IN THE SUPREME COURT OF IOWA

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

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

APPELLANT'S APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS FILED FEBRUARY 7, 2018

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CERTIFICATE OF SERVICE

On February 26, 2018, 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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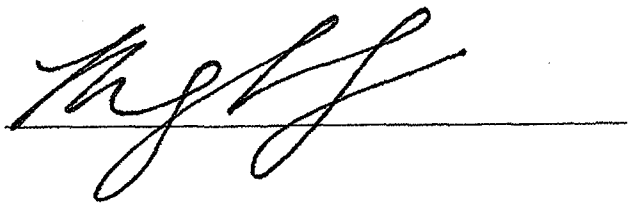

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QUESTION PRESENTED FOR REVIEW

Does 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 the defendant guilty if any amount of controlled substance was present in his urine, violate the defendant's due process rights?

TABLE OF CONTENTS

Page

Certificate of Service 2

Questions Presented for Review 3

Table of Authorities 5

Statement in Support of Further Review 8

Statement of the Case 16

Argument 11

Conclusion 31

Attorney's Cost Certificate 31

Certificate of Compliance 32

Opinion, Iowa Court of Appeals (2/7/18) 33

TABLE OF AUTHORITIES

Cases: Page:

Bierkamp v. Rogers, 293 N.W.2d 577 (Iowa 1980) 25

Bruns v. State, 503 N.W.2d 607 (Iowa 1993) 14

City of Chicago v. Morales, 527 U.S. 41 (1999) 18

Grayned v. City of Rockford, 408 U.S. 104 (1972) 18

Harden v. State, 434 N.W.2d 881 (Iowa 1989) 14

In re Detention of Cubbage, 671 N.W.2d 442 (Iowa 2003) .. 20

King v. State, 818 N.W.2d 1 (Iowa 2012) 21

Kolender v. Lawson, 461 U.S. 352 (1983) 18

Lamasters v. State, 821 N.W.2d 856 (Iowa 2012) 28, 29

People v. Derror, 715 N.W.2d 822, 846 (2006) 24–26

People v. Feezel, 783 N.W.2d 67 (Mich. 2010) 24

Schmitt v. Jenkins Truck Lines, Inc.,
149 N.W.2d 789 (Iowa 1967) 20

State v. Bower, 725 N.W.2d 435 (Iowa 2006) 18

State v. Brothern, 832 N.W.2d 187 (Iowa 2013) 29

State v. Childs, 898 N.W.2d 177 (Iowa 2017) 9

State v. Clay, 824 N.W.2d 488 (Iowa 2012) 29

State v. Comried, 693 N.W.2d 773 (Iowa 2005) 8–9, 21, 24

State v. Davis, 884 N.W.222, 2016 WL 1677591
(Iowa Ct. App. 2016) 10, 27

State v. Demaray, 704 N.W.2d 60 (Iowa 2005)..... 21

State v. Greene, 592 N.W.2d 24 (Iowa 1999) 29

State v. Groves, 742 N.W.2d 90 (Iowa 2007).....13, 20, 24

State v. Hartog, 440 N.W.2d 852 (Iowa 1989) 21

State v. Heinrichs, 845 N.W.2d 450
(Iowa Ct. App. 2013) 18

State v. Hernandez-Lopez, 639 N.W.2d 226 (Iowa 2002)..... 20

State v. Hodges, 800 N.W.2d 755, 2011 WL 944378
(Iowa Ct. App. 2011) 10, 26

State v. Leckington, 713 N.W.2d 208 (Iowa 2006)..... 30

State v. Murray, 796 N.W.2d 907 (Iowa 2011) 10

State v. Nail, 743 N.W.2d 535 (Iowa 2007) 14, 17

State v. Paredes, 775 N.W.2d 554 (Iowa 2009) 29

State v. Seering, 701 N.W.2d 655 (Iowa 2005)..... 13

State v. Tobin, 333 N.W.2d 842 (Iowa 1983)..... 13

State v. Tyler, 873 N.W.2d 741 (Iowa 2016)..... 28

State v. Williams, 695 N.W.2d 23 (Iowa 2005) 29

Strickland v. Washington, 466 U.S. 668 (1984)..... 30

Taylor v. State, 352 N.W.2d 683 (Iowa 1984)..... 13

Zaber v. City of Dubuque, 789 N.W.2d 634 (Iowa 2010) 21

Constitutional Provisions:

