IN THE SUPREME COURT OF IOWA

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|---|---|---|
| STATE OF IOWA, | ) | |
| | ) | |
| Plaintiff-Appellee, | ) | |
| | ) | |
| v. | ) | S.CT. NO. 17-1798 |
| | ) | |
| KAYLA HAAS, | ) | |
| | ) | |
| Defendant-Appellant. | ) | |

APPEAL FROM THE IOWA DISTRICT COURT
FOR STORY COUNTY
HONORABLE STEVEN P. VAN MAREL (Suppression) AND
HONORABLE JAMES MALLOY (Trial and Sentencing), JUDGES

# APPELLANT'S BRIEF AND ARGUMENT AND REQUEST FOR ORAL ARGUMENT

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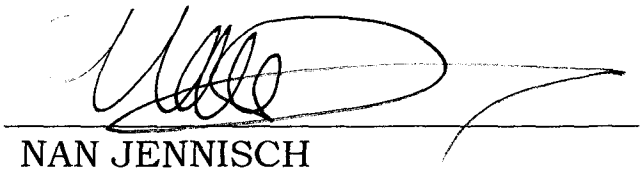
**CERTIFICATE OF SERVICE**

On the 12th day of July, 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 Kayla Haas, 225 S. Kellogg, Ames, IA 50010.

APPELLATE DEFENDER'S OFFICE



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**I. Officers were motivated to stop Haas because of her presence in front of a specific house. Lacking reasonable suspicion, the officers surveilled her vehicle for over an hour. The officers initiated a traffic stop unrelated to enforcement of the traffic law, motivated only by her presence at the house. Was Haas thereby subject to an impermissible pretextual seizure in violation of article 1, section 8 of the Iowa Constitution?**

### Authorities

State v. Harrison, 846 N.W.2d 362, 371 (Iowa 2014)

**A. Federal precedent.**

U.S. Const. Amend. IV

Terry v. Ohio, 392 U.S. 1, 8-9; 88 S.Ct. 1868, 1873 (1968)

U.S. Const. Amend. IV

Delaware v. Prouse, 440 U.S. 648 at 653, 99 S.Ct. 1391, 1398 (1979)

United States v. Brignoni-Ponce, 422 U.S. 873, 884, 95 S.Ct. 2574, 2582 (1975)

Whren v. United States, 517 U.S. 806, 116 S.Ct. 1769 (1996)

**B. Independent Interpretation of the Iowa Constitution.**

State v. Baldon, 829 N.W.2d 785, 812 (Iowa 2013)

State v. Gaskins, 866 N.W.2d 1, 7-14 (Iowa 2015)

State v. Short, 851 N.W.2d 474, 496-506 (Iowa 2014)

State v. Pals, 805 N.W.2d 767 (Iowa 2011)

State v. Ochoa, 792 N.W.2d 260, 287-91 (Iowa 2010)

State v. Cox, 781 N.W.2d 757 (Iowa 2010)

State v. Bruegger, 773 N.W.2d 862 (Iowa 2009)

Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009)

State v. Cline, 617 N.W.2d 277, 284-85 (Iowa 2000)

State v. Turner, 630 N.W.2d 601, 606 (Iowa 2001)

King v. State, 797 N.W.2d 565, 571 (Iowa 2011)

**C. Pretextual stops violate article 1, section 8 of the Iowa Constitution.**

Phyllis W. Beck & Patricia A. Daly, State Constitutional Analysis of Pretext Stops: Racial Profiling and Public Policy Concerns, 72 Temp. L.Rev. 597, 597 (1999)

David O. Markus, Whren v. United States: A Pretext to Subvert the Fourth Amendment, 14 Harv. BlackLetter L.J. 91, 96–109 (1998)

Patricia Leary & Stephanie Rae Williams, Toward a State Constitutional Check on Police Discretion to Patrol the Fourth Amendment's Outer Frontier: A Subjective Test for Pretextual Seizures, 69 Temp. L. Rev. 1007, 1025 (1996)

State v. Heath, 929 A.2d 390, 398, 402 (Del. Super. Ct. 2006)

Terry v. Ohio, 392 U.S. 1, 27; 88 S.Ct. 1868, 1873 (1968)

Whren v. United States, 517 U.S. 806, 813, 116 S.Ct. 1769 (1996)

Kevin R. Johnson, How Racial Profiling Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering, 98 Geo. L.J. 1005, 1063-64 (April 2010)

State v. Cline, 617 N.W.2d 277, 291 (Iowa 2000)

Sunghoon Roh & Matthew B. Robinson, A Geographic Approach to Racial Profiling: The Microanalysis and Macroanalysis of Racial Disparity in Traffic Stops, 12:2 Police Quarterly 137, pdf pp.3-7 (June 2009), https://libres.uncg.edu/ir/asu/f/Robinson_Mathew_Roh_2009_A_Geographical_Approach.pdf.

Kelly Montgomery, Note, Leaving Well Enough Alone – Why the "Would Have" Standard Works Well for Determining Pretext Stops in Washington State: A Critical Analysis of the Whren Decision, 21 Seattle U. L. Rev. 159, 169 (Summer 1997)

United States v. Cannon, 29 F.3d 472, 475-76 (9th Cir. 1994)

State v. Ochoa, 206 P.3d 143 (N.M. Ct. App. 2008)

State v. Ladson, 979 P.2d 833 (Wash. 1999)

State v. Ladson, 979 P.2d 833, 836 (Wash. 1999)

Robert F. Williams, The Law of American State Constitutions, 194 (2009)

State v. Ochoa, 792 N.W.2d 260, 267 (Iowa 2010)

State v. Cooley, 229 N.W.2d 755, 758 (Iowa 1975)

State v. Aschenbrenner, 289 N.W.2d 618, 619 (Iowa 1980)

State v. Bailey, 452 N.W.2d 181, 182 (Iowa 1990)

State v. Heminover, 619 N.W.2d 353 (Iowa 2000)

State v. Hoskins, 711 N.W.2d 720 (Iowa 2006)

State v. Griffith, 691 N.W.2d 734 (Iowa 2005)

State v. Freeman, 705 N.W.2d 293 (Iowa 2005)

State v. Gaskins, 866 N.W.2d 1, 13 (Iowa 2015)

State v. Short, 851 N.W.2d 474, 492 (Iowa 2014)

State v. Harrison, 846 N.W.2d 362, 371 (Iowa 2014)

State v. Coleman, 890 N.W.2d 284 (Iowa 2017)

Kathy A. Bolten, Iowa Studies Show Blacks Stopped More Often Than Whites (Aug. 15, 2015), http://www.desmoinesregister.com/story/news/crime-and-courts/2015/08/16/black-iowa-racial-profiling-studies/31787611/

Dr. Christopher Barnum, ICPD Traffic Stop Analysis, p. 50 http://www8.iowa-city.org/weblink/0/doc/1524344/Electronic.aspx (last viewed February 12, 2018)

State v. Cooley, 229 N.W.2d 755, 761 (Iowa 1975)

State v. Pals, 805 N.W.2d 767, 782-84 (Iowa 2010)

Varnum v. Brien, 764 N.W.2d 862, (Iowa 2009)

**D. The stop conducted on Haas was pretextual.**

State v. Cooley, 229 N.W.2d 755, 756 (Iowa 1975)

State v. Aschenbrenner, 289 N.W.2d 618 (Iowa 1980)

State v. Bailey, 452 N.W.2d 181 (Iowa 1990)

State v. Heminover, 619 N.W.2d 353 (Iowa 2000)

State v. Heath, 929 A.2d 390, 403 (Del. Super. Ct. 2006)

State v. Ochoa, 206 P.3d 143, 155-56 (N.M. Ct. App. 2008)

**II. This court has held officers have reasonable suspicion to stop a vehicle if it is owned by a suspended driver and there are no circumstances invalidating the officers' assumption that the owner is also the driver. Were there circumstances invalidating the officers' assumption that the owner was also the driver?**

**Authorities**

State v. Vance, 790 N.W.2d 775 (Iowa 2010)

DeVoss v. State, 648 N.W.2d 56, 62 (Iowa 2002)

Aller v. Rodgers Mach. Mfg. Co., 268 N.W.2d 830, 840 (Iowa 1978)

Kane v. State, 436 N.W.2d 624, 626 (Iowa 1989)

State v. Clay, 824 N.W.2d 488, 494 (Iowa 2012)

State v. Green, 896 N.W.2d 770, 775 (Iowa 2017)

State v. Brown, 890 N.W.2d 315, 321(Iowa 2017)

Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2025, 2063 (1984)

State v. Artzer, 609 N.W.2d 526, 531 (Iowa 2000)

Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981)

State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987)

State v. Lyman, 776 N.W.2d 865, 878 (Iowa 2010)

State v. Vance, 790 N.W.2d 775, 786 (Iowa 2010)

State v. Schoelerman, 315 N.W.2d 67, 71-72 (Iowa 1982)

Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968)

United States v. Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2574 (1975)

Michigan v. Summers, 452 U.S. 692, 101 S.Ct. 2587 (1981)

Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319 (1983)

U.S. v. Hensley, 713 F.2d 220 (6th Cir. 1983)

Com. V. Rodriquez, 614 A.2d 1378, 1384 (Pa. 1992)

**A. The fact that the registered owner of a vehicle is barred from driving does not necessarily amount to reasonable suspicion to seize the vehicle.**

State v. Vance, 790 N.W.2d 775 (Iowa 2010)

**B. Officers in this case were aware of circumstances indicating the registered owner was not the driver, making it unreasonable to infer, at the time of the stop, that Haas was the driver.**

State v. Vance, 790 N.W.2d 775 (Iowa 2010)

**C. Alternatively, trial counsel was ineffective for failing to address Vance in both the motion to suppress and during the hearing on the motion to suppress.**

State v. Vance, 790 N.W.2d 775 (Iowa 2010)

State v. Coleman, 890 N.W.2d 284 (Iowa 2010)

State v. Goff, 342 N.W.2d 830, 838 (Iowa 1983)

Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2025, 2063 (1984)

State v. Artzer, 609 N.W.2d 526, 531 (Iowa 2000)

State v. Dudley, 766 N.W.2d 606, 620 (Iowa 2009)

State v. Lyman, 776 N.W.2d 865, 878 (Iowa 2010)

State v. Schoelerman, 315 N.W.2d 67, 71-72 (Iowa 1982)

