IN THE SUPREME COURT OF IOWA
Supreme Court No. 16-1525

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TIMOTHY ALVIN NEWTON,
Defendant-Appellant.

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

APPELLEE'S BRIEF

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ROUTING STATEMENT

This Court can decide this case based on existing legal principles, and accordingly, transfer to the Iowa Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3); *see State v. Comried*, 693 N.W.2d 773 (Iowa 2005); *see also State v. Davis*, 14-1976, 2016 WL 1677591, at *4–5 (Iowa Ct. App. April 27, 2016); *State v. Hodges*, No. 10-0031, 2011 WL 944378, at *5 (Iowa Ct. App. Mar. 21, 2011).

STATEMENT OF THE CASE

Nature of the Case

After trial, a jury convicted Newton of operating while intoxicated, in violation of Iowa Code section 321J.2(1) and 321J.2(2)(a) (2013), and child endangerment, in violation of Iowa code sections 726.6(1)(a) and 726.6(7). Newton now appeals, alleging that his counsel at trial was constitutionally ineffective, and that the district court impermissibly considered pending charges when it sentenced him. The Honorable Dustria A. Relph presided over trial and sentencing.

Facts and Course of Proceedings

At 9:14 on September 3, 2014, Eric Fell summoned police to his residence after discovering an SUV and detached trailer stuck in a

ditch next to his driveway. Trial Tr. p.187 ln.14–p.188 ln.6; Trial Exhs. 14, 15, 16, 19; Exh. App. 4–7. Ringgold County Sherriff's Deputy Pitt was one of two deputies on duty that night and was the first to arrive at Fell's property. Trial Tr. p.211 ln.12–p.214 ln.19. Upon his arrival, Pitt observed a green trailer and truck trapped in a muddy ditch. Trial Tr. p.213 ln.19–p.214 ln.17, p.215 ln.23–p.216 ln.9. Pitt stopped Fell who had brought his tractor out in an attempt to extricate the vehicle from the ditch. Trial Exh. 3; Exh. App. 3. After speaking with Fell, Pitt then met with Newton and his son, N.N. Trial Tr. p.214 ln.10–25.

As he approached the truck, Pitt noted the engine was still running and observed Newton reclined in the driver's seat as the driver-side door hung open with windows down. Trial Tr. p.215 ln.1–p.22. N.N. was standing outside the vehicle. Trial Tr. p.215 ln.8–10. Pitt spoke with Newton, and quickly became concerned that Newton was under the influence of alcohol or controlled substance. Newton indicated that he was waiting for Fell to bring out his tractor and tow his truck out from the mud. Trial Tr. p.217 ln.5–9. Newton was unaware that tractor already arrived, despite the vehicle's loud diesel engine and bright lights. Trial Tr. p.217 ln.9–p.218 ln.7.

Pitt noted that Newton seemed disoriented. Newton was oblivious that he possessed his wallet or driver's license, even though both were between his feet on the floor of vehicle. Trial Tr. p.222 ln.19–p.223 ln.6; p.286 ln.19–p.287 ln.11. When asked to provide his license, despite thumbing past the license twice, Newton did not seem to recognize it, and Pitt had to point it out to him. Trial Tr. p.223 ln.7–p.224 ln.8. When asked if he was all right, Newton responded "it was one of those Sunday night things." Trial Tr. p.224 ln.9–13. It was Wednesday night. Trial Tr. p.224 ln.19–24. Newton then corrected himself, noting it was not Sunday; Pitt inquired if Newton knew what day it was and Newton responded "Yes. This is Tuesday night." Trial Tr. p.14–18. Newton was surprised to learn it was Wednesday. Trial Tr. p.224 ln.23–p.225 ln.1. Newton denied consuming any alcohol, but indicated that he was not feeling well and had not slept well. Trial Tr. p.225 ln.2–25. Newton acknowledged he had been driving the vehicle. Trial Tr. p.220 ln.11–p.221 ln.20.

At this point, Deputy White arrived on the scene. Trial Tr. p.226 ln.8–20. After bringing him up to speed, Pitt informed White he believed Newton to be under the influence. Trial Tr. p.226 ln.11–20. White began interacting with Newton. When asked for an explanation

as to how the situation had occurred, Newton indicated that he had run into trouble while attempting to turn his vehicle around in Fell's driveway—the trailer had fallen off the driveway and detached. Trial Tr. p.228 ln.7–20. Although he had managed to get the SUV back out on the road, Newton seemed confused how his vehicle had re-entered the ditch and told the deputies to ask N.N. how it had occurred. Trial Tr. p.229 ln.7–p.230 ln.11; p.476 ln.10–p.477 ln.13. Newton's responses explaining how the vehicle and trailer had crossed into both sides of Fell's ditch were vague. Trial Tr. p.326 ln.17–p.327 ln.18. Although Newton indicated that he had pulled into Fell's residence to turn around based on GPS instructions, White knew that Newton had not yet overshot his turn—he had three miles to go. Trial Tr. p.472 ln.23–p.475 ln.18. Later, Newton again seemed confused as to where he was. Trial Tr. p.505 ln.2–p.507 ln.3.

