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IN THE SUPREME COURT FOR THE STATE OF IOWA
NO. 19-0048

DAVID MICHAEL JOHNSTON,
Petitioner-Appellant,

vs.

IOWA DEPARTMENT OF TRANSPORTATION,
Respondent-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY,
HONORABLE JEANIE VAUDT

PETITIONER-APPELLANT'S FINAL BRIEF

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ROUTING STATEMENT

Pursuant to Iowa R. App. P. 6.110, the Iowa Supreme Court should retain this case as it presents a significant issue of law where there is no controlling precedent from the Iowa Supreme Court or Iowa Court of Appeals on one point of this appeal, which creates an issue of first impression and of public importance that should be determined by the Iowa Supreme Court. Specifically, although this Court has ruled on Iowa Code section 321.555 previously, this appeal presents a new issue of application regarding Iowa Code section 321.555 for review.

CASE STATEMENT

David Michael Johnston appeals the district court's dismissal of his Petition for Judicial Review of a final agency action by the Iowa Department of Transportation (hereinafter IDOT). The agency imposed a five-year bar on his driving privileges as a habitual offender under Iowa Code section 321.555.

FACTUAL BACKGROUND AND COURSE OF PROCEEDINGS

From the Appellant's perspective, the facts of this case are not in dispute. On December 23, 2011, Johnston was arrested and charged with Operating While Intoxicated (First Offense) in violation of Iowa Code section 321J.2. (App. 4). Johnston was convicted of this offense on March 8, 2012. (App. 4). On November 12, 2017, Johnston was arrested and charged with Operating While Intoxicated (Second Offense) in violation of Iowa Code section 321J.2 and Eluding in violation

Iowa Code section 321.279(3)(*a*). (App. 4). On April 19, 2018, he was convicted of the Operating While Intoxicated (OWI) charge and granted a deferred judgment as to the Eluding charge. (App. 9).

On April 23, 2018, the IDOT issued an official notice that it was barring Johnston's privilege to operate and drive motor vehicles effective May 28, 2018, until April 23, 2023. (App. 4). The notice was issued under Iowa Code section 321.560 because the IDOT had determined Johnston was a habitual offender under the provisions of Iowa Code section 321.555, namely:

> As used in this section and sections 331.556 through 321.562, "habitual offender" means any person who has accumulated convictions for separate and distinct offenses described in subsections 1, 2, or 3, committed after July 1, 1974, for which final convictions have been rendered, as follows:
>
> 1. Three or more of the following offenses, either singularly or in combination, within a six-year period:
>
> . . . .
>
> 2. Six or more of any separate and distinct offenses within a two-year period in the operation of a motor vehicle . . . .

Iowa Code § 321.555 (1)–(2) (2017). (App. 5-6). The IDOT cited December 23, 2011 and November 12, 2017 as the dates of the violations at law. (App. 4-5).

Johnston appealed the revocation and a telephone hearing was held on July 12, 2018 before an Administrative Law Judge (ALJ). (App. 4). On July 19, 2018, a decision was rendered sustaining the IDOT's revocation determination. (App. 6). Johnston appealed the findings of the ALJ to an IDOT reviewing officer. (App. 7-

8). The reviewing officer issued an order affirming the decision of the ALJ on August 31, 2018. (App. 10). Johnston filed a Petition for Judicial Review on September 28, 2018 and the district court heard oral arguments on December 13, 2018. (App. 11). The district court dismissed Johnston's Petition for Judicial Review on December 26, 2018. (App. 16)

STANDARD OF REVIEW

Final administrative agency action is subject to judicial review. Iowa Code § 17A.19. The exercise of judicial review of final agency action is for the correction of errors at law. *N.W. Bell Tel. Co. v. Iowa St. Commerce Comm'n*, 359 N.W.2d 491, 492 (Iowa 1984). Relief may be granted if the agency action prejudiced the substantial rights of the petitioner and the action falls under any one of several enumerated criteria. *See* Iowa Code § 17A.19(10)(*a*)–(*n*) *accord Ghost Player, LLC v. Iowa Dep't of Econ. Dev.*, 906 N.W.2d 454, 462 (Iowa 2018). Standards contained in Iowa Code section 17A.19(10) are applicable in determining whether the appellate court reaches the same result as the district court. *Burton v. Hilltop Care Ctr.*, 813 N.W.2d 250, 255 (Iowa 2012).