Iowa R. Prof'l Conduct 32:1.1

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State v. Westeen, 591 N.W.2d 203, 210 (Iowa 1999)

State v. Schoelerman, 315 N.W.2d 67, 72 (Iowa 1982)

Ledzema v. State, 626 N.W.2d 134, 143 (Iowa 2001)

State v. Clay, 824 N.W.2d 488, 500 (Iowa 2012)

**III. The officers in this case cited a malfunctioning license plate light as a ground for the traffic stop. The video record is, at the least, inconsistent with the assertion that Haas's license plate light was not working. Defense counsel failed to challenge whether the plate light was, in fact, malfunctioning. Was counsel ineffective for this failure?**

## Authorities

Kane v. State, 436 N.W.2d 624, 626 (Iowa 1989)

State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1973)

State v. Hildebrant, 405 N.W.2d 839, 840-41 (Iowa 1987)

State v. Oetken, 613 N.W.2d 679, 683 (Iowa 2000)

Ledezma v. State, 626 N.W.2d 134, 141 (Iowa 2001)

State v. Green, 896 N.W.2d 770, 775 (Iowa 2017)

State v. Brown, 890 N.W.2d 315, 321 (Iowa 2017)

Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2025, 2063 (1984)

State v. Artzer, 609 N.W.2d 526, 531 (Iowa 2000)

Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981)

State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987)

State v. Gaskins, 866 N.W.2d 1, 5 (Iowa 2015)

State v. Halverson, 857 N.W.2d 632, 635 (Iowa 2015)

**A. Defense counsel had a duty to challenge whether the light was in fact malfunctioning.**

Iowa R. Prof'l Conduct32:1.1

Iowa R. of Prof'l Conduct, Comment 5

State v. Lopez, No. 16-1213, 2018 WL 672085, @ *3 (Iowa February 2, 2018)

State v. Harris, 891 N.W.2d 182, 186 (Iowa 2017)

Iowa Code § 321.388 (2017)

State v. Lyon, 862 N.W.2d 391 (Iowa 2010)

**B. Haas was prejudiced by the failure to challenge the plate light as grounds for the stop.**

Ledzema v. State, 626 N.W.2d 134, 143 (Iowa 2001)

Strickland v. Washington, 466 U.S. 668, 690, 104 S.Ct. 2052, 2066 (1984)

E.g. Weeks v. U.S., 232 U.S. 383, 34 S.Ct. 341 (1914)

Wolf v. People of State of Colorado, 338 U.S. 25, 69 S.Ct. 1359 (1949)

Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684

State v. Harrison, 846 N.W.2d 362 (Iowa 2014)

State v. Vance, 790 N.W.2d 775 (Iowa 2010)

**IV. The district court failed to consider Haas's reasonable ability to pay court costs and attorney fees. Consideration of the reasonable ability to pay is a constitutional prerequisite for imposing court costs and attorney fees. Did the district court deprive Haas of procedural due process and fail to exercise its discretion when it failed to consider Haas's reasonable ability to pay?**

## Authorities

State v. Janz, 358 N.W.2d 547, 548-49 (Iowa 1984)

State v. Bruegger, 773 N.W.2d 862, 871 (Iowa 2009)

Iowa R. Crim. P. 2.24(5)(a)

State v. Van Hoff, 415 N.W.2d 647, 648 (Iowa 1987)

State v. Dudley, 766 N.W.2d 606, 626 (Iowa 2009)

Iowa Code § 910.2(1)

State v. Coleman, No. 16-0900, 2018 WL 672132 (Iowa Feb. 2, 2018)

Goodrich v. State, 608 N.W.2d 774, 776 (Iowa 2000)

State v. Blank, 570 N.W.2d 924, 927 (Iowa 1997)

State v. Van Hoff, 415 N.W.2d 647, 648 (Iowa 1987)

State v. Haines, 360 N.W.2d 791, 797 (Iowa 1985)

State v. Harrison, 351 N.W.2d 526, 527 (Iowa 1984)

State v. Kurtz, 878 N.W.2d 469, 472 (Iowa Ct. App. 2016)

State v. Christensen, No. 09-1457, 2010 WL 5276884 (Iowa Dec. 17, 2010)

State v. Jenkins, 788 N.W.2d 640, 646-47 (Iowa 2010)

State v. Dvorsky, 322 N.W.2d 62, 67 (Iowa 1982)

State v. Wagner, 484 N.W.2d 212, 216 (Iowa 1992)

State v. Kaelin, 362 N.W.2d 526, 528 (Iowa 1985)

State v. Storrs, 351 N.W.2d 520, 522 (Iowa 1984)

## ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because an issue raised involves a substantial issue of first impression in Iowa. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(c). The issue of pretextual seizure has not yet been decided under article 1, section 8 of the Iowa Constitution.

## STATEMENT OF THE CASE

**Nature of the Case:** This is an appeal by Defendant-Appellant Kayla Jean Haas from her conviction and sentence for driving while barred, an aggravated misdemeanor in violation of Iowa Code Section 321.560 (2017), entered following a bench trial.

**Course of Proceeding and Disposition Below:** On June 23, 2017 the State filed a trial information charging Haas with driving while barred, an aggravated misdemeanor, in violation of Iowa Code Section 321.561. (6/23/17 Trial Information) (App. pp. 6-7). Haas pled not guilty and waived her right to speedy trial on July 10, 2017. (7/10/17 Written Arraignment and Plea of Not Guilty) (Conf. App. pp. 26-27).

Haas filed a motion to suppress on August 21, 2017, claiming she was subject to a pretextual stop in violation of her rights guaranteed by article 1, section 8 of the Iowa Constitution. (8/21/17 Motion to Suppress) (App. pp. 8-16). The district court held a suppression hearing on October 12, 2017 (Supp. Tr. 1:1-25). Haas's motion to suppress was denied. (10/12/17 Order) (App. pp. 17-18).

Haas waived jury trial on October 31, 2017. (10/31/17 Waiver of Jury Trial; Tr. 3:1-22) (App. pp. 19-20). A bench trial on the minutes of testimony was held November 1, 2017. (Tr. 3:1-22). Haas was found guilty as charged. (11/1/17 Order of Disposition; Tr. 5:14-9) (App. pp. 21-23). The court sentenced Haas to thirty days in the jail, a fine of $625, surcharge, court costs, and attorney fees. (11/1/17 Order of Disposition; Tr. 9:12-16) (App. pp. 21-23).

Haas timely filed her notice of appeal on November 7, 2017. (Notice of Appeal) (App. pp. 24-25).

**Facts:** Ames police had been surveilling the house at 403 Oliver Street in Ames for at least a week prior to June 9, 2017.

(Hertz Incident Report p.5; Supp. Tr. 6:24-7:1) (Conf. App. p. 19). Police searched the home on June 8, 2017. (Supp. Tr. 7:4-7). The officer in this case testified he did not take part in the search and did not know what was found. (Supp. Tr. 24:20-25:2). The record does not indicate what, if anything, was found at the home.

On June 9, Officers Spoon and Hertz of the Ames Police Department spotted a Ford Explorer parked outside the house at 403 Oliver. (Hertz Incident Report p.5; Supp. Tr. 6:21-7:1) (Conf. App. p. 19). They arrived before sunset and parked down the block. (Supp. Tr. 8:4-6, 7:19-21). The officers ran the license plate of the Explorer and it came back registered to Haas, whose license was barred. (Hertz Incident Report p.5; Minutes of Testimony; Supp. Tr. 9:17-10:2) (Conf. App. p. 19).

Officers Spoon and Hertz sat and watched the car for over an hour. (Supp. Tr. 7:22-23). It was light out when they arrived but the sun went down and it got dark before the vehicle finally left. (Supp. Tr. 8:2-6). During their surveillance the officers had observed three people loading items into the SUV.

(Supp. Tr. 8:10-16). In the dark of night, the officers saw three people get in the car, but did not know which of the three was driving. (Supp. Tr. 10:3-11). The officers had no reason to believe they were the same three people. (Supp. Tr. 19:11-13). When the Explorer left, the officers followed. (Supp. Tr. 10:3-11). Officer Spoon testified he observed a license plate light was not working and, as a result, pulled the Explorer over. (Hertz Incident Report p.5; Minutes of Testimony; Supp. Tr. 10:22-11:3) (Conf. App. p. 19). The officers identified Haas as the driver. (Minutes of Testimony; Hertz Incident Report p.5; Supp. Tr. 36:21) (Conf. App. p. 19). The officers arrested her, then searched and towed the Explorer. (Supp. Tr. 36:24-5). Nothing illegal was found in the vehicle. (Supp. Tr. 14:15-15:1, 24:5-19).

Additional facts relevant to specific legal issues will be mentioned below, as necessary.

## ARGUMENT

**I. Officers were motivated to stop Haas because of her presence in front of a specific house. Lacking reasonable suspicion, the officers surveilled her vehicle for over an hour. The officers initiated a traffic stop unrelated to enforcement of the traffic law, motivated only by her presence at the house. Haas was thereby subject to an impermissible pretextual seizure in violation of article 1, section 8 of the Iowa Constitution.**

**Preservation of Error:** Error was preserved by the district court's adverse ruling on Haas's motion to dismiss. (8/21/17 Motion to Suppress; Supp. Tr. 38:9-10; 10/12/17 Order Denying Motion to Suppress) (App. pp. 8-18).

**Merits:** Haas contends her vehicle was subject to an impermissible pretextual stop. A seizure is pretextual where the officer makes a constitutional stop (e.g., to enforce the traffic code), with an obvious goal of investigating some crime for which they had no basis to initiate a stop. State v. Harrison, 846 N.W.2d 362, 371 (Iowa 2014) (Appel, J., dissenting). The United States Supreme Court has condoned pretextual stops as long as there is reasonable suspicion, but Haas argues this Court should adopt a different standard under article 1, section

8 of the Iowa Constitution. Because the stop of Haas's vehicle was pretextual, all evidence resulting from the stop must be suppressed under the Iowa Constitution.

**A. Federal precedent.**

The Fourth Amendment to the United States Constitution guarantees the right of all people to be free from unreasonable searches and seizures without a warrant supported by probable cause. U.S. Const. Amend. IV. "This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in the study to dispose of his secret affairs." Terry v. Ohio, 392 U.S. 1, 8-9, 88 S.Ct. 1868, 1873 (1968). A traffic stop is a seizure for the purposes of the Fourth Amendment, and must be reasonable if conducted without a warrant. U.S. Const. Amend. IV; Delaware v. Prouse, 440 U.S. 648 at 653, 99 S.Ct. 1391, 1398 (1979). Unwarranted seizures are subject to objective standards to protect reasonable expectations of privacy "against the discretion of the official in the field." Prouse, 440 U.S. at 655, 99 S.Ct. at 1397.