White also believed Newton to be under the influence and initiated sobriety testing. Trial Tr. p.477 ln.14–22. White conducted the testing as Pitt observed. Trial Tr. p.305 ln.18–p.310 ln.17. Because White was aware Newton had prior injuries, White did not request Newton conduct "walk and turn" or "one leg stand" sobriety testing. Instead, White first conducted a horizontal gaze nystagmus test. Trial

Tr. p.478 ln.16–p.479 ln.12. Both deputies noted that Newton's eyes demonstrated the involuntary jerking indicative of being under the influence. Trial Tr. p.310 ln.18–p.313 ln.4; p.488 ln.17–p.490 ln.15. White also conducted vertical nystagmus testing, but determined no vertical nystagmus was present. Trial Tr. p.490 ln.16–p.492 ln.13. White then conducted a convergence test which Newton also failed. Trial Tr. p.492 ln.14–p.494 ln.4. White also requested Newton participate in the Romberg test, which Newton passed. Trial Tr. p.313 ln.12–p.314 ln.4; p.494 ln.7–p.495 ln.5. Finally, Newton agreed to take a preliminary breath test which did not indicate the presence of alcohol in his body. Trial Tr. p.495 ln.6–p.496 ln.11. Both White and Pitt agreed that they had not smelled alcohol on Newton's person, but they also agreed that his responses to questions, general demeanor, and horizontal gaze nystagmus and convergence testing indicated he was under the influence of a substance. Trial Tr. p.283 ln.20–25; p.479 ln.21–23; p.496 ln.12–p.498 ln.4. White believed he possessed reasonable grounds to invoke implied consent procedures and did so. Trial Tr. p.502 ln.7–p.503 ln.9.

After arriving at the Sherriff's department for additional testing, Newton laid down on a wooden bench. Trial Tr. p.517 ln.6–p.518

ln.20. Pursuant to testing procedures, White requested a sample of Newton's urine. Trial Tr. p.520 ln.10–p.521 ln.9. He did so because at the time, the Department of Criminal Investigations testing facility did not process blood. Trial Tr. p.521 ln.10–16. After initially requesting to provide a blood sample instead, Newton agreed to provide a urine sample. Trial Tr. p.522 ln.13–p.525 ln.16. The sample was sealed and driven personally by White to DCI laboratory for testing. Trail Tr. p.529 ln.11–p.533 ln.6.

Initial screening and further testing of Newton's sample revealed the presence of benzodiazepines, opiates, cocaine metabolites, marijuana metabolites, and tricyclics. Trial Exhs. 28, 29, 30, 31, 32, 33; Exh. App. 8–14. A representative of the DCI testified that for a positive test result to appear in the DCI's initial screening test, the sample must contain more than the minimum threshold—62 nanograms per milliliter of urine for marijuana and 182 nanograms per milliliter in for cocaine. Trial Tr. p.352 ln.9–p.353 ln.12; p.360 ln.24–p.365 ln.7; p.367 ln.23–p.381 ln.8, Exh. 28; Exh. App. 8; *see also* Iowa Admin. Code. r.661–157.7(1). The representative testified that such a level of marijuana in urine was inconsistent with passive inhalation and observed that cocaine cannot be innocently consumed.

Trial Tr. p.361 ln.14–p.365 ln.7. As a result of sampling and the deputies' observations of Newton, the State charged him with operating while intoxicated and child endangerment. Trial Tr. p.536 ln.20–p.538 ln.3.

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

ARGUMENT

I. Defense Counsel was not Ineffective. Iowa Code section 321J.2(1)(c) easily satisfies rational basis review, and Newton's conviction is constitutional.

Preservation of Error and Standing

Error was not preserved. Newton was required to raise his void-for-vagueness and due process challenges within forty days of arraignment. Iowa Rs. Crim. P. 2.11(2), (4). As Newton concedes, no argument on vagueness was raised until the day of trial. Appellant's Br. 31–32; Trial Tr. p.168 ln.19–p.170 ln.15; p.352 ln.2–8. The ruling was not rendered until the day of closing arguments. Trial Tr. p.706 ln.23–p.707 ln.18; 7/18/2016 Defendant's Proposed Jury Instructions; App. 28. This was too late to preserve error on the claim Newton presents on appeal. *See, e.g., State v. Dawson*, No. 13–0792, 2015 WL 1546353, at *5 & n.4 (Iowa Ct. App. Apr. 8, 2015) (noting void-for-vagueness attack "would have been untimely at trial"

pursuant to Rule 2.11(2)). Accordingly and as Newton suggests, this Court's review of the claim must be through the lens of ineffective assistance of counsel. Appellant's Br. 32. The State concurs that because the nature of the claim is legal in nature, the present record is sufficient to resolve the claim.

