IN THE SUPREME COURT OF IOWA

No. 17-0476

STATE OF IOWA,
Appellee,

vs.

JOHN NESS
Appellant

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR WOODBURY COUNTY, IOWA
THE HONORABLE TIMOTHY JARMAN, DISTRICT JUDGE

APPELLANT'S AMENDED BRIEF

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ROUTING STATEMENT

The question whether the exclusionary rule set forth in Iowa Code § 321J.5, which rule declares that the results of a preliminary breath test are inadmissible, is applicable even where the law enforcement officer who administered a PBT claims to have done so not as part of an OWI investigation but rather as part of an investigation of whether the subject of that test violated his probation, presents a substantial issue of first impression, which has never been resolved in a published case, pursuant to Iowa Rule of Appellate Procedure 6.1101(2)(c). This appeal should therefore be retained by the Supreme Court.

STATEMENT OF THE CASE

Nature of the Case: This is an appeal by the Defendant-Appellant, John Ness, from the judgment and conviction entered in the Iowa District Court for Woodbury County, following a jury trial. *Cf.* Order of Disposition at 1, App'x at 67. Ness was convicted of Operating While Intoxicated – Third Offense, a class D felony, in violation of Iowa Code § 321J.2. The district court sentenced Ness to an indeterminate term of incarceration not to exceed five years, for assignment to the OWI continuum pursuant to Iowa Code § 321J.2(5)(a)(1). *See* Order of Disposition at 1, App'x at 67. The district court further assessed a fine of $3,125, plus surcharges and court costs; ordered that Ness complete Drinker Driver School; ordered that Ness obtain a substance abuse evaluation and comply with all recommendations of that evaluation for twelve months; and revoked Ness's driving privileges for six years pursuant to Iowa Code § 321J.4(4). *See* Order of Disposition at 1-2, App'x at 67-68.

Course of Proceedings Before the District Court: On July 27, 2016, the State charged Ness by trial information with Operating While Intoxicated – Third Offense, in violation of Iowa Code § 321J.2, a class D felony. *See* Trial Information at 1, App'x at 29. Ness entered a plea of not guilty on August 8, 2018. *See* Written Arraignment at 1, App'x at 30.

On February 8, 2017, the State filed a pretrial brief raising the issue that is central to this appeal. *Cf.* State's Pre-Trial Brief at 1, App'x at 45. In that brief, the State argued that the results of a preliminary breath test administered to Ness by Ness's probation officer should be admissible at Ness's jury trial. *See* State's Pre-Trial Brief at 2-3, App'x at 46-47.

The district court took up the admissibility of the results of the preliminary breath test at a pretrial conference held on February 15, 2017. *See* PTC Tr. at 1-2. At the pretrial conference, Ness, through counsel, resisted the State's contention that the PBT results were admissible. *See* PTC Tr. at 3-9. The district court, in an order entered on February 20, 2017, ruled that the results of the PBT would be admissible at Ness's jury trial. *See* Order (Feb. 20, 2017) at 1-2, App'x at 50-51.

A one-day jury trial was held on February 28, 2017. *See* Trial Tr. at 1. The jury returned a verdict the same day, finding Ness guilty of Operating While Intoxicated. *See* Verdict Form at 1, App'x at 56.

A sentencing hearing was held on March 23, 2017. *See* Sent. Tr. at 1. The district court sentenced Ness to an indeterminate term of incarceration not to exceed five years, for assignment to the OWI continuum pursuant to Iowa Code § 321J.2(5)(a)(1). *See* Order of Disposition at 1, App'x at 67. The district court further assessed a fine of $3,125, plus surcharges and

court costs; ordered that Ness complete Drinker Driver School; ordered that Ness obtain a substance abuse evaluation and comply with all recommendations of that evaluation for twelve months; and revoked Ness's driving privileges for six years pursuant to Iowa Code § 321J.4(4). *See* Order of Disposition at 1-2, App'x at 67-68.

Ness timely appealed. *See* Notice of Appeal. App'x at 70.

STATEMENT OF FACTS

Appellant John Ness was, at the time of his arrest on the Operating While Intoxicated charge at issue in this appeal, being supervised by probation officer Nick O'Brien. Trial Tr. at 36-37. On the day of Ness's arrest, he was scheduled to meet with the probation officer at 1:30 p.m., at the probation office. Trial Tr. at 38.

The probation officer testified during trial that, on the day of Ness's arrest, the officer arrived at the probation office between 1:10 p.m. and 1:15 p.m. Trial Tr. at 38. When he arrived there, he saw Ness drive his vehicle into the parking lot that the probation building makes available for probationers. Trial Tr. at 38. The probation officer met Ness at the stairs to the probation building. Trial Tr. at 39.

At that point, according to the probation officer, he and Ness had a conversation. Trial Tr. at 39. The probation officer testified that he detected "a strong odor of alcohol coming from Mr. Ness's person." Trial Tr. at 39. Other than that, however, Ness's behavior during this encounter did not seem out of the ordinary for him. Trial Tr. at 41-42. The probation officer testified that this concerned him, because one of the conditions of Ness's probation prohibited him from consuming alcohol, and because Ness "got out of a vehicle." Trial Tr. at 39. The State played for the jury a video

that showed Ness driving up to the probation office. *See* Trial Tr. at 40; *accord* Ex. 1 – Video from Probation Office.