Traffic stops are only reasonable if the officers are aware of "specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion" that some law is being broken. United States v. Brignoni-Ponce, 422 U.S. 873, 884, 95 S.Ct. 2574, 2582 (1975). A traffic violation may be enough to render a seizure of a vehicle reasonable under the Fourth Amendment. Prouse, 440 U.S. at 655, 99 S.Ct. at 1397.

**1. Federal embrace of pretextual seizures.**

The United States Supreme Court has legitimized pretextual stops under the Fourth Amendment. Whren v. United States, 517 U.S. 806, 116 S.Ct. 1769 (1996). In 1996 the United States Supreme Court took up a case where plainclothes police observed a truck waiting at a stop sign for longer than usual. Whren, 517 U.S. at 808. When officers approached the truck in an effort to warn the driver about traffic infractions, they observed several bags of crack cocaine in the driver's hands. Id. The defendant moved to suppress the evidence prior to his trial on federal drug charges, arguing the

officers lacked both probable cause and reasonable suspicion to believe a drug crime was afoot, and that the officers' stated reason for approaching the truck was pretextual. Id. The court denied the motion and the defendant was convicted. Id.

The Supreme Court upheld the conviction on the grounds that a vehicle stop is a reasonable warrantless seizure under the Fourth Amendment when police have reasonable suspicion or probable cause to believe a traffic violation has occurred. Id. at 808-10, 116 S.Ct. at 1770-73. Under the federal constitution the reasonableness of a seizure does not turn on the intent of an individual officer. Id. at 813, 116 S.Ct. at 1774. In rejecting the defendant's proposed test of good faith, the Court held it cannot take an officers' actual and admitted pretext into account when evaluating the reasonableness of a traffic stop. Id. at 814, 116 S.Ct at 1774-75.

**B. Independent Interpretation of the Iowa Constitution.**

The incorporation doctrine just sets the floor for civil liberties in every state equal to those guaranteed by the federal

constitution. State v. Baldon, 829 N.W.2d 785, 812 (Appel, J., concurring specially) (Iowa 2013). Nothing in the incorporation doctrine precludes state courts from providing more protection under their state constitutions. Id. at 812-13. After incorporation, states became less likely to interpret their state constitutions differently than the federal constitution when the two contained similar or identical language. Id.

Independent interpretation reemerged in Iowa at a time when the federal constitution was being interpreted with the effect of "scal[ing] back on substantive holdings under the Bill of Rights." Id. at 820. In Iowa, this Court has expanded protections in the areas of equal protection, cruel and unusual punishment, due process, and search and seizure. See, e.g., State v. Gaskins, 866 N.W.2d 1, 7-14 (Iowa 2015); State v. Short, 851 N.W.2d 474, 496-506 (Iowa 2014); State v. Pals, 805 N.W.2d 767 (Iowa 2011); State v. Ochoa, 792 N.W.2d 260, 287-91 (Iowa 2010); State v. Cox, 781 N.W.2d 757 (Iowa 2010); State v. Bruegger, 773 N.W.2d 862 (Iowa 2009); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

"[T]here is no principle of law that requires this court to interpret the Iowa Constitution in line with the United States Constitution, as long as our interpretation does not violate any provision of the federal constitution." State v. Cline, 617 N.W.2d 277, 284-85 (Iowa 2000) (overruled on other grounds, by State v. Turner, 630 N.W.2d 601, 606 (Iowa 2001)). A Fourth Amendment opinion of the United States Supreme Court is no more binding upon this Court's interpretation of article 1, section 8 of the Iowa Constitution than is a case decided by another state supreme court under a search and seizure provision of that state's constitution. Ochoa, 792 N.W.2d at 267.

"Even 'in...cases in which no substantive distinction [appears] between state and federal constitutional provisions, we reserve the right to apply the principles differently under the state constitution compared to its federal counterpart.'" Gaskins, 866 N.W.2d at 6 (quoting King v. State, 797 N.W.2d 565, 571 (Iowa 2011)). Accordingly, Whren is only persuasive authority for the purposes of interpreting the Iowa Constitution.

When this court independently interprets the guarantees of article 1, section 8 of the Iowa Constitution, it looks at several factors, like: (1) the scope and meaning of Iowa's search and seizure clause; (2) the rationale of the federal decisions; (3) related decisions from other states; and (4) whether the federal interpretation is consistent with Iowa law. Cline, 617 N.W.2d at 285; Ochoa, 792 N.W.2d at 268-29.

**C. Pretextual stops violate article 1, section 8 of the Iowa Constitution.**

***i. Whren has Suffered Major Criticism of its Reasoning, Policy Choices, and Consequences.***

Following the United States Supreme Court's embrace of pretextual stops, the Whren decision was "promptly and vociferously assailed...as legally incorrect, technically flawed, and fundamentally unfair" by scholars, journalists, and lawyers alike. Phyllis W. Beck & Patricia A. Daly, State Constitutional Analysis of Pretext Stops: Racial Profiling and Public Policy Concerns, 72 Temp. L.Rev. 597, 597 (1999). See, e.g., David O. Markus, Whren v. United States: A Pretext to Subvert the Fourth Amendment, 14 Harv. BlackLetter L.J. 91,

96–109 (1998) (Whren disregarded the Fourth Amendment's "reasonableness" requirement, dismissed the Supreme Court's own condemnation of pretext, overstated the problems with discerning subjective intent, and disempowered the courts from weighing the evidence); Patricia Leary & Stephanie Rae Williams, Toward a State Constitutional Check on Police Discretion to Patrol the Fourth Amendment's Outer Frontier: A Subjective Test for Pretextual Seizures, 69 Temp. L. Rev. 1007, 1025 (1996) (describing Whren as "a rickety piece of judicial scholarship").

The Delaware Superior Court correctly saw the danger of unbridled discretion in the Whren rule. State v. Heath, 929 A.2d 390, 398, 402 (Del. Super. Ct. 2006). The court cited a study showing 93% of all drivers committed some traffic violation on a road between Baltimore and Delaware. Heath, 929 A.2d at 398, 402. The traffic code is a morass of regulations so extensive that almost everyone is in violation of the rules as soon as they get in the car. Id. Using traffic violations as a de facto measuring stick for reasonableness gives

rise to the danger of arbitrary police action. Id.

Pretextual stops also undermine the rationale of Terry. Terry adopted a reasonable suspicion standard to protect citizens from detention based on an "inchoate and unparticularized suspicion or 'hunch.'" Terry, 392 U.S. at 27, 88 S.Ct. at 1883. But with pretextual stops, traffic violations operate as cover for the detention of citizens based on an officer's hunch about conduct unrelated to the stop. Even worse, this cover is per-se reasonable according to Whren. Whren, 517 U.S. at 813, 116 S.Ct. at 1774. The ability of an officer to recite the traffic code, the letter of which most of us violate most of the time (think: going 26 in a 25), is an appallingly low bar when examining the reasonableness of a seizure and search.

Whren also paved the way to legalized racial profiling under the guise of per-se reasonable traffic infractions, which most of us commit a lot of the time. The Whren Court dismissed this problem by holding "the constitutional basis for objecting to intentionally discriminatory application of laws is

the Equal Protection Clause, not the Fourth Amendment." Id. This has been described as a "right without a remedy" because of the difficulty of establishing an equal protection claim. Kevin R. Johnson, How Racial Profiling Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering, 98 Geo. L.J. 1005, 1063-64 (April 2010) [hereinafter Johnson, Racial Profiling]. And exclusion of evidence at trial is not a remedy for an equal protection violation, making such claims useless to a criminal defendant on charges for unrelated offenses discovered during the illegal stop. Johnson, Racial Profiling, 98 Geo. L.J. 1005, 1064; cf. Cline, 617 N.W.2d at 291 (noting "good faith" exception to exclusionary rule leaves defendant without remedy for an unconstitutional search.).

To be clear, racial profiling is no idle concern:

> Among the most well known studies to find evidence of racial profiling include studies of the New Jersey Turnpike in 1996 by Lamberth Consulting and a follow-up study in 2000. The 1996 study found that blacks accounted for 73% of stops in spite of making up less than 14% of road users. The 2000 study showed that although blacks and Hispanics

made up 78% of those searched by officers, contraband was found on whites more than blacks and Hispanics (25%, 13%, and 5%, respectively) (ACLU, 2007).

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A study by the New York State Attorney General in 1999 of the New York City Police Department's "stop and frisk" practices of pedestrians found further evidence suggestive of racial profiling. It found that, although blacks make up just 26% of the population, they accounted for 51% of all the stops during the period of the study. Hispanics, who made up 24% of the population, accounted for 33% of all the stops. Whites, who made up 43% of the population, accounted for only 13% of all stops.

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A study in the state of Massachusetts by the Institute on Race and Justice at Northeastern University also found evidence of possible racial profiling.

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With regard to police searches, the study found that across Massachusetts, white drivers were less likely to be searched than non-white drivers (1.3% versus 1.8%, respectively), and "racial disparity in searches was observed in 208 jurisdictions throughout the state" (Farrell et al., 2004: 26). *** While all drivers may be more likely to be cited for egregious violations of the law, differential behavior patterns do not appear to explain away racial differences in citation and warning rates" (Farrell et al., 2004: 28).

The Illinois Traffic Stop Study, which used a unique methodology, found evidence consistent with racial profiling as well (Weiss and Grumet-Morris, 2006). The authors of the study constructed a ratio based on estimates of the minority driving population

compared with the percentage of stops of minorities by agencies. According to the authors, the overall ratio in the state of Illinois was 1.12, meaning minorities were being disproportionately stopped (Weiss and Grumet-Morris, 2006: 3).

The authors found that whites were more likely than minorities to be stopped for moving violations (73% versus 68%, respectively) and that minorities were more likely than whites to be stopped for non-moving violations (32% versus 27%, respectively). According to the authors:

"This difference manifests itself more clearly when we observe the distribution of stops for license/registration violations, a non-moving violation. This class of offenses is instructive because law enforcement officers can generally exercise significant discretion in deciding whether to initiate these contacts" (Weiss and Grumet-Morris, 2006: 5).

