IN THE SUPREME COURT OF IOWA
Supreme Court No. 17-1798

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KAYLA JEAN HAAS,
Defendant-Appellant.

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

APPELLEE'S BRIEF

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Authorities

Carroll v. United States, 267 U.S. 132 (1925)
Illinois v. Wardlow, 528 U.S. 119 (2000)
New Jersey v. T.L.O., 469 U.S. 325 (1985)
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Diana Roberto Donahoe, *"Could Have," "Would Have:" What the Supreme Court Should Have Decided in* Whren v. United States, 34 Am. Crim. L. Rev. 1193, 1202 (1997)
Peter G. Galie, *The Other Supreme Courts: Judicial Activism Among State Supreme Courts*, 33 Syracuse L. Rev. 731 (1982)
Lewis R. Katz, "*Lonesome Road": Driving Without the Fourth Amendment*, 36 Seattle U. L. Rev. 1413, 1471 (2013)
Margaret M. Lawton, *State Responses to The Whren Decision*, 66 Case W. Res. 1039, 1044 (Summer 2016)
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https://en.wikipedia.org/wiki/Scofflaw (last accessed June 2, 2018)
" 'Enough is enough': Tens of thousands march to protest police violence" https://www.cbsnews.com/news/eric-garner-ferguson-missouri- protesters-converge-on-washington/ (last accessed June 2, 2018)

II. Reasonable suspicion, if not probable cause, supports detaining a motorist's vehicle where she is barred and seen loading it with two other people before leaving.

Authorities

Commonwealth v. Deramo, 762 N.E.2d 815 (Mass. 2002)
Commonwealth v. Garden, 883 N.E.2d 905 (Mass. 2008)
Feld v. Borkowski, 790 N.W.2d 72 (Iowa 2010)
Lamasters v. State, 821 N.W.2d 856 (Iowa 2012)
Terry v. Ohio, 392 U.S. 1 (1968)
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State v. Mills, 458 N.W.2d 395 (Iowa Ct. App. 1990)
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State v. Vance, 790 N.W.2d 775 (Iowa 2010)
U.S. Const. Amend. IV
Iowa Const. Art. I, § 8
Iowa R. App. P. 6.903(3)

III. The record does not contradict testimony that Haas' license plate light was not functioning. License plates must have reflective coating. This may explain what the officers' video shows and why counsel acted as he did. Haas has not shown ineffective assistance of counsel.

Authorities

Paulson v. Newton Corr. Facility, Warden, 703 F.3d 416 (8th Cir. 2013)
Scott v. Harris, 550 U.S. 372 (2007)
Shelton v. Mapes, U.S. D.Ct. No. 4:12-cv-00076-JAJ (filed Sept. 9, 30, 2014) *aff'd on appeal* 821 F.3d 921 (8th Cir. 2016)
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IV. Haas was properly ordered to repay the costs of her appointed attorney. Given Haas' case has progressed to appeal and her costs are uncertain, her challenge to them is not ripe.

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State v. Callison, 2011 WL 2694838 (Iowa Ct. App. 2011)
State v. Coleman, 890 N.W.2d 284, 301 (Iowa 2017)
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State v. Dudley, 766 N.W.2d 606 (Iowa 2009)
State v. Fry, S.Ct. No. 17-0561, 2018 WL 1433129 (Iowa Ct. App. Mar. 21, 2018)
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ROUTING STATEMENT

The Court should transfer this matter to the Court of Appeals. Iowa R. App. P. 6.1101(3). The State notes that the Iowa Supreme Court has retained *State v. Brown*, S.Ct. No. 17-0367 which raises the question of whether *Whren v. United States*, 517 U.S. 806 (1996) is consistent with Iowa Constitution Article I, section 8.

STATEMENT OF THE CASE

Nature of the Case

Kayla Haas was convicted of driving while barred, an aggravated misdemeanor. Iowa Code §§ 321.560, .561 (2015). She contends the district court erred to deny her motion to suppress.

The Honorable Steven P. Van Marel presided over the suppression hearing and the Honorable James Malloy presided over the trial on the minutes.

Course of Proceedings

The State accepts the defendant's statement of the procedural history of the case. Iowa R. App. P. 6.903(3).

Facts

Kayla Hass, who was barred from driving, was seen loading her 1999 Ford Explorer in front of a house at 430 Oliver Street in Ames, Iowa on June 9, 2018. Supp. Tr. p. 5, l. 21-p. 7, l. 1. The house is in

"quiet" residential district. *Id.* p. 25, ll. 8-19. Neighbors had complained suspecting drug dealing was going on there. *Id.* p. 7, ll. 2-15, p. 25, ll. 16-19, p. 26, ll. 22-24. The day before, June 8th, police executed a search warrant on the home for stolen property and drugs. *Id.* p. 7, ll. 8-15. Accordingly, Officers Steven Spoon and Clint Hertz were asked to "keep an eye" on the house. *Id.* p. 25, ll. 16-19.

An hour before dark, Officers Spoon and Hertz drove past Haas' Explorer, turned around, and parked at the end of the block. *Id.* p. 7, l. 17-p. 8, l. 6. They learned that Haas was the registered owner of the vehicle and was barred from driving. *Id.* p. 8, ll. 7-16, p. 9, l. 17-p. 10, l. 2. And, they saw a woman who appeared to be Kayla Haas and two men loading the vehicle. *Id.* p. 8, ll. 7-16, p. 28, ll. 1-6.

Once it was dark, the Explorer drove away. *Id.* p. 10, l. 3-p. 11, l. 9. Officer Spoon could not tell who was driving or how many people were in the vehicle. *Id.* p. 10, l. 3-p. 11, l. 9, p. 27, ll. 10-12. But, he noticed that the license plate lamp was "out." *Id.* p. 10, l. 3-p. 11, l. 9; *see* St. Ex. 1 (video) 24:44:42-24:46:21.

The officers stopped the Explorer and found Haas was driving. *Id.* p. 11, l. 4-14. Two men, Kelly Smith and David Lewis, were passengers. *Id.* p. 12, ll. 13-22, Mins. Test. Secure Att.

Officer Spoon told her she had been stopped for driving while barred. Supp. Tr. p. 11, ll. 15-24; *see* St. Ex. 1 (video) 24:46:22-21:48-40.

Haas replied, "No, I got my license. It's all taken care of" and produced an Iowa identification card. Supp. Tr. p. 11, ll. 15-24; *see* St. Ex. 1 (video) 24:46:22-21:48:40.