The probation officer had Ness take a seat in the lobby of the probation office, so the officer could "staff the issue" with his supervisor. Trial Tr. at 42. The officer obtained an "alcohol screening device" – an Alco-Sensor III – from his supervisor's office. Trial Tr. at 43-44. The probation officer asked Ness whether he had consumed alcohol, and Ness denied that he had. Trial Tr. at 43. The probation officer administered a breath test on the alcohol screening device. Trial Tr. at 43-44. The probation officer was allowed to testify, over Ness's objection raised and finally resolved before trial, that the result of the alcohol screening device test was .130. Trial Tr. at 44; *cf.* PTC Tr. at 9-14. The probation officer further testified that, after being confronted with the test results, Ness stated that he thought he had sobered up enough to drive to his probation appointment. Trial Tr. at 45.

The probation officer testified that the Sioux City Police Department was contacted, because "of the significant level of alcohol in [Ness's] system and the fact that he drove" to the probation office. Trial Tr. at 46. Ness was transported by a police officer to the Woodbury County Jail, but no further OWI investigation was performed. Trial Tr. at 53-54. Ness was then booked into the Woodbury County Jail. Trial Tr. at 59-61. The

booking officer testified, and her report indicated, that she had asked Ness whether he was intoxicated and he responded that he was, *see* Trial Tr. at 60-61, *accord* Ex. 5 – Booking Sheet, App'x at 112; but the booking was recorded on video, and in a review of that video Ness's purported statement that he was intoxicated is not audible. *Cf.* Ex. 6 – Booking Video.

ARGUMENT

I. THE DISTRICT COURT ERRED BY ADMITTING INTO EVIDENCE, DURING NESS'S JURY TRIAL, THE RESULTS OF A PRELIMINARY BREATH TEST.

Preservation of Error

At the final pretrial conference, Ness argued, through counsel that the PBT results were inadmissible, for a number of reasons, including that the PBT results should be excluded under the implied consent statute. *See* PTC Tr. at 8-9. The district court expressly considered this issue, and made a final ruling as to the admissibility of the PBT result over that particular objection, in a written order entered following the pretrial conference. *See* Order and Rulings on Pretrial Matters at 1-2, App'x at 50-51; *accord State v. Schaer*, 757 N.W.2d 630, 634 (Iowa 2008) (where district court conclusively overrules, in limine, a particular objection, the proponent of that objection need not renew it when the evidence if offered in order to preserve error on that same objection).

Standard of Review

This Court generally reviews evidentiary rulings for abuse of discretion. *Williams v. Hedican*, 561 N.W.2d 817, 822 (Iowa 1997). An abuse of discretion occurs when a court exercises its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v.*

Maghee, 573 N.W.2d 1, 5 (Iowa 1997). "A ground or reason is untenable when it is not supported by substantial evidence or when it is based on an erroneous application of the law." *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000).

This Court reviews questions or statutory interpretation for errors at law. *State v. Hearn*, 797 N.W.2d 577, 580 (Iowa 2011).

Argument

The district court erred by admitting, in Appellant John Ness's jury trial on a charge of Operating While Intoxicated, the results of a preliminary breath test administered by his probation officer after his probation officer saw Ness drive to the probation office for a meeting and believed that Ness had been drinking. In particular, the district court erroneously interpreted Iowa Code § 321J.5 as not excluding the PBT results in this case. Thus, since the appellate courts in this State have held that the admission of PBT results into evidence is reversible error, this Court should reverse Ness's OWI conviction, and remand for a new trial.

A. The PBT Evidence.

Before the district court, the State proffered the following as the PBT result evidence that it intended to offer at trial:

> As part of his probation, Mr. Ness was given a chemical test on the Alco-Sensor III (ASIII). The result of the Defendant's

> chemical test was .130% BAC. The Defendant admitted to driving and reported that he thought he had sobered up prior to coming to his appointment. The Sioux City Police Department was contacted and the Defendant was arrested for public intoxication under Iowa Code 123.46. The Defendant was subsequently also charged with Operating While Intoxicated stemming from the same incident.

State's Pretrial Brief at 1-2, App'x at 45-46.

The evidence concerning the PBT and its results – offered after the district court's ruling, described below, that this evidence was admissible over Ness's objection – came by way of testimony by Ness's probation officer. The probation officer testified that, at about 1:15 p.m. on the day of Ness's arrest, the officer observed Ness drive up to the probation office, and park his vehicle in the office's parking lot. Trial Tr. at 38. The probation officer testified that he met Ness at the stairs to the probation office building's door, and that when he encountered Ness, he detected a strong odor of alcohol coming from Ness's person. Trial Tr. at 39. The probation officer thereafter told Ness to have a seat in the lobby. Trial Tr. at 42.

In describing his course of conduct after he first encountered Ness prior to Ness's arrest, the probation officer testified: "More or less I wanted him to have a seat and I needed to go staff the issue with my supervisor since I had observed him driving a vehicle and had concerns he was using alcohol." Trial Tr. at 42. Ness's probation officer further testified that, when he left

to staff the matter with his supervisor, he had Ness sit in the lobby and told the receptionist that his "suspicion was [Ness] was under the influence of alcohol." Trial Tr. at 42-43.

Ness's probation explained that he "got the alcohol screening device from [his] supervisor's office because [he] needed to confirm whether or not Mr. Ness was using alcohol." Trial Tr. at 43. The probation officer testified that he administered the test, and obtained a BAC result of .130. Trial Tr. at 44. And the probation officer testified that, after he obtained a positive PBT result, he told Ness that "the bigger concern" was "that he chose to drive after using alcohol." Trial Tr. at 45.

Finally, the probation officer confirmed that, after obtaining the PBT result, the Sioux City Police Department was contacted both because of how high the result was, "and the fact that [Ness] drove there" to the probation office. Trial Tr. at 46.

B. The Parties' Arguments.

The parties presented arguments to the district court, prior to trial, about whether the PBT results were admissible.