Clear differences were also found for consent searches. Minorities were nearly 3 times more likely than whites to be subject to a consent search. In 2005, blacks were 3.3 times more likely to be subjected to consent searches than whites and Hispanics were 2.7 times more likely (Weiss and Grumet-Morris, 2006: 6). Finally, minorities were more likely than whites to be cited (68% versus 60%, respectively) (Weiss and Grumet-Morris, 2006: 6).

The Rhode Island Traffic Stop Report found further evidence consistent with racial profiling (Farrell and McDevitt, 2006). Among its key findings were that, after being stopped, non-white drivers were more likely than white drivers to be subjected to a discretionary search (5.9% versus 2.9%, respectively). Further, in "22 of the 39 agencies studied, non-whites [were] significantly more likely than whites to be subjected to a discretionary search. Statewide, the odds of a non-white motorists being

> searched [were] roughly twice that of a white driver being searched" (Weiss and Grumet-Morris, 2006: 2). Importantly, in this study, people of color were less likely to be found with contraband than whites.
>
> ***
>
> Perhaps the strongest evidence of racial profiling in policing comes from a 2005 Bureau of Justice (BJS) study. The BJS study showed clear evidence of racial profiling nationally, based on the finding that blacks and Hispanics were more likely to be searched following a stop yet no more likely to be found in possession of contraband. While whites only had their cars searched 3.5% of the time, blacks and Hispanics had their cars searched 10.2% and 11.4% of the time, respectively (Bureau of Justice Statistics, 2005).

Sunghoon Roh & Matthew B. Robinson, A Geographic Approach to Racial Profiling: The Microanalysis and Macroanalysis of Racial Disparity in Traffic Stops, 12:2 Police Quarterly 137, pdf pp.3-7 (June 2009), https://libres.uncg.edu/ir/asu/f/Robinson_Mathew_Roh_2009_A_Geographical_Approach.pdf.

Racial profiling is not a myth; pretextual stops add a layer of protection to the profilers by covering the problem with the veneer of the per-se reasonable enforcement of violations of the traffic code, which most of us commit quite a lot.

### *ii. Other jurisdictions hold pretextual stops unconstitutional.*

Several federal circuits have rejected Whren's "could have" standard for variations of the "would have" standard. Kelly Montgomery, Note, Leaving Well Enough Alone – Why the "Would Have" Standard Works Well for Determining Pretext Stops in Washington State: A Critical Analysis of the Whren Decision, 21 Seattle U. L. Rev. 159, 169 (Summer 1997). These circuits have deviated from the United States Supreme Court's holding in Whren because the "would have" standard (the one used in the federal circuits which have rejected the Whren approach) adds to the Whren test by asking whether the officer conformed to police procedures in conducting the stop. Montgomery, Leaving Well Enough Alone; See e.g., United States v. Cannon, 29 F.3d 472, 475-76 (9th Cir. 1994) (describing the test as "whether a reasonable police officer would have stopped the defendant for the traffic violation, absent his unrelated suspicions").

Three state courts have rejected Whren under their state constitution. State v. Heath, 929 A.2d 390 (Del. Super. Ct. 2006); State v. Ochoa, 206 P.3d 143 (N.M. Ct. App. 2008); State v. Ladson, 979 P.2d 833 (Wash. 1999).

In State v. Heath, the Delaware Superior Court held that purely pretextual traffic stops violate the Delaware Constitution's search and seizure clause. Heath, 929 A.2d 390 (Del. Super. Ct. 2006). The Heath Court reasoned that "unfettered discretion to use a . . . traffic violation to search for evidence to support an officer's hunch about a (non-traffic) offense becomes...the equivalent of granting the police a general warrant to search and seize virtually all travelers on the roads of this State." Id. at 401. The officers in Heath arrived to serve an arrest warrant at a house, saw the defendant approach in a vehicle, and pulled the vehicle over for failing to signal. Id. at 394. The officer admitted the investigation had nothing to do with a failure to signal. Id. The Heath Court used a burden-shifting, totality of the circumstances test to determine the stop in that case was purely pretextual and violated the

state constitution. Id. at 504-06.

The New Mexico Supreme Court invalidated pretextual stops in State v. Ochoa, 206 P.3d 143 (N.M. Ct. App. 2008). Like the court in Heath, the Ochoa Court crafted a burden-shifting, totality of the circumstances test in analyzing whether a stop was pretextual. Id. at 156-57 (N.M. Ct. App. 2008). The Ochoa court considered factors like:

> whether the defendant was arrested for and charged with a crime unrelated to the stop; the officer's compliance or non-compliance with standard police practices; whether the officer was in an unmarked car or was not in uniform; whether patrolling or enforcement of the traffic code were among the officer's typical employment duties; whether the officer had information, which did not rise to the level of reasonable suspicion or probable cause, relating to another offense; the manner of the stop, including how long the officer trailed the defendant before performing the stop, how long after the alleged suspicion arose or violation was committed the stop was made, how many officers were present for the stop; the conduct, demeanor, and statements of the officer during the stop; the relevant characteristics of the defendant; whether the objective reason articulated for the stop was necessary for the protection of traffic safety; and the officer's testimony as to the reason for the stop.

Id. at 156. In finding the stop pretextual, the court noted the drug agent did not issue traffic citations in the course of his

duties. Id. at 157. The officer wanted to investigate the vehicle in relation to activities at the targeted house, not for a traffic violation. Id.

In Washington, the Supreme Court interpreted the broader search and seizure provision of that state's constitution[1] and invalidated pretextual stops altogether. State v. Ladson, 979 P.2d 833, 836 (Wash. 1999). The Ladson Court reasoned that with pretextual stops, "the actual reason for the stop is inherently unreasonable, otherwise the use of pretext would be unnecessary." Id. at 839. The Washington Supreme Court relied on the totality of the circumstances, including the subjective intent of the officer. Id. at 843.

Haas recognizes the trend of state courts answering the pretext question in lockstep with Whren. See Robert F. Williams, The Law of American State Constitutions, 194 (2009). But this case is an appropriate one for Iowa to continue the "slow but perceptible shift away from a lockstep approach"

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[1]"No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Cont. Art 1, Section 7.

toward a more independent interpretation of our state constitution. State v. Ochoa, 792 N.W.2d 260, 267 (Iowa 2010).

***iii. Pretextual Stops are Inconsistent with Iowa Law.***

***a. Moving away from the lockstep approach.***

Prior to Whren, the Iowa Supreme Court disfavored the use of pretextual stops. State v. Cooley, 229 N.W.2d 755, 758 (Iowa 1975); see also State v. Aschenbrenner, 289 N.W.2d 618, 619 (Iowa 1980) (holding "officers are bound by the real reasons for their actions."); State v. Bailey, 452 N.W.2d 181, 182 (Iowa 1990) (same).

The Iowa Supreme Court adopted the lockstep approach to the incorporation doctrine and, with the opinion in Whren, Iowa lost those protections against pretextual stops. After Whren, article 1, section 8 of the Iowa Constitution protected no more and no less than the Fourth Amendment. State v. Heminover, 619 N.W.2d 353 (Iowa 2000). Subsequent cases reinforced the idea that pretext and officer intent was irrelevant to the

reasonableness of a stop. See State v. Hoskins, 711 N.W.2d 720 (Iowa 2006); State v. Griffith, 691 N.W.2d 734 (Iowa 2005); State v. Freeman, 705 N.W.2d 293 (Iowa 2005).

This Court has subsequently moved on from the lockstep approach. State v. Ochoa, 792 N.W.2d 260, 264-68 (Iowa 2010). In interpreting this state's constitution, this Court has reaffirmed its duty to ". . . jealously protect [its] authority to follow [its] own independent approach." Id. at 267; State v. Gaskins, 866 N.W.2d 1, 13 (Iowa 2015); State v. Short, 851 N.W.2d 474, 492 (Iowa 2014).

Since the departure from the lockstep approach, this Court has never directly considered the validity of a pretextual traffic stop. State v. Harrison, 846 N.W.2d 362, 371 (Iowa 2014) (Appel, J., dissenting). This Court should take the present opportunity to examine the contours of a pretextual traffic stop and rule those kinds of stops unconstitutional under article 1, section 8 of the Iowa Constitution.

***b. Pretextual stops in Iowa.***

The Iowa Supreme Court addressed many concerns about

pretextual stops in the case of State v. Coleman, 890 N.W.2d 284 (Iowa 2017). Coleman involved the narrow question of prolonging a stop after an officer no longer had reasonable suspicion. Id. at 288. But this Court reiterated concern about "driving while black" and the potential for abuse and racial profiling. Id. at 287.

Concerns about racial profiling and potential abuse in Iowa are not overblown. Available data reveals that African-Americans are pulled over more often than whites. Kathy A. Bolten, Iowa Studies Show Blacks Stopped More Often Than Whites (Aug. 15, 2015), http://www.desmoinesregister.com/story/news/crime-and-courts/2015/08/16/black-iowa-racial-profiling-studies/31787611/.

In Davenport, blacks were more likely to be stopped by police, arrested, and asked to have their vehicle searched. Id. Nonetheless, officers were more likely to find something illegal in the vehicles of white drivers. Id. In Iowa City, minorities were 14 percent of the traffic stops in 2005-2007, 19 percent of

stops in 2010-2012, but only made up 10 percent of the population. Id.

In a 2015 study tracking the Iowa City Police Department, officers were about twice as likely to arrest a minority driver as a white driver during a stop. Dr. Christopher Barnum, ICPD Traffic Stop Analysis, p. 50 http://www8.iowa-city.org/weblink/0/doc/1524344/Electronic.aspx (last viewed February 12, 2018). The study found officers were about twice as likely to ask for a consent search, even though the rate of finding contraband was about the same for minority and non-minority drivers. Id.

Iowa is not destined to live forever in the shadow of the Whren decision. The United States Supreme Court simply set a floor below which states cannot go. This Court can follow the trend of independent interpretation and rule pretextual stops invalid under article 1, section 8 of the Iowa Constitution. This Court can help shut the door to racial profiling and protect Iowans against arbitrary exercise of police power by reading the Iowa Constitution to protect Iowans against pretextual stops.