U.S. Const. amend. XIV, § 1 14

Iowa Const. art. I, § 9 14

Statutes and Court Rules:

Iowa Code § 321J.2(1)(a) (2015) 27

Iowa Code § 321J.2(1)(c) (2015) 17

Iowa Code § 321J.2(4) (2015) 57

Iowa R. App. P. 6.1101(1)(b)(2) (2017) 8

Iowa R. App. P. 6.1101(1)(b)(4) (2017) 8

Iowa R. App. P. 6.1103(1)(b)(1) 9

Iowa R. App. P. 6.1103(1)(b)(2) 10

Iowa R. App. P. 6.903(2)(d) (2017) 8

Iowa R. App. P. 6.904(2)(c) (2017) 10

Other Authority:

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/static files/nti/pdf/812118-Roadside_Survey_2014.pdf 22

STATEMENT IN SUPPORT OF FURTHER REVIEW

This case raises the question of whether 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 a defendant's rights under the due process clause. The Court of Appeals found that the statute is not unconstitutionally vague and is rationally related to the purpose of the operating-while-intoxicated statute. See (Opinion pp. 8–12).

Newton requests the Iowa Supreme Court grant further review in this case because it raises an issue that involves a substantial issue of first impression and constitutional law, and it is of broad public importance. Iowa R. App. P. 6.903(2)(d) & 6.1101(1)(b)(2), (4) (2017). In State v. Comreid, 693 N.W.2d 773 (Iowa 2005), the Iowa Supreme Court determined 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. State v. Comried, 693 N.W.2d 773, 778 (Iowa 2005). In Comried, the

defendant only argued that the statute's text of "any amount" incorporated the cutoff levels established by an administrative rule; constitutional due process challenges to section 321J.2(1)(c) were not raised. Id. at 774–75. See also State v. Childs, 898 N.W.2d 177, 196 (J. Appel, dissenting) ("No constitutional issues were raised in Comried."). Moreover, this case presents constitutional challenges not presented or decided in State v. Childs. See State v. Childs, 898 N.W.2d 177, 188 (Iowa 2017) (Cady, C.J., specially concurring) ("Furthermore, no constitutional claim has been presented on appeal that requires us to address or even discuss whether the statute is rationally related to a legitimate government interest."). However, to the extent the Court in Comried found the per se ban was reasonably related to the statute's purpose, Newton requests this Court overrule its prior decision. See Comried, 693 N.W.2d at 776. See also Iowa R. App. P. 6.1103(1)(b)(1).

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 to settle this substantial question of constitutional law. See Iowa R. App. P. 6.1103(1)(b)(2).

Because section 321J.2(1)(c) violates due process, Defendant–Appellant Timothy Alvin Newton respectfully requests the Court grant further review of the decision of the Court of Appeals on February 7, 2018.

STATEMENT OF THE CASE

Nature of the Case: Defendant–Appellant Timothy Alvin Newton seeks further review of the decision of the Court of Appeals affirming his conviction for Operating While Intoxicated, following a jury trial and verdict finding him guilty of Operating While Intoxicated – Second Offense[1] and Child Endangerment, in Ringgold County.

Facts: The Court of Appeals' statement of the background facts is essentially correct. Any additional relevant facts will be discussed below.

ARGUMENT

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 THE DEFENDANT 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

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[1] The Court of Appeals reversed the conviction and sentence for the enhancement of a second offense and remanded for further proceedings. (Opinion p. 2). Newton does not seek review of that portion of the Court's decision.

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. The Court of Appeals

found the issue had been adequately preserved for its review. See (Opinion p.7 n.5).

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. I, § 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 the 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.

CONCLUSION

Defendant–Appellant Timothy Alvin Newton requests this Court accept his application for further review, vacate the decision of the Court of Appeals, and remand his case for a new trial.