The ultimate question is not whether the evidence submitted to the agency supports a different conclusion but whether the evidence supports the findings actually made. *Pointer v. Iowa Dep't of Transp.*, 546 N.W.2d 623, 625 (Iowa 1996) (citation omitted). The court should reverse if it comes to a different conclusion than

the district court. *Westling v. Hormel Foods, Corp.*, 810 N.W.2d 247, 251 (Iowa 2012). Where the IDOT has not been clearly vested with the discretion to interpret the statute, no deference is given to their interpretation and the court is free to substitute its de novo review for the agency's interpretation. *Welch v. Iowa Dep't of Transp.*, 801 N.W.2d 590, 594 (Iowa 2011). "Evidence is substantial when a reasonable person would accept it as adequate to reach the same findings. The ultimate question is not whether the evidence supports a different finding but whether the evidence supports the findings actually made." *Pointer v. Iowa Dept. of Transp.*, 546 N.W.2d 623, 625 (Iowa 1996) (citing *Reed v. Iowa Dep't of Transp.*, 478 N.W.2d 844, 846 (Iowa 1991)).

ARGUMENT

I. THE IDOT FAILED TO PROVIDE SUBSTANTIAL EVIDENCE JOHNSTON IS A HABITUAL OFFENDER FOR PURPOSES OF IOWA CODE SECTION 321.555 AND HIS DRIVING PRIVILEGES SHOULD BE RESTORED

Johnston's appeal is premised on three arguments as to why he should not be classified as a habitual offender for the purposes of Iowa Code section 321.555 and why is his driving privileges should be restored.

First, Johnston argues the deferred judgment he received for his eluding charge, which was ultimately expunged from his record, should not count for the purposes of calculating whether he is a habitual offender under Iowa Code section 321.555. Alternatively, Johnston argues the dates of convictions for the three (3)

includable charges should be used instead of the dates of the offenses. Lastly, Johnston argues the IDOT failed to produce evidence that he was eluding a pursuing law enforcement vehicle as required by Iowa Code section 321.555(1).

For these reasons, the IDOT's determination that Johnston is a habitual offender pursuant to Iowa Code section 321.555(1) should be overturned and Johnston's driving privileges should be reinstated.

A. A Deferred Judgment is Not a "Final Conviction" for Purposes of Iowa Code Section 321.555(1)

1. Preservation of Error

Johnston's claim that a deferred judgment is not a "final conviction" under Iowa Code section 321.555(1) was raised at the administrative and district court levels and ruled upon by the district court. Error preservation "requires that issues must be presented to and passed upon by the district court before they can be raised and decided on appeal." *Metz v. Amoco Oil. Co.*, 581 N.W.2d 597, 600 (Iowa 1998). Error has been preserved on this point.

2. Argument

Iowa Code section 321.555 only accumulates convictions "for which *final convictions* have been rendered." Iowa Code § 321.555 (emphasis added). Because Johnston was granted a deferred judgment on his eluding violation, that conviction is not "final" within the meaning of the statute and therefore cannot be used in calculating whether or not he is a habitual offender.

A deferred judgment is defined as

> a sentencing option whereby both the adjudication of guilt and the imposition of a sentence are deferred by the court and whereby the court assesses a civil penalty as provided in section 907.14 upon the entry of the deferred judgment. The court retains the power to pronounce judgment and impose sentence subject to the defendant's compliance with conditions set by the court as a requirement of the deferred judgment.

Iowa Code § 907.1(1).

The word "conviction" is defined in chapter 321 but does not include a deferred judgment. *See* Iowa Code § 321.1(15). Nonetheless, the word "conviction" may be ambiguous, and "may have different meanings within different contexts." *State v. Kluesner*, 389 N.W.2d 370, 372 (Iowa 1986).

> [T]echnically the word means the final consummation of the prosecution against the accused including the judgment or sentence rendered pursuant to an ascertainment of his guilt.
>
> In its general and popular sense and frequently in its ordinary legal sense, the word 'conviction' is used in the sense of establishment of guilt prior to and independently of judgment and sentence by a verdict of guilty or a plea of guilty.

