IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. RYAN JOSEPH HAHN, Defendant-Appellant.	)))))))))	S.CT. NO. 20-0202

APPEAL FROM THE IOWA DISTRICT COURT
FOR SCOTT COUNTY
HONORABLE TAMRA ROBERTS, JUDGE
(MOTION TO SUPPRESS)
HONORABLE PATRICK A. MCELYEA (TRIAL & SENTENCING)

APPELLANT'S BRIEF AND ARGUMENT AND REQUEST FOR ORAL ARGUMENT

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FINAL

CERTIFICATE OF SERVICE

On the 2nd day of October, 2020, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Ryan Hahn, 703 Davenport St., Dixon, IA 52745.

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the district court erred in denying Hahn's motion to suppress because the trash survey was conducted in violation of his right against unreasonable searches and seizures under the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 8 of the Iowa Constitution?

Authorities

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ROUTING STATEMENT

Because this case presents an important constitutional issue of first impression for the Iowa Supreme Court, this case should be retained by the Iowa Supreme Court. Iowa R. App. P. 6.1101(2)(a) & (f). Specifically, this case argues that Iowans have a constitutionally recognized right to privacy in their garbage, and that the published court of appeals decision in State v. Henderson, 435 N.W.2d 394 (Iowa Ct. App. 1988), should be overruled. Additionally, this case argues that when police seize garbage bags from closed garbage cans and subsequently search the contents of those bags, they impermissibly trespass on effects in violation of the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Iowa Constitution. The Supreme Court recently granted further review in a case raising this argument (State v. Wright, Supreme Court No. 19-0180, Application for Further Review Granted 4/19/2020), and should retain this case as well.

STATEMENT OF THE CASE

Nature of the Case: The defendant-appellant, Ryan Hahn, appeals from his conviction, judgment and sentences for possession with intent to deliver marijuana in violation of Iowa Code section 124.401(1)(d) (2017), failure to affix a drug tax stamp in violation of Iowa Code section 453B.12 (2017), and possession of a controlled substance – second offense (Vyvanse) in violation of Iowa Code section 124.401(5) (2017) following a jury trial in the District Court of Scott County.

Course of Proceedings: The State charged Ryan Hahn with possession with intent to deliver marijuana in violation of Iowa Code section 124.401(1)(d), failure to affix a drug tax stamp in violation of Iowa Code section 453B.12, child endangerment in violation of Iowa Code section 726.6(7), and possession of a controlled substance – second offense (Vyvanse) in violation of Iowa Code section 124.401(5). (Trial Information) (App. pp. 5-9). Hahn was charged alongside codefendant Danielle Grimm. (Trial Information) (App. pp. 5-9).

Hahn filed a motion to suppress evidence seized during a search of his house, arguing that the search warrant relied on a prior search of his garbage conducted in violation of his rights under Article I, Section 8 of the Iowa Constitution and the Fourth and Fourteenth Amendments to the United States Constitutions. (Motion to Suppress) (App. pp. 10–11). The district court denied that motion. (Order Denying Motion to Suppress) (App. pp. 16–18). The case proceeded to jury trial, where Hahn was tried along with his codefendant Grimm. (Trial Transcript p. 1 L. 6–7). After the State rested, the court granted Hahn's motion for judgment of acquittal with regard to the child endangerment count. (Trial Transcript p. 185 L. 1–8). Hahn rested without presenting evidence. (Trial Transcript p. 188 L. 11–12). The jury returned a verdict finding Hahn guilty of possession with intent to deliver marijuana, failure to affix a drug tax stamp, and possession of a controlled substance – second offense (Vyvanse). (Jury Trial Order) (App. pp. 19–20). The court sentenced Hahn to an

indeterminate term not to exceed five years on both the possession of marijuana with intent to deliver and failure to affix tax stamp counts, and two years on the possession of a controlled substance – second offense (Vyvanse) count, all concurrent with one another. (Sentencing Order) (App. pp. 21–23). The court suspended the terms of incarceration, and placed Hahn on two years of supervised probation. (Sentencing Order) (App. pp. 21–23). Hahn filed a timely notice of appeal. (Notice of Appeal) (App. pp. 24–26).

Facts: In September 2018, Ryan Hahn lived with Danielle Grim and three children at 703 Davenport Street in Dixon, Iowa. The address came to the attention of law enforcement when DHS worker Theresa Hirst sent an email to Scott County Sheriff's Deputy Daniel Furlong on September 7, 2018, asking if he had had any contacts with Hahn or Grimm. (Hearing on Supp. Motion p. 16 L. 14–18; Defendant's Exhibit E) (Conf. App. p. 14). Hirst's email stated that one of the children in the household told her that Hahn took frequent trips to

Colorado to purchase marijuana, and also kept "a clear bag with a bunch of pills" at the house. (Defendant's Exhibit E) (Conf. App. p. 14). The email stated that Hahn's address was 704 Davenport Street, but Deputy Furlong subsequently learned that Hirst was mistaken about the address. (Hearing on Supp. Motion p. 20 L. 9–10).