ATTORNEY'S COST CERTIFICATE

The undersigned hereby certifies that the true cost of producing the necessary copies of the foregoing Application for Further Review was $4.74, and that amount has been paid in full by the Office of the Appellate Defender.

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State Appellate Defender

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

This application complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because:

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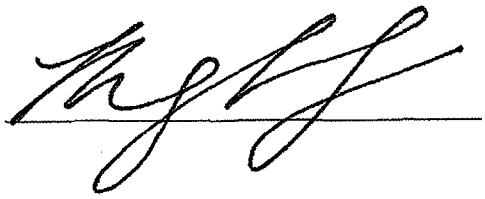

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Dated: 02/23/2018

IN THE COURT OF APPEALS OF IOWA

No. 16-1525
Filed February 7, 2018

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TIMOTHY ALVIN NEWTON,
Defendant-Appellant.

Appeal from the Iowa District Court for Ringgold County, Dustria A. Relph, Judge.

A defendant appeals his convictions for operating while intoxicated, second offense, and child endangerment. **REVERSED IN PART AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Mary K. Conroy, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, and Timothy M. Hau, Assistant Attorney General, for appellee.

Considered by Vogel, P.J., and Potterfield and Mullins, JJ.

mc

VOGEL, Presiding Judge.

Timothy Newton appeals his convictions for operating while intoxicated (OWI), second offense, and child endangerment. He claims his OWI conviction must be reversed because the jury was instructed on the "any amount of a controlled substance" alternative in Iowa Code section 321J.2(1)(c) (2014), and this alternative is unconstitutionally vague and violates his due process rights.[1] He also claims his stipulation to his prior OWI offense was invalid because it was not knowingly and voluntarily entered. Finally, he claims his sentence must be vacated and this case remanded for a new sentencing hearing because the court considered unproven offenses when determining his sentence. We affirm Newton's OWI conviction as we conclude section 321J.2(1)(c) is not unconstitutionally vague and is rationally related to the purpose of the OWI statute. However, because Newton was not afforded a proper colloquy when stipulating to his prior conviction, we reverse his conviction and sentence for OWI, second offense, and remand this case for proceedings consistent with this opinion. Because of this reversal, we need not address the claims he makes regarding his sentencing hearing.

I. Background Facts and Proceedings.

Eric Fell arrived at his rural home on the night of September 3, 2014, to find a vehicle and a detached trailer in the ditch in front of his home and a young boy walking up to the road. Fell contacted the sheriff's office to report the accident. He then drove his tractor to the location of the vehicle to assist with pulling the

[1] Newton does not separately challenge the conviction for child endangerment. *See* Iowa Code § 726.6.

vehicle and trailer from the ditch. Deputy Sheriff Samuel Pitt arrived on scene and instructed Fell not to move either the trailer or the vehicle. Deputy Pitt contacted the boy and the adult in the vehicle, identifying them as Newton and his eleven-year-old son. The vehicle was running, and Newton was seated in a reclined position behind the steering wheel with the driver's side door open and with his son standing next to the driver's side. Newton told the deputy he was waiting for the property owner's tractor to arrive and was surprised when the deputy pointed out the tractor was already present. Deputy Pitt noted this was odd because the tractor was very loud with bright running lights and was so close to the disabled vehicle "that it would have been almost impossible to be unaware of its presence."

Deputy Pitt suspected Newton was impaired almost immediately because Newton was agitated and disoriented, slurred his speech, and had difficulty maintaining his balance as he exited the vehicle. Newton explained to the deputy that he became stuck in the ditch when he attempted to turn around on the highway after missing his turn. Deputy Pitt asked Newton for his driver's license, and Newton initially responded he did not have it with him. After Deputy Pitt pointed out to Newton his wallet was located directly under Newton's legs on the floor of the vehicle, Newton then proceeded to search through his wallet looking for his license, thumbing past it twice before finding it. Deputy Pitt asked Newton whether he was "all right," and Newton replied it was "one of those Sunday night things" and then corrected himself to say it was Tuesday night. However, the accident occurred on a Wednesday night.[2] When Deputy Pitt corrected Newton on the day

[2] The incident occurred the week of Labor Day.

of the week, Newton seemed surprised. Newton denied consuming any alcohol or taking any medication, but he did say he did not "feel well."