The State filed a pretrial brief on the issue. In the brief, the State argued as follows:

> Implied consent law is not the exclusive means by which the State may obtain chemical test evidence from a Defendant in an

> Operating While Intoxicated proceeding. *See* Iowa Code Section 321J.18. ("This chapter does not limit the introduction of any competent evidence bearing on the question of whether a person was under the influence of an alcoholic beverage . . . ."). In this case, the officer did not invoke the implied consent procedures, and consequently, we do not judge the admissibility of any chemical test under the standards applicable to the implied consent standards. *State v. Demaray*, 704 N.W.2d 60, 64, 2005 WL 2319238 (Iowa 2005). Instead, the chemical test was obtained through probationary procedures. As part of the Defendant's probation, he is not to consume any alcohol. Thus, we turn to the standard described in section 321J.18, which requires evidence obtained outside the implied consent law to be "competent," as well as the general standards governing waiver and release under state law. *Id.* When the Defendant arrived at his probation appointment, probation officer O'Brien administered to the Defendant the Alco-Sensor III. The Alco-Sensor III (ASIII) is a handheld breath alcohol tester approved by the National Highway and Traffic Safety Administration (75 FR 11624-01) and recognized by the Iowa Commissioner of Public Safety under Iowa Administrative Code Sections 123.46, 661-157(5), 661-157(6) and the Department of Criminal Investigations website – https://breathalcohol.iowa.gov/pages/devices/pdt. The Defendant's result was .130% BAC. The Defendant was arrested for public intoxication under Iowa Code 123.46. After further review of the video evidence, just prior to his probation appointment, the Defendant is seen operating a motor vehicle in the Department of Corrections parking lot. The Defendant has now subsequently been charged with Operating While Intoxicated stemming from the same incident. The Defendant is not charged under the implied consent laws and therefore the introduction of the chemical test result in this case falls under Iowa Code Section 321J.18 as competent evidence and should not be barred from use at trial.

State's Pretrial Br. at 2-3, App'x at 45-46.

At the pretrial conference, Ness, through counsel, objected to the admission of the PBT results, on a number of grounds. As relevant to this appeal, Ness's trial counsel argued against the State's contention that the use of the PBT here did not trigger the "implied consent" statute that requires the exclusion of PBT results. *See* PTC Tr. at 7-9.

C. The District Court's Ruling.

The district court, in a written order entered before trial, ruled that the results of the PBT were admissible over Ness's objections. The district court wrote:

> Next, the court must address the issue of the Alco-Sensor III test given to the defendant by a probation officer. The test result indicated that the defendant had a breath-alcohol concentration of .130. The defense resists the admission of any evidence related to the Alco-Sensor test, particularly the test result. The state seeks to introduce evidence of the test and the result at trial of this matter.
>
> The Alco-Sensor III device is often used as a preliminary breath screening device by law enforcement in the course of an Operating While Intoxicated investigation. When used as a "preliminary breath test" (PBT) under the implied consent law, the results of the PBT cannot normally be introduced into evidence at trial.
>
> However, the implied consent law (Section 321J.6) was not implicated in this case. The Alco-Sensor was not used for the purpose of a preliminary breath screening test. Instead, it was used by a probation officer to confirm his belief that the defendant was intoxicated when he appeared for a probation appointment.

> Under these circumstances, the court finds that the use of and the test result obtained by the Alco-Sensor may be offered and admitted into evidence if the state provides the proper foundation for the device and the use of the device. This would include more than evidence that the probation officer was properly trained in its use. The state will need to provide qualified evidence as to the theory of operation of the device and the meaning of the test result. Since this case is not charged under the theory of a breath or blood alcohol level over the legal limit, the Alco-Sensor result cannot be introduced to indicate that the defendant is guilty of OWI because his level was over the legal limit.

Order and Rulings on Pretrial Matters at 1-2, App'x at 50-51.

D. Analysis.

The district court erred by admitting the PBT evidence at issue here. The PBT evidence is inadmissible both under the plain text of Iowa Code § 321J.5, and according to this Court's interpretation of § 321J.5. Admitting the PBT evidence here is also contrary to the purpose of § 321J.5. And, even apart from § 321J.5's prohibition on the admission of PBT evidence like the evidence here, the PBT evidence is inadmissible under Iowa Rule of Evidence 702, because of what the unreliability of such evidence as long recognized by the appellate courts in this State.

1. First, the district court's ruling that the PBT result here was admissible over Ness's objection is inconsistent with the text of Iowa Code section 321J.5. That code section provides that:

> 1. When a peace officer has reasonable grounds to believe that either of the following have occurred, the peace officer may request that the operator provide a sample of the operator's breath for a preliminary screening test using a device approved by the commissioner of public safety for that purpose:
>
> > a. A motor vehicle operator may be violating or has violated section 321J.2 or 321J.2A.
> >
> > b. The operator has been involved in a motor vehicle collision resulting in injury or death.
>
> 2. The results of this preliminary screening test may be used for the purpose of deciding whether an arrest should be made or whether to request a chemical test authorized by this chapter, but shall not be used in any court action except to prove that a chemical test was properly requested of a person pursuant to this chapter.

Iowa Code § 321J.5.