Id. (quoting *State v. Hanna*, 179 N.W.2d 503, 508 (Iowa 1970)).

Here, "conviction" must be given a narrow meaning because of the severe punitive consequences that flow from § 321.555, in addition to its protective nature. *See State v. Tong*, 805 N.W.2d 599 (Iowa 2011). By entering a deferred judgment, the court retained its power to enter judgment *at a later time*, and the case is by no means final. On May 6, 2019, Johnston was discharged from probation and the

eluding charge was expunged from his record. Therefore, it is inconsistent with the purpose of a deferred judgment to punish Johnston for the "conviction." The statute's purpose must be considered in this respect, and the statute should be construed in favor of Johnston, meaning the deferred judgment on the eluding charge should not count as a conviction.

In *Schilling vs. Iowa Department of Transportation*, the Court determined a deferred judgment is a final conviction for purposes of the driver's license revocation statute. 646 N.W.2d 69, 73 (Iowa 2002). The Court based this determination partly on "whether the license revocation is aimed at the protection of the public or as a punishment measure." *Id.* at 73. The *Schilling* Court's primary factor in reaching this conclusion was a determination the suspension did not serve the purpose of increasing the offender's criminal punishment. *Tong*, 805 N.W.2d 599, 602 (Iowa 2011). Subsequently, the Court in *Tong* limited the ruling in *Schilling* when applied to laws which serve the dual purpose of both protecting the public and increasing a criminal offender's punishment. *See id.* (finding the distinction made in *Schilling* unhelpful when the statute serves the dual purpose of punishment and protection).

The eluding statute cited as the basis for the deferred judgment—and applied as one of Johnston's convictions—sustains the same dual purpose as the felon in possession statute examined in *Tong*. *See* Iowa Code § 321.279 (defining the criminal offenses warranted upon a conviction for eluding a law enforcement

vehicle). In light of *Tong*, the use of the eluding statute for the dual legislative purposes of protecting the community and punishing the offending driver requires consideration of what qualifies as a conviction. Because the statute cannot logically be read to only serve the purpose of community protection, a deferred judgment with potential—but unrealized punitive consequences—is inconsistent with what constitutes a final conviction for the purposes of the habitual offender status and cannot be included as support for the Department's revocation of Johnston's driving privileges.

It should further be noted, using *Tong*, and applying its principles here, the habitual offender statute, Iowa Code section 321.555, while protecting the community, further punishes Johnston even after his conviction. As explained above, Johnston is looking at a five-year bar of his driving privileges. Under most scenarios, even though this bar is present, an individual labeled as a habitual offender would still be able to procure a temporary restricted license and operate a motor vehicle as long as certain requirements are met. *See generally* Iowa Code § 321.215. However, in Johnston's case, since he pled guilty to an eluding charge in violation of Iowa Code section 321.279, and even though he received a deferred judgment, the IDOT will not even grant him a temporary restricted license. Iowa Code § 321. 215(1)(b). Understanding that the right to operate a motor vehicle is a privilege and not a right, this is not protecting the community, this is punishing Johnston for the

next five (5) years for crimes committed some five years and eleven months apart. The statute, as applied by the IDOT, protects the community and further punishes Johnston. Therefore, based upon the protection and punishment increasement of Iowa Code section 321.555, Johnston's deferred judgment should not be considered a conviction. *See Tong*, 805 N.W.2d at 602.

Since a conviction and final judgment has not been entered on Johnston's eluding charge, the IDOT cannot use the charge for the purposes of calculating whether or not Johnston is a habitual offender and the IDOT was wrong in doing so.

B. The Appropriate Barometer for Determining Whether an Individual is a Habitual Offender Under Iowa Code Section 321.555(1) is the Date of the Predicate Convictions

1. Preservation of Error

Johnston argues the date of conviction should determine whether an individual is a habitual offender under Iowa Code section 321.555(1) was raised in both the administrative and district court levels and ruled upon by the district court. (App. 15-17). Error preservation "requires that issues must be presented to and passed upon by the district court before they can be raised and decided on appeal." *Metz*, 581 N.W.2d at 600. Error has therefore been preserved on this issue.