### *c. The applicable test.*

Haas asks this Court to adopt the totality of the circumstances test currently used in Delaware and New Mexico, and used in Iowa until 1994. See State v. Heath, 929 A.2d 390, 402-03 (Del. Super. Ct. 2006); State v. Ochoa, 206 P.3d 143, 144-56 (N.M. Ct. App. 2008); State v. Cooley, 229 N.W.2d 755, 761 (Iowa 1975). This approach differs from the per-se rule in Whren, permitting the defendant to rebut the objective justification in light of available facts. Heath, 929 A.2d at 402-03; Ochoa, 206 P.3d at 155-56; see also Cooley, 229 N.W.2d 755 (Iowa 1975) (discussing the specific factual situation being "read against" an objective backdrop to determine reasonableness).

The bright line in Whren may be more convenient, but Iowa courts are more than capable of applying tests based on the totality of the circumstances. See e.g., State v. Pals, 805 N.W.2d 767, 782-84 (Iowa 2010) (discussing totality of circumstances in voluntary consent to search issue); Varnum v. Brien, 764 N.W.2d 862, (Iowa 2009) (equal protection). Mere

convenience of application is not enough when the resulting rule does not protect the privacy and security interests of Iowans and paves the way toward increasing racial profiling and abuses of police power.

Haas proposes this court, instead of the per-se rule of Whren, capable of providing cover for pretextual stops, adopts a rule under article 1, section 8 of the Iowa Constitution which prevents vehicle stops as subterfuge for further detention to investigate activity about which they have a mere hunch.

**D. The stop conducted on Haas was pretextual.**

***i. Pre-Whren analysis in Iowa.***

Prior to Whren, Iowa tended to disfavor pretextual stops. See State v. Cooley, 229 N.W.2d 755, 756 (Iowa 1975) (invalidating stops based on a subterfuge); State v. Aschenbrenner, 289 N.W.2d 618 (Iowa 1980) (holding "officers are bound by the real reasons for their actions"); State v. Bailey, 452 N.W.2d 181 (same).

In State v. Aschenbrenner, the Iowa Supreme Court explicitly rejected Whren's per-se rule: officers "may not rely on

reasons they could have but did not actually have." Aschenbrenner, 289 N.W.2d at 619. Whren abrogated this principle, and the Iowa Supreme Court later followed suit in State v. Heminover, 619 N.W.2d 353 (Iowa 2000). As discussed supra, Heminover and its progeny were decided while Iowa was in lockstep with federal interpretation. Haas urges this Court to part with the lockstep approach and return to independent interpretation consistent with Aschenbrenner and its line of cases.

The case of State v. Cooley, 229 N.W.2d 755 (Iowa 1975) is especially informative because the facts are so similar. On October 8, 1971, at about 9:00 p.m., two Des Moines police officers on special investigative duty spotted a car parked in front of the Salt and Pepper Lounge in Des Moines. Cooley, 229 N.W.2d at 756. Steven Melvin Cooley emerged from the car around 9:30 and went in the bar for a few minutes, then back to the car, and repeated this two or three times. Id. Cooley left the bar and the officers stopped the car to ask the driver (Cooley's wife) for her license. Id. When Cooley

emerged from the passenger side the officers saw the handle of a gun poking out of his waist band. Id.

The Iowa Supreme Court analyzed the stop as both a "car-stop" and an "investigatory stop." Id. at 759 (Iowa 1975). The Court first invalidated the stop as a car-stop because it "was not effected [sic] for the motivative purpose of inspecting the operator's permit." Id. The motivative purpose of the officers was to investigate what they observed while surveilling Cooley. Id. at 758-59. Because the "motivative purpose" was other than what the officer had reasonable suspicion to investigate, the Court refused to endorse the State's plain view theory of admissibility for the gun seen poking out of Cooley's waist band. Id. at 759.

The Court next invalidated the stop as an investigatory stop. Id. at 761. The Court evaluated the totality of the circumstances and concluded the justification for the investigatory stop was inadequate. Id. The State had not shown "*specific and articulable facts which*, with rational inferences, can be *objectively* said to have reasonably warranted

the involved car-stoppage and attendant intrusion upon defendant's constitutionally guaranteed rights." Id. (emphasis added).

> More precisely, (1) no specific crime was being investigated, (2) the police had no incriminating information concerning the car or its occupants, (3) apparently neither officer had even previously seen those occupants (4) 9:30 p.m. is a reasonable hour to be traveling city streets, (5) out-of-county license plates are frequently seen in the Des Moines area, (6) although one of the policemen testified, Hall, the man with whom defendant was seen conversing, had been suspected of illegal narcotic sales and robberies, neither officer could say Hall had ever been convicted of any such offense, (7) both officers conceded the conduct of defendant and other car occupants was susceptible to legitimate explanation.

Id.

Applying the rationale of Cooley, in light of the trend toward independent interpretation, renders the stop on Haas unconstitutional. Just like in Cooley, this case starts with two officers on specialized duty. (Supp. Tr. 5:16-20); Cooley, 229 N.W.2d at 756. Just like in Cooley, the Ames officers observed people going to and from the vehicle. (Supp. Tr. 8:10-16); Cooley, 229 N.W.2d at 756 (Iowa 1975). In Cooley the officers stopped the car because they considered the defendant's

actions suspicious. Cooley, 229 N.W.2d at 756. In this case Officer Spoon testified his attention was drawn to Haas's car because "it was parked in front of 430 Oliver." (Supp. Tr. 6:21-25). Spoon later testified he initiated the stop only after noticing a non-working plate light. (Supp. Tr. 11:4-6). Spoon then had this exchange with defense counsel:

> Q. Okay. So did the coming and going from the house have anything to do with Ms. Haas's stop?
> A. We had – were sitting there watching the house and she'd been parked in front of it, yes.
> Q. Had nothing to do with the fact that she was visiting the house?
> A. The stop had everything to do with her driving while barred.

(Supp. Tr. 17:11-18).

As with the officer in Cooley, Spoon and Hertz's "motivative purpose" was not to defeat the scourge of driving while barred; they were not motivated by a desire to enforce the traffic code. The officers had information about the registered owner of the car but knew nothing about the occupants. (Hertz Incident Report p.5; Minutes of Testimony; Supp. Tr. 9:17-10:2, 10:9-11) (Conf. App. p. 19). Neither Officer Spoon nor Officer Hertz had

ever seen Haas in their life, and neither could identify her companions. (Supp. Tr. 8:17-24).

It is not unusual or suspicious for people to load and unload a car, and the presence of the car outside a house makes no difference. This is especially true where neither officer had any idea what, if anything, was found in the house the day before. (Supp. Tr. 24:20-25:2). The officers observed non-suspicious conduct. (Supp. Tr. 18:23-19:4). They searched the car after they arrested Haas. (Supp. Tr. 13:2-14:2). Officers recited a lap top serial number to dispatch, probably to see if it was stolen, under the guise of an "inventory search." (Supp. Tr. 14:19). All of these circumstances support Haas's contention that the officers were motivated to stop Haas because of her presence at a specific house.

Lacking any reasonable suspicion to support their real motive, the officers followed Haas. With the benefit of an expansive traffic code the officers were inevitably able to find a reason to conduct a stop. This subterfuge allowed the officers

to seize Haas and subsequently cover their pretext by way of the per-se rule of Whren.

If the officers were motivated by implicit racial bias or explicit racial animus, the result under Whren would be no different. An officer might testify he was motivated by economic prejudice or sexism. Officers with a personal grudge may target an individual out of spite. The victim has no remedy in a court of law, where their liberty is at stake, if the stop resulted in evidence and a charge. Such an appalling possibility for abuse surely cannot be consistent with Iowa law and the values Iowans hold most dear.

The possibility of abuse would be reduced with the adoption of a burden-shifting test. The adoption of a burden-shifting test would not burden the courts with litigation – the same suppression hearings will be held, with the orders granted or denied based on more than is currently considered. The negligible increase in resources used by the court along with increased discretion on the part of the court, make the burden-shifting test the right test for Iowa.

### *ii. Modern burden-shifting tests since Whren.*

The Delaware Superior Court considers the totality of the circumstances when interpreting that state's search and seizure protections. State v. Heath, 929 A.2d 390, 403 (Del. Super. Ct. 2006). The Heath Court crafted a burden-shifting scheme for trial judges to use when evaluating whether a traffic stop was unconstitutionally pretextual. Id. at 402-04.

The Heath test begins where the Whren test ends: by asking whether, at the time of the stop, the officer reasonably believed the defendant was committing a traffic offense and whether the law authorized a stop for that offense. Id. at 402. If the State shows reasonable suspicion the burden shifts to the defendant to establish that an unrelated purpose motivated the stop. Id. at 403.

When deciding if the defendant meets this burden the Heath Court considered the traffic violation grounds of the stop; the crime for which the defendant was arrested; whether evidence of the crime of arrest was discovered during the stop; the officers had a hunch about a non-traffic related offense

unsupported by reasonable suspicion; and whether pretext can be inferred. Id.

If the defendant meets this burden the stop is presumably pretextual, but the State can rebut this presumption. Id. The State overcomes this presumption by showing reasonable suspicion for the underlying criminal offense (i.e. the non-traffic offense); that the traffic stop was routine; the stop was made under the perception that it was necessary to protect public safety; and the officer's intent was legitimate. Id. See also State v. Ochoa, 206 P.3d 143, 155-56 (N.M. Ct. App. 2008) (creating similar burden-shifting test.)

The officer admitted he stopped Heath to investigate the defendant's presence in a high-crime area. Heath, 929 A.2d at 405. Because the officer's *motivation* for the stop was completely removed from the *basis* for the stop, the totality of the circumstances warranted a finding of impermissible pretext. Id. at 405-06.

In this case, Officer Spoon's attention was drawn to Haas's vehicle because "it was parked in front of 430 Oliver, a house

[the police had] been watching over the course of several days." (Supp. Tr. 6:24-7:1). The officers sat and watched Haas's vehicle for over an hour. (Supp. Tr. 8:2-6). Officers Spoon and Hertz were not patrol officers; they rarely conducted traffic stops. (Supp. Tr. 15:7-9; 15:18-20).

The officers in this case did not surveil Haas and her companions for over an hour just to stem the scourge of driving while barred. The officers were suspicious of the house at 430 Oliver, and Haas's presence out front is what drew the officers' attention. (Supp. Tr. 6:24-7:1). Officers Spoon and Hertz are not tasked with eliminating the evil of non-working license plate lights.