On the evening of Monday, September 10, 2018, Deputy Furlong and his partner Deputy Eric Burton went to Hahn's address, opened a garbage can, and removed one bag of garbage. (Hearing on Supp. Motion p. 7 L. 23–p. 8 L. 3; p. 8 L 25–p. 9 L. 10). Upon searching that bag, the deputies located "[i]ndicia to Danielle Grimm in the form of a summary of work hours at 'Casey's' on 8/26/2018" and a "[r]eceipt from a marijuana dispensary in Denver, Colorado showing a purchase of two ½ ounce quantities of marijuana from 'Stone Dispensary' located at 4820 Morrison Rd. on 9/1/18." (Search Warrant Application ¶ 6) (Conf. App. p. 9). Burton also had a follow-up contact with Hirst, who described her

conversations with two of the children at their school, as well as a home visit where Hahn refused to allow her inside. (Search Warrant Application ¶ 7) (Conf. App. p. 9).

Burton applied for a search warrant for 703 Davenport Street, based on information from the contacts with Hirst, the items found during the garbage search, and Hahn's criminal history.[1] (Search Warrant Application ¶ 6–8) (Conf. App. p. 9). The application was granted, and the search was executed on Wednesday, September 19, 2018. (Trial Transcript p. 18 L. 21–p. 19 L. 4). After the deputies located marijuana, marijuana products, and drug paraphernalia, Hahn and Grimm were charged with the offenses outlined above. (Search Warrant Return; Trial Information) (App. pp. 4–9). Hahn filed a motion to suppress, claiming that the search of his garbage was conducted in violation of his rights under the

[1] Hahn's criminal history was summarized in the application as two convictions for domestic abuse assault, two convictions for operating while intoxicated, a conviction for possession of a controlled substance, and "a revocation of [Hahn's] driving privileges due to a drug-related conviction in 2014 . . . that did not show up on his criminal history check."

United States and Iowa Constitutions. (Motion to Suppress) (App. pp. 10–11).

At the suppression hearing, the State called Deputy Furlong. (Hearing on Supp. Motion, p. 5 L. 1). Furlong testified that his job duties included conducting "trash surveys" where he would go to the home of the subject of a drug investigation either the night before or the morning of trash collection day, take trash, move it elsewhere, and examine it. (Hearing on Supp. Motion p. 6 L. 18–p.7 L. 9). He said that he would do this if garbage was "out, ready for disposal" at the targeted address. (Hearing on Supp. Motion p. 7 L. 6). He also said that he would only conduct a trash survey if reaching the cans did not require him to "actually have to step foot on the property in order to obtain the trash," because if he went onto the property he would be "trespassing." (Hearing on Supp. Motion p. 7 L. 10–18).

Furlong further testified that he and his partner Deputy Burton went to Hahn's address on the evening of Monday,

September 10, 2018. (Hearing on Supp. Motion p. 7 L. 23–p. 8 L. 3). They chose that evening based on a list of Scott County garbage collection days Furlong had compiled in 2010 indicating Tuesday was garbage collection day in Dixon. (Hearing on Supp. Motion p. 9 L. 11–p. 10 L. 11; State's Exhibit 3) (Ex. App. p. 3). Furlong admitted that he had subsequently learned garbage was collected in Dixon on Fridays, not Tuesdays. (Hearing on Supp. Motion p. 11 L. 16–23).

Furlong also testified that they located two garbage cans in the alley behind Hahn's house and opened both of them, but only one of the cans contained a single bag of garbage, which they took. (Hearing on Supp. Motion p. 9 L. 2–10). He could not recall whether there were other garbage cans in the alley that evening. (Hearing on Supp. Motion p. 19 L. 9–11). Furlong testified that, although the cans were "in the grass" of Hahn's back yard, he and Burton did not have to enter the property because they could reach the garbage can while

standing in the alley. (Hearing on Supp. Motion p. 18 L. 23–p. 19 L. 3).

The State also called Deputy Burton, who testified to substantially the same set of facts as Furlong. (Hearing on Supp. Motion p. 21 L. 3–p. 25 L. 10). Burton also took photographs of Hahn's house on Monday, October 7, 2019, two days prior to the suppression hearing. (Hearing on Supp. Motion p. 26 L. 1–15; State's Exhibits 6, 7, and 8) (Ex. App. pp. 4–6). No garbage cans are visible in any of these photos.

The Defense called Christopher Owens, operations manager at Republic Services, the waste management company that services Dixon, Iowa. (Hearing on Supp. Motion p. 33 L. 2–24). Owens testified that in September of 2018 Dixon's garbage collection day was Friday, not Tuesday. (Hearing on Supp. Motion p. 34 L. 19–23). Owens also testified that garbage was collected at Hahn's address on

Saturday,[2] September 8, 2018 and on Friday, September 14, 2018. (Hearing on Supp. Motion p. 36 L. 1–21).

Hahn testified at the hearing that he kept the garbage cans next to his back door when it was not collection day. (Hearing on Supp. Motion p. 42 L. 5–8). He would typically take the cans to the alley on the morning of collection day, and would return them to their place next to the back door "a few hours" after collection. (Hearing on Supp. Motion p. 42 L. 11–15; p. 42 L. 23–p. 43 L. 2). He stated that the cans would normally be located outside the back door "six and a half days a week." (Hearing on Supp. Motion p. 43 L. 3–5.).