Officer Spoon explained that if that were the case, she would have received a "real driver's license." Supp. Tr. p. 11, ll. 15-24. With that, Officer Spoon arrested Haas for driving while barred. *Id.* p. 12, ll. 8-12; *see* St. Ex. 1 (video) 21:48:40.

Haas' companions did not have licenses. Supp. Tr. p. 12, ll. 13-22. Officer Spoon elected[1] to impound the vehicle. *Id.* p. 12, l. 23-p. 13, l. 24. Pursuant to policy, the vehicle was searched to catalogue valuable items. *Id.* p. 13, ll. 11-21. Nothing was seized. *Id.* p. 13, ll. 19-21.

Officer Spoon denied that the vehicle detention was "just a pretext" to search the car. *Id.* p. 13, l. 25-p. 14, l. 2. He acknowledged that he does not usually undertake traffic stops. *Id.* p. 15, ll. 18-25. He further acknowledged that he misspoke during the traffic stop when he said that Haas' taillight was "out." *Id.* p. 16, ll. 4-5; *see* St.

[1] As it happens, Officer Spoon did not have discretion to do otherwise. Supp. Tr. p. 21, ll. 4-24.

Ex. 1 (video) 24:46:22-24:46:28. And, he acknowledged that he had detained three people near the house in the preceding days. Supp. Tr. p. 16, l. 14-p. 18, l. 3.

Police had encountered some of them before. One person, April Jimenez, had been stumbling down the sidewalk. *Id.* p. 17, l. 25-p. 18, l. 3. Another time, Kelly Smith (Haas' passenger) dragged Jimenz out of the woods by a dog chain around her neck. *Id.* p. 26, ll. 12-21. Police had arrested others before for methamphetamine or paraphernalia possession. *Id.*

Officer Spoon acknowledged that he hoped to stop Kayla Haas. *Id.* p. 21, ll. 4-9. But, he did "[b]ecause we knew Ms. Haas was barred." *Id.* "The stop had everything to do with her driving while barred." *Id.* p. 17, ll. 15-18.

The district court overruled Haas' motion to suppress. *Id.* p. 35, l. 8-p. 38, l. 10. It ruled the officers had probable cause to stop Haas for the equipment violation. *Id.* p. 36, ll. 13-17. The officers "for sure [had] reasonable suspicion if not probable cause[] to stop the vehicle to see who the driver was." *Id.* p. 36, ll. 13-17, p. 37, ll. 9-13. The officers may have had "a duty to stop somebody they believed was committing the offense of driving while barred. *Id.* p. 37, ll. 9-13.

"While they did have this information about … criminal activity in the house…and maybe even [hoped] they would get the car driving away, I don't think it was a pretextual stop." *Id.* p. 37, ll. 14-18. Even if it was, the officers' subjective intent was irrelevant. *Id.*

ARGUMENT

I. Kayla Haas was driving while barred and her vehicle lacked a functioning license plate light. The Iowa Constitution requires an objectively reasonable basis to conduct a traffic stop. The district court properly overruled her motion to suppress.

Preservation of Error

The State does not contest error preservation. Iowa R. App. P. 6.903(3).

Standard of Review

The Court on appeal reviews the record *de novo* when an appellant alleges a constitutional error occurred. *State v. Tague*, 676 N.W.2d 197, 201 (Iowa 2004). It makes an "independent evaluation of the totality of circumstances as shown by the entire record." *Id.* (quoting *State v. Turner*, 630 N.W.2d 601, 606 (Iowa 2001)). The court grants "considerable deference to the trial court's findings regarding the credibility of witnesses, but [is] not bound by them." *Id.*

Merits

Introduction

Kayla Haas was detained on suspicion—if not probable cause—of driving while barred and of a license plate light violation. *See* Iowa Code §§ 321.388, 321.560, 321.561. She believes that these bases were pretextual, that her detention offended Iowa Constitution Article I, section 8. She believes Iowa should return to the principles of *State v. Cooley*, 229 N.W.2d 755 (Iowa 1975) that bind officers to the true reasons for their actions. She offers three state court decisions that do not follow *Whren v. United States*, 517 U.S. 806 (1996), the leading case permitting pretextual detentions under the Fourth Amendment. And, she suggests the Court adopt a burden-shifting mechanism to analyze her claims.

A number of flaws mar Haas' arguments. First, properly understood, *Cooley*'s rule would not assist Haas. Second, the objective test has stout footings in Iowa. Third, the rule Haas seeks has found scant purchase anywhere, and for good reason. Fourth, Haas undervalues Iowa's distinctive protections for motorists. Finally, a preponderance of the evidence shows Haas was no victim of a pretextual stop.

A. Before *Whren*, Iowa permitted traffic stops where officers had at least one valid motivation.

The Fourth Amendment and Iowa Constitution Article I, section 8 prohibit unreasonable searches and seizures. U.S. Const. Amend. IV, XIV; Iowa Const. Art. I, § 8. Both provisions allow an officer to temporarily detain a motorist if "reasonable suspicion" or "probable cause" exists to believe a crime or traffic violation has occurred. *State v. Pals*, 805 N.W.2d 767, 774 (Iowa 2011) (citing *Whren*, 517 U.S. at 809-10 and *Terry v. Ohio*, 392 U.S. 1, 20-27 (1968)).

"Reasonable suspicion" means "specific and articulable cause to reasonably believe criminal activity is afoot." *State v. Kreps*, 650 N.W.2d 636, 641 (Iowa 2002). An "inchoate and unparticularized suspicion or 'hunch'" will not do. *Id*. (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123-24 (2000) (quoting *Terry*, 392 U.S. at 27)). Reasonable suspicion is less demanding than probable cause. Probable cause exists when "peace officer observes a violation of our traffic laws, however minor…." *Tague*, 676 N.W.2d at 201. "Probable cause" does not require proof beyond a reasonable doubt. *State v. Tyler*, 830 N.W.2d 288, 293 (Iowa 2013).

Before 1996, uncertainty existed whether reasonable suspicion or probable cause turned on an officer's subjective motivations. In

1980, the Iowa Supreme Court stated, "Officers are bound by their true reason for making the stop. They may not rely on reasons they could have had but did not actually have." *State v. Aschenbrenner*, 289 N.W.2d 618, 619 (Iowa 1980). Reasonable suspicion, *Aschenbrenner* continued, "does not depend on what cause [officers] articulated; it depends on what the basis of the stop actually was." 289 N.W.2d at 621.