A second deputy, Deputy Landon White, arrived at the scene, and Deputy Pitt relayed to him that he believed Newton was impaired. Upon his arrival, Deputy White attempted to obtain the assistance of an officer who had a highly specialized certification in impaired driving investigations, but no officers with that certification were available. Therefore, after questioning Newton and observing his demeanor and disorientation, Deputy White conducted the standard field sobriety test he was certified to administer. Deputy White knew Newton had a prior leg injury, so he did not administer the one-leg stand test or the walk-and-turn test. Newton did not pass the horizontal gaze nystagmus test or the lack of convergence test, but no nystagmus was present during the vertical gaze nystagmus test, and Newton did not have difficulty performing the modified Romberg balance test. Deputy White then decided to invoke implied consent, and Newton agreed to accompany the deputy to the station to provide a urine sample.

As the deputy proceeded to drive to the station, Newton again indicated he was confused as to where he was located in relation to town, and when they arrived at the station, Deputy White thought it was strange Newton laid down on the wooden bench in the holding area. After reading the implied-consent advisory, Deputy White requested Newton provide a urine sample. Newton responded that he would prefer to provide a blood sample. Deputy White informed Newton of his right to have an independent test done with a blood sample if he would like but insisted he was requesting a urine sample. Newton then provided the sample, which was sent to the department of criminal investigations lab. Newton's urine

sample came back positive for benzodiazepines, opiates, cocaine metabolites, marijuana metabolites, and tricyclics. Deputy White testified that the impairment he observed during his field testing would have been consistent with the use of benzodiazepines, opiates, marijuana, and tricyclics.[3]

Newton offered expert testimony at trial. The expert reviewed the video evidence of the incident and testified he did not see any signs of impairment in Newton. He further testified, "There is no evidence to conclude that he was impaired due to any of the drugs cited or the metabolites cited within the testing. The field testing is absolutely not conclusive." He further asserted "urine testing cannot determine impairment." Instead, it was his position that blood testing "is going to give us better information as to [the] relationship to impairment."[4]

Newton also offered the testimony of his wife, who stated he was lethargic and ill the day of the accident and had been ill for several days. Newton's son also testified that his father was sick that day and that his grandfather, Newton's father, drove the vehicle and trailer into the ditch when he was attempting to turn around because the GPS told them they had missed their turn. The son further testified Newton's father got a ride from the scene to retrieve a garbage truck to assist in pulling the vehicle and trailer from the ditch, and after Newton's father left, Newton drove the vehicle to attempt to get both the vehicle and trailer out of the ditch but

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[3] We also note the trial testimony from a criminalist with the Iowa Division of Criminal Investigation Criminalistics Laboratory established the laboratory follows the nationally accepted standards establishing threshold levels of certain substances before a positive test result is reported. This is to prevent positive test results for people who may have been passively exposed to certain substances. Newton tested above the applicable threshold amounts.

[4] Although Newton was advised of his right to independent testing on the night in question, he did not seek such testing.

was ultimately unable to do so. Newton also offered the testimony of his father, who confirmed he was the one driving when the vehicle and trailer initially became stuck in the ditch. Newton's father testified he was able to get a ride to town to get the garbage truck but the truck had a flat tire. By the time he repaired the tire and got back to the scene, everyone was gone.

After four days of testimony, the jury found Newton guilty as charged of OWI and child endangerment. Following the verdict, the defense informed the court that Newton was willing to stipulate that it was his second OWI offense. The court engaged Newton in the following colloquy:

> First I want to ask, is what you're about to do and statements you're about to make concerning that previous conviction, are those being given freely and without any duress, threats, or coercion?
>
> THE DEFENDANT: Yes.
>
> THE COURT: All right. And are you at this time under the influence of any alcoholic beverage or medication?
>
> THE DEFENDANT: No.
>
> THE COURT: Have you in the past six months been hospitalized for the treatment of any physical or mental condition?
>
> THE DEFENDANT: No.
>
> THE COURT: And were you on or about February 2, 2007, convicted of the crime of operating while intoxicated in Polk County, Iowa?
>
> THE DEFENDANT: Yes.
>
> . . . .
>
> THE COURT: All right. The court finds that you are knowingly and voluntarily making—or stipulating that you have in fact previously been convicted of operating while intoxicated.