Following Hahn's testimony, the State recalled Deputy Furlong. (Hearing on Supp. Motion p. 43 L. 19–20). Furlong testified that he took photos of Hahn's house on Wednesday, September 19, 2018, the day the search warrant was executed. (Hearing on Supp. Motion p. 44 L. 14–20). Exhibit 9 is a photo of the back of Hahn's house, with one garbage can

[2] Garbage collection was delayed one day that week because of the Labor Day holiday.

visible near the back door. (State's Exhibit 9) (Ex. App. p. 7). Exhibit 10 is a photo of the shed, with one garbage can visible next to the shed. (State's Exhibit 10) (Ex. App. p. 8). Furlong testified that neither photo showed the location of the cans on September 10, when both were "placed out along the alley." (Hearing on Supp. Motion p. 46 L. 9–12).

The district court found that the deputies testified more credibly than Hahn, and therefore that the seizure and subsequent search of Hahn's garbage was constitutionally permissible. (Order Denying Supp. Motion) (App. pp. 16–18).

ARGUMENT

I. The district court erred in denying Hahn's motion to suppress because the trash survey was conducted in violation of his right against unreasonable searches and seizures under the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 8 of the Iowa Constitution.

A. Error Preservation.

Hahn filed a motion to suppress, arguing the "trash survey" of the garbage from 703 Davenport Street violated his right against unreasonable searches and seizures in violation

of both the Fourth and Fourteenth Amendments to the United States Constitution and article I, section 8 of the Iowa Constitution. (Motion to Supp.) (App. pp. 10–11). The district court denied that motion. (Order Denying Supp. Motion) (App. pp. 16–18). Error is therefore preserved. State v. Lovig, 675 N.W.2d 557, 562 (Iowa 2004) (adverse ruling on motion to suppress preserved error).

At the beginning of the suppression hearing, the following exchange occurred:

> **THE COURT:** Before the Court begins, I do want to note that, when I read through the motion and the resistance, it looks like some of the areas of the law aren't disputed but maybe this is more of a factual dispute; is that correct?
> **MR. WALKER:** That is correct, Your Honor.
> **MR. HUFF:** Yes, Your Honor.
> **THE COURT:** All right. Just want to make sure everyone is on the same page.

(Hearing on Supp. Motion p. 4 L. 16–24. Additionally, in the Order Denying Motion to Suppress, the district court stated that "[t]he parties do not dispute the existing law in this matter, but believe there is only a factual issue in regard to the location of the trash can." (Order Denying Supp. Motion)

(App. pp. 16–18). However, the motion to suppress was made pursuant to "the 4th and 14th Amendments of the United States Constitution" and "Article I, Section 8 of the Iowa Constitution." (Motion to Suppress) (App. pp. 10–11). In its response, the State argued that there is no reasonable expectation of privacy in garbage, and that the seizure of garbage on non-collection days does not change this conclusion. (Resistance to Motion to Suppress) (App. pp. 12–15). The district court found "that the search was not subject to the search warrant requirement," because "any scavenger or passerby would believe that the contents of the can were no longer private." (Order Denying Motion to Suppress) (App. pp. 16–18).

"[W]here a question is obvious and ruled upon by the district court, the issue is adequately preserved." State v. Paredes, 775 N.W.2d 554, 561 (Iowa 2009) (citing State v. Williams, 695 N.W.2d 23, 27–28 (Iowa 2005)). Hahn's motion to suppress and the State's response raised the issue of the

location of the garbage cans as well as the broader question of the constitutionality of garbage searches, and the district court's conclusion indicates that it considered and ruled on each of those issues. The issues are therefore preserved on appeal. See Id.

B. Standard of Review.

Appellate courts review constitutional claims de novo. State v. Pals, 805 N.W.2d 767, 771 (Iowa 2011). The Court will make an independent evaluation of the totality of the circumstances as shown by the entire record, including evidence introduced during the suppression hearing and the trial. State v. Breuer, 577 N.W.2d 41, 44 (Iowa 1998). Insofar as this assessment involves review of credibility determinations, appellate courts "give deference to the district court's fact findings because of that court's ability to assess the credibility of the witnesses," but are not bound by those findings. State v. Carter, 696 N.W.2d 31, 36 (Iowa 2005).

C. Discussion.

During the suppression hearing, both deputies testified that when they collected the garbage, they could reach Hahn's garbage can while standing in the alley. (Hearing on Supp. Motion p. 19 L. 2–3; p. 31 L. 3–5). This occurred several days prior to the scheduled garbage collection day. Hahn, on the other hand, testified that the garbage cans were routinely kept just outside the back door of the home, except for a few hours on collection day. (Hearing on Supp. Motion p. 42 L. 23–p. 44 L. 5). The State submitted photographs taken on the day the deputies searched the house, showing one can outside the back door and another next to a shed several feet from the alley. (State's Exhibits 9 and 10) (Ex. App. pp. 7–8).

