

IN THE SUPREME COURT 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
THE HONORABLE JEANIE VAUDT**

**APPELLEE'S RESISTANCE TO APPELLANT'S
APPLICATION FOR FURTHER REVIEW OF THE
IOWA COURT OF APPEALS DECISION FILED MAY 13, 2020**

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APPELLEE'S RESISTANCE TO APPLICATION FOR FURTHER REVIEW

The respondent-appellee, Iowa Department of Transportation (DOT), by and through undersigned counsel, resists petitioner-appellant's Application for Further Review. In support and further explanation, the DOT states:

1. Further review by the Iowa Supreme Court is not appropriate because none of the grounds set forth in Iowa R. App. P. 6.1103(1)(b) has been met.

2. The decision of the Court of Appeals correctly and unanimously affirmed the district court's dismissal of petitioner's petition for judicial review on the grounds that two of petitioner's arguments squarely contradicted binding legal precedent and the third was unpreserved.

3. In rejecting petitioner's first argument that his deferred judgment did not constitute a final conviction for purposes of section 321.209, the Court of Appeals correctly held that *Schilling v. Iowa Dept. of Transp.*, 646 N.W.2d 69 (Iowa 2002), was dispositive of this argument, holding that "the rationale of Schilling applies equally to section 321.555(1) [the habitual offender statute], and we hold that Johnston's deferred

judgment is a final conviction for purposes of that section.” Court of Appeals Decision at 6.

4. The Court went on to reiterate that “[w]e therefore conclude that Johnston’s deferred judgment for his violation of section 321.279 is a final conviction for purposes of section 321.555(1).” Court of Appeals Decision at 7.

5. In rejecting petitioner’s second argument that the dates of his convictions should be used instead of the dates of his offenses for purposes of section 321.555(1) (the habitual offender statute), the Court of Appeals correctly held that his argument “was squarely addressed and rejected in *State v. Phelps*, 417 N.W.2d 460, 461-62 (Iowa 1988), where the appellant’s license was revoked under section 321.555(2).” Court of Appeals Decision at 9.

6. As to petitioner’s third argument, the Court of Appeals correctly held as follows: “we reject as unpreserved Johnston’s novel claim that an additional ‘pursuing’ element exists in section 321.555(1)(g).” Court of Appeals Decision at 10.

7. The Court of Appeals was correct in affirming the decision of the district court in its entirety and further review should be denied. There is no legal error for this Court to correct.

WHEREFORE, for all the reasons and authority stated above, petitioner's Application for Further Review should be denied and the decision of the Court of Appeals left undisturbed.

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

This Resistance to Application for Further Review complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this Resistance contains 384 words, excluding the parts of the Resistance exempted by Iowa R. App. p. 6.903(1)(g)(1).

This Resistance 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 Resistance has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in size 14 Times New Roman.

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CERTIFICATE OF FILING AND CERTIFICATE OF SERVICE

I, Michelle E. Rabe, hereby certify that on June 11, 2020, a copy of Appellee's Resistance to Application for Further Review was filed electronically with the Clerk of the Iowa Supreme Court through the EDMS system, and which system further will provide access and service to the Resistance on that same date to:

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