2. Argument

Assuming Johnston's deferred judgment is includible, the next issue this Court must determine is whether the proper timestamp for a violation under

§ 321.555(1) is the date of *offense* or the date of *conviction*. The difference is material, as Johnston is a habitual offender under the former but not the latter.

A plain reading of the statute shows the date of conviction to be a logical and clear timestamp to determine whether three violations occurred within a six-year period. *See Shaw v. Soo Line R.R. Co.*, 463 N.W.2d 51, 54 (Iowa 1990) ("Any speculation about the legislature's intent . . . cannot displace the plain meaning [of the statute]."). Iowa Code section 321.555 defines "habitual offender" as a person who has "accumulated convictions" and requires that each conviction be "final" and must have "been rendered." *See State v. Schweitzer*, 646 N.W.2d 117, 120 (Iowa Ct. App. 2002) ("A statute should be construed so that effect will be given to all of its provisions, and no part is superfluous or void."). The ability to suspend the license of an individual as a habitual offender under section 321.555(1) thus turns on whether a criminal proceeding was instituted, and a conviction obtained for the qualifying offenses.

Under the current statutory framework, the IDOT cannot make the required prima facie showing of moving violations until a final conviction is entered. *See* Iowa Code § 321.1(15) ("'Conviction' means a final conviction . . . ."). The conviction itself thus becomes a required element to support adjudication of a defendant as a habitual offender. The IDOT's argument that the date of offense is the appropriate benchmark would lead to the absurd result that an individual could

be labeled a habitual offender prior to the ripening of all required elements. *See Gospel Assemb. Church v. Iowa Dep't of Revenue*, 368 N.W.2d 158, 161 (Iowa 1985) (applying the doctrine of ripeness to agency action to prevent unnecessary advisory decisions by Iowa courts). This absurdity is further seen due to the fact the IDOT does not revoke an individual's right to operate a motor vehicle until after they have been convicted of eluding. Iowa Code § 321.209.

The ALJ and the District Court relied on *State v. Phelps* for the proposition that the phrase "for which final convictions have been rendered" is apparently superfluous. (Order on Judicial Review, p. 5). *See also State v. Phelps*, 417 N.W.2d 460 (Iowa 1988). Yet since *Phelps* was decided, the Iowa Supreme Court has noted on several occasions that *conviction date* is the proper yardstick under § 321.555. *See State v. Brauer*, 540 N.W.2d 442, 443 (Iowa 1995) ("Iowa Code section 321.555(1) defines a habitual offender as a person who has three or more convictions for specified offenses within a six-year period."); *Iowa Dep't of Transp. v. Iowa Dist. Ct.*, 539 N.W.2d 191, 193 (Iowa 1995) ("Section 321.555(1) provides that any person found guilty of three or more listed traffic offenses within a six-year period shall be considered an habitual offender."). And in any event, the *Phelps* Court interpreted subsection two of the statute, not subsection one. *See* 417 N.W.2d at 461. Those subsections are not worded identically. *Compare* Iowa Code § 321.555(1), *with id.* § 321.555(2). To the extent *Phelps* relied on specifically

worded legislative enactments, it would be antithetical to now rely on that caselaw because it's 'close enough.' *See Iowa Dep't of Transp. v. Iowa Dist. Ct.*, 530 N.W.2d 725, 727 (Iowa 1995) ("The statutory scheme [of § 321.555] evidences a legislative intent to distinction these subsections . . . .").

Further, construing Iowa Code section 321.555(1) differently than section 321.555(2) does not run contrary to the *in pari materia* doctrine because the showing of proof that the moving violation actually occurred under section 321.555(1) places a completely different burden on the parties. *But see Phelps*, 417 N.W.2d 462 (holding "the two-year time period for [§321.555(2)] defines the time within which the violations, not convictions, must have occurred."). In *Phelps*, the Court specifically states their ruling to use violations as the marker during the time period applies to subsection 2 of section 321.555 and not section 321.555 in its entirety. 417 N.W.2d at 462. Motor vehicle violations under Iowa Code sections 321.555(1)(*a*)–(*h*) require an independent, evidentiary showing of proof by the IDOT detailing the violative conduct by the defendant—followed by a finding of guilt by a criminal court—for a conviction to be entered and for the offense to be recognized by the statute. Iowa Code § 321.555(1). Instances of conduct categorized under Iowa Code section 321.555(2) involve charges and convictions for which the IDOT must only show a "forfeiture of bail of a person upon a charge of violating any provision" of the motor vehicle chapter. Iowa Code § 321.491(2)(*a*).