The district court denied Hahn's motion to suppress, stating:

> The Court did not find the Defendant's testimony as credible. Pictures on September 19, 2018, show that one can was located on the back patio of the home, but another was located near the shed on the rear of the property next to the alley. September 19, 2018, was not a trash pickup day, so his testimony was

> inconsistent with photographic evidence on that date.
> Given the location of the cans, abutting the alley and could be accessed from the alley, and the fact that it was not along any home or outbuilding, the Court finds that the search was not subject to the search warrant requirement. The trash survey was conducted in an acceptable manner as allowed in the case law cited by both parties in their Motion and Resistance. Any scavenger or passerby would believe that the contents of the can were no longer private.

(Order Denying Supp. Motion) (App. pp. 16-18). The district court's conclusion that the trash survey was constitutionally permissible was in error for three reasons: the police did not testify credibly that they had not entered Hahn's property when they seized the garbage bag, the trash survey was a trespass on effects in violation of Hahn's constitutional rights under both the United States and Iowa Constitutions, and the trash survey was an intrusion on Hahns' reasonable expectation of privacy in violation of Article I Section 8 of the Iowa Constitution.

1. *The district court erred in finding the deputies' testimony was more credible than Hahn's testimony, and therefore that the police did not enter Hahn's property.*

The protections of the Fourth Amendment and article I, section 8 extend to the curtilage of the home. State v. Lewis, 675 N.W.2d 516, 523 (Iowa 2004); Oliver v. United States, 466 U.S. 170, 180 (1984). Curtilage is the "area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" Lewis, 675 N.W.2d at 523 (quoting Oliver, 466 U.S. at 180). Four factors have been considered to determine the extent of the home's curtilage and whether an area should be treated the same as the home itself. Id.; United States. v. Dunn, 480 U.S. 294, 300 (1987). The factors are (1) "the proximity of the area claimed to be curtilage to the home"; (2) "whether the area is included within an enclosure surrounding the home"; (3) "the nature of the uses to which the area is put"; and (4) "the steps taken by the resident to protect the area from observation by people passing by." Lewis, 675 N.W.2d at 523. These factors are not

exclusive; "[r]ather, these factors are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration—whether the area in question is so intimately tied to the home itself that it should be placed under the home's "umbrella" of Fourth Amendment protection." Dunn, 480 U.S. at 301.

The question of purpose for entry is also relevant to determining whether a constitutional violation has occurred. In Florida v. Jardines, the United States Supreme Court addressed the question of whether police violated the defendant's Fourth Amendment rights by walking onto his front porch and having a police canine sniff his door. Florida v. Jardines, 569 U.S. 1, 9 (2013). The Court noted that, although "[t]he front porch is the classic exemplar of an area adjacent to the home and to which the activity of home life extends," there is an implicit license for visitors to enter that area to knock on the door. Jardines, 569 U.S. at 7–8. However, the Court also pointed out the limitations of that

license, and ultimately held that "explor[ing] the area around the home in hopes of discovering incriminating evidence" constitutes a search, even if it occurs in an area the general public is permitted to briefly enter. Id. at 9.

The district court's conclusion that the deputies testified more credibly than Hahn, and therefore that the garbage cans were reachable from the alley on the evening of September 10, 2018, is not supported by the evidence. While Exhibit 9 may contradict Hahn's assertion that the cans were always right outside his back door except on collection days, it supports his more general assertion that the cans were not routinely accessible from the alley, and more likely would not have been accessible from the alley on September 10. The accessibility of the garbage cans was the core of the issue, because the ultimate question was whether the deputies committed an unconstitutional search and seizure by entering the curtilage of Hahn's home.

Contrary to the district court's conclusion, the evidence does not support a finding that the officers remained in the alley when they seized Hahn's garbage. Exhibit 9 shows one can located just outside Hahn's back door, corroborating his testimony about where the cans were generally kept. (State's Exhibit 9) (Ex. App. p. 7). Exhibit 10 shows another can next to a shed in Hahn's back yard, out of reach to a person standing in the alley. (State's Exhibit 10) (Ex. App. p. 8). No photographic evidence shows the cans in any location accessible without trespassing in Hahn's yard.

The deputies' description of where the cans were located was counterintuitive. Deputy Furlong testified that two cans were located on the alley, on a non-collection day, but only one of them contained anything. (Hearing on Supp. Motion p. 9 L. 2–10). This could indicate that the household kept both cans right next to the alley at all times. But Exhibits 9 and 10 show this is not the case. On the other hand, this could mean that someone in the household arbitrarily took both

cans to the alley, despite the fact that it was not collection day and one can was completely empty. The former possibility is foreclosed by the photographic evidence, and the latter requires a finding that the members of the household acted in an arbitrary manner when disposing of garbage. Nonetheless, the district court concluded that one of these circumstances was the truth of the matter.

The evidence contradicts the testimony of Deputies Furlong and Burton that they seized Hahn's garbage bag while standing in the alley. It was not garbage collection day. (Hearing on Supp. Motion p. 34 L. 21). It was not household routine to keep the garbage cans at the alley when they were not for collection. (Hearing on Supp. Motion p. 42 L. 23–p. 43 L. 5; State's Exhibits 9 and 10) (Ex. App. pp. 7–8). One of the cans was empty. (Hearing on Supp. Motion p. 9 L. 7–8; p. 31 L. 12–20). The only photographs that give insight into where the cans were kept show they were not kept in an area accessible from the alley. (State's Exhibits 9 and 10) (Ex.