Examining the totality of the circumstances in this case, including Officer Spoon's own testimony, reveals the pretextual nature of the stop. The officers were motivated by Haas's presence at 430 Oliver. Lacking reasonable suspicion, they sat and surveilled. They stopped Haas not because her license was barred, but as an excuse to investigate her connection with the house. The motive for the stop was completely removed

from the basis for the stop.

This Court should refuse to continually endorse the blank check available to police under Whren. Instead, this Court ought to interpret article 1, section 8 of the Iowa Constitution to afford protection against such practices, especially given the reality of racial profiling and the potential for abuse of police authority.

**Conclusion:** Kayla Haas was minding her own business, not breaking any law, loading her car in front of 430 Oliver Street in Ames on June 9, 2017. Officers Spoon and Hertz were motivated to pull her over because she happened to be in front of that particular house. They knew they lacked even reasonable suspicion, so they sat and watched Haas for over an hour. They wanted to pull her over and they got lucky – the registered owner of the vehicle had a suspended license. Under the guise of rooting out the menace of suspended drivers, officers pulled Haas over with the purpose of searching her car. Such an elaborate subterfuge is repugnant to the Iowa Constitution.

**II. This court has held officers have reasonable suspicion to stop a vehicle if it is owned by a suspended driver and there are no circumstances invalidating the officers' assumption that the owner is also the driver. There were circumstances invalidating the officers' assumption that the owner was also the driver.**

**Preservation of Error:** Defense counsel did not directly raise this issue in the district court. However, the district court cited the relevant case, State v. Vance, 790 N.W.2d 775 (Iowa 2010), when it denied Haas's motion to suppress. (Supp. Tr. 36:10-13).

There is an exception to the requirement of issue preservation in the context of evidentiary rulings. DeVoss v. State, 648 N.W.2d 56, 62 (Iowa 2002). On appellate review, this Court can consider issues raised by the district court in an evidentiary ruling but not directly raised by counsel. See Aller v. Rodgers Mach. Mfg. Co., 268 N.W.2d 830, 840 (Iowa 1978) (holding ruling can be upheld on any ground, even those not urged in the objection).

Alternatively, any failure to preserve error was the result of ineffective assistance of counsel. A claim of ineffective

assistance of counsel can be an exception to the general rule of error preservation. Kane v. State, 436 N.W.2d 624, 626 (Iowa 1989). Review of ineffective-assistance-of-counsel claims is de novo. State v. Clay, 824 N.W.2d 488, 494 (Iowa 2012).

**Standard of Review:** "When a defendant challenges a district court's denial of a motion to suppress based upon the deprivation of a state...constitutional right, [the] standard of review is de novo. State v. Green, 896 N.W.2d 770, 775 (Iowa 2017) (quoting State v. Brown, 890 N.W.2d 315, 321(Iowa 2017)). This Court gives deference to the district court in its factual findings, but is free to find otherwise. Green, 896 N.W.2d at 775 (citing Brown, 890 N.W.2d at 321).

The Sixth and Fourteenth amendments to the United States Constitution, as well as article 1, section 10 of the Iowa Constitution, guarantee criminal defendants not just the right to counsel but the right to effective counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2025, 2063 (1984); State v. Artzer, 609 N.W.2d 526, 531 (Iowa 2000). When evaluating ineffective assistance claims, this Court asks

"whether under the entire record and totality of the circumstances counsel's performance was within the normal range of competence." Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). The presumption is that counsel acted effectively. State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987).

"Trial counsel's performance is measured objectively by determining whether counsel's assistance was reasonable, under prevailing professional norms, considering all the circumstances." State v. Lyman, 776 N.W.2d 865, 878 (Iowa 2010). This Court relies on the Code of Professional Responsibility for Lawyers to measure counsel's performance. State v. Vance, 790 N.W.2d 775, 786 (Iowa 2010) (citing State v. Schoelerman, 315 N.W.2d 67, 71-72 (Iowa 1982)).

**Merits:** The district court erred by denying Haas's motion to suppress under State v. Vance, 790 N.W.2d 755 (Iowa 2010), because this case is distinguishable from Vance. Alternatively, trial counsel was ineffective for failing to raise and distinguish Vance.

Haas contended the traffic stop violated her right to be free of unreasonable search and seizure under article 1, section 8 of the Iowa Constitution and Fourth Amendment. (Motion to Suppress, p.1) (App. p. 8). A constitutional violation occurs when police subject a citizen to a search or seizure which is both warrantless and unreasonable. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968).

"In justifying a particular intrusion, there must be specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Id. at 21, 88 S.Ct. at 1879-80. This standard has spawned a glut of other standards articulating which specific articulable facts, and rational inferences from those facts, reasonably warrant an intrusion. See, e.g., State v. Vance, 790 N.W.2d 775 (Iowa 2010) (holding officers were reasonable in stopping a vehicle when (1)the registered owner was barred, and (2) the officer is aware of no circumstances invalidating the assumption that the owner is the driver); United States v. Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2574 (1975) (holding

seizure of vehicle on suspicion it contains an illegal immigrant is allowed under Terry); Michigan v. Summers, 452 U.S. 692, 101 S.Ct. 2587 (1981) (allowing detention of individuals while house was searched, despite absence of probable cause to detain); Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319 (1983) (holding investigatory detention in a small room amounted to arrest, not Terry-type stop); U.S. v. Hensley, 713 F.2d 220 (6th Cir. 1983) (concluding "the Fourth Amendment does not permit police officers in one department to seize a person simply because a neighboring police department has circulated a flyer reflecting the desire to question that individual."); Com. v. Rodriquez, 614 A.2d 1378, 1384 (Pa. 1992) (refusing to extend Terry to the detention of tenants of an apartment complex at which another apartment was being searched).

This Court has held officers are reasonable in making a stop on a vehicle when the owner has a suspended license, and where the police are aware of no other circumstances invalidating the assumption the owner is the driver. Vance, 790 N.W.2d at 782. The police were aware of circumstances

invalidating the assumption that Haas was the driver. The stop was therefore unconstitutional. The district court ruling must be reversed, and this case should be remanded for further proceedings.

**A. The fact that the registered owner of a vehicle is barred from driving does not necessarily amount to reasonable suspicion to seize the vehicle.**

This Court discussed whether reasonable suspicion exists when an officer runs a license plate through the in-car verification system and the registered owner turns out to have a suspended license in State v. Vance, 790 N.W.2d 775 (Iowa 2010). In Vance, an officer observed a vehicle parked on Bristol Road in Waterloo and ran the license plate number through his in-car computer. Id. at 778. The car came back registered to Athena Smith, whose license was suspended. Id. The officer stopped the car and, upon exiting his patrol car, noticed the only person in the car was a male driver. Id. The defendant filed a motion to suppress all fruits of the traffic stop, arguing the officer lacked reasonable suspicion for the stop. Id. at 797.

In upholding the defendant's conviction, this Court reasoned that the registered owner of a vehicle is most likely to be the driver. Id. at 781. The Court held:

> "[A]n officer has reasonable suspicion to initiate an investigatory stop of a vehicle...when the officer knows the registered owner...has a suspended license, *and the officer is unaware of any evidence or circumstances indicating the registered owner is not the driver...*"

Id. (emphasis added). The stop in Vance was supported by reasonable suspicion because, at the time of the stop, the officer inferred that the registered owner was the driver and was unaware of any circumstances which made this inference unreasonable. Id. at 783.

**B. Officers in this case were aware of circumstances indicating the registered owner was not the driver, making it unreasonable to infer, at the time of the stop, that Haas was the driver.**

Unlike in Vance, the officers who stopped Haas were aware of circumstances making it unreasonable to believe the registered owner was the driver. Vance involved one occupant but in this case the officers observed three people approach and enter the car. (Supp. Tr. 8:10-16); Vance, 790 N.W.2d at 778.

The officers had no idea which of the three was driving. (Supp. Tr. 10:9-11).

In Vance, the officer was watching traffic; in this case police sat and watched Haas's car for over an hour. (Supp. Tr. 7:23, 8:5-6). Even so, they were unable to see who got in the driver's seat. (Supp. Tr. 10:9-11).

Prior to the traffic stop neither officer knew who Haas was. (Supp. Tr. 8:17-19). In Vance the officer was familiar with both the registered owner of the vehicle and with the person driving at the time of the stop. Id.

The Vance Court held when police know the registered owner of a vehicle has a suspended license, this knowledge is usually enough to conduct a traffic stop. Id. at 781. The court in Vance relied on the inference that the owner of the car will do most of the driving. Id. The Vance court noted that this inference may be fallible. Id.

An inference like the one in Vance seems doubtful in this case. The police knew the registered owner had a barred license. (Hertz Incident Report p.5; Minutes of Testimony;

Supp. Tr. 9:17-10:2) (Conf. App. p. 19). They knew two other people were present, and did not know the license status of the two other people. (Supp. Tr. 8:17-24). The officers could not see who the driver was, even though they had been watching the car for over an hour. (Supp. Tr. 10:3-11). These circumstances certainly count as "*any*...circumstances indicating the registered owner is not the driver." Id. (emphasis added). Accordingly, Haas requests this Court reverse the district court's ruling and remand for further proceedings.

**C. Alternatively, trial counsel was ineffective for failing to address Vance in both the motion to suppress and during the hearing on the motion to suppress.**

If this Court finds the Vance error was not preserved, counsel provided ineffective assistance. Counsel failed to distinguish the facts of the present case from those in State v. Vance, 790 N.W.2d 775 (Iowa 2010). Any thoroughly prepared attorney would have been aware of Vance because the case is discussed in State v. Coleman, 890 N.W.2d 284 (Iowa 2010), a central case in the motion to suppress. Compare Coleman,

890 N.W.2d at 297 ("In Vance, we considered...reasonable suspicion...to stop a vehicle when the officers knew that the owner...had a suspended driver's license...") to Motion to Suppress, p. 6-7 (App. pp. 13-14).

Haas was prejudiced by this failure because the district court relied upon Vance in its ruling denying the motion to suppress. Zealous advocacy on the Vance issue would have provided a better view of the law and likely changed the outcome. The omissions in this case therefore cannot be explained by plausible strategic or tactical considerations and may be resolved on direct appeal. State v. Goff, 342 N.W.2d 830, 838 (Iowa 1983).