This higher burden of proof for criminal moving violations under section 321.555(1) is a recognition of the relative seriousness of the offenses; offenses requiring substantial evidentiary support before steps are taken to restrict an offender's license privileges to protect the general public. *Iowa Dep't of Transp. v. Iowa Dist. Ct.*, 530 N.W.2d at 727–28. To interpret this scheme in a way that ignores the importance of the finding of guilt for section 321.555(1) offenses and grounds the restriction on the reported offense date ignores a material factor and could lead to absurd and inconsistent results. *Id*. Therefore, since final judgment has not been entered on Johnston's eluding charge, it cannot be counted as a conviction used to suspend his license.

If the plain language does not control, Johnston contends the term "offenses" as used in § 321.555(1) is ambiguous and certainly is not a placeholder for "offense date." *See State v. Sailer*, 587 N.W.2d 756, 760 (Iowa 1998) (finding the term "offense" ambiguous). Notably, the word "offense" is not defined in chapter 321, but again, the word "conviction" is defined. Read in context, the term "offense" is a reference to the eight subsections beneath it—subsections (*a*) through (*h*)—and the statutory citations for those violations. The term does not supplant the "render[ing]" of a "final conviction[ ]." Chapter 321 by nature contains hundreds of law violations. At some point it becomes logical to use the term "offense" as a shortcut

to the spiderweb of traffic violations throughout the Iowa Code. For example, as authorized on a uniform traffic complaint and citation,

> I hereby give my unsecured appearance bond in the amount of .... dollars and enter my written appearance. I agree that if I fail to appear in person or by counsel to defend against *the offense* charged in this citation the court is authorized to *enter a conviction and render judgment* against me for the amount of my appearance bond in satisfaction of the penalty plus court costs.

Iowa Code § 805.6 (emphases added).

The term "offense," in this context, also connotes some sort of judicial proceeding or determination—i.e., not a traffic stop.

> *Black's Law Dictionary* defines "offense" as "[a] felony or misdemeanor; a breach of the criminal laws; violation of law for which penalty is prescribed." *Black's Law Dictionary* 1081 (6th ed. 1990). *Webster's* definition of the law-related meaning of "offense" is similar: "an infraction of law: CRIME, MISDEMEANOR." *Webster's Third New Int'l Dictionary* 1566 (1993).

Sailer, 587 N.W.2d at 760. Only once a conviction is rendered and finality is accomplished can we determine which "offense" an individual committed. Importantly, there is no language in the statute that would indicate a Court should then *retroactively* use the date of offense, instead of the date of conviction. The statute's purpose and ease of application point to the date of conviction.

Here, *State v. Wiseman* is a proper application of this principle. 614 N.W.2d 66 (Iowa 2000). In *Wiseman*, the issue was whether a defendant's prior *guilty plea* or *conviction date* to OWI should be used to enhance his sentence. The defendant

was convicted in 1997 and had a prior conviction for OWI. *Id.* at 66. However, "Wiseman's plea of guilty was over six years before his present offense, but his conviction on that plea was within the six-year window of section 321J2(3)." *Id.* at 67. The Court held the conviction date should be used. "[W]e believe a plea of guilty standing alone is irrelevant on the issue of enhancement *until a conviction or deferred judgment is entered*." *Id.* (emphasis added).

Constructing the statute to apply to dates of conviction is also consistent with Iowa Code section 321.209. Under that statute, revocation of a license (including for eluding) is effective "upon receiving a record of the operator's conviction . . . when such conviction has become final." Iowa Code § 321.209. It would be illogical to base revocation in one statute by date of conviction, and another on date of offense.

Since Johnston's dates of conviction are March 8, 2012, April 19, 2018, and April 19, 2018 (App. 9), more than six years separate these dates of conviction, and therefore, Johnston is not a habitual offender under Iowa Code section 321.555.