App. pp. 7–8). The evidence does not support the district court's conclusion that the deputies were in the alley when they opened his garbage can and seized a bag of garbage. The evidence in fact supports the opposite conclusion: that they trespassed into Hahn's yard to seize his garbage.

Thus, on the date in question the cans were either outside Hahn's back door or next to a shed in his back yard. Applying the factors outlined in Lewis and Dunn, either of these possibilities means that the cans were within the curtilage of Hahn's home.

If the cans were located outside the back door, it is clear that they were in an area which "harbors those intimate activities associated with domestic life and the privacies of the home." Lewis, 675 N.W.2d at 523. The area is mere feet from the home itself. (State's Exhibit 9) (Ex. App. p. 7). Exhibit 10 shows that the back yard was not completely enclosed. (State's Exhibit 10) (Ex. App. p. 8). However, Exhibit 9 shows a fence separating the front yard from the

back. (State's Exhibit 9) (Ex. App. p. 7). This demonstrates an effort to exclude visitors approaching from the front of the house. The area outside the back door was used for storage and recreation—exhibit 9 shows children's toys, tools, and painting supplies kept in that location. (State's Exhibit 9) (Ex. App. p. 7). The presence of personal property indicates that this is not an area that Hahn would expect members of the public to enter at will, particularly for the purpose of tampering with or removing property. Finally, the area outside the back door was shielded from the street by the house, and the garbage itself was shielded from view, twice-over, by the garbage bag and garbage can. If the cans were located outside the back door, they were within the curtilage of the home, and subject to the protections of the United States and Iowa Constitutions.

The same conclusion is warranted if the cans were next to the shed. While not as close to the home, the can is right next to an outbuilding, making clear its association with the

nearby house. Similar to the area by the back door, the area by the shed is used for property storage. In Exhibit 10, large appliances are visible next to the shed. (State's Exhibit 10) (Ex. App. p. 8). A photograph submitted during trial, Exhibit 59, shows the interior of the shed on the day the search warrant was executed. (State's Exhibit 59) (Ex. App. p. 9). The shed itself, like the area around it, is clearly used for property storage; a light fixture, a tool bag, and other items are present. (State's Exhibit 59) (Ex. App. p. 9). Like the area outside the back door, the fence excluding visitors at the front of the house from the back yard and the fact that two different containers were obscuring the garbage from view both indicate that the area next to the shed was constitutionally protected curtilage.

Finally, if the Court concludes that these locations were subject to any implicit license allowing the public to enter, the deputies still conducted a search in violation of Hahn's rights as outlined in Jardines. Like entering the defendant's porch

and having a dog sniff his door in that case, the deputies entered Hahn's property for the sole purpose of finding incriminating evidence. As in Jardines, this was a constitutional violation requiring suppression of all associated evidence.

This Court is not bound by the district court's credibility determinations. Carter, 696 N.W.2d at 36. The evidence demonstrates that the deputies did not credibly testify that they remained in the alley when they seized Hahn's trash. The district court erred in finding that the deputies testified credibly, and should have concluded that the garbage cans were not at the alley when the trash survey occurred. The district court should have further concluded that Deputies Furlong and Burton entered the curtilage of Hahn's home to seize his garbage and subsequently search it, in violation of Hahn's rights under the United States and Iowa constitutions. Alternatively, the district court should have concluded that

entering Hahn's yard for the purpose of locating incriminating evidence violated Hahn's rights as outlined in Jardines.

2. *The "trash survey" was a search conducted in violation of the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Iowa Constitution because it constituted a trespass on effects.*

Both the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Iowa Constitution prohibit the unreasonable search and seizure of "effects." U.S. Const. amend. IV; Iowa Const. art. I, § 8. Effects are defined as "[m]ovable property; goods." Black's Law Dictionary (11th ed. 2019).

In United States v. Jones, Justice Scalia's majority opinion made it clear that the "search" analysis outlined in Katz and subsequent cases—that a search occurs when the government intrudes on a subjective expectation of privacy that society would consider objectively reasonable—did not replace wholesale the prior property-based jurisprudence, but rather supplemented it. United States v. Jones, 565 U.S.

400, 406–08 (2012). Jones addressed whether attaching a GPS unit to a vehicle and tracking the vehicle's movements constituted a search for Fourth Amendment purposes. Id. at 403. The majority rejected the Government's argument that, because those movements were on public roadways and thus visible to the public, no search occurred. Id. at 410. The majority also rejected the Government's similar argument that the vehicle's travel on public roadways was akin to it being in "open fields" and thus not subject to Fourth Amendment protections. Id. at 410–11. These arguments were irrelevant because they ignored the preceding act by the government: "physically occupy[ing] private property for the purpose of obtaining information," which would have undoubtedly "been considered a 'search' within the meaning of the Fourth Amendment when it was adopted." Id. at 404–05. While Katz addressed advancements in technology and the need to protect against governmental intrusions not requiring any trespass, the decision's "reasonable-expectation-of-privacy test

has been *added to*, not *substituted for*, the common-law trespassory test." Id. at 409; see also State v. Ochoa, 792 N.W.2d 260, 276 (Iowa 2010) ("A close reading of Katz . . . indicates that the majority of the United States Supreme Court did not abandon a property-rights theory, but instead added a component of privacy onto existing Fourth Amendment doctrine."). The government therefore violates the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Iowa Constitution when it "physically occupies private property for the purpose of obtaining information," even if its act does not implicate Katz privacy expectations.