Section 321J.5 applies here, by its terms. As an initial matter, there can be no dispute that Ness's probation officer, who administered the PBT to Ness, is a peace officer. *See* Iowa Code § 321J.1(8) ("Peace officer" means: a. A member of the state patrol. b. A police officer under civil service as provided in chapter 400. c. A sheriff. d. A regular deputy sheriff who has had formal police training. e. Any other law enforcement officer who has satisfactorily completed an approved course relating to motor vehicle operators under the influence of alcoholic beverages at the Iowa law enforcement academy or a law enforcement training program approved by the department of public safety."); *accord id.* § 801.4(11) ("Peace officers"

include "[p]arole officers acting pursuant to section 906.2," and "[p]robation officers acting pursuant to section 602.7202, subsection 4, and section 907.2."). Indeed, the State did not argue before the district court that the probation officer here is not a peace officer; and the district court did not consider or find that the probation officer is not a peace officer.

The remainder of the plain text of § 321J.5 applies here, as well. The probation officer's testimony at trial makes clear that, when he administered the PBT to Ness, the probation officer "ha[d] reasonable grounds to believe that" Ness "ha[d] violated section 321J.2" – *i.e.*, that Ness had operated a motor vehicle while intoxicated. Indeed, the probation officer's own testimony indicates even more than the "reasonable grounds" required to trigger § 321J.5 – the probation officer's primary motivation in administering the PBT was because he believed that Ness was intoxicated while he was operating a motor vehicle. For example, the probation officer testified: "More or less I wanted him to have a seat and I needed to go staff the issue with my supervisor since I had observed him driving a vehicle and had concerns he was using alcohol." Trial Tr. at 42. The probation officer testified that, after he obtained a positive PBT result, he told Ness that "the bigger concern" was "that he chose to drive after using alcohol." Trial Tr. at 45. And the probation officer confirmed that, after obtaining the PBT

result, the Sioux City Police Department was contacted both because of how high the result was, "and the fact that [Ness] drove there" to the probation office. Trial Tr. at 46.

Similarly, the probation officer's testimony makes clear that he believed that the PBT that he administered was a screening test: Ness's probation explained that he "got the alcohol *screening* device from [his] supervisor's office because [he] needed to confirm whether or not Mr. Ness was using alcohol." Trial Tr. at 43 (emphasis added).

And the device that the probation officer used to administer the PBT is approved by the commissioner of public safety for the purpose of obtaining a preliminary breath screening, but *not* for obtaining a BAC level for evidentiary use. *See* Iowa Administrative Code 661-157.2(3) ("The division of criminal investigation criminalistics laboratory shall maintain a list of devices approved by the commissioner of public safety for collection of breath samples for evidentiary purposes," and "[t]he current list shall be available . . . on the Web site of the department of public safety."); Public Notice of Iowa Department of Public Safety DCI Criminalistics Laboratory (Mar. 31, 2009), https://breathalcohol.iowa.gov.files/Evidentiary_Breath_Tests.pdf ("Pursuant to the authority of Iowa Code sections 321J.11 and 321J.15, and in accordance with 661 Iowa Administrative Code

157.2(321J), the following devices are approved for use in the State of Iowa in conducting evidentiary tests of breath samples for the purpose of establishing whether a person is intoxicated: . . . Datamaster DMT . . . [and] Datamaster cdm," and no mention of the Alco-Sensor III); *cf.* Iowa Administrative Code 661-157.5(1) ("A peace officer desiring to perform a *preliminary screening test* of a person's breath shall use a device approved by the division of criminal investigation criminalistics laboratory," and "[t]he list of approved devices is available on the Web site of the department"); Department of Criminal Investigations Approved *PBT* List, https://breathalcohol.iowa.gov.pages.devices/pbt (listing Alco-Sensor III).

Thus, since the PBT administered by the probation officer here to Ness "shall not be used in any court action except to prove that a chemical test was properly requested of a person pursuant to this chapter." Iowa Code § 321J.5(2). In particular, the exclusionary rule set forth in § 321J.5(2) contains no exceptions that would allow admission into evidence of the results of a test like the one administered here.

And this Court should reject the district court's reasoning to the contrary, for several reasons. The district court concluded that § 321J.5 excludes the results of an Alco-Sensor III test only when the device is used as a preliminary screening device in the course of an OWI investigation.

See Order and Rulings on Pretrial Matters at 1-2, App'x at 50-51. But that is simply not so. Rather, § 321J.5 excludes such results where the officer who administers the test "has reasonable grounds to believe" that an OWI has occurred. In other words, according to the plain text of § 321J.5, the question is not, as the district court believed, whether the administering officer *intends* to be investigating an OWI at the time when he administers the test; but rather whether the investigating officer *reasonably believes*, at the time when he administers the test, that an OWI may have been committed.

The reason for this distinction is obvious. If the law were what the district court concluded it is, then in every case where an officer administered a PBT to someone suspected of OWI, the officer could claim that he administered it only as part of an investigation or whether the suspect had committed public intoxication, and then later – after administration of the test – announce that his investigation was changing into an OWI investigation. In such a case, if the district court's interpretation of § 321J.5 is correct, the PBT results would be admissible. The same would be true any time an investigating officer determined that an OWI suspect was on probation or parole – the officer could claim that he administered the PBT only to investigate whether the suspect had violated

the terms of his parole or probation, and then – under the district court's reasoning here – the PBT results would be admissible.

Moreover, even were the district court correct in holding that the subjective intent of the officer administering the PBT, as to what exactly the officer is investigating at the particular moment of investigation, is determinative of whether the PBT results are admissible, the PBT still would be inadmissible here. This is so because the probation officer's own testimony revealed that his intent, at the time when he administered the test, absolutely was to investigate whether Ness had operated his vehicle while intoxicated. In particular, he probation officer testified that, after he obtained a positive PBT result, he told Ness that "the bigger concern" was "that he chose to drive after using alcohol." Trial Tr. at 45. The probation officer also testified that, after obtaining the PBT result, the Sioux City Police Department was contacted both because of how high the result was, "and the fact that [Ness] drove there" to the probation office. Trial Tr. at 46.