C. The IDOT Did Not Present Substantial Evidence Johnston Had Committed the Offense of "Eluding a Pursuing Law Enforcement Vehicle" as Required by Plain Reading of Iowa Code Section 321.555(1) and Therefore the Eluding Conviction Cannot be Used for Calculating Whether Johnston is a Habitual Offender

1. Preservation of Error

Iowa Code section 17A.19(7) mandates "[i]n proceedings for judicial review of agency action in a contested case . . . a court shall not itself hear any further evidence with respect to those issues of fact whose determination was entrusted by the Constitution or a statute to the agency in that contested case proceeding." Iowa Code § 17A.19(7).

Johnston's claim Iowa Code section 321.555(1) requires evidence the offender was eluding a *pursuing* law enforcement vehicle was raised in the administrative and district court, but the district court erroneously determined the issue had not been preserved for judicial review. Iowa's issue preservation rules are not designed to be hyper-technical nor do they place form over substance. *Lee v. State*, 815 N.W.2d 731, 739 (Iowa 2012). A challenge to an administrative ruling is properly preserved when the challenge is adequate to put the Respondent on notice of the nature of the protest. *Griffin Pipe Prods. Co. v. Bd. of Review*, 789 N.W.2d 769, 772 (Iowa 2010). Courts will not "exalt form over substance when the objectives of our error preservation rules have been met." *Lee v. State*, 815 N.W.2d 731, 739 (Iowa 2012).

The district court, on judicial review, cited *Ahrendsen v. Iowa Dep't of Human Servs.*, for the proposition that review "is limited to questions considered by the agency." 613 N.W.2d 674, 676 (Iowa 2000) (Order on Judicial Review, p. 8). The specific language of *Ahrendsen* is important though. *Ahrendsen* explicitly addresses "questions considered by the agency," specifically, whether the appellant was entitled to relief from the agency holding retroactive payments of Medicaid benefits were limited to a three-month period prior to an application. *Id.* at 675. Later in the opinion the *Ahrendsen* Court addressed the "three theories" under which the appellant sought relief. *Id.* at 677. The ultimate "question" considered by the court then, was whether the application of the controlling statute was correctly applied. The theories put forth by the appellant were merely contentions arguing how the agency incorrectly applied the law which did not require individual preservation before the agency.

Similarly, Johnston's question submitted to both the ALJ and the reviewing officer alleged the agency had failed to present substantial evidence warranting suspension of driving privileges. (App. 4-8). Johnston's application for reversal unambiguously questioned whether the IDOT had met its burden of establishing three independent instances of violative conduct as required by the statute and whether the agency in affirming the finding had accurately interpreted the meaning of the habitual offender statute. (App. 4, 7-8).

The IDOT's assertion that each individual theory must be plead to the agency to preserve for judicial review is overly formalistic and requires parties plead challenges to a level of precision beyond what is required in other adjudicative proceedings. *See Ames 2304, LLC v. City of Ames, Zoning Bd. of Adjustment*, 924 N.W.2d 863 (Iowa 2019) (Emphasizing when performing statutory interpretation, courts must consider an ordinance in its entirety, including any "additional ammunition for the same argument"); *Off. of Consumer Advoc. v. Iowa St. Commerce Comm'n*, 465 N.W.2d 280, 283–84 (Iowa 1991); *see also Thompson v. Fowler*, No. 17-0284, 2017 WL 6513973, at *2 (Iowa Ct. App. Dec. 20, 2017) (finding specific theories argued on appeal do not need to be preserved when the ultimate issue in dispute was decided by the district court).

The district court also cites *Schaefer v. Iowa Dep't of Trans.*, No. 02-0580, 2002 WL 1842482, at *3 (Iowa Ct. App. Aug. 14, 2002) as persuasive authority to support dismissal of this argument on error preservation grounds. (App. 18). The portion of *Schaefer* cited by the district court narrowly construing error preservation in agency action is dicta though because the ultimate claim was dismissed on jurisdictional grounds, namely failure to file the appeal in a timely manner, and *not* error preservation grounds. *See id.* at *2.