Deputies physically occupied Hahn's private property, twice, in order to obtain information. They first opened his closed garbage can when it was located in his yard on his own private property. (Hearing on Supp. Motion p. 9 L 7; p. 18 L. 23 – p. 19 L. 1). They then removed and opened a second closed container: the garbage bag. (Hearing on Supp. Motion p. 9 L. 8–10). Both of these acts were done for the purpose of

obtaining information—investigating the concerns raised by the DHS email. Only after twice invading Hahn's private effects did they obtain the evidence used to obtain the search warrant. The Fourth Amendment and Article I, Section 8 both protect against the invasion of personal effects in this manner, and the motion to suppress evidence stemming from these violations should have been granted.

3. *The "trash survey" was a search conducted in violation of Hahn's rights under Article I, Section 8 of the Iowa Constitution, because it intruded on his reasonable expectation of privacy.*

The search of Hahn's garbage during the "trash survey" was conducted in violation of his rights under Article I, Section 8 of the Iowa Constitution. The evidence seized as a result of that search, including evidence seized during a search pursuant to a warrant issued on the basis of the garbage search, should have been suppressed.

Article I, Section 8 of the Iowa Constitution provides: "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and

searches shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized." Iowa Const. Article I, § 8. When independently evaluating the Iowa Constitution's guarantee against unreasonable searches and seizures, the Iowa Supreme Court has generally examined several factors, including related decisions from other states, the rationale of the federal decisions, the scope and meaning of Iowa's search and seizure clause, and whether the federal interpretation is consistent with Iowa law. State v. Cline, 617 N.W.2d 277, 285 (Iowa 2000) (overruled on other grounds by State v. Turner, 630 N.W.2d 601, 606 n.2 (Iowa 2001)); Ochoa, 792 N.W.2d at 268–91. Although Article I Section 8 was "generally designed with the same scope, import, and purpose" as the Fourth Amendment, this Court is "by no means bound by" federal interpretations, and adopts those interpretations only to the extent that it is persuaded by "the reasoning of the

decision." Ochoa, 792 N.W.2d at 267. The Court may apply the general principles of a federal doctrine "in a different and more stringent fashion" when addressing claims raised under the Iowa Constitution. State v. Bruegger, 773 N.W.2d 862, 883 (Iowa 2009).

These principles have led the Court to depart from federal standards on multiple occasions, particularly when assessing the legality of a search. See, e.g., State v. Ingram, 914 N.W.2d 794 (Iowa 2018) (modifying the inventory exception to the warrant requirement under the Iowa Constitution); State v. Gaskins, 866 N.W.2d 1 (Iowa 2015) (modifying the search incident to arrest exception to the warrant requirement under the Iowa Constitution); State v. Short, 851 N.W.2d 474 (Iowa 2014) (finding a warrantless search of a probationer's apartment violates the Iowa Constitution); State v. Ochoa, 792 N.W.2d 260 (Iowa 2010) (finding a warrantless search of a parolee's motel room violates the Iowa Constitution); State v. Cline, 617 N.W.2d 277 (Iowa 2000) (rejecting the good faith

exception to the warrant requirement under the Iowa Constitution) (abrogated on other grounds by State v. Turner, 630 N.W.2d 601 (Iowa 2001)). These cases all reflect the Iowa Constitution's "strong emphasis on individual rights," Short, 851 N.W.2d at 482, the "considerable value on the sanctity of private property" recognized by the framers of the Iowa Constitution, Ochoa, 792 N.W.2d at 274–75, and the Court's concern about "giving police officers unbridled discretion to rummage at will among a person's private effects" Gaskins, 866 N.W.2d at 10 (quoting Arizona v. Gant, 556 U.S. 332, 345 (2009)).

The Iowa Court of Appeals held in 1988 that Article I Section 8 is not violated when police inspect "garbage which has been put out for collection." State v. Henderson, 435 N.W.2d 394, 396–97 (Iowa Ct. App. 1988). The court reached this conclusion by approving of and applying the United States Supreme Court's analysis of this issue in the Fourth Amendment context. Id. at 397 (citing California v.

Greenwood, 486 U.S. 35 (1988)). The Court of Appeals has reaffirmed that holding on multiple occasions since Henderson. See, e.g., State v. Skola, 634 N.W.2d 687, 690–91 (Iowa Ct. App. 2001) (relying on Henderson to conclude defendant did not have legitimate expectation of privacy in garbage left for collection near the street inside plastic garbage bin); State v. Kern, No. 03-1615, 2004 WL 1836220, at *3 (Iowa Ct. App., July 28, 2004) (finding no reasonable expectation of privacy in garbage bags set out for collection between sidewalk and street); State v. MacKenzie, No. 14-1509, 2016 WL 6651866, at *4 (Iowa Ct. App., Nov. 9, 2016) (relying on Henderson to conclude no reasonable expectation of privacy in garbage placed out for collection and located ten feet from private roadway but outside the curtilage of the house and near a utility pole); State v. May, No. 13-0628, 2014 WL 1714460, at *3 (Iowa Ct. App. Apr. 30, 2014) (no reasonable expectation of privacy in three garbage bags removed from plastic garbage can placed by the street for