Accordingly, the PBT results here were inadmissible under the plain text of § 321J.5(2).

2. Second, the only interpretation of § 321J.5 that is consistent with the prior decisions of the appellate courts of this State is one that renders

inadmissible the PBT results at issue here. Those decisions recognize that PBT results are inadmissible, and mention no limitations on or exceptions to that rule. *See, e.g., State v. Massick*, 511 N.W.2d 384, 388 (Iowa 1994) (the results of a preliminary breath test are inadmissible); *State v. Deshaw*, 404 N.W.2d 156, 158 (Iowa 1987) (evidence that the result of a preliminary breath test indicated the presence of alcohol is reversible error).

Indeed, one Court of Appeals decision reveals that the exclusionary rule of § 321J.5 applies even in prosecutions for offenses other than OWIs, which would not be the case if, as the State argued before the district court, § 321J.5 applies only in the context of Iowa's implied consent statute. In *McGlothlin v. State*, No. 06-1246, 2007 Iowa App. Lexis 918 (Iowa Ct. App. Aug. 22, 2007), an applicant for postconviction relief challenged his murder conviction, arising out of an incident where he shot another man after they had been drinking and camping together. *Id.* at *1-2. The district court in the underlying criminal prosecution ruled that the results of the applicant's PBT were inadmissible. *Id.* at *3. The district court made this ruling despite the fact that this case unquestionably did not involve an OWI investigation – the men had been camping, not driving, and they got to the place they were camping by hitchhiking. *Id.* at *1-2. This Court, in *Gavlock v. Coleman*, 493 N.W.2d 94, 96-97 (Iowa 1992), likewise

suggested that PBT results are inadmissible even outside the context of OWI cases. In *Gaylock*, this Court stated that PBT results would not have been admissible, even in a civil personal injury case, had the party seeking to exclude those results made proper objections under § 321J.5(2).

Nor is the one case that the State relied on before the district court – *State v. Demaray*, 704 N.W.2d 60 (Iowa 2005) – to the contrary. This is so because *Demaray* involved a different issue than is before the Court here, and thus has no bearing on the resolution of this appeal.

In *Demaray*, the defendant lost control of his vehicle on an icy road, and his vehicle became stuck in a ditch. *Id.* at 61. the defendant climbed out of the ditch, was struck by another vehicle, and was injured. *Id.* When a law enforcement officer arrived on the scene, the officer noticed the smell of alcohol on the defendant's breath. *Id.* The defendant was then taken to a hospital because of his injuries. *Id.*

Rather than invoking Iowa's implied consent law when they were eventually able to see the defendant at the hospital, law enforcement officers had the defendant sign a release of his medical records, which records included the results of a blood test performed by the hospital for treatment purposes. *Id.* at 61-62. This blood test result showed that the defendant had a BAC over the legal limit shortly after he arrived at the hospital. *Id*. at 62.

The defendant was charged with OWI. *Id.* He filed a motion to suppress the medical records obtained by the law enforcement officers, on the ground that the blood sample at issue was not taken in compliance with the implied consent statute. *Id.* The *Demaray* Court held that the motion to suppress should be denied, on the ground that the implied consent statute is not the sole basis for obtaining a sample that can be used against an OWI defendant, and on the further ground that the sample at issue in *Demaray* was otherwise obtained properly. *Id.*

This decision has no applicability here. In *Demaray*, the issue was simply whether the State must obtain any sample of blood (or by analogy, of breath or of urine) for use against an OWI defendant through the procedures set forth in the implied consent statute, in order for that sample to be admissible against the defendant in the OWI prosecution. In other words, in *Demaray* there was no potentially applicable exclusionary rule barring the admission of the blood test result evidence at issue; the only issue was whether, by setting forth the requirements of the implied consent statute, the legislature at the same time *sub silentio* provided for the exclusion of any samples obtained by any means other than through the implied consent procedures.

The issue here, in contrast, involves an *express* exclusionary rule: § 321J.5. And resolution here requires a straightforward interpretation of that statute – in particular, whether that statute's reference to its exclusionary rule being triggered when an officer has reasonable grounds to believe that an OWI has occurred, really means that the statute is not triggered until an officer with reasonable grounds to believe that an OWI has occurred *also* subjectively intends to end any investigation of any other offense and to begin an OWI investigation. *Demaray* has no bearing on that issue, and certainly is not controlling.

That Ness's interpretation of § 321J.5 is correct, and that the interpretation advanced by the State and adopted by the district court is incorrect, is further revealed by an examination of cases from other jurisdictions applying materially identical statutes. For example, in *Harmon v. State*, 809 A.2d 696 (Md. Ct. App. 2002), the Maryland Court of Appeals considered a question similar, in all material respects, to the question before the Court here. The defendant in *Harmon* pled guilty to a charge of forgery. *Id.* at 697. She was initially sentenced to a mostly suspended sentence of incarceration and a term of probation. *Id.* But while on work release during the portion of the sentence of incarceration that was not suspended, the defendant was alleged to have consumed alcohol in violation of the work

release program's rules. *Id.* Following an evidentiary hearing, the district court modified the defendant's sentence, and sentenced her to one year of imprisonment with probation to follow. *Id.*

The issue on appeal was whether the district court had erred by admitting into evidence, during the evidentiary hearing prior to the court modifying the defendant's sentence, the results of a preliminary breath test. *Id.* at 701. In particular, the State produced, at the evidentiary hearing, testimony by a correctional officer that after the defendant came from the lobby to her cell block area in the detention center where she was staying during her period or work release, the officer smelled an odor of alcohol on her breath, and he gave the defendant a preliminary breath test. *Id.* The officer further testified that the result of the PBT was positive for alcohol, at .07 BAC. *Id.* at 702.