Additionally, Newton's brief appears to challenge the facial validity and vagueness of Iowa Code section 321J.2(1)(c). Appellant's Br. 38–39 ("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."). For the reasons discussed below, he cannot raise—and this Court cannot review—such a claim. Iowa Code section 321J.2(1)(c) simply is not vague as applied to Newton.

> Although the aim of a litigant often might be to entirely strike a statute as unconstitutional, it is ordinarily enough for us to consider, with exceptions not applicable here, the narrower question of whether the statute is unconstitutional as applied in the case. If it is constitutional as applied, then, by definition, it is not unconstitutional on its face. And if it is constitutional as applied, the litigant cannot "borrow" the claim of unconstitutionality of another.

State v. Hepburn, 270 N.W.2d 629, 631 (Iowa 1978); *see also State v. Hunter*, 550 N.W.2d 460, 463–64 (Iowa 1996) (overruled on other

grounds in *State v. Robinson*, 618 N.W.2d 306, 311–12 (Iowa 2000). This Court can and should address the issue of whether counsel was ineffective for failing to timely raise the "as-applied" challenge Newton presents in his brief on appeal. However, for the reasons discussed below, any facial challenge to Iowa Code section 321J.2(1)(c) within Newton's brief is not properly before the Court.

Standard of Review

Iowa courts review constitutional challenges to a statue de novo. *See State v. Seering*, 639 N.W.2d 226, 233 (Iowa 2002).

Likewise, review of claims of ineffective assistance of counsel are performed de novo. Under the ineffective assistance of counsel framework, to prevail "a defendant must typically show that (1) counsel failed to perform an essential duty and (2) prejudice resulted." *State v. Keller*, 760 N.W.2d 451, 452 (Iowa 2009). Courts employ a heavy presumption that trial counsel's actions are reasonable under the circumstances and that they fall within the normal range of professional competency. *State v. Hildebrant*, 405 N.W.2d 839, 841 (Iowa 1987). To prove prejudice, Newton must demonstrate a "substantial, not just conceivable" likelihood of a different result if his counsel timely raised the issue. *See King v.*

State, 797 N.W.2d 565, 572 (Iowa 2011). Both elements must be proven, and failure to prove either element is fatal to the claim. "If the claim lacks prejudice, it can be decided on that ground alone without deciding whether the attorney performed deficiently." *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001).

Merits

Newton asks this Court to find his counsel was ineffective for failing to timely challenge Iowa Code section 321J.2(1)(c) as unconstitutional as applied to him. On appeal, he asserts the statute violates the Iowa and Federal Constitutions' prohibition on "vague" laws and respective due process guarantees. Both claims would have failed, counsel was under no obligation to raise either issue.

A. Counsel was not obligated to challenge Iowa Code section 321J.2(1)(c) as void for vagueness.

Iowa Code section 321J.2(1)(c)'s per se ban on driving while a controlled substance is within one's body is not void for vagueness. To the contrary, the statute's prohibition could not be clearer—any reasonable individual would know that driving while drugged violates Iowa law.

Article I, Section 9 of the Iowa Constitution and the Fourteenth Amendment to the United States Constitution prohibit the

enforcement of vague statutes. The Iowa Supreme Court has historically interpreted due process guarantees of Iowa and the Federal Constitutions to be co-extensive, and this Court should continue to do so. *See Nguyen v. State*, 878 N.W.2d 744, 755 (Iowa 2016); *State v. Nail*, 743 N.W.2d 535, 539 (Iowa 2007). Under both constitutional provisions, a statute is impermissibly vague where it "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits." *Hill v. Colorado*, 530 U.S. 730, 732 (2000).

When considering vagueness challenges, Iowa courts apply an "avoidance theory"—the Court is to presume that the statute is constitutional and utilize "any reasonable construction" to uphold it. *Nail*, 743 N.W.2d at 539–40. This has been reformulated as requiring a defendant challenging the vagueness of a statute to "refute 'every reasonable basis' upon which a statute might be upheld." *Id.* (quoting *State v. Seering*, 701 N.W.2d 655, 661 (Iowa 2005)). Vagueness challenges are determined on the basis of statutes and pertinent case law and not the subjective expectations of a particular defendant. *See id.*

Likewise, when considering a "vague-as-applied" challenge, the Court is to consider whether a defendant's conduct "clearly falls 'within the proscription of the statute under any construction.'" *State v. Musser*, 721 N.W.2d 734, 745 (Iowa 2006). If a standard of conduct can be reasonably ascertained by reference to prior judicial decisions, statutes, the dictionary, or other common generally accepted usage, then the statute satisfies constitutional due process requirements. *State v. Gonzalez*, 718 N.W.2d 304, 310 (Iowa 2006). Likewise, a challenged statutory provision must be read *in pari materia* with other relevant statutes—Iowa courts assume "the legislature strives to create a symmetrical and harmonious system of laws." *Nail*, 743 N.W.2d at 541. However, when statutory constructions are in perfect equipoise, Iowa courts resolve such doubts in the defendant's favor. *See Gonzalez*, 718 N.W.2d at 308.