collection); State v. Williams, No. 07-1065, 2008 WL 2746480, at *1 (Iowa Ct. App. July 16, 2008) (no legitimate privacy right in tied garbage bags thrown into jointly used dumpster outside apartment building); State v. Allen, No. 01-1823, 2003 WL 1523879, at *2 (Iowa Ct. App. March 26, 2003) (no legitimate expectation of privacy in trash bags left at curb); Grider v. State, No. 17-1126, 2018 WL 5292087, at *3 (Iowa Ct. App. October 24, 2018) (finding counsel not ineffective for failing to challenge constitutionality of "trash rip" when record unclear whether garbage was set out for collection).

However, the Iowa Supreme Court has never ruled on this issue. The Court should discard the previous judicial reliance on Greenwood because that decision is based on flawed, unpersuasive reasoning, and hold that the Iowa Constitution protects the citizens of Iowa from this incredibly intrusive police behavior.

In Greenwood, the Court, despite accepting that a person manifests a subjective expectation of privacy in their garbage

by placing it in opaque garbage bags, concluded that society does not view such an expectation as objectively reasonable. Greenwood, 486 U.S. at 40–43. The Court based this conclusion on three general propositions: that it is possible individuals or animals could open garbage containers and expose their contents to the public; that individuals lose any expectation of privacy in their garbage when they place it out for collection by third parties; and that police are not required to avert their eyes to things observable by the general public. Id. at 40–41. These propositions are largely indistinct from one another, and they all share the same flaw: they presume that the possibility of a future occurrence means that society would find a present expectation of privacy unreasonable.

First, this Court should find the possibility of individuals or animals exposing garbage to public view is entirely irrelevant to questions of constitutional privacy, whether subjective or objective. Article I, Section 8 of the Iowa Constitution protects against *governmental* intrusion into

individual privacy. The possibility of a snoop or an animal exposing what was otherwise hidden from view does not compel the conclusion that society as a whole would expect government actors to do the same. Nor does the mere possibility that such a thing *could* happen dictate the conclusion that privacy interests are thwarted. In no other context does such a possibility thwart privacy expectations; the mere chance that a burglar could enter a home does not give police carte blanche to do the same, nor does the possibility that a pet might drag a household item outside mean that police are free to enter and inspect that item. As Justice Brennan stated in his Greenwood dissent, "[t]he mere *possibility* that unwelcome meddlers *might* open and rummage through the containers does not negate the expectation of privacy in their contents . . . ." Greenwood, 486 U.S. 35, 54 (Brennan, J., dissenting). This Court should reject the first Greenwood rationale.

Second, this Court should find that placing garbage for collection by a third party does not eliminate an individual's expectation of privacy, particularly before the transfer to the third party has even occurred. Until the item has actually changed hands, the conveyor could change her mind at any time. An individual might decide not to mail the letter that they placed in their mailbox, might decide to remove a conveyance to a family member from their will, and might decide they do not actually want to discard an item they placed in their garbage can. As with the "possibility of exposure to the public" rationale, there is no other context where the mere possibility that an item may be conveyed to a third party in the future has defeated an individual's pre-conveyance privacy interest in that item. Justice Brennan recognized this obvious flaw:

> [E]ven the voluntary relinquishment of possession or control over an effect does not necessarily amount to a relinquishment of a privacy expectation in it. Were it otherwise, a letter or package would lose all Fourth Amendment protection when placed in a mailbox or other depository with the "express purpose" of

> entrusting it to the postal officer or a private carrier; those bailees are just as likely as trash collectors (and certainly have greater incentive) to "sor[t] through" the personal effects entrusted to them, "or permi[t] others, such as police to do so." Yet, it has been clear for at least 110 years that the possibility of such an intrusion does not justify a warrantless search by police in the first instance.

Greenwood, 486 U.S. at 55 (Brennan, J., dissenting) (citations omitted). This Court should reject Greenwood's second rationale.

Finally, this Court should find the proposition that police need not shield their eyes to information otherwise exposed to the public has no bearing whatsoever on society's expectation of privacy in items that are shielded, rather than exposed, from public view. Like the first proposition, this issue has no relationship to the actual circumstances present when police remove closed, opaque garbage bags from a closed, opaque garbage can. This is not a "plain view" issue. The contents of garbage bags contained within garbage cans are not exposed to the public, and thus there is no information that police would be required to shield their eyes from if required to

obtain a search warrant before looking through the bags. Justice Brennan pointed out that "all that Greenwood 'exposed . . . to the public,' were the exteriors of several opaque, sealed containers. Until the bags were opened by police, they hid their contents from the public's view . . . ." Greenwood, 486 U.S. at 53 (Brennan, J., dissenting) (citation omitted). This Court should reject the third and final Greenwood rationale.