The Maryland court held that the district court erred by admitting the evidence of the defendant's PBT result. *Id.* at 705. The court noted that a Maryland statute provides:

> A police officer who has reasonable grounds to believe that an individual is or has been driving or attempting to drive a motor vehicle while under the influence of alcohol or while impaired by alcohol may, without making an arrest and prior to the issuance of a citation, request the individual to submit to a preliminary breath test to be administered by the officer using a device approved by the State Toxicologist.

> . . . .
>
> Use of the results of the test. The Results of the preliminary breath test shall be used as a guide for the police officer in deciding whether an arrest should be made and may not be used as evidence by the State in any court action. The results of the preliminary breath test may be used as evidence by a defendant in a court action. The taking of or refusal to submit to a preliminary breath test is not admissible in evidence in any court action. Any evidence pertaining to a preliminary breath test may not be used in a civil action.

Id. (quoting Md. Code. Tranps. § 16-205.2).

The State, in *Harmon*, argued that this code provision applies only to prosecutions for violations of the transportation article, and so is not applicable to a probation violation hearing. *Id.* at 705. The Maryland court disagreed:

> We perceive the language of the statute as exceedingly clear, however. Section 16-205.2 pronounces that a PBT "may *not* be used as evidence by the State in *any* court action." (Emphasis added). No exceptions are embodied in the text, nor is the mandatory language of the text limited to transportation actions. Indeed, the only limitation is that the action must be a court action, which the hearing below surely was. Regardless of its precise nature, it was an evidentiary court proceeding with significant consequences to the appellant.
>
> Although hearings concerning probation are sometimes conducted in an informal manner, and the technical rules of evidence may be relaxed, the absolute language of the statute leaves no doubt as to its applicability. It compels us to conclude that the PBT was not admissible at the hearing.

Id. (internal citation omitted).

There is no reason why exactly the same analysis should not apply in this case.

Accordingly, since under the relevant case law, Ness's interpretation of § 321J.5 is correct, and the State's and the district court's is incorrect, this Court should adopt the interpretation of § 321J.5 that requires exclusion of the PBT results here.

3. Even were it not the case that section 321J.5 does not unambiguously apply here by its text, and even were such an interpretation not demanded by the prior appellate court decisions from this State and other jurisdictions, this Court should hold that declining to apply section 321J.5 here would unacceptably frustrate that statute's purpose.[1]

As to what the purpose of section 321J.5 is, this Court need not speculate, because that purpose has been repeatedly identified by the appellate courts of this state. For example, in *State v. Albrecht*, 657 N.W.2d 474, 479 (Iowa 2003), the Supreme Court explained that "[b]ecause of the

[1] The purpose of section 321J.5 matters, because the goal in interpreting a statute is to discovery the true intention of the legislature. *Bernau v. Iowa Dep't of Transp.*, 580 N.W.2d 757, 761 (Iowa 1998). Determining legislative intent requires consideration of the language of the statute, the statute's subject matter, the object sought to be accomplished, the purpose to be served, the underlying policies, the remedy provided, and the consequences of various interpretations. *United Fire & Cas. Co. v. Acker*, 542 N.W.2d 517, 519 (Iowa 1995). A court must construe a statute in a way that will avoid impractical or absurd results. *Id.*

PBT's unreliability, the legislature chose to make the results inadmissible in evidence." In *State v. Thompson*, 815 N.W.2d 55, 60 (Iowa Ct. App. 2012), the Court of Appeals explained that "the legislature accounted for any possible inaccuracy in an underlying PBT test by making such evidence inadmissible." In *State v. Zell*, 491 N.W.2d 196, 197 (Iowa Ct. App. 1992), the Court of Appeals explained that "[t]he results of the preliminary screening test are inadmissible because the test is inherently unreliable and may register an inaccurate percentage of alcohol present in the breath, *and may also be inaccurate as to the presence or absence of any alcohol at all*." (emphasis added). And in *State v. Calvert*, No. 10-0663, 2011 Iowa App. Lexis 251, at *8 (Iowa Ct. App. Mar. 30, 2011), the Court of Appeals explained that "[t]he legislature has determined the results of a PBT are not admissible evidence because the PBT is unreliable."

Indeed, the PBT device used here – the Alco-Sensor III – is the very same PBT device as was used in several of the above-cited cases declaring PBTs to be unreliable. *See State v. Albrecht*, 657 N.W.2d 474 (Iowa 2003) ("Because of the PBT's unreliability, the legislature chose to make the results inadmissible in evidence."); *State v. Zell*, 491 N.W.2d 196, 197 (Iowa Ct. App. 1992); *State v. Thompson*, 815 N.W.2d 55, 60 (Iowa Ct.

App. 2012); *accord State v. Rolling*, No. 04-0128, 2005 Iowa App. Lexis 256 (Iowa Ct. App. Mar. 31, 2005).

Accordingly, the purpose of section 321J.5 is to allow law enforcement officers to use a PBT as a quick and easy *screening* tool, while also ensuring that the results of the PBT are – on account of their long-recognized unreliability – never heard by a trier of fact in any court proceeding.

Admitting the PBT results here, as requested by the State would be "repugnant" to this purpose. *Cf. State v. Deshaw*, 404 N.W.2d 156, 158 (Iowa 1987) (rejecting a trial court's interpretation of section 321J.5 that is "repugnant to the purpose and scheme of this section"). All of the long-recognized problems with the reliability of PBT results – which problems are the very reason why the General Assembly decreed that PBT results are inadmissible – exist just as much in the context of a probation violation investigation or a public intoxication investigation as they do in an investigation dedicated solely to a suspected OWI.