The court denied Newton's posttrial motions and sentenced him to two years in prison for each offense, to run concurrently. The fines were suspended, and Newton's driver's license was suspended for one year. Newton appeals.

II. Scope and Standard of Review.

Our review of a challenge to the constitutionality of a statute is de novo. *State v. Thompson*, 836 N.W.2d 470, 483 (Iowa 2013).

> [S]tatutes are cloaked with a presumption of constitutionality. The challenger bears a heavy burden, because it must prove the unconstitutionality beyond a reasonable doubt. Moreover, "the challenger must refute every reasonable basis upon which the statute could be found to be constitutional." Furthermore, if the statute is capable of being construed in more than one manner, one of which is constitutional, we must adopt that construction.

Id. (citations omitted). Likewise, to the extent Newton asserts an ineffective-assistance-of-counsel claim, our review is also de novo as such a claim has its basis in the Sixth Amendment. *See State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008).

Newton also challenges the colloquy the court engaged in when accepting his stipulation to his prior OWI offense. We review that claim for the correction of errors at law. *See State v. Meron*, 675 N.W.2d 537, 540 (Iowa 2004).

III. Constitutional Challenge to Section 321J.2(1)(c).

Newton contends his constitutional rights were violated in this case because the jury was allowed to convict him based on the presence of drug metabolites in his urine when testimony at trial established that the presence of drug metabolites in urine does not necessarily indicate the person is impaired. He asserts section 321J.2(1)(c) is unconstitutionally vague and not rationally related to the purpose of the OWI statute.[5]

[5] The State argues Newton did not preserve error on these constitutional challenges because Newton failed to raise these challenges within forty days of arraignment. *See* Iowa R. Crim. P. 2.11(2), (4) (providing any defense or objection capable of determination without trial may be raised by motion before trial and requiring defenses and objections based on defects in the institution of the proceeding or defects in the indictment or information to be raised within forty days of arraignment). Instead, Newton challenged the application of the statute to him at trial. Assuming without deciding that the constitutional

A. Void for Vagueness.

There are three foundations for the void-for-vagueness doctrine:

> First, a statute cannot be so vague that it does not give persons of ordinary understanding fair notice that certain conduct is prohibited. Second, due process requires that statutes provide those clothed with authority sufficient guidance to prevent the exercise of power in an arbitrary or discriminatory fashion. Third, a statute cannot sweep so broadly as to prohibit substantial amounts of constitutionally-protected activities, such as speech protected under the First Amendment.

State v. Heinrichs, 845 N.W.2d 450, 454 (Iowa Ct. App. 2013) (quoting *State v. Nail*, 743 N.W.2d 535, 539 (Iowa 2007)). Newton asserts section 321J.2(1)(c) violates the first two foundations; he claims it 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. Because drug metabolites can be present in the system long after the impairment of the drug wears off, Newton asserts individuals will not know when the metabolites have been removed from the body so as to be able to drive without facing punishment. He also claims the statute allows for the prosecution of some individuals based solely on law enforcement's knowledge of the person's drug usage, not on the individual's impaired driving.

Iowa Code section 321J.2(1)(c) provides: "A person commits the offense of operating while intoxicated if the person operates a motor vehicle in this state in

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challenge was untimely, the State did not object to Newton's late-filed challenge on timeliness grounds, nor did the district court deny the challenge based on timeliness. *See State v. Maestas*, 224 N.W.2d 248, 250 (Iowa 1974) (requiring constitutional objections to a statute as being vague and overbroad to be challenged "at the earliest available opportunity in the progress of the case"). Because the district court ruled on the merits of the challenge, we consider the issue to be preserved for our review. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("[I]ssues must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

any of the following conditions: . . . c. While any amount of a controlled substance is present in the person, as measured in the person's blood or urine." Newton does not assert any of the words used in the statute are unclear; instead, he asserts a person would not know when he is in violation of the statute because he would not be aware of when the metabolites of a controlled substance still happen to be present in one's urine. In *State v. Bock*, the defendant made a similar challenge to the alcohol alternative to the OWI statute. 357 N.W.2d 29, 33–34 (Iowa 1984). There the defendant claimed that statute was "unconstitutionally vague because persons of common intelligence cannot know if their blood, breath, or urine carries an alcohol concentration which is proscribed by its terms." *Id.* at 33. The supreme court rejected the challenge noting:

> 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.