Aschenbrenner drew these propositions from *State v. Cooley*, 229 N.W.2d 757-59 (Iowa 1975) and *People v. Bower*, 597 P.2d 115, 120 (Cal. 1979). *Cooley*, in short, looked at an officer's "motivative purpose" lest a "mere subterfuge" permit "indiscriminate and intolerable stopping of vehicles on our highways upon nothing more than intuition, surmise, and conjecture." 229 N.W.2d at 758, 759, 761. A host of decisions followed, binding the state to the "true reason" officers had for stopping a vehicle. *See, e.g.*, *State v. Wiese*, 525 N.W.2d 412, 415 (Iowa 1994); *State v. Rosensteil*, 473 N.W.2d 59, 61 (Iowa 1991); *State v. Lamp*, 322 N.W.2d 48, 51 (Iowa 1982).

By 1990, the Iowa Supreme Court recognized that most federal courts and commentators employed an objective analysis of facts to assess an apparently "pretextual" stop. *State v. Garcia*, 461 N.W.2d

460, 463 (Iowa 1990). Even adhering to *Aschenbrenner*'s subjective test, the Court recognized that an officer "may have multiple reasons for making a stop." *Id.* at 264. Although bound by their "true reasons," officers "may cite multiple reasons for stopping or arresting a suspect." *State v. Harris*, 490 N.W.2d 561, 563 (Iowa 1992). So long as one is "proper, albeit…secondary," the stop or arrest remains valid. *Garcia*, 461 N.W.2d at 264.

In 1996, a unanimous Supreme Court concluded in *Whren* that "the constitutional reasonableness of traffic stops does *not* depend on the actual motivation of the individual officers involved." *State v. Predka*, 555 N.W.2d 202, 205 (Iowa 1996) (citing *Whren*, 517 U.S. at 813). If there is probable cause to believe a traffic violation occurred, it does not matter if the ground for approach was pretextual. *Whren*, 517 U.S. at 813. The Constitution, the *Whren* court noted, prohibits selective enforcement of the law based on considerations such as race. *Id.* But the basis for objection "is the Equal Protection Clause, not the Fourth Amendment." *Id.*

B. Iowa has held fast to an objective test for traffic detentions, even in an era of more vigorous state constitutionalism.

Following *Whren*, numerous Iowa cases recognized that the subjective motivations of an officer were not relevant to reasonable suspicion or probable cause. *See, e.g.*, *Kreps*, 650 N.W.2d at 641 ("The motivation of the officer is not controlling"); *State v. Heminover*, 619 N.W.2d 353, 360 (Iowa 2000) ("'the constitutional reasonableness of traffic stops' does not 'depend[] on the actual motivations of the officers involved'") (abrogated on other grounds by *State v. Turner*, 630 N.W.2d 601, 606 (Iowa 2001)); *State v. Cline*, 617 N.W.2d 277, 281 (Iowa 2000) (same) (abrogated on other grounds by *Turner*, 630 N.W.2d at 606 n.2; *Predka*, 555 N.W.2d at 205 (same). The rule in Iowa is that reasonable suspicion or probable cause is measured from the perspective of an objectively reasonable police officer. *Tyler*, 830 N.W.2d at 292-93 (Iowa 2013); *State v. Vance*, 790 N.W.2d 775, 781 (Iowa 2010); *Tague*, 676 N.W.2d at 201, 204.

Haas seeks a different result under Article I, section 8. She states the Iowa Supreme Court has expanded protections under the Iowa Constitution in the areas of equal protection, due process, cruel

and unusual punishment, and search and seizure. Appellant's Pr. Br. p. 30, *et seq.* (citing *State v. Gaskins*, 866 N.W.2d 1, 7-14 (Iowa 2015); *State v. Short*, 851 N.W.2d 474, 496-506 (Iowa 2014); *Pals*, 805 N.W.2d at 782; *State v. Ochoa*, 792 N.W.2d 260, 287-91 (Iowa 2010); *State v. Cox*, 781 N.W.2d 757, 768 (Iowa 2010); *State v. Bruegger*, 773 N.W.2d 862, 886 n.9 (Iowa 2009); *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009). This proposition is true, as far as it goes.

A better statement would be that the Court has expanded some protections to a point, preserving or rejecting some exceptions to the warrant requirement. *Compare Gaskins*, 866 N.W.2d at 16 (rejecting search incident to arrest exception of *New York v. Belton*, 453 U.W.2d 454 (1981) to open a closed container in a vehicle) *with State v. Storm*, 898 N.W.2d 140, 146 (Iowa 2017) (preserving automobile exception as discussed in *Carroll v. United States*, 267 U.S. 132 (1925) to warrant requirement under Article I, section 8); *see also State v. Brooks*, 888 N.W.2d 406, 412-17 (Iowa 2017) (summarizing probationer/parolee house search cases *State v. Baldon*, 829 N.W.2d 785 (Iowa 2013); *State v. Kern*, 831 N.W.2d 149 (Iowa 2013); *State v. Short*, 851 N.W.2d 474 (Iowa 2014); and *State v. King*, 867 N.W.2d 106 (Iowa 2015) and finding the "special needs doctrine" of *New*

Jersey v. T.L.O., 469 U.S. 325 (1985) did not offend Article I, section 8 under the circumstances).

Even as the Court has explored the limits of Article I, section 8, it has adhered to the principle that the test for reasonable suspicion or probable cause is "objective," untethered to the subjective motivations of the officer. *Harrison*, 846 N.W.2d at 365-66; *Tyler*, 830 N.W.2d at 292-93; *Tague*, 676 N.W.2d at 201, 204; *Cline*, 617 N.W.2d at 281.

Justice Appel, dissenting in *State v. Harrison*, wrote that the Court has "never directly considered the validity of a traffic stop where the basis of the stop was alleged to be pretextual." 846 N.W.2d 362, 371 (Iowa 2014) (Appel, J. dissenting); *see also State v. Lyon*, 862 N.W.2d 391, 397 (Iowa 2015) (citing dissent in *Harrison*, 846 N.W.2d at 369-70). And, he continued, Harrison had not raised—and the majority did not decide— "whether *Whren* is good law under the Iowa Constitution when a traffic stop is based on pretext." *Harrison*, 846 N.W.2d at 371 (Appel, J., dissenting).

C. The overwhelming majority of courts adhere to an objective test for reasonable suspicion.

It is fair to say that many commentators howled after *Whren*. *See*, *e.g.*, Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of* Whren v. United States, 83 Geo. Wash. L. Rev. 882, 884 (2015) ("*Whren v. United States* is notorious for its effective legitimization of racial profiling…"); Lewis R. Katz, *"Lonesome Road": Driving Without the Fourth Amendment*, 36 Seattle U. L. Rev. 1413, 1471 (2013) (arguing the United States Supreme Court is "committed to not restraining arbitrary police discretion on our streets and highways"). Nevertheless, the overwhelming majority of jurisdictions follow it.

