid in full by the Office of the Appellate Defender.

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