Id. at 34 (emphasis added). While a person may not be aware of the precise moment the metabolites of a controlled substance leave the body, the statute does place a person on notice of the described the type of conduct (consuming controlled substances) that places the person in jeopardy of violating the statute. We conclude section 321J.2(1)(c) is not unconstitutionally vague because it gives "a person of ordinary intelligence fair notice of what is prohibited." *Id.* at 33–34.

In addition, we reject Newton's claim that the statute is vague because it leads to arbitrary or discriminatory enforcement. Before a urine or blood sample can be requested, the law enforcement officer needs to invoke the implied-consent

procedure, which requires the officer to have "reasonable grounds to believe that the person was operating a motor vehicle" while impaired. *See* Iowa Code § 321J.6(1); *see also State v. Childs*, 898 N.W.2d 177, 185 (Iowa 2017) ("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.").

Newton's vehicle and trailer were located in the ditch at a time when there were no adverse weather conditions. Newton was sitting behind the wheel with the engine running. His explanation as to how he came to be in the ditch was incoherent. He was confused as to the time of day, his location in relation to his destination, and whether he even possessed his wallet and driver's license. In addition, he failed the horizontal gaze nystagmus test and the lack of convergence test, yet there was no indication of the consumption of alcohol. We conclude the deputy's request for a urine sample in this case was not arbitrary. We therefore deny Newton's challenge to the statute on vagueness grounds.

B. Substantive Due Process. Newton also challenges the application of the statute in this case on substantive due process grounds. There are two parts to a substantive due process evaluation: "The first requires a determination of 'the nature of the individual right involved.'" *State v. Seering*, 701 N.W.2d 655, 662 (Iowa 2005) (citation omitted). Then we apply the analysis that is appropriate for the nature of the right:

> If a fundamental right is implicated, we apply strict scrutiny analysis, which requires a determination of "whether the government action infringing the fundamental right is narrowly tailored to serve a compelling government interest." If a fundamental right is not implicated, a statute need only survive a rational basis analysis,

> which requires us to consider whether there is "a reasonable fit between the government interest and the means utilized to advance that interest."

Id. (citation omitted). Newton concedes a fundamental right is not implicated in this case, so we apply a rational basis review of the statute. Under the rational basis analysis, we are deferential to the legislature's judgment, though our review is not "toothless." *Hensler v. City of Davenport*, 790 N.W.2d 569, 584 (Iowa 2010). However, Newton "must negate every reasonable basis upon which the statute may be sustained." *King v. State*, 818 N.W.2d 1, 23 (Iowa 2012)

The purpose of chapter 321J is to reduce the number of deaths and injuries caused by impaired drivers. *Welch v. Iowa Dep't of Transp.*, 801 N.W.2d 590, 594 (Iowa 2011) ("[W]e have continuously affirmed that the primary objective of the implied consent statute is the removal of dangerous and intoxicated drivers from Iowa's roadways in order to safeguard the traveling public."). While not addressing a constitutional due process claim, our supreme court has twice determined "[t]he 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." *See State v. Comried*, 693 N.W.2d 773, 776 (Iowa 2005) (emphasis added); *see also Childs*, 898 N.W.2d at 183–87 (quoting with approval and affirming the *Comried* decision).[6] "It is not absurd for the legislature to enact a per se, or zero-tolerance, ban on driving with [a controlled substance] in one's body, given the absence of an available scientific test to determine what level of

[6] Newton asks that we reverse the supreme court's decision in *Comried*. "We are not at liberty to overrule controlling supreme court precedent." *State v. Beck*, 854 N.W.2d 56, 64 (Iowa Ct. App. 2014). In addition, the supreme court has recently reaffirmed the *Comried* decision in *Childs*, 898 N.W.2d at 183–87.