Claims of insubstantial evidence may be used to challenge a legal conclusion where the facts used by an agency to substantiate a legal finding are inadequate to

satisfy governing legal standards. *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 220 n.1 (Iowa 2006). When an agency fails to consider relevant evidence or otherwise commits error in applying legal standards to the facts of the case, a new decision is warranted. *Id.*

Further, it is a court's responsibility to interpret statutes and correctly apply the law when the question is one of law in an agency action. *Bromeland v. Iowa Dep't of Transp.*, 562 N.W.2d 624, 624 (Iowa 1997). The interpretation and identification of all of a statute's elements is thus within the purview of the district court when reviewing agency action to determine if it reaches the same conclusion as the agency. *Ames 2304, LLC*, 924 N.W.2d 863.

Even if this issue is found not to have been preserved for judicial review, whether the IDOT presented evidence fulfilling all elements of the habitual offender statute supporting the revocation of Johnston's license is incident to whether substantial evidence supports the IDOT's finding—which has been properly preserved for review—and should be addressed on the merits. *See Presbytery of S.E. Iowa v. Harris*, 226 N.W.2d 232, 234 (Iowa 1975) (holding assignments set for initial review on appeal will not be entertained except as incident to a determination of other issues properly presented).

2. Argument

Assuming this Court affirms the IDOT's habitual-offender calculation based on offense date, the eluding violation must nevertheless be excluded because the IDOT presented no evidence that the offense involved eluding of "a pursuing law enforcement vehicle" in violation of Iowa Code § 321.279. See Iowa Code § 321.555(1)(g) (emphasis added).

The IDOT, i.e., the State, has the burden of proving a prima facie case for revocation under § 321.555. *State v. Iowa Dist. Ct.*, 455 N.W.2d 918, 919 (Iowa 1990). Thus, if the IDOT presented no evidence on a material element and they overlooked that deficiency, its decision is unreasonable, arbitrary, and capricious and characterized as an abuse of discretion. See Iowa Code § 17A.19(10)(n). To support license revocation, the convictions which Johnston was found guilty of must fall within the explicit offenses outlined within section 321.555(1). *Brauer*, 540 N.W.2d at 444. Iowa Code section 321.555(1)(g) states, "Eluding or attempting to elude a *pursuing* law enforcement vehicle in violation of section 321.279." (emphasis added). Stated another way, this provision requires the IDOT show Johnston violated section 321.279 while eluding a *pursuing* law enforcement vehicle. The additional "pursuing" requirement is in stark contrast to other provisions within the same statutory framework which only require a showing of a conviction of a particular automotive violation. *See* Iowa Code § 321.555(1)(b)

("Operating a motor vehicle in violation of section 321J.2 or its predecessor statute."); Iowa Code § 321.555(1)(f) ("Failure to stop and leave information or to render aid *as required* by sections 321.261 and 321.263) (emphasis added). The only logical reason for including "pursuing" within the habitual offender statute is to require the IDOT to show an additional predicate; the eluding conviction involved evasive activity beyond a failure to stop for visual or audible signals, which is all that is required under Iowa Code section 321.279.

Generally, a certified abstract is prima facie evidence that "the person named in the abstract was duly convicted by the court in which the conviction or holding was made of each offense shown by the abstract." Iowa Code § 321.556(3). However, as applied to the eluding subsection of § 321.555, more factual development is required of the IDOT. This is because a bare-bones conviction for eluding under section 321.279 contains no requirement that the law-enforcement vehicle be "pursuing" a person at the time of the violation:

> The driver of a motor vehicle commits a serious misdemeanor if the driver willfully fails to bring the motor vehicle to a stop or otherwise eludes or attempts to elude a marked official law enforcement vehicle driven by a uniformed peace officer after being given a visual and audible signal to stop. The signal given by the peace officer shall be by flashing red light, or by flashing red and blue lights, and siren.

Iowa Code § 321.279(1).