"In nearly every state that has considered the issue, *Whren* has been followed or cited with approval." *People v. Robinson*, 767 N.E.2d 638, 649-50 (N.Y. 2001) (collecting cases); *see State v. Norman*, No. CR07293066, 2008 WL 1066917, *6 (Sup. Ct. Conn. Mar. 20, 2008) (collecting cases and stating "the vast majority of other jurisdictions that have considered the issue of whether state constitutional protections related to pretextual stops are greater than those provided under the U.S. Constitution have rejected the

argument and embraced *Whren*"); *Fertig v. State*, 146 P.3d 492, 500 (Wyo. 2006) (stating "[i]n nearly every state that has considered the issue, *Whren* has been followed or cited with approval" and collecting cases); Margaret M. Lawton, *State Responses to The* Whren *Decision*, 66 Case W. Res. 1039, 1044 (Summer 2016) (noting majority of states follow *Whren* under state constitutions "even if the state has used a different test prior to the Supreme Court's decision").

Courts in four jurisdictions have adopted the "reasonable officer" test. Lawton, *State Responses*, 66 Case W. Res. L. Rev. at 1040. Also known as the "would have" test, this test focuses not on whether the officer "could have" validly stopped the motorist. *Id.* Rather, the test asks "whether a reasonable officer, given the same circumstances, would have made the stop absent the invalid purpose." *Id.* (citing Diana Roberto Donahoe, *"Could Have," "Would Have:" What the Supreme Court Should Have Decided in* Whren v. United States, 34 Am. Crim. L. Rev. 1193, 1202 (1997)). But one jurisdiction has retreated from a wholesale break with *Whren*, another interprets its rule in a narrow fashion, another employs its rule indistinguishably from *Whren*, and the last does not follow the outlier decision of one of the district courts.

Taking them in reverse order, in *State v. Heath* a district court judge developed a burden-shifting mechanism by which courts can ferret out a pretextual stop. 929 A.2d 390, 402-03 (Del. Sup. Ct. 2006). This test places an initial burden on the state to show probable cause or reasonable suspicion, a five-part rebuttal by the defendant employing a non-exclusive list of six factors to show pretextualism, and the state may rebut that inference of pretext with a non-exhaustive four-factor analysis. *Id.* at 403. Lower Delaware courts have repeatedly declined to follow *Heath* and the state Supreme Court has questioned it. *Turner v. State*, 25 A.3d 774, 777 (Del. 2011); *State v. Bordley*, 2017 WL 2972174, *3 (Del. Sup. Ct. 2017).

A panel of the New Mexico Court of Appeals found pretextual detentions violate the state constitution. *State v. Ochoa*, 206 P.3d 143, 155 (Iowa 2008); *see State v. Gonzales*, 257 P.3d 894, 899 (N.M. 2011) (Bosson, J, concurring and "at least for now, *Ochoa* is the law of the land within our state borders"). The *Ochoa* court concluded an officer's subjective motivation was relevant. If a defendant could show pretext, the burden returned to the state to show the officer "would have" stopped the defendant irrespective of an improper

motive. *Id.* In practice, New Mexico courts rarely find pretext in the absence of admission to it or other circumstances. Lawton, *State Responses*, 66 Case W. Res. L. Rev. at 1051 (collecting cases).

New Mexico recognizes a higher expectation of privacy in automobiles and has unique state concerns with border checkpoints. *State v. Cardena-Alvarez*, 25 P.3d 225, 231 (N.M. 2001). Iowa, on the other hand, recognizes a reduced expectation of privacy in vehicles, given that they function as transport, seldom serve as a residence, and travel in public view. *State v. Storm*, 898 N.W.2d 140, 146-47 (Iowa 2017).

In *State v. Ladson*, 979 P.2d 833 (Wash. 1999), the Washington Supreme Court rejected *Whren*. Over a spirited dissent, a bare majority held the state constitution required consideration of the objective circumstances as well as the officer's subjective motivations. *Id.* at 843. Washington's search and seizure provision differs from Iowa's. *Compare* Wash. Const. Art. I, § 7 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law.") *with* Iowa Const. Art. I, § 8 ("The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated; and

no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized."); see Peter G. Galie, *The Other Supreme Courts: Judicial Activism Among State Supreme Courts*, 33 Syracuse L. Rev. 731, 763 (1982) (noting the Washington framers explicitly rejected a proposal identical to the Fourth Amendment in favor of Article I, section 7).

Even so, Washington has "walked back" its holding in *Ladson*. It now permits "mixed motive" detentions, upholding a stop if the officer also had a valid reason notwithstanding a primary invalid one. *State v. Arreola*, 290 P.3d 983, 991 (Wash. 2012).

Notwithstanding the concerns of commentators, the pure objective standard for evaluating reasonable suspicion or probable cause enjoys near universal acceptance. The weight of numbers is compelling. But it also reflects the value of the rule. *See, e.g.*, *State v. McClendon*, 517 S.E.2d 128, 132 (N.C. 1999) (adopting the "compelling" reasoning of *Whren* under state constitution).

For the "run-of-the-mine" cases, there is no realistic alternative to the rule that probable cause or reasonable suspicion both justify a detention and limit officers' discretion. *See Whren*, 517 U.S. at 819;

Robinson, 767 N.E.2d at 646-47 ("probable cause stops are not based on the discretion of police officers. They are based on violations of law."). Engrafting subjective considerations to a totality of circumstances analysis is nothing more than an effort to prevent police from doing what they could do for different reasons. *See Whren*, 517 U.S. at 814. The inherent inconsistency of this thinking led this court to permit "mixed motive" detentions, just as Washington does now. *Compare Arreola*, 290 P.3d at 991 *with Garcia*, 461 N.W.2d at 464.

Entertaining "pretext" as a basis for suppressing evidence hazards confusion and social cost. Haas disagrees. She surmises that a multi-part, multi-factor reasonable suspicion analysis to ascertain pretext is a painless endeavor because courts will always hear suppression motions. This misses the mark. If the constitution requires one doctrine or another, the courts must bear it irrespective of the cost. *See, e.g.*, *State v. Roby*, 897 N.W.2d 127, 148 (Iowa 2017) ("We recognize the difficulties of individualized [sentencing] hearings" for juvenile offenders required by the Iowa Constitution). Typically, burden is a question for prophylactic rules. *State v. Peterson*, 663 N.W.2d 417, 425 (Iowa 2003).