[controlled substance] impairs driving." *Childs*, 898 N.W.2d at 185. We conclude the per se ban on operating a motor vehicle with any amount of controlled substance in one's body is rationally related to the legitimate government interest in reducing traffic fatalities and injuries from impaired driving. *See Loder v. Iowa Dep't of Transp.*, 622 N.W.2d 513, 516 (Iowa Ct. App. 2000) ("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."). We thus conclude Newton's substantive due process claim fails.[7]

IV. Habitual Offender Colloquy.

Next, Newton asserts the court failed to engage him in the proper colloquy when he stipulated to his prior OWI conviction. Subsequent to Newton's conviction, our supreme court has now defined "the scope of the inquiry" a district court must employ when accepting a defendant's stipulation to prior convictions for sentencing enhancements. *See State v. Harrington*, 893 N.W.2d 36, 45–47 (Iowa 2017). The court must "inform the offender of the nature of the habitual offender charge" and "inform the offender that these prior felony convictions are only valid if obtained when the offender was represented by counsel or knowingly and voluntarily waived the right to counsel." *Id.* at 45. The court "must also make sure a factual basis exists to support the admission to the prior convictions." *Id.* at

[7] We have similarly concluded section 321J.2(1)(c) does not offend substantive due process in *State v. Davis*, No. 14-1976, 2016 WL 1677591, at *4–5 (Iowa Ct. App. Apr. 27, 2016) (addressing claim through the lens of ineffective assistance of counsel) and in *State v. Hodges*, No. 10-0031, 2011 WL 944378, at *3–5 (Iowa Ct. App. Mar. 21, 2011) (same).

45–46. "[T]he court must inform the offender of the maximum possible punishment of the habitual offender enhancement, including mandatory minimum punishment." *Id.* at 46. "[T]he court must inform the offender of the trial rights enumerated in Iowa Rule of Criminal Procedure 2.8(2)(b)(4)." *Id.* The offender must also be informed "that no trial will take place by admitting to the prior convictions" and "that the State is not required to prove the prior convictions were entered with counsel if the offender does not first raise the claim." *Id.* Finally, "[t]he district court must inform the offender that challenges to an admission based on defects in the habitual offender 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." *Id.*

The State does not dispute that the colloquy in this case falls far short of the requirements announced in *Harrington*. Instead, the State asserts Newton did not preserve error on this claim due to his failure to include this claim in his motion in arrest of judgment. The State urges us to review this claim through the lens of ineffective assistance of counsel. However, the error-preservation requirement announced in *Harrington* is only applicable "prospectively." *See id.* at 43. Because Newton's conviction predated *Harrington*, we do not hold the lack of a motion in arrest of judgment against Newton. *See State v. Steiger*, 903 N.W.2d 169, 170 (Iowa 2017) ("Requirements of the enhanced-penalty hearing were not followed by the district court in this case, and the error preservation rule we established in *Harrington* was not in existence at the time."). Therefore, Newton's conviction for OWI second offense must be reversed, and this case is remanded for further proceedings consistent with the supreme court's decision in *Harrington* to conduct

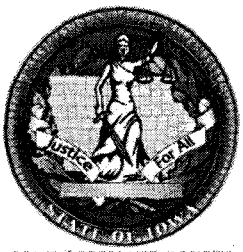
a hearing on the prior conviction pursuant to rule 2.19.[8] We affirm the jury's judgment of guilt on the present OWI conviction and the conviction for child endangerment.

V. Conclusion.

Because we conclude section 321J.2(1)(c) is not unconstitutionally vague and is rationally related to the purpose of the OWI statute, we deny Newton's due process challenge to his conviction. However, because the court did not provide Newton a proper colloquy when accepting his stipulation to his prior conviction, we reverse his conviction and sentence for OWI, second offense, and remand this case for proceedings consistent with this opinion.

REVERSED IN PART AND REMANDED.

[8] Because we are reversing his sentence and remanding for further proceedings, we need not address Newton's final claim regarding the sentencing court's consideration of unproven offenses when determining his sentence.



IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	**Case Title**
16-1525	State v. Newton

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