Iowa Code section 321J.2(1)(c) prohibits driving while any amount of a controlled substance is present in the person's blood or urine. The statute itself is unmistakably clear; it prohibits operation of a motor vehicle "[w]hile any amount of a controlled substance is present in the person, as measured in the person's blood or urine." The Iowa Code contains a list of controlled substances, providing

notice to the public that they may not possess said substances—nor by implication consume them. Iowa Code § 124.401. The term "controlled substance" necessarily includes metabolites of the controlled substance. *See State v. Childs*, 898 N.W.2d 177, 184–85 (Iowa 2017). Contrary to Newton's suggestion, a person of ordinary intelligence is on notice that after using a controlled substance their urine is likely to test positive for the same. Certainly, the public is on notice that they may not drive an automobile on Iowa roadways while their bodies possess these substances.

Other states have adopted per se bans and concluded these laws are clear and survive vagueness challenges. *See State v. Bowers*, No. 1101009621, 2011 WL 13175123, at *4 (Del. Ct. C.P. June 27, 2011) (finding Delaware Code section 4177(a)(6)'s per se ban survives vagueness challenge); *Brown v. State*, 744 N.E.2d 989, 995–96 (Ind. Ct. App. Oct. 2003) (upholding Indiana Code § 9-30-5-1(c)'s per se ban, finding "when read together, [the statute] adequately and unambiguously inform persons of ordinary intelligence of the proscribed conduct"); Georgia Code § 40-6-391 ("A person shall not drive or be in actual physical control of any moving vehicle while . . . Subject to the provisions of subsection (b) of this Code section, there

is any amount of marijuana or a controlled substance, as defined in Code Section 16-13-21, present in the person's blood or urine, or both, including the metabolites and derivatives of each or both without regard to whether or not any alcohol is present in the person's breath or blood."); Illinois Code § 5/11-501(a)(6) ("A person shall not drive or be in actual physical control of any vehicle within this State while . . there is any amount of a drug, substance, or compound in the person's breath, blood, other bodily substance, or urine resulting from the unlawful use or consumption of a controlled substance listed in the Illinois Controlled Substances Act, an intoxicating compound listed in the Use of Intoxicating Compounds Act, or methamphetamine as listed in the Methamphetamine Control and Community Protection Act."); Rhode Island Code § 31-27-2(b)(2) (criminalizing "[w]hoever drives, or otherwise operates, any vehicle in the state with a blood presence of any scheduled controlled substance as defined within chapter 28 of title 21, as shown by analysis of a blood or urine sample").

Akin to challenges to Iowa Code chapter 321J.2(1)(b)'s per se ban on driving while one's blood alcohol level is 0.08, Iowa courts have had little difficulty finding one's inability to know when their

alcohol level has risen above or dropped below the .08 threshold does not render the statute void for vagueness.

> Although persons engaging in consumption of alcoholic beverages may not be able to ascertain precisely when the concentration of alcohol in their blood, breath, or urine reaches the proscribed level, they should, in the exercise of reasonable intelligence, understand what type of conduct places them in jeopardy of violating the statute. We believe a realization of this potential jeopardy of violating the statute is sufficient to satisfy the requirements of due process.

State v. Bock, 357 N.W.2d 29, 33–34 (Iowa 1984) (rejecting void for vagueness attack on Iowa Code section 321J.2). This logic is equally apposite to Iowa's per se controlled substance ban. Like alcohol's variable dissipation, a reasonable person's inability to know exactly when their body no longer contains a metabolite of a controlled substance does not render a clear statute vague. To the contrary, the person was already sufficiently on notice that possession and subsequent consumption of a controlled substance was illegal. *See* Iowa Code § 124.401; *see also Williams v. State*, 50 P.3d 1116, 1123 (Nev. 2002) ("Williams was given adequate notice that she was not permitted to legally possess or use marijuana, yet she chose to do both and then drive a vehicle. Further, the statute provides adequate

notice that it is unlawful to drive with clearly defined levels of marijuana or marijuana metabolite in the bloodstream."). Newton cannot meet his burden to establish that this statute failed to provide adequate notice of the proscribed conduct.