But, so long as the question is the rule's efficacy, the better questions train on the rule's application in the field. After all, the constitution governs behavior. So, if an *officer* has reasonable suspicion or probable cause that a motorist is breaking the law, what principle may she use to decide whether she can detain the driver? Is it the gravity of the offense; scheduled, misdemeanor, or felony? Is it the frequency that "law-abiding" citizens violate the particular law? Is there a concept of breaking the law a lot or a little, the latter tending to preclude a detention? Is it whether the officer is ignorant or unaware of other possible crimes the defendant may have committed? Is it whether the officer has purged himself of implicit racial bias or assured himself race is not an issue?

Any difficulty in answering these questions springs from a lack of cogency in the "would have" or "reasonable officer" doctrine. Summoning other principles to save it, such as "privacy" is no balm. The right to be left alone has value, but is driving while barred a core privacy interest? *See State v. Farabee*, 22 P.3d 175, 181 (Mont. 2000) ("Operating a vehicle without two operable headlights in violation of state law is certainly not one of the core individual interests protected by the right to privacy.").

There is also the matter of consistency. Subjective motivations play little role in ordinary probable cause analysis. *See Duffries v. State*, 133 P.3d 887, 889 (Okla. Crim. Ct. App. 2006) (quoting *Whren*, 517 U.S. at 813 and declining under state constitution to include officer's subjective motivations in analysis). Arguably, any given officer's subjective beliefs may supply evidence of an objective standard. *See State v. Kurth*, 813 N.W.2d 270, 278 (Iowa 2012) (in community caretaking context, affirming that *Whren* and purely objective standard applies). Otherwise, consideration of subjective beliefs is an anathema to probable cause analysis.

In short, good reasons support adhering to a purely objective assessment of reasonable suspicion and probable cause. The court should decline to engraft Haas' multi-factored burden-shifting test on Article I, section 8. *See Cline*, 617 N.W.2d at 285-93 (discussing factors supporting departure from established precedent on state law grounds including text of constitutional provisions, judicial decisions within and without the state, history, and academic commentary); *State v. Bjerke*, 697 A.2d 1069, 1073 (R.I. 1997) (refusing to accept subjective analysis under state constitution stating "The decision to depart from minimum standards and to increase the level of

protection should be made guardedly and should be supported by a principled rationale."); *see also Gaskins*, 866 N.W.2d at 21-36 (Appel, J., concurring and discussing categories of authority).

Notwithstanding public controversy over traffic detentions, a subjective analysis invites as many problems as it solves, is inconsistent with the general body of search and seizure law, and swims against the tide nationally.

D. Haas' burden-shifting test is unnecessary given Iowa's distinctive protections for motorists.

Still, it is natural to ask whether there are other mechanisms to address injustices attending pretextual detentions. Courts do worry over *Whren*'s effect. *See*, *e.g.*, *Gama v. State*, 920 P.2d 1010, 1012-13 n.3 (Nev. 1996) (following the objective, "could have" test reasonable suspicion under Nevada constitution but stating "We fear that the practice may result in substantial inconvenience and annoyance for many otherwise law-abiding Nevadans"). The State will not defend selective law enforcement, particularly when motivated by racial bias, zealotry, or incompetence. Fortunately, Iowa has a number of protections to ameliorate the concerns Haas expresses.

Whren identified the Equal Protection Clause as a source for redress. 517 U.S. at 813. Iowa's Due Process and Equal Protection Clauses are self-executing and permit actions for damages. *Godfrey v. State*, 898 N.W.2d 844, 871-72 (Iowa 2017).

"A number of jurisdictions have entered into consent decrees that provide a framework to control the exercise of police authority…." *Pals*, 805 N.W.2d at 772. There is also the prospect of legislation. *See* Senate File 2280 … Senate Study Bill 1177 (an Act relative to law enforcement profiling). And, there is social activism. " 'Enough is enough': Tens of thousands march to protest police violence" https://www.cbsnews.com/news/eric-garner-ferguson-missouri-protesters-converge-on-washington/ (last accessed June 2, 2018).

Iowa also has specific measures in place that limit officers' conduct with the public. Officers cannot stop a vehicle on an anonymous tip alone. *State v. Kooima*, 833 N.W.2d 202, 211-12 (Iowa 2013). They may not exceed a narrow scope of community caretaking to detain a motorist. *Kurth*, 813 N.W.2d at 278. Officers cannot justify a stop if they were mistaken on the law that applied. *Coleman*, 890 N.W.2d at 298 n.2 (recognizing that the officer's

mistake of law violated the Iowa Constitution, which differed from the more lenient federal constitution standard); *State v. Louwrens*, 792 N.W.2d 649, 654 (Iowa 2010). An officer cannot stop a car if subjectively, but unreasonably mistaken about a fact. *Tyler*, 830 N.W.2d at 292; *State v. Lloyd*, 701 N.W.2d 678, 680-81 (Iowa 2005).

As one sister state has recognized, the concerns with the unreasonableness of pretextual stop is not in the initial legally justified stop but "in the ensuing police investigatory conduct that may be excessive and unrelated to the traffic law violation." *Mitchell v. State*, 745 N.E.2d 775, 787 (Ind. 2001). Once a car is stopped, officers cannot extend the detention after the reason for it is resolved. *See State v. Coleman*, 890 N.W.2d 284, 301 (Iowa 2017) (prohibiting any action that prolongs a traffic stop once "the reason for the traffic stop is resolved and there is no other basis for reasonable suspicion"). Officers have limited ability to search incident to arrest. *Gaskins*, 866 N.W.2d at 17 (determining the search of a safe in the car was not a valid search incident to arrest). Consent to a search of a vehicle during a traffic stop is analyzed more stringently in Iowa. *See Pals*, 805 N.W.2d at 782 (determining under an Iowa version of the federal totality-of-the-circumstances test that consent was not voluntary).

Iowa has robust safeguards in place to prevent unjustified vehicle detentions.

E. A preponderance of evidence supports the district court's ruling that reasonable suspicion or probable case supported this traffic stop.

Given the law, Haas' arguments begin to collapse on themselves. To enrich her claim that the detention was pretextual, she contends she was "minding her own business, not breaking any law" when police "got lucky" that "the registered owner of the vehicle had a suspended license." Appellant's Pr. Br. p. 58. She describes the officers as acting "[u]nder the guise of rooting out the menace of suspended drivers" with the purpose of searching her car. *Id.*; *see also* p. 57 ("Officers Spoon and Hertz are not tasked with eliminating the evil of non-working license plate lights"). The rhetoric is inexact.