***i. Ineffective assistance.***

The Sixth and Fourteenth amendments to the United States Constitution, as well as article 1, section 10 of the Iowa Constitution, guarantee criminal defendants not just the right to counsel but the right to effective counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2025, 2063 (1984); State v. Artzer, 609 N.W.2d 526, 531 (Iowa 2000). A defendant

can show ineffective assistance of counsel by demonstrating by a preponderance of the evidence that trial counsel failed to perform an essential duty, and the failure resulted in prejudice to the defendant. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064; State v. Dudley, 766 N.W.2d 606, 620 (Iowa 2009). "Trial counsel's performance is measured objectively by determining whether counsel's assistance was reasonable, under prevailing professional norms, considering all the circumstances." State v. Lyman, 776 N.W.2d 865, 878 (Iowa 2010). This Court relies on the Code of Professional Responsibility for Lawyers to measure counsel's performance. State v. Vance, 790 N.W.2d at 786 (citing State v. Schoelerman, 315 N.W.2d 67, 71-72 (Iowa 1982)).

***ii. Trial counsel had a duty to distinguish Vance.***

Counsel has a duty to provide competent representation to a client. Iowa R. Prof'l Conduct32:1.1. "Competent representation requires the...thoroughness and preparation reasonably necessary for the representation. Id. Being thorough and prepared "includes inquiry into and analysis of

the factual and legal elements of the problem." Iowa R. Prof'l Conduct32:1.1 cmt. 5.

Any attorney acting within professional norms of thoroughness and preparation would have known about Vance in the course of analysis of the factual and legal problem in this case. Defense counsel filed a 9-page motion to suppress in this case. (Motion to Suppress) (App. pp. 8-16). The motion to suppress relied on State v. Coleman, 890 N.W.2d 284 (Iowa 2017), to raise the issues inherent in pretextual stops. (Motion to Suppress, p. 6-8) (App. pp. 13-15). The Coleman Court cited Vance for the proposition that

> law enforcement had reasonable suspicion under the Fourth Amendment to stop a vehicle when the officers knew that the owner of the vehicle had a suspended driver's license *and when the officers had no evidence or circumstances indicating that the registered owner was not the driver of the vehicle.*

Coleman, 890 N.W.2d at 297 (citing Vance, 790 N.W.2d at 783 (emphasis added)).

The Court laid down a firm rule in Vance: officers are reasonable in assuming the owner and driver are the same

person if there are not circumstances invalidating that assumption. Vance, 790 N.W.2d at 783. There were ample circumstances invalidating the assumption that Haas was the driver, *regardless of who was eventually discovered in the driver's seat.*

A normally competent attorney could not have concluded the Vance issue was not worth raising. See State v. Westeen, 591 N.W.2d 203, 210 (Iowa 1999) (quoting State v. Schoelerman, 315 N.W.2d 67, 72 (Iowa 1982). The police saw three people entering and exiting Haas's car. (Supp. Tr. 8:10-16). Officer Spoon testified one person "appeared to be" Haas even though he had no experience with her. (Supp. Tr. 8:10-19). The officers sat and watched the vehicle for over an hour, while it got dark outside. (Supp. Tr. 8:4-6). Even so, they could not tell who got in the driver's seat. (Supp. Tr. 10:6-11). The officers had no experience with Haas and could not recall whether they knew who she was with. (Supp. Tr. 8:17-24).

There are no Iowa cases clarifying what counts as

"evidence or circumstances" invalidating the assumption that the owner of a car is also the driver. A review of the facts of Vance would have lent weight to Haas's argument at the district court that the stop was illegal. Failing to distinguish Vance was a failure to pursue a factual and legal element of Haas's suppression claim. Counsel was therefore required to pursue the Vance issue. See Iowa R. Prof'l Conduct 32:1.1 cmt. 5.

***iii. Haas was prejudiced by trial counsel's failure to distinguish Vance.***

A defendant is prejudiced by counsel's failure to carry out his duty when there is a reasonable probability that the result of the proceeding would have been different without the error. Ledzema v. State, 626 N.W.2d 134, 143 (Iowa 2001) (quoting Strickland v. Washington, 466 U.S. 668, 690, 104 S.Ct. 2052, 2066 (1984). A reasonable probability is one which is "sufficient to undermine confidence in the outcome." Ledzema, 626 N.W.2d at 143 (quoting Strickland, 466 U.S. at 694, 104 S.Ct. at 2068).

The district court had an incorrect view of the ruling in

Vance, and counsel failed to provide a fuller view. Had defense counsel distinguished Vance, the district court would have had a fuller picture of the holding in that case. With a fuller picture, the court would have ruled differently on this point.

The district court relied on Vance in concluding "it is reasonable for an officer to infer that the registered owner of the vehicle will do the vast amount of driving.'" (Supp. Tr. 36:11-13). The Vance Court did address this inference. However, the Vance holding contains a nuance not understood by the district court – officers are reasonable in stopping a vehicle if the driver is suspended *and there are no circumstances invalidating the assumption that the owner is the driver.* Vance, 790 N.W.2d at 783. Leaving out this crucial portion of the holding, as the district court did, gives police carte blanche to pull over vehicles just because they are registered to a suspended driver. This is just not what the Vance Court held. Id.

In this case there were circumstances invalidating the assumption that Haas was the driver. The police saw three

people entering and exiting Haas's car. (Supp. Tr. 8:10-16). Officer Spoon testified one person "appeared to be" Haas even though he had no experience with her. (Supp. Tr. 8:10-19). The officers sat and watched the vehicle for over an hour, while it got dark outside. (Supp. Tr. 7:22-23, 19:8-13). Even so, they could not tell who got in the driver's seat. (Supp. Tr. 19:8-13). The officers had no experience with Haas and had no idea who she was with. (Supp. Tr. 8:17-24). Had the district court applied the correct rule to these circumstances, the outcome would have been different.

**Conclusion:** The district court was incorrect about the holding of Vance. This case is distinguishable from Vance and that case should not control. As a result the district court's conclusion was erroneous. This Court must reverse the district court, suppress all evidence from the illegal seizure, and remand for further proceedings.

**III. The officers in this case cited a malfunctioning license plate light as a ground for the traffic stop. The video record is, at the least, inconsistent with the assertion that Haas's license plate light was not working. Defense counsel failed to challenge whether the plate light was, in fact, malfunctioning. Counsel was ineffective for this failure.**

**Preservation of Error:** A claim of ineffective assistance of counsel can be an exception to the general rule of error preservation. Kane v. State, 436 N.W.2d 624, 626 (Iowa 1989). Review of an appellate issue is not precluded when the failure to preserve error results from a due process denial of effective representation. State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1973). The Court can resolve the claim of ineffective assistance of counsel on direct appeal if it finds the record sufficient to do so. State v. Hildebrant, 405 N.W.2d 839, 840-41 (Iowa 1987).

**Standard of Review:** When the defendant alleges denial of a constitutional right, appellate review is de novo based on the totality of the circumstances. State v. Oetken, 613 N.W.2d 679, 683 (Iowa 2000); Ledezma v. State, 626 N.W.2d 134, 141 (Iowa 2001). This Court gives deference to the district court in its factual findings, but is free to find otherwise. State v.

Green, 896 N.W.2d 770, 775 (Iowa 2017) (quoting State v. Brown, 890 N.W.2d 315, 321 (Iowa 2017).

**Merits:** The Sixth and Fourteenth amendments to the United States Constitution, as well as article 1, section 10 of the Iowa Constitution, guarantee criminal defendants not just the right to counsel but the right to effective counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2025, 2063 (1984); State v. Artzer, 609 N.W.2d 526, 531 (Iowa 2000). When evaluating ineffective assistance claims, this Court asks "whether under the entire record and totality of the circumstances counsel's performance was within the normal range of competence." Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). The presumption is that counsel acted effectively. State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987).

To establish her claim of ineffective assistance, Haas must demonstrate (1) trial counsel failed to perform an essential duty, and (2) this failure resulted in prejudice. Strickland, 466 U.S. at 687-88, 104 S.Ct. at 2064-65; State v. Gaskins, 866 N.W.2d 1, 5 (Iowa 2015). Haas must meet her burden by a

preponderance of the evidence. State v. Halverson, 857 N.W.2d 632, 635 (Iowa 2015).

Trial counsel failed to challenge the evidence supporting the conclusion that the license plate light was in fact not working. Haas was prejudiced by this failure because the district court cited the equipment violation in its ruling. Zealous advocacy challenging this evidence likely would have changed the outcome in Haas's favor. The omissions in this case therefore cannot be explained by plausible strategic or tactical considerations and may be resolved on direct appeal. Id.

**A. Defense counsel had a duty to challenge whether the light was in fact malfunctioning.**

Counsel had a duty to provide competent representation to his client. Iowa R. Prof'l Conduct32:1.1. "Competent representation requires the...thoroughness and preparation reasonably necessary for the representation." Id. Being thorough and prepared "includes inquiry into and analysis of the factual and legal elements of the problem." Iowa R. Prof'l

Conduct32:1.1 cmt. 5.

Because a challenge to the evidence supporting probable cause for a stop is a meritorious challenge, counsel had a duty to challenge those facts. "Because counsel has no duty to raise a meritless issue, we [must] turn to the question of whether [the defendant's] challenge...has merit." State v. Lopez, No. 16-1213, 2018 WL 672085 (Iowa Feb. 2, 2018) (quoting State v. Harris, 891 N.W.2d 182, 186 (Iowa 2017)).

The testimony by Officer Spoon, that the plate light was malfunctioning, is inconsistent with the video of the stop. Officer Spoon testified that once he caught up to Haas, he "noticed that the – that the taillight was out – or sorry – the plate lamp was out." (Supp. Tr. 11:1-3). This Court may hesitate to parse the testimony of Officer Spoon, especially if that testimony amounts to a slip of the tongue. Officer Spoon made the same slip at the scene of the stop; he told Haas her taillight was out, not her plate light. (Supp. Tr. 16:4-7; Exhibit 1, 21:46:19.). But the reason for the stop changed in the incident report. The report says nothing about a taillight, instead the

report states the officers "noted the license plate lights were not working." (Hertz Incident Report, p. 5) (Conf. App. p. 19). Maybe it was not important to Officer Spoon whether it was a plate light or a tail light, because he was motivated by reasons other than enforcing the traffic code. (Supp. Tr. 16:4-7).