Likewise, this section cannot lead to arbitrary enforcement. Appellant's Br. 38. Read *in pari materia* with Iowa law, any fear that Iowa Code section 321J.2(1)(c) will be used as an arbitrary dragnet to wrongfully punish innocent conduct is unfounded. Prior to being charged, a defendant must be stopped by an officer with reasonable suspicion of criminal activity or probable cause of a traffic violation. *State v. Tyler*, 830 N.W.2d 288, 293–94 (Iowa 2013). That traffic stop may not continue longer than necessary to accomplish the goal of the stop, and upon innocent resolution of the initial cause for the stop, the stop must cease. *State v. Coleman*, 890 N.W.2d 284, 288–301 (Iowa 2017); *In re Property Seized from Pardee*, 872 N.W.2d 384, 385–86 (Iowa 2015). Prior to obtaining a urine sample, the officer must have developed reasonable ground to invoke Iowa's implied consent procedures. Iowa Code § 321J.6(1). For a positive test result to appear in the DCI's initial screening test, the sample must contain more than the minimum threshold—62 nanograms per

milliliter of urine for marijuana and 182 nanograms per milliliter in for cocaine. Trial Tr. p.352 ln.9–p.353 ln.12; p.360 ln.24–p.365 ln.7; p.367 ln.23–p.381 ln.8, Exh. 28; Exh. App. 8; *see also* Iowa Admin. Code. r.661–157.7(1). This level of marijuana in urine is inconsistent with passive inhalation by an innocent bystander—and cocaine cannot be innocently consumed. Trial Tr. p.361 ln.14–p.365 ln.7. The arbitrary enforcement Newton suggests is impossible as a practical matter. *See Childs*, 898 N.W.2d at 185 ("The harshness of Iowa's flat ban is ameliorated by the fact that the motorist would be asked to submit to chemical testing only after the officer performed a lawful traffic stop and had reasonable grounds to believe the driver was impaired.").

White's decision to invoke implied consent and request a test sample of Newton's urine was far from arbitrary. As the deputies testified, Newton's conduct at the scene was unusual. He appeared disoriented and confused, unsure of what day it was and unable to locate his wallet, then his driver's license. Trial Tr. p.222 ln.19–p.225 ln.1. His explanations for the predicament he had found himself in were vague, turning to his son to inform the deputies how they had arrived there. Trial Tr. p.229 ln.19–p.230 ln.11. He presented

horizontal nystagmus, yet did not smell of alcohol, nor did he have the telltale signs of alcohol intoxication. Trial Tr. p.283 ln.20–25; p.479 ln.21–23; p.496 ln.12–p.498 ln.4. The State does not dispute that Deputy Pitt testified he was aware Newton used prescription drugs and marijuana—yet this fact cannot render the request improper, both deputies testified Newton seemed visibly impaired. Trial Tr.293 ln.17–25; p.325 ln.19–p.326 ln.7; p.547 ln.21–25. White indicated he had known Newton for fifteen to twenty years, and did not seem like himself. Trial Tr. p.477 ln.23–p.478 ln.6. Given the foregoing, it was not arbitrary for the deputies to conclude Newton was potentially under the influence of a controlled substance and request a sample of his urine. Because any timely filed challenge on these grounds would have been properly rejected by the district court, Newton's claim of ineffective assistance necessarily fails. Respectfully, this Court should affirm.

B. Iowa Code Section 321J.2(1)(c) does not violate substantive due process.

Newton additionally alleges his counsel was ineffective for not timely raising a due process challenge to section 321J.2. This claim must also fail as Iowa courts have already concluded the section

survives rational basis scrutiny. Counsel had no obligation to relitigate the matter.

As with vagueness challenges, both the federal and Iowa constitutions contain substantive due process guarantees. *See* U.S. Const. amend. XIV; Iowa Const. Art. I, Sec. 9. These guarantees prohibit the government from infringing upon "rights implicit in the concept of ordered liberty." *State v. Hernandez-Lopez*, 639 N.W.2d 226, 237 (Iowa 2002) (quoting *United States v. Salerno*, 481 U.S. 739, 746 (1987)). The rights and tests under each constitution are the same. This Court must first identify the nature of the right involved and determine whether the right is "fundamental." *Santi v. Santi*, 633 N.W.2d 312, 317 (Iowa 2001). Where the right is "fundamental" this Court applies strict scrutiny analysis. *Santi*, 633 N.W.2d 317–18. However, where the right is not fundamental, the law need only satisfy the rational basis test. *Hernandez-Lopez*, 639 N.W.2d at 238.

Under rational basis scrutiny, the government interest and the means employed to advance that interest must be reasonably related. *Id*.

> [I]t is the City's prerogative to fashion remedies to problems affecting its resident. If the ordinance proves to be ineffective, then the elected city council may change course and

> amend or repeal it. The court's power to declare a statute or ordinance unconstitutional is tempered by this court's respect for the legislative process. Under the rational basis test, we must generally defer to the [State's] legislative judgment.

Ames Rental Property Ass'n v. City of Ames, 736 N.W.2d 255, 258-59 (Iowa 2007).

The parties agree driving in the State of Iowa is not a right at all, much less a "fundamental" right. Appellant's Br. 40. Rational basis applies. The parties further agree the State has a legitimate interest in keeping drugged drivers off Iowa's roadways. Appellant's Br. 46. Helpfully, the Iowa Legislature saw fit to explicitly indicate its rationales for drafting and passing Iowa Code chapter 321J:

> 1. Drivers often do not realize the consequences of drinking alcohol or using other drugs, and driving a motor vehicle.
>
> 2. Prompt intervention is needed to protect society, including drivers, from death or serious long-term injury.
>
> 3. The conviction of a driver for operating while intoxicated identifies that person as a risk to the health and safety of others, as well as to the intoxicated driver.
>
> 4. Close observation of the effects on others of alcohol and drug use by an intoxicated driver convicted of operating while intoxicated may have a marked effect on recidivism and should therefore be encouraged by the courts.