Haas was neither suspected of nor convicted of driving with a suspended license, which is a simple misdemeanor. Iowa Code § 321.218. She was suspected of driving while barred as a habitual offender, investigated for that offense, and convicted of it. *Id.* §§ 321.555, .560, .561. It is an aggravated misdemeanor, punishable by two years in prison. *Id.* § 321.561. Where one stands on this crime's blameworthiness may depend on where one sits.

In Haas' case, she was barred because she had three convictions for driving while suspended, three convictions for operating while intoxicated, one conviction for driving while barred, and one conviction for failure to keep her vehicle under control. Mins. Test. Secure Att. 2; Conf. App. 5-12. She has been sanctioned twelve times for everything from non-payment of fines to failing to file SR22 insurance to violating probation to operating while intoxicated. *Id.* By definition, she is a scofflaw. https://en.wikipedia.org/wiki/Scofflaw (last accessed June 2, 2018).

Little wonder the district court found officers did not act on pretext, but rather had reasonable suspicion if not probable cause to detain Haas. Supp. Tr. p. 36, l. 13-p. 38, l. 10.

"It is well-settled that a traffic violation, however minor, gives an officer probable cause to stop a motorist." *State v. Aderholt*, 545 N.W.2d 559, 563 (Iowa 1996). The State need only prove reasonable suspicion or probable cause by a preponderance of the evidence. *Tague*, 676 N.W.2d at 201, 204. Neither must be shown beyond a reasonable doubt. *Vance* holds that officers may detain the driver of a vehicle registered to an owner who is barred. 790 N.W.2d at 781.

Lyon recognizes that officers may stop a vehicle when it appears there is no illumination on the rear license plate. 862 N.W.2d at 397; *see* Iowa Code § 321.388 (requiring rear license plate to be illuminated to distance of 50 feet).

Ample factual basis supports this detention. Haas, who is white, was not the victim of racial profiling. Officers reasonably suspected she was the driver and was barred. The light on her license plate did not function. The record shows she was stopped, arrested, and convicted for driving while barred. No evidence from the truck was used against her. The district court properly declined to suppress.

II. Reasonable suspicion, if not probable cause, supports detaining a motorist's vehicle where she is barred and seen loading it with two other people before leaving.

Preservation of Error

The State does not contest error preservation. Iowa R. App. P. 6.903(3); *Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012); Supp. Tr. p. 36, ll. 10-25. As such, it is unnecessary to address Haas' claims of ineffective assistance of counsel.

Standard of Review

The Court reviews a constitutional search and seizure challenge *de novo*, independently evaluating the totality of circumstances, but affording deference to the district court on matters of witness credibility. *Vance*, 790 N.W.2d at 780.

Merits

Haas believes officers lacked reasonable suspicion to detain her for driving while barred. She believes the district court erred when it concluded that *State v. Vance* supported the investigatory detention. She makes a direct challenge based on the Fourth Amendment and Article I, section 8, without distinguishing between them.

The state and federal constitutions protect against unreasonable, warrantless traffic detentions absent probable cause or reasonable suspicion. U.S. Const. Amend. IV, XIV; Iowa Const. Art. I, § 8; *Pals*, 805 N.W.2d at 774 (citing *Whren*, 517 U.S. at 809-10 and *Terry*, 392 U.S. at 20-27). Both provisions are at play, although Haas does not argue one requires a different analysis or result than the other. *See Gaskins*, 866 N.W.2d at 6-7 (concerning preservation of constitutional claims and Court's authority to interpret provisions differently); *Short*, 851 N.W.2d at 480 (citing *Feld v. Borkowski*, 790

N.W.2d 72, 78 n.4 (Iowa 2010) and stating "in the absence of the most cogent circumstances, we do not create issues or unnecessarily overturn existing law sua sponte when the parties have not advocated for such a change").

Vance holds:

> an officer has reasonable suspicion to initiate an investigatory stop of a vehicle to investigate whether the driver has a valid driver's license when the officer knows the registered owner of the vehicle has a suspended license, and the officer is unaware of any evidence or circumstances indicating the registered owner is not the driver of the vehicle.

790 N.W.2d at 781. It is reasonable to infer that the registered owner of the vehicle will do the "vast amount of the driving." *Id.* Although that inference may be fallible, it is adequate for reasonable suspicion. *Id.* at 781-82. The inference may dissipate if the officer comes upon information that the "vehicle's driver appears to be much older, much younger, or of a different gender than the vehicles registered owner." *Id.* at 782 (quoting *State v. Newer*, 742 N.W.2d 923, 926 (Wis. 2007)); *accord State v. Mills*, 458 N.W.2d 395, 397 (Iowa Ct. App. 1990) (stating it "was reasonable to infer the vehicle was being driven by its owner given the absence of evidence to the contrary.").

Haas argues, in short, that officers "were aware of circumstances indicating the registered owner was not the driver," negating reasonable suspicion. Appellant's Pr. Br. pp. 65-67. These circumstances, in her view, are that officers did not see her drive, knew there were two other people, and did not know her. *Id.*

Taking these arguments in reverse order, the record shows that the officers identified Haas, even if they did not personally know her. Supp. Tr. p. 8, ll. 7-19. They watched a woman come out of the house that "appeared to be" Haas. *Id.* Officer Hertz obtained her driver's license record from the in-car computer. *Id.* p. 8, ll. 7-19, p. 9, l. 17-p. 10-p. 10, l. 2.

It is true the officers did not see who was driving the vehicle. But nothing about *Vance* or the cases on which it relies suggest that officers must verify the identity of the driver. Indeed, it says the opposite. *Vance*, 790 N.W.2d at 782.

Finally, the fact that there were two other people with Haas since some time before the vehicle moved does not invalidate the assumption that Haas may be the driver. One could argue the presence of other people with the owner at some point during the day reduces the likelihood that any one is the driver, but that runs counter

to the permissible inference that the owner typically drives it. *Id.* at 781. It runs counter to the principle that inferences may be fallible yet valid. *Id.* And finally, it runs counter the analysis that trains on what is observable about the driver, such as sex or identity. *Id.* at 782-83.

It matters little that *possibly* one of the men was driving Haas' vehicle. *See, e.g.*, *id.* at 782 (citing *Commonwealth v. Deramo*, 762 N.E.2d 815, 819 (Mass. 2002) ("While it is certainly possible that someone other than a vehicle's owner may be operating the vehicle on any given occasion, the likelihood that the operator is the owner is strong enough to satisfy the reasonable suspicion standard.")). Take, for instance, *Commonwealth v. Garden*, 883 N.E.2d 905 (Mass. 2008). There, three men and a woman got in a Honda owned by a woman with a suspended license. *Garden*, 883 N.E.2d at 908. As it turned out, the driver was a man. *Id.* The Massachusetts Supreme Court upheld an investigatory detention because at the time of the stop, officers "did not know … that the driver of the car was a man…." *Id.* at 909.