More obviously, if State's preferred interpretation is correct, then every single time an office stops a driver suspected of operating a vehicle while intoxicated, the officer can simply say that he initiated the investigation as part of a public intoxication investigation, and the case only

later transformed into an OWI investigation – thereby inserting the same arbitrary barrier between the two purportedly different investigations as the State suggests can be inserted here between a probation violation investigation and an OWI investigation. There is no principled distinction between the hypothetical posed in this paragraph, and what the State is asking this Court to accept here. The General Assembly cannot have intended that its rule on the inadmissibility of a PBT result could so easily be circumvented. This is exactly the kind of absurd result that this Court must avoid in interpreting section 321J.5.

Accordingly, this Court should reject, as impermissibly inconsistent with the purpose of § 321J.5, any interpretation of that statute that would permit the admission into evidence of the PBT result at issue here.

4. Furthermore, even were there no section 321J.5, the PBT result would still be inadmissible under the Rules of Evidence.

The result of a PBT has been recognized to be admissible only when accompanied by expert testimony to explain to the finder of fact the technical aspects of the PBT that would not ordinarily be comprehensible to a layman without resort to speculation. *See State v. Doerr*, 599 N.W.2d 897 (Wisc. Ct. App. 1999); *accord* Iowa R. Evid. 5.701 (describing the limits of lay witness testimony). Here, presumably, the State would present the

testimony of the probation officer who administered the PBT as the required expert testimony.

But under the Rules of Evidence, such expert evidence is not admissible, because it is so unreliable. Iowa Rule of Evidence 5.702 governs the admissibility of expert evidence. Under Rule 5.702, a decision on admissibility of proffered expert evidence focuses on two primary issues: the reliability of the conclusions offered, and whether even reliable conclusions will be helpful to the finder of fact.

The first of these is determinative here. As described above, the General Assembly has decreed, and the appellate courts have repeatedly recognized as a matter of law, that the results of a PBT are unreliable – both as to the amount of alcohol in a defendant's breath, and as to whether there is any alcohol on the defendant's breath at all.

Accordingly, even were the PBT results here not inadmissible under section 321J.5, this Court would still be required to exclude those results under Iowa Rule of Evidence 5.702.

E. Conclusion.

Thus, since the plain text of Iowa Code § 321J.5 requires the exclusion of the PBT evidence here, and since the purpose of that provision and the relevant case law confirm that this is so, the district court erred by admitting

that evidence over Ness's objection, and this Court should thus reverse the district court and remand for a new trial.

II. IN THE ALTERNATIVE, NESS'S TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT PROPERLY TO THE RESULTS OF A PRELIMINARY BREATH TEST.

Preservation of Error.

Ness's alternative claim that his trial counsel was ineffective, in failing to properly object to the PBT evidence in any of the above-described particulars, falls within an exception to the error preservation rules. *See State v. Philo*, 697 N.W.2d 481, 485 (Iowa 2005).

Standard of Review.

This Court reviews *de novo* claims of ineffective assistance of counsel. *See State v. Tejeda*, 677 N.W.2d 744, 754 (Iowa 2004).

Argument.

Should this Court conclude that Ness's trial counsel did not properly preserve error on any of the arguments set forth above, then Ness's trial counsel rendered ineffective assistance. And under an ineffective assistance of counsel analysis, Ness is likewise entitled to a new trial.

A. Legal Standard – Ineffective Assistance of Counsel.

To prevail on a claim of ineffective assistance of counsel, a defendant must show by a preponderance of the evidence (1) that trial counsel failed to

perform an essential duty, and (2) that prejudice resulted. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006); *accord Strickland v. Washington*, 466 U.S. 668, 689 (1984).

This Court often preserves claims of ineffective assistance of counsel for postconviction proceedings, but the Court will decide such claims on direct appeal if the record is adequate to do so. *State v. Tate*, 710 N.W.2d 237, 239 (Iowa 2006).

B. Ness's Counsel Before the District Court Breached an Essential Duty by Failing to Properly Object to the PBT Evidence.

To prove that his trial counsel failed to perform an essential duty, a defendant must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *Strickland*, 466 U.S. at 688. "A normally competent attorney . . . should either be familiar with the basic provisions of the criminal code, or should make an effort to acquaint himself with those provisions which may be applicable to the criminal acts allegedly committed by his client." *Id.* at 71-72. "The same is true of case law." *State v. Fountain*, 786 N.W.2d 260, 266 (Iowa 2010). The question, in deciding whether Ness's trial counsel breached an essential duty by failing to properly object to the PBT evidence, is "whether a normally competent attorney could have concluded that the question . . . was not worth raising." *See State v. Schoelerman*, 315 N.W.2d 67, 72 (Iowa

1982).

Here, for all the reasons set forth above, the PBT results were inadmissible under § 321J.5. Thus, if this Court concludes that Ness's trial counsel failed properly to object to the PBT results, then Ness's trial counsel breached an essential duty by that failure.

Nor should this claim be preserved for postconviction proceedings. Often the motivation for preserving ineffective assistance arguments is to allow determination of whether the alleged ineffective assistance was part of a reasonable trial strategy. But that obviously is not the case here.