Iowa Code § 321J.23; *see also State v. Comried*, 693 N.W.2d 773, 775 (Iowa 2005). Notably, the manufacture and distribution of substances such as marijuana and cocaine are unregulated—their potency and effects are varied and unpredictable. *See Comried*, 693 N.W.2d at 776 (citing *State v. Phillips*, 873 P.2d 706, 708 (Ariz. Ct. App. 1994)). At trial, the State's expert witness testified the DCI's blood testing capabilities were not capable of detecting cocaine or three other controlled substances found in Newton's blood. Trial Tr. p.397 ln.9-21.

Even so, Newton asserts that his counsel was duty-bound to relitigate whether section 321J.2(1)(c) violates due process. In his view, Iowa's "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) . . . would be related to the impaired driving ability, and therefore, related to preventing dangerous drivers on the road." Appellant's Br. 45. He is mistaken.

The Iowa Court of Appeals has on multiple occasions rejected due process challenges to Iowa Code section 321J.2(1)(c), each time concluding that Iowa's per se ban reasonably furthers the legislature's

purpose of protecting the public from those who are impaired by controlled substances:

> The statute is aimed at keeping drivers who are impaired because of the use of illegal drugs off the highways. Unlike the blood alcohol concentration test used to measure alcohol impairment there is no similar test to measure marijuana impairment. There is, though, as was used here, a test to measure the use of marijuana, a drug illegal in the State of Iowa, in a person's body. There being no reliable indicator of impairment, the legislature could rationally decide that the public is best protected by prohibiting one from driving who has a measurable amount of marijuana metabolites.

Loder v. Iowa Dep't of Transportation, 622 N.W.2d 513, 516 (Iowa Ct. App. 2000)); *see also State v. Hodges,* No. 10-0031, 2011 WL 944378, at *5 (Iowa Ct. App. Mar. 21, 2011). Clinical studies have not established a numerical correlation between drug concentration and impairment. *See People v. Fate*, 636 N.E.2d 549, 550 (Ill. 1994); *Shepler v. State*, 758 N.E.2d 966, 970 (Ind. Ct. App. 2001). Likewise, the court has further concluded that due to the fact that THC (the active ingredient in marijuana) leaves the body relatively quickly and law enforcement officers must transport suspects in order to conduct urine or blood tests, including marijuana metabolites within the per se prohibition is reasonable. *See State v. Davis*, No. 14-1976, 2016

WL 1677591, at *5 (Iowa Ct. App. Apr. 27, 2016) (citing *State v. Whalen*, 991 N.E.2d 738, 744 (Ohio Ct. App. 2013)). Indeed, the Iowa Supreme Court has also identified the rational connection between the subsection's per se ban and the legislature's rational—and commendable—goals:

> [S]ubsection (1)(c) was intended to do something more—to prohibit people from operating motor vehicles with controlled substances in their bodies, whether or not they are under the influence.
>
> The legislature could reasonably have imposed such a ban because the effects of drugs, as contrasted to the effects of alcohol, can vary greatly among those who use them.

Comreid, 693 N.W.2d at 776; *see also Shepler*, 758 N.E.2d at 970. It was—and remains—reasonable for the legislature to decide it could best protect the public by prohibiting driving with any measurable amount of controlled substances in one's system.

While perhaps beneficial in a facial challenge to the statute, Newton's suggestion that "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" is immaterial in resolving the present case. Appellant's Br. p.42. Newton did not have trace amounts of controlled

substances in his system. To the contrary, the levels of marijuana and cocaine metabolites in his body exceeded the State's threshold screening amounts. Trial Tr. p.352 ln.9–p.365 ln.12; Trial Exh. 28; Exh. App. 8. His body also contained benozodiazepines, opiates, and tricyclics. Trial Exh. 28, 31, 32, 33; Exh. App. 8, 12–14. Further, as the deputies testified, Newton was visibly impaired and disoriented. Trial Tr. p.222 ln.19–p.225 ln.1; p.229 ln.7–p.230 ln.11; p.286 ln.19–p.287 ln.11; p.326 ln.17–p.327 ln.18; p.472 ln.23–p.475 ln.18; p.476 ln.10–p.477 ln.13; p.505 ln.2–p.507 ln.3. Newton cannot stand on the rights of hypothetical individuals with "trace" amounts to advance his claim that the statute violated *his* due process rights. *See Hepburn*, 270 N.W.2d at 631. The statute's clear application to him renders his ineffective assistance of counsel argument meritless.