Here, the officers had no affirmative information that would rule out Haas as the driver. It was dark. They did not see who was driving. They did not see how many people were in the Explorer. It was possible one of the two men seen earlier was driving. It was possible a hitherto unnoticed fourth person was driving. And it was possible Haas was driving. Consistent with the prevailing inference that owners tend to be the drivers of their cars, officers correctly surmised it was Haas.

Vance controls and the district court did not err.

III. The record does not contradict testimony that Haas' license plate light was not functioning. License plates must have reflective coating. This may explain what the officers' video shows and why counsel acted as he did. Haas has not shown ineffective assistance of counsel.

Preservation of Error and Standard of Review

The State does not contest Haas' statement of error preservation or the nature of review. Iowa R. App. P. 6.903(3).

Merits

Haas believes counsel breached a duty to challenge testimony that her license plate light was not functioning. To the contrary, the record supports the officer's testimony. Haas has not proven ineffective assistance of counsel.

The Constitutions of the United States and Iowa guarantee a criminal defendant the right to effective assistance of counsel. U.S. Const. Amends. IV, XIV; Iowa Const. Art. I, § 10.[2] To establish ineffective assistance of counsel, a defendant must show that: (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom. *Ledezma v. State*, 626 N.W.2d 134, 141-42, 145 (Iowa 2001);[3] *Wemark v. State*, 602 N.W.2d 810, 814 (Iowa 1999) (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).

Counsel is presumed competent. A defendant is not entitled to perfect representation but rather only that which is within the range of normal competency. *Strickland*, 466 U.S. at 689; *Karasek v.*

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[2] Haas does not argue or cite authority for a different result or analysis under the Iowa Constitution. As such, the Court should employ existing principles. Iowa R. App. P. 6.903(2)(g)(3) (stating failure to cite authority in support of an issue may be deemed a waiver of that issue); *State v. Piper*, 663 N.W.2d 894, 913-14 (Iowa 2003) (overruled on other grounds by *State v. Hanes*, 790 N.W.2d 545, 550 (Iowa 2010) and declining to undertake party's research and advocacy).

[3] Iowa courts have stated both these elements require proof by a "preponderance of the evidence." *See, e.g., State v. Halverson*, 857 N.W.2d 632, 635 (Iowa 2015); *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001). Federal courts, however, have indicated that this incorrect, at least with respect to proof of prejudice. *Paulson v. Newton Corr. Facility, Warden*, 703 F.3d 416, 420-21 (8th Cir. 2013); *Shelton v. Mapes*, U.S. D.Ct. No. 4:12-cv-00076-JAJ (filed Sept. 9, 30, 2014) *aff'd on appeal* 821 F.3d 921 (8th Cir. 2016). Rather, the standard is whether there is a reasonable likelihood of a different result sufficient to undermine confidence in the verdict.

State, 310 N.W.2d 190, 192 (Iowa 1981). Counsel has no duty to raise a meritless objection. *State v. Westeen*, 591 N.W.2d 203, 208 (Iowa 1999); *see also State v. Hoskins*, 586 N.W. 2d 707, 709 (Iowa 1998) ("Trial counsel is not incompetent in failing to pursue a meritless issue.").

Haas believes State's Exhibit 1, the dash-cam video, "shows an illuminated license plate the entire time...." Appellant's Pr. Br. p. 79. Not necessarily so.

The Code requires a white, electric light to illuminate a rear license plate to a distance of fifty feet. Iowa Code § 321.388. The absence of such a light provides reasonable suspicion for an investigatory detention. *Lyon*, 862 N.W.2d at 398.

The Code also requires license plates to have a reflective coating. Iowa Code § 321.35. It was after dark when officers began following Haas' vehicle. Supp. Tr. p. 10, ll. 6-8; St. Ex. 1 *passim*. The lights from the patrol car illuminate Haas' license plate, so much so that reflected light bleaches it out entirely. St. Ex. 1 *passim*. At one point, though, the Explorer turns, it appears the license plate reflects only ambient light, confirming the light was out. *Id*. 24:44:42, *et seq*.

The video does not "clearly contradict" the testimony. *State v. Griffieon*, S.Ct. No. 12-2169, 2013 WL 3872840, *3 (Iowa Ct. App. July 24, 2013). The State introduced it, which does not imply it undermines the testimony. *See State v. Akers*, S.Ct. No. 17-0577, 2018 WL 1182616, *3 (Iowa Ct. App. Mar. 7, 2018) (finding own scrutiny of video differed from officer's testimony and noting it was the defense that offered the video). The video shows the license plate reflecting back the police car's own lights and brightly so. The one time the Explorer angles away from those lights, the license plate appears dark. As such, the video does not undermine the testimony. *See State v. Spencer*, S.Ct. No. 17-0360, 2018 WL 2230722, *3 (Iowa Ct. App. May 16, 2018) ("Upon our *de novo* review, we find there is nothing in the video evidence which undermines the officers' testimony about their observations" of a non-functioning plate light).

In some instances, a video may "speak for itself." *Scott v. Harris*, 550 U.S. 372, 378 n.5 (2007). But here it does not offer "clear contradiction" of Officer Spoon's testimony. Counsel may have surmised it was only worth inquiring whether the officer could read the plate with the benefit of his own headlights. Supp. Tr. p. 20, l. 21-p. 21, l. 3. This might suggest to counsel that the officers did not

really confirm the Explorer owner was barred. Given the record, counsel did not necessarily shoulder a burden to argue that the plate was unilluminated as well.

Neither did this choice cause Haas *Strickland* prejudice. The district court found reasonable suspicion, if not probable cause to detain Haas for driving while barred. As such, the secondary basis for the detention caused Haas no additional harm.

IV. Haas was properly ordered to repay the costs of her appointed attorney. Given Haas' case has progressed to appeal and her costs are unknown, her challenge to them is not ripe.

Preservation of Error

Haas may assert her sentence is illegal for the first time on appeal. *State v. McCright*, 569 N.W.2d 605, 608 (Iowa 1997).

Standard of Review

To the extent the claim is proper, it may be reviewed for correction of errors at law. *State v. Jenkins*, 788 N.W.2d 640, 642 (Iowa 2010); *State v. Davis*, 544 N.W.2d 453, 455 (Iowa 1996).