Iowa Code section 321.555(1)(g) and Iowa Code section 321.279 are facially separate legislative statutes. Section 321.279 serves to identify the criminal offense

of eluding a law enforcement officer by laying out the elements necessary to attain a conviction. Section 321.555(1)(g) serves—according to the IDOT's own argument in front of the district court—the important legislative purpose of protecting Iowa's roadways from unsafe drivers. In challenging the support for the IDOT's decision, Johnston is not challenging his conviction under 321.279, but rather, alleges the IDOT did not meet its burden of production to show a prima facie violation of section 321.555(1)(g). *See Brauer*, 540 N.W.2d at 445 ("The *only* external evidence that is relevant to whether a defendant is a habitual offender is evidence relating to . . . (3) the offenses underlying the convictions are not embraced by section 321.555."). Johnston does not dispute section 321.279 is embraced within section 321.555; Johnston disputes whether section 321.555 *only* embraces a conviction under section 321.279. In fact, during the hearing in front of the ALJ, the IDOT didn't even have a representative on the call arguing or placing into the record and evidence that Johnston was eluding a pursuing law enforcement vehicle. (App. 4).

With the requirement of the IDOT in showing Johnston eluded a pursing law enforcement in mind, it is important to discuss statutory construction to show there is a difference and that difference is meaningful. The rules of statutory construction contemplate a meaningful and reasonable interpretation of the words used in statute rather than an interpretation that renders the term meaningless. With that in mind, the Iowa Supreme Court has found that courts:

> "must place a reasonable construction on the statute which will best effect the purpose of the statute, rather than one which will defeat it…[t]he statute should not be construed so is to make any part of its superfluous ***unless no other construction is reasonably possible***…[w]e will presume the legislature enacted each part of the statute for a purpose and intended that each part be given effect."

In the Interest of G.J.A., 547 N.W.2d 3, 6 (Iowa 1996) (internal citations omitted).

The Court has gone further finding courts:

> "will not construe a statute in a way to produce impractical or absurd results…and we should not speculate as to the probable legislative intent apart from the wording used in the statute…we are required to interpret the language fairly and sensibly in accordance with the plan meaning of the words used by the legislature."

Carolan v. Hill, 553 N.W.2d 882, 887 (Iowa 1996) (internal citations omitted).

The Iowa Supreme Court has further found:

> "Generally, we are to use rules of statutory construction as aids in determining legislative intent only when the terms of a statute are ambiguous. We are to give precise and unambiguous language its plain and rationale meaning as used in conjunction with the subject considered. We are therefore not to speculate as to the probable legislative intent apart from the wording used in the statute. We must look to what the legislature said, rather than what it should or might have said."

Johnson v. Johnson, 564 N.W.2d 414, 417 (Iowa 1997).

Here, the statute is unambiguous. The legislature intended for habitual offender eluding to require an additional step: that the law enforcement vehicle be *pursuing* the defendant at the time of the violation. The IDOT, as an agency of the

State, has the burden of proving a prima facie case to support revocation under Iowa Code section 321.555. *State v. Iowa Dist. Ct.*, 455 N.W.2d at 919. Under this plain and unambiguous reading of the statute, if the IDOT failed to present any evidence supporting the material element Johnston's conviction arose from eluding a *pursuing* law enforcement vehicle, the conviction cannot stand alone as a third offense and the revocation of Johnston's driver's license was not justified and must be overturned.

CONCLUSION

David Johnston respectfully requests this Court reverse the district court's Order on Judicial Review in its entirety, vacate the IDOT's revocation of. Johnston's driving privileges and enter judgment in favor of Johnston.

ORAL ARGUMENT NOTICE

Counsel requests to submit this case with oral argument.

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CERTIFICATES OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because it contains 5,680 words (less than 14,000 words), excluding the parts of the brief exempted by Rule 6.903(1)(g)(1), which are the table of contents, table of authorities, statement of the issues, and certificates.

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 Office Word 2016 in font size 14, Times New Roman.

/s/ *Christopher Stewart*
Dated: August 19, 2019
Christopher Stewart

CERTIFICATES OF FILING AND SERVICE

I hereby certify that I e-filed the Appellant's Final Brief with the Electronic Document Management System with the Iowa Judicial Branch on the 19th day of August, 2019. The following counsel will be served by Electronic Document Management System:

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I hereby certify that on the 19th day of August, 2019, I did serve the Plaintiff-Appellant's Final Brief on Appellee, listed below, by mailing one copy thereof to the following Appellant:

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