In sum, Iowa Code section 321J.2(1)(c) does not violate due process. Counsel was under no obligation to raise the issue and relitigate this already resolved question. Because Newton has not met his burden to either establish the statute was unconstitutional or that his counsel was constitutionally deficient, the State respectfully requests this Court to affirm.

II. *State v. Harrington* Presented a New Rule of Criminal Procedure and Newton did not Preserve Error; he Cannot Claim *Harrington*'s Benefit. Likewise, Newton's Counsel was not Ineffective.

Preservation of Error

In order to raise the present challenge, Harrington was required to raise the claim in a motion in arrest of judgment. *See* Iowa R. Crim. P. 2.24(3)(a). Newton concedes error was not preserved—"Newton did file a motion in arrest of judgment; however the motion did not challenge his stipulation to the prior offense." Appellant's Br. 52. The *Harrington* court indicated that its ruling establishing new procedural compliance rules applied prospectively. *State v. Harrington*, 893 N.W.2d 36, 43 (Iowa 2017). Although Newton's conviction was not final at the time *Harrington* decision was rendered, he failed to challenge the sufficiency of the district court's colloquy below. *Griffith v. Kentucky*, 479 U.S. 314, 317–19 (1987); *Smith v. State,* 598 So.2d 1063, 1066 (Fla.1992) ("[T]o benefit from the change in law, the defendant must have timely objected at trial if an objection was required to preserve the issue for appellate review"); *Wright v. State*, No. 16-0275, 2017 WL 1401475, at *2–4 (Iowa Ct. App. April 19, 2017) (discussing *Griffith* and the requirement that a defendant must timely raise a claim to obtain the benefit of a ruling);

8/31/2016 Motion for New Trial and Motion in Arrest of Judgment; App. 43–45. Appellate courts only decide issues presented and decided in the district court. *State v. Paredes*, 775 N.W.2d 554, 573 (Iowa 2009) (Cady, J., dissenting) ("The doctrine of preservation of error is built on the premise that trial courts must first decide legal questions, and appellate courts review the decisions made."). Having failed to preserve this claim, Newton is not entitled to application of *Harrington*'s rule on appeal. *See Lamasters v. State*, 821 N.W.2d 856, 862 (Iowa 2012).

The fact that the district court did not inform him of the importance of filing a motion in arrest of judgment to preserve such a claim does not reopen the door to direct challenge—this too was a new obligation brought about by *Harrington*. *See Harrington*, 893 N.W.2d at 43; *see State v. Wade*, No. 16-0867, 2017 WL 2181450, at *1, *4–5 (Iowa Ct. App. May 17, 2017) (rejecting argument that counsel was ineffective for allowing defendant to admit previous convictions without adequate colloquy; *Harrington* was not retroactive). Accordingly, if this Court is to review Newton's present claim, it must do so through the aegis of ineffective assistance of counsel.

Standard of Review

This Court reviews claims of ineffective assistance of counsel de novo. *See Anfinson v. State*, 758 N.W.2d 496, 499 (Iowa 2008). Stated above, must show (1) counsel breached an essential duty and (2) prejudice resulted. *Id.* If Newton fails to prove either element, the claim fails altogether. *Id.*

Merits

Newton cannot show prejudice. The State does not dispute that the district court failed to discuss the nature of the enhanced charge, that the prior conviction could only be used if Newton was represented by counsel, or about his trial rights within Iowa Rule of Criminal procedure 2.8(2)(b)(4) as required by *Harrington*. *Compare* Trial Tr. p.823 ln.16–p.825 ln.8 *with Harrington*, 893 N.W.2d at 45–46; Appellant's Brief 56–58. However this concession is immaterial in resolving the question of whether Newton's counsel was ineffective for failing to file a motion in arrest of judgment.

The concrete requirements set forth in *Harrington* simply were not the law at the time of Newton's trial or sentencing. Neither counsel nor the district court can be faulted for failing to predict that six months after trial the Iowa Supreme Court would establish new

compliance rules for establishing prior offenses. *See State v. Schoelerman*, 315 N.W.2d 67, 72 (Iowa 1982) ("We recognize that an attorney need not be a 'crystal gazer' who can predict future changes in established rules of law in order to provide effective assistance to a criminal defendant."). Likewise, no prejudice fell on Newton. The record establishes the State was prepared to establish the prior conviction. 2/2/2015 Mins. of Test. p.9; Conf. App. 12. Newton did not contest the fact of the prior OWI conviction contained within the PSI. *Compare* 9/7/2016 PSI p.3 ("defendant denied he was ever arrested for this offense") *with* p.4 (describing 2005 conviction for OWI 2nd Offense and Eluding); Conf. App. 63–64.

If this Court were to find that the district court was obligated to both inform Newton of the importance of filing a motion in arrest of judgment and the procedural requirements established in *Harrington*, then indeed, the correct remedy is to remand for compliance with the same. Appellant's Br. 59. However, because Newton did not preserve error on this claim and because his counsel was not ineffective for permitting Newton to acknowledge his prior convictions, the State respectfully requests this Court to affirm.