Merits

Haas contends the district court erred to require her to repay the costs of her appointed attorney without considering her reasonable ability to pay. The contention is either mistaken or premature.

A person may be ordered to compensate the State for the costs of court-appointed representation. Iowa Code §§ 815.9(3), 910.2(2). Before imposing a specific amount as part of restitution, "the district court must determine the defendant's reasonable ability to pay it." *State v. Coleman*, 907 N.W.2d 124, 149 (Iowa 2018); *State v. Dudley*, 766 N.W.2d 606, 615 (Iowa 2009).

Haas, it is true, qualified for appointed counsel. Fin. Aff. Appl. Appt'd Counsel (filed June 12, 2017); Order (filed June 13, 2017); Conf. App. 4; App. 4. Subsequently, an indigent defense notice was filed on October 20, 2017. Ind. Def. Claim (filed Oct. 20, 2017).[4] On November 1, 2017, the District Court entered judgment and imposed a fine, surcharge, and costs "to include repayment of court appointed attorney fees, *if any*." Verdict (filed Nov. 1, 2017); App. 21. "The

[4] The content of this and other claims do not appear to have been filed through EDMS, suggesting they were not filed and therefore not part of the record. Iowa R. App. 6.301.

Court finds," it added, "the Defendant has the ability to re-pay court-appointed attorney fees and the same are ordered." *Id.*; App. 22.

Three subsequent indigent defense claim forms were submitted after notice of appeal. Ind. Def. Claim Form (filed Dec. 20, 2017), Ind. Def. Claim Form (filed Dec. 27, 2017), Ind. Def. Claim Form (filed Jan. 26, 2018). On January 29, 2018, the district court entered an order requiring Haas to pay a $38.50 claim for attorney fees processed by the State Public Defender, finding she "has the ability to pay…." Order for Legal Assistance Fees (filed Jan. 29, 2017); App. 26. Later that day, the Court filed an order purporting to rescind a legal fees assessment of $136.50 because the "matter is at the Supreme Court, on appeal, and the fees ordered should not have been assessed at this time." Order (filed Jan. 29, 2018); App. 28.

It appears the district court contemplated assessing attorney fees up to and including the bench trial. It had the benefit of one indigent defense claim. Indigent Defense Claim Form (filed Oct. 20, 2017). And, it determined Haas had the reasonable ability to pay. Verdict (filed Nov. 1, 2017); App. 22. But then, Haas appealed, meaning those fees would change. On January 29, 2018, rescinded a $136.50 assessment. Order (filed Jan. 29, 2018); App. 28. Although

Iowa Courts Online "Financials" list a host of costs, fines, and surcharges, they have not been made part of the appellate record, such as by a court order or an official plan of restitution.

Haas argues the district court failed to consider her reasonable ability to pay. The record shows it did. Verdict (filed Nov. 1, 2017); App. 22.

If Haas contended the court abused its discretion in that determination, that ruling might be reviewable. *State v. Fry*, S.Ct. No. 17-0561, 2018 WL 1433129, *2 (Iowa Ct. App. Mar. 21, 2018). But, there must be both a determination of reasonable ability to pay and a fixed amount to pay. Because there is no record of the latter, this matter is not ripe. As it stands, the file contains notice of several claims, but it is not clear what the State Public Defender has approved or what the court has ordered, if anything. Furthermore, the district court appears to have rescinded all legal assistance fees. Order (filed Jan. 29, 2018); App. 28.

Until there is a plan of restitution listing specific amounts to pay, a court is not required to give consideration to a defendant's ability to pay. *State v. Jackson*, 601 N.W.2d 354, 357 (Iowa 1999); *State v. Pearl*, S.Ct. No. 13-0796, 2014 WL 1714490, *5 (Iowa Ct. App.

Apr. 30, 2014). Also, while it is a somewhat different question, "[w]hen a plan is entered, the defendant can seek modification, if he is dissatisfied with the amount." *Pearl*, S.Ct. No. 13-0796, 2014 WL 1714490, *5 (citing *Jackson*, 601 N.W.2d at 357). Unless that remedy is exhausted, there is no basis for reviewing the issue. *Jackson*, 601 N.W.2d at 357; *see also State v. Swartz*, 601 N.W.2d 348, 354 (Iowa 1999); *accord State v. Callison*, 2011 WL 2694838, at *4 (Iowa Ct. App. 2011) (affirming when sentencing order did not specify a cap on fees) ("lump sum" did not delineate between other forms of restitution and attorneys' fees).

Several cases are instructive. In *Pearl*, the district ordered the defendant to repay the cost of court-appointed representation, but left blank the space which would specify the amount. S.Ct. No. 13-0796, 2013 WL 1714490, *4-5. The Court of Appeals, citing *Jackson*, found the issue premature. *Id.*

In *State v. Hols*, the Court of Appeals noted the sentencing order failed to specify the amount of court-appointed attorney fees. *State v. Hols*, 2013 WL 750307, at *2 (Iowa Ct. App. 2013). It was not available at the time of sentencing. *Id.* at *2. Accordingly, the court "le[ft] blank the spot where an amount to be paid might have been

inserted." *Id.* at *2; Judgment and Sent., p. 2; App. 265. Neither did the record contain a supplemental restitution order. *See id.* at *1–3. As such, the Court determined the issue was premature and affirmed. *Id.* at *2-3.

In *Lane*, the State Public Defender had not filed an approved amount for attorney fees. S.Ct. No. 14-0065, 2015 WL 162070, *3 (Iowa Ct. App. Jan. 14. 2015). The Court of Appeals agreed a challenge to an attorney fee order was premature.

In *State v. Marble*, the State had not yet filed a request for attorney fees "in an amount approved by the State Public Defender." S.Ct. No. 14-1190, 2015 WL 4158936, *2 (Iowa Ct. App. July 9, 2015). The Court of Appeals noted that once the request was filed, the defendant could challenge it according to the procedures in Iowa Code § 910.7. *Id.* But, without a record to be reviewed, the argument was premature. *Id.* (citing *Worthington v. Kenkel*, 684 N.W.2d 228, 234 (Iowa 2004)).

The record is unclear what Haas is obliged to pay, if anything at the moment. To the extent Haas complains there has not been a determination of her ability to pay, first, there has. But, second, whether it is an abuse of discretion is unknowable without a record in

the district court file of the amount imposed. The Court should conclude the matter is not ripe and allow it to proceed, if necessary, according to the restitution challenge procedures.

CONCLUSION

The judgment should be affirmed.

REQUEST FOR NONORAL SUBMISSION

The State asks to be heard only if the Court grants the defendant's request for oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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