There are two ways in which a PCR applicant can overcome the *Strickland* presumption that trial counsel's challenged action might be considered reasonable trial strategy: (1) by showing that the challenged action could never be considered part of a sound strategy; *or* (2) by showing that the suggested strategy, even if sound, did not in fact motivate counsel's action. *United States v. Graves*, 951 F. Supp. 2d 758, 766 (E.D. Pa. 2013); *accord Thomas v. Varner*, 428 F.3d 491, 499 (3d Cir. 2005) (same); *Murtishaw v. Woodford*, 255 F.3d 926, 951 (9th Cir. 2001); *Anderson v. Attý Gen.*, 425 F.3d 853, 859 (10th Cir. 2005); *Baldwin v. Adams*, 899 F. Supp. 2d 889, 904 (N.D. Cal. 2012). The Supreme Court's language in *Strickland* makes clear that this rule is the proper one. *See Strickland*, 466

U.S. at 690-91. And Iowa law is in conformity with this rule. *See State v. Clay*, 824 N.W.2d 488, 500-01 ("Until the record is developed *as to trial counsel's state of mind*, we cannot say whether trial counsel's failure to object implicated trial tactics or strategy." (emphasis added)); *accord id.* at 501 ("[E]ven if trial counsel's failure to object *was* a *conscious* trial tactic or strategy, the present record does not allow us to decide if such tactic or strategy was reasonable under prevailing professional norms." (emphasis added)); *see also State v. Madsen*, 813 N.W.2d 714, 725 (Iowa 2012); *cf. Ledezma v. State*, 626 N.W.2d 134, 143 (Iowa 2001).

Here, any failure to properly object to the PBT evidence obviously was not part of trial counsel's trial strategy, or otherwise a tactical decision. Ness's trial counsel tried to keep the PBT results out, *see* PTC Tr. at 9-14; he simply failed to raise all of the best arguments for keeping that evidence out, which arguments are set forth above, and he failed to renew during trial the objections that he did make during the pretrial conference. Accordingly, any error on the part of Ness's trial counsel cannot have been the result of a strategic decision, and nothing would be gained by preserving this issue for postconviction relief.

Accordingly, in the alternative that this Court concludes that Ness's trial counsel failed to properly raise or preserve any of the arguments in Part I,

above, Ness's trial counsel breached an essential duty by doing so.

C. Ness Was Prejudiced by His District Court Counsel's Error.

To prove prejudice, the defendant must prove "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.*

Here, absent the PBT results, the State's case against Ness was weak. The State's strongest evidence, other than the PBT, was the testimony of Ness's probation officer's supervisor, and the arresting police officer. The supervisor testified that Ness smelled like alcohol, that his speech was slurred, and that his eyes were bloodshot, Trial Tr. at 28, as did the police officer who arrested him, and also unsteady balance. Trial Tr. at 51-52.

But Ness's probation officer's testimony did not totally support this – the probation officer testified, in response to an inquiry by counsel for the State, that Ness's behavior and mannerisms at the time of their encounter did not seem out of the ordinary for Ness. Trial Tr. at 41-42. Likewise, in response to the question whether there were "indicators" that caused him concern, the probation officer responded only by saying "The smell of

alcohol was the biggest indicator," without identifying any other indicators. *See* Trial Tr. at 42. Later, the most that the probation officer could say was that Ness's eyes were bloodshot and watery, once he took off his sunglasses, which the officer said are indicators of alcohol use. Trial Tr. at 45-46.

Ness's probation officer also essentially denied that Ness seemed to be having trouble driving. In response to a question by counsel for the State as to whether it seemed to him that Ness "was having trouble parking," the probation officer answered that it appeared only that Ness "was wanting to straighten out his vehicle." Trial Tr. at 38.

This, naturally, undermines the persuasiveness of the testimony of the supervisor and the arresting officer. Moreover, even if this evidence is sufficient for the jury to conclude that Ness had been drinking, it does not demand a conclusion that he also was under the influence of alcohol at the time when he was driving.

Finally, as a matter of logic the PBT results are simply more powerful evidence than any of the State's other evidence against Ness. For the jury to be presented with results generated by a machine specifically designed to test for the presence of alcohol is simply going to be more persuasive than any subjective testimony of any witness.

Accordingly, since the relative importance of the PBT results is sufficient to undermine confidence that the result of the jury trial would have been the same had Ness's trial counsel properly objected, Ness was prejudiced by his trial counsel's breach of an essential duty.

D. Conclusion.

Since, if this Court concludes that Ness's trial counsel failed to properly object to or preserve error on the PBT results, then Ness's trial counsel breached an essential duty and Ness was prejudiced by that breach, then in that alternative Ness received ineffective assistance of counsel and should be granted a new trial.

CONCLUSION

For the foregoing reasons, Appellant John Ness respectfully requests that this Court reverse the judgment and sentenced entered by the district court, and remand for a new trial.

REQUEST FOR ORAL ARGUMENT

Appellant John Ness respectfully requests oral argument of ten minutes per side.

Respectfully submitted,

MAYNE, ARNESON HINDMAN, HISEY & DAANE

BY: _/s/ Zachary S. Hindman_____

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CERTIFICATE OF SERVICE

The undersigned certifies a copy of this Appellant's Amended Brief was served on the 2nd day of November, 2017, upon the following persons, by EDMS and United States Mail, respectively:

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The undersigned further certifies that the Appellant's Amended Brief was sent to the Clerk of the Supreme Court, Iowa Judicial Branch, 1111 East Court Avenue, Des Moines, Iowa 50319, on the 2nd day of November, 2017, by EDMS.

_/s/ Zachary S. Hindman_____

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Iowa R. App. P. 6.903 (1)(g)(1) because this brief contains 9,527 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman 14.

Dated this 2nd day of November, 2017.

_/s/ Zachary S. Hindman_____