III. The District Court Permissibly Considered Newton's Pending Charges Within an Unobjected-to PSI when it Found Probation was not an Appropriate Sentence.

Preservation of Error

A defendant may challenge sentencing errors on direct appeal absent an objection in the district court. *See State v. Lathrop*, 781 N.W.2d 288, 293 (Iowa 2010).

Standard of Review

Iowa's appellate courts review sentencing decisions for correction of errors at law. *See State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002).

Merits

The district court did not err when it weighed Newton's failure to take responsibility for and conform his actions to the law against his requested sentence of probation. When making a sentencing determination, the district court may consider the circumstances of the crime, the defendant's age, character, or propensities, the defendant's chances for reform or rehabilitation, and the court's duty to protect the community from further offenses by the defendant or others. *See State v. Laffey*, 600 N.W.2d 57, 62 (Iowa 1999); Iowa Code § 901.5. The State agrees it is "a well-established rule that a sentencing court may not rely upon additional, unproven, and

unprosecuted charges unless the defendant admits to the charges or there are facts presented to show the defendant committed the offenses." *Formaro*, 638 N.W.2d at 725. Yet, a sentencing court remains free to consider unchallenged information within the PSI. *See State v. Witham*, 583 N.W.2d 677, 678 (Iowa 1998); *State v. Norem*, No. 99-1066, 2000 WL 703136, at *3 (Iowa Ct. App. May 31, 2000).

When an appellate court concludes the district court considered an improper sentencing factor, the appropriate remedy is to remand for resentencing. *Id.* A defendant's burden of proving the district court's consideration of an impermissible factor is a high one; a "trial court's sentencing decision is cloaked with a strong presumption in its favor, and a sentence will not be disturbed absent some showing by the defendant that the sentencing court *actually considered*" an impermissible factor. *Witham*, 583 N.W.2d at 678 n.1 (emphasis added). When a defendant has satisfied this showing, the appellate court will "not speculate about the weight given by the sentencing court to the improper factor, and that there is no way of knowing what sentence would have been pronounced had the improper factor

not been considered." *State v. Carillo*, 597 N.W.2d 497, 501 (Iowa 1999).

The State disagrees with Newton's allegation that the district court improperly considered four prior operating while intoxicated offenses—the PSI indicated that Newton had previously been convicted of the crime in 1987, 1997, 1999, and 2005. 9/7/2016 PSI p. 3–5; Conf. App. 63–65. The State agrees the record does not clearly indicate Newton has eight *prior* controlled substance convictions. However, this fact does not warrant remand. There were seven—Newton's 1987 conviction in Missouri for OWI; 1992 Public Intoxication; 1997 OWI 2nd Offense; 1999 OUI; 2005 Public Intoxication; 2005 Possession of a Controlled Substance; 2005 OWI 2nd. 9/7/2016 PSI p.3–5; Conf. App. 63–65. Including Newton's present convictions the number rose to eight. The district court's erroneous statement does not necessitate remand. *See State v. Thomas*, 520 N.W.2d 311, 313–14 (Iowa 1994) ("We are also aware that the sentencing process can be especially demanding and requires trial judges to detail, usually extemporaneously, the specific reasons for imposing the sentence. . . . The performance of this judicial duty

can produce 'unfortunate phraseology' and unintended or misconstrued remarks.").

Lastly, the State does not dispute that the district court considered his pending charges at the time of sentencing. It was permitted to do so. Newton did not object to the pending charges listed within the PSI—accordingly they were properly before the district court. Sent. Tr. p.7 ln.3–p.8 ln.4; 9/7/2016 PSI p. 4, 11; Conf. App. 64, 71. The record demonstrates the sentencing judge did not consider Newton presumptively guilty for the pending charges, but noted his failure to comply with the conditions of pretrial release bode ill for his rehabilitation if sentenced to probation.

> 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.

Sent. Tr. p.28 ln.1–14. The unobjected-to pending charges within the PSI bolstered the district court's reasonable concerns that Newton's past experiences with probation were an ill presage of his ability to rehabilitate. *See Norem*, 2000 WL 703136, at *3. Under the facts of this case, it was not an improper sentencing consideration. The State respectfully requests this Court to affirm.

CONCLUSION

Newton's counsel was not ineffective for failing to challenge the constitutionality of Iowa Code § 321J.2(1)(c) as applied to him. Newton failed to challenge the district court's colloquy on his prior conviction below and accordingly cannot obtain the benefit provided by *State v. Harrington* on appeal. Finally, because Newton failed to challenge the "pending charges" within the PSI, the allegations contained within could be considered by the district court—not to consider his guilt, but as weighing against his chances of rehabilitation on probation. The State respectfully requests this Court to affirm Newton's convictions and sentences.

REQUEST FOR NONORAL SUBMISSION

The State does not request oral submission. In the event oral argument is ordered, the State respectfully requests to be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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