The video on record contradicts Officer Spoon's testimony. The video shows an illuminated license plate light. (Exhibit 1, 21:44:25 – 21:45:05). There is nothing in the video record which indicates Haas's plate light was malfunctioning in any way, shape, or form. (Exhibit 1, Complete). In fact, the video shows an illuminated license plate the entire time the officers followed Haas down the road. (Exhibit 1, 21:44:25 – 21:45:05).

The Iowa plate light statute requires a license plate to be illuminated as to "render it clearly legible from a distance of fifty feet to the rear." Iowa Code § 321.388 (2017). Haas's license plate, so far as the video record shows, was clearly legible from a distance of fifty feet. (Exhibit 1, 21:44:25 – 21:45:05).

State v. Lyon, 862 N.W.2d 391 (Iowa 2010), is distinguishable from the present case. In Lyon, the issue was

whether police had probable cause to stop a vehicle for an inoperable license plate light when the police observed the malfunction at a distance greater than 50 feet. Id. at 398. The Lyon Court ruled that "when the issue is whether the license plate light is illuminated *at all*, that lack of illumination can be detected from a distance greater than fifty feet." Id. The video shows the officers within fifty feet of Haas's vehicle at all times. (Exhibit 1, Complete).

Trial counsel never addressed the video evidence at the suppression hearing, as it related to whether the plate light was, in fact, inoperable. See (Supp. Tr. 14:9-15:4 (referencing inventory search and events recorded on video of search); Supp. Tr. 15:24-16:7 (noting officers told Haas, at the scene of the stop, that her taillight was out and not her plate light); Supp. Tr. 19:20-20:6 (referencing video and asking whether officers said Haas's vehicle was trying to "give them the slip" prior to the stop)). Trial counsel did note the officers' headlights were illuminating the license plate. (Supp. Tr. 20:21-25). However, counsel failed to ask the next obvious question – if her

license plate light was illuminated, and clearly legible from the officer's car, how could the police tell the plate light was inoperable? Counsel failed to argue this point. (Supp. Tr. 29:21-33:6).

Counsel failed to make a basic factual argument – based on the video evidence, it was impossible for the officers to tell whether the plate light was malfunctioning. Sure, counsel skirted around the edges of the argument by asking Officer Spoon whether the license plate was legible. But counsel had a meritorious argument to make after beating around the bush – the video evidence shows it was impossible to use the license plate light as grounds for the stop.

The validity of this stop is a meritorious issue. This Court should find trial counsel had a duty to address the issue directly. Officer Spoon's testimony is the only part of the record suggesting the plate light was out. And that testimony was at least confused. The video record flatly contradicts Officer Spoon's claim. In fact, the video record suggests Haas did not violate the plate light statute. Counsel failed to address

this argument. That failure cannot be explained away by improvident trial strategy.

**B. Haas was prejudiced by the failure to challenge the plate light as grounds for the stop.**

Prejudice results from counsel's failure to carry out a duty when there is a reasonable probability that the result of the proceeding would have been different without the error. Ledzema v. State, 626 N.W.2d 134, 143 (Iowa 2001) (quoting Strickland v. Washington, 466 U.S. 668, 690, 104 S.Ct. 2052, 2066 (1984)). A reasonable probability is one which is "sufficient to undermine confidence in the outcome." Ledzema, 626 N.W.2d at 143 (quoting Strickland, 466 U.S. at 694, 104 S.Ct. at 2068).

If a seizure is in dispute, the facts are just as important as the law. E.g. Weeks v. U.S., 232 U.S. 383, 34 S.Ct. 341 (1914); Wolf v. Colorado, 338 U.S. 25, 69 S.Ct. 1359 (1949); Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684; State v. Harrison, 846 N.W.2d 362 (Iowa 2014); State v. Vance, 790 N.W.2d 775 (Iowa 2010).

The failure to challenge the plate light malfunction undermines confidence in the outcome of the suppression hearing. The district court cited the plate light as a reason validating the stop. (Supp. Tr. 36:5-7). Had defense counsel addressed this issue head-on, the district court's attention would have likely been drawn to the fact that the video evidence does not support Officer Spoon's contention that the plate light was malfunctioning. The video record flatly contradicts the testimony of Officer Spoon. Counsel failed to address this contradiction. Failure to raise flatly contradictory evidence undermines confidence in the outcome. Because counsel's failure to directly address the plate light issue undermines confidence in the outcome, there is a high probability that the outcome would have been different but for counsel's failure. Ledzema v. State, 626 N.W.2d 134, 143 (Iowa 2001); Strickland v. Washington, 466 U.S. 668, 690, 104 S.Ct. 2052, 2066 (1984).

**Conclusion:** The video of the stop is the most reliable part of the record on the issue of whether Haas' plate light was out. This video is contradictory to Officer Spoon's testimony.

The video, because it is not plagued by the problems of human memory and perception, is more substantial than the testimony of even Officer Spoon. Counsel failed to argue this contradictory evidence. Had counsel argued the point, the district court would have ruled differently on this issue. Counsel therefore provided ineffective assistance. The ruling of the district court ruling must be vacated. The stop should be invalidated, and all fruits of the stop must be suppressed.

**IV. The district court failed to consider Haas's reasonable ability to pay court costs and attorney fees. Consideration of the reasonable ability to pay is a constitutional prerequisite for imposing court costs and attorney fees. The district court deprived Haas of procedural due process and failed to exercise its discretion when it failed to consider Haas's reasonable ability to pay.**

**Preservation of Error:** An improper award of criminal restitution is an illegal sentence. See State v. Janz, 358 N.W.2d 547, 548-49 (Iowa 1984) (Noting that the practice in Iowa for many years had been to allow either the district court or the appellate court to correct an illegal sentence).

A challenge to an illegal sentence includes a claim that that the sentence itself is unconstitutional. State v. Bruegger, 773

N.W.2d 862, 871 (Iowa 2009). An illegal sentence may be corrected at any time. Iowa R. Crim. P. 2.24(5)(a).

**Standard of Review:** Appeals of restitution orders, which are part of a criminal sentence, are reviewed for an abuse of discretion. State v. Van Hoff, 415 N.W.2d 647, 648 (Iowa 1987). Constitutional issues are reviewed de novo. State v. Dudley, 766 N.W.2d 606, 626 (Iowa 2009).

**Merits:** Haas submitted a financial affidavit in this case, showing she was indigent. (6/12/17 Application for Counsel) (Conf. App. p. 4). The district court entered a disposition order on November 17, 2017. (11/17/17 Order of Disposition) (App. pp. 21-23). The court ordered Haas to pay a fine, surcharge, "and the costs of this action to include repayment of court appointed attorney fees, if any." (11/17/17 Order of Disposition) (App. pp. 21-23). The record reflects no consideration of Haas's reasonable ability to pay.

In criminal cases where a defendant is found guilty, the district court imposes fines and surcharges without regard to ability to pay. Iowa Code § 910.2(1) (2017). But the district

court must impose court costs and court-appointed attorney fees "to the extent that the offender is reasonably able to pay." Id.

"A court's assessment of a defendant's reasonable ability to pay is a constitutional prerequisite for a criminal restitution order." State v. Coleman, No. 16-0900, 2018 WL 672132, (Iowa Feb. 2, 2018); Goodrich v. State, 608 N.W.2d 774, 776 (Iowa 2000); State v. Blank, 570 N.W.2d 924, 927 (Iowa 1997); State v. Van Hoff, 415 N.W.2d 647, 648 (Iowa 1987); State v. Haines, 360 N.W.2d 791, 797 (Iowa 1985); State v. Harrison, 351 N.W.2d 526, 527 (Iowa 1984); State v. Kurtz, 878 N.W.2d 469, 472 (Iowa App. 2016). Procedural due process requires predeprivation consideration, in the district court, of a defendant's reasonable ability to pay. State v. Christensen, No. 09-1457, 2010 WL 5276884, (Iowa Dec. 17, 2010); State v. Jenkins, 788 N.W.2d 640, 646-47 (Iowa 2010).

The district court failed to meet the requirement of procedural due process when it imposed court costs and attorney fees. The record shows Haas is indigent. (6/12/17

Application for Counsel) (Conf. App. p. 4). The district court did not consider her financial situation. The court ordered Haas to pay attorney fees without even knowing the amount of those fees. It is impossible to determine reasonable ability to pay an unknown amount of money. Even if the exact amount is unknown, the district court could have considered Haas's reasonable ability to pay up to a certain amount. The district court failed to perform the constitutional prerequisite of considering the reasonable ability to pay and thereby fell short of the requirements of procedural due process.

If the trial court has discretion, it must exercise that discretion. State v. Dvorsky, 322 N.W.2d 62, 67 (Iowa 1982); See also Harrison, 351 N.W.2d at 529-30 (ordering trial court to exercise the requisite discretion in determining reasonable ability to pay). When a defendant challenges a restitution order, the defendant prevails only if they show (1) failure to exercise discretion or (2) abuse of discretion. Kurtz, 878 N.W.2d at 473; State v. Wagner, 484 N.W.2d 212, 216 (Iowa 1992); Van Hoff, 415 N.W.2d at 648; State v. Kaelin, 362 N.W.2d

526, 528 (Iowa 1985); State v. Storrs, 351 N.W.2d 520, 522 (Iowa 1984). "The court is required to exercise discretion only as to the defendant's reasonable ability to pay court costs and attorney fees." Wagner, 484 N.W.2d at 216 (citing Kaelin, 362 N.W.2d at 528).

The district court failed to exercise its discretion in assessing court costs and attorney fees. The court did not inquire into Haas's financial situation. The record shows Haas is indigent. The district court failed to consider her ability to pay before entry of the order. The court also assessed court costs and attorney fees without any idea of what those costs would be, making it impossible for the court to consider the question of reasonable ability to pay. Even without an exact amount the court could have considered her ability to pay up to a certain amount. Because of these failures this case should be remanded for consideration of Haas's reasonable ability to pay.

**Conclusion:** The district court failed to consider Haas's reasonable ability to pay before imposing court costs and

attorney fees. This Court must remand for consideration of Haas's reasonable ability to pay court costs and attorney fees.

## CONCLUSION

Haas requests this Court reverse the district court's denial of the motion to suppress and remand for a new trial where the fruits of the illegal seizure are not admissible. Alternatively, Haas requests this Court remand for a determination of her reasonable ability to pay court costs and attorney fees.

## REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument.

**ATTORNEY'S COST CERTIFICATE**

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $7.25, and that amount has been paid in full by the Office of the Appellate Defender.

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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) because:

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