Although a majority of states have endorsed the reasoning of Greenwood and held that their state constitutions do not prohibit warrantless police review of the contents of garbage bags put out for collection, a significant minority of states have rejected it. See State v. Lien, 441 P.3d 185, 202 (Ore. 2019) (warrantless search of trash collected by garbage collector and turned over to police violated defendant's rights against unreasonable searches under Oregon constitution); State v. Crane, 329 P.3d 689, 695 (N.M. 2014) (New Mexico constitution provides protection of privacy in garbage sealed from plain view and set out for collection); Beltz v. State, 221

P.3d 328, 335 (Alaska 2009) (holding person who sets out garbage for collection has some objectively reasonable expectation of privacy under Alaska constitution and a police search of the trash must be supported by reasonable suspicion); Litchfield v. State, 824 N.E.2d 356, 363-64 (Ind. 2005) (concluding Indiana constitution requires police to have articulable individualized suspicion before they may search discarded garbage); State v. Morris, 680 A.2d 90, 118 (Vt. 1996) (holding Vermont constitution protects garbage disposed of in customary manner from warrantless police searches); State v. Boland, 800 P.2d 1112, 1116 (Wash 1990) (police warrantless removal and search of garbage put out for collection unreasonably interfered with defendant's private affairs under Washington constitution); State v. Hempele, 576 A.2d 793, 803 (N.J. 1990) (defendants had reasonable expectation of privacy in trash left out for collection); State v. Tanaka, 701 P.2d 1274, 1278 (Haw. 1985) (under Hawaii constitution, defendants had reasonable expectation of privacy

in their garbage bags put out for collection); People v. Krivda, 486 P.2d 1262, 1269 (Cal. 1971), as clarified in People v. Krivda, 504 P.2d 457 (Cal. 1973) (under California constitution, defendants had reasonable expectation of privacy in their trash barrels).

There has also been substantial academic criticism of third-party doctrine in general and Greenwood's flawed assumptions regarding society's expectation that the contents of their garbage remain private. See, e.g., Orin S. Kerr, The Case for the Third-Party Doctrine, 107 Mich. L. Rev. 561, 601, n. 5 (2009) (collecting citations: "A list of every article or book that has criticized the [third-party] doctrine would make this the world's longest law review footnote."); Edwin G. Fee, Jr., Criminal Procedure I: Narrowing the Protection of the Fourth Amendment, 1989 Ann. Surv. Am. L. 371, 381-384 (1991); Stephen E. Henderson, The Timely Demise of the Fourth Amendment Third Party Doctrine, 96 Iowa L. Rev. Bull. 39, 40 (2011) (asserting the third-party doctrine is "fundamentally

misguided," unpopular as a matter of State constitutional law, and predicting its demise under federal law); Search and Seizure-Garbage Searches, 102 Harv. L. Rev. 191, 195-197 (1988); Madeline A. Herdrich, Note, California v. Greenwood: The Trashing of Privacy, 38 Am. U. L. Rev. 993, 1019–20 (1989); Kevin E. Maldonado, Comment, California v. Greenwood: A Proposed Compromise to the Exploitation of the Objective Expectation of Privacy, 38 Buff. L. Rev. 647, 659-667 (1990).

The Greenwood decision rests on a deeply flawed analysis of the privacy interests involved in the warrantless search and seizure of household garbage. Its rationales are all based on hypothetical future occurrences that are unrelated to the actual circumstances present when police officers seize and subsequently search garbage. In light of the important privacy interests involved, as well as the substantial amount of criticism mounted against the decision and the doctrines upon which it rests by scholars and state courts, this Court should

decline to follow suit. The Court should join the other states that have concluded that a person does in fact have a subjective expectation of privacy in the contents of garbage concealed twice-over within containers, and that society would deem this expectation objectively reasonable.

D. Remedy

Because the trash survey was conducted in violation of Hahn's constitutional right against unreasonable searches and seizures, the items seized should not have been considered when evaluating the search warrant application. This Court should conclude that without that information, the application did not supply the requisite probable cause to support a search warrant. Hahn's conviction should be reversed, all evidence seized during the warrant search should be suppressed, and the case should be remanded for further proceedings.

The Fourth Amendment to the United States Constitution and article I, section 8 of the Iowa Constitution protect people

from unreasonable searches and seizures. U.S. Const. amend. IV; Iowa Const. art. I, § 8. The Fourth Amendment guarantee against unreasonable searches is applicable to the states via the Fourteenth Amendment. See Mapp v. Ohio, 367 U.S. 643, 655 (1961). Both constitutions require that a warrant to search a person's home or property must be supported by probable cause. U.S. Const. amend. IV; Iowa Const. art. I, § 8.

The test to determine whether probable cause exists to issue a search warrant is whether a person of reasonable prudence would believe that evidence of a crime might be located on the premises to be searched. State v. Gogg, 561 N.W.2d 360, 363 (Iowa 1997). Probable cause to search requires a determination that (1) the items sought are connected to criminal activity and (2) the items sought will be found in the place to be searched. State v. McNeal, 867 N.W.2d 91, 99-100 (Iowa 2015).

The task of the judge issuing the search warrant is to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit presented to the judge, there is a fair probability that law enforcement authorities will find evidence of a crime at a particular place. State v. Davis, 679 N.W.2d 651, 656 (Iowa 2004). A finding of probable cause depends on a nexus between the criminal activity, the things to be seized, and the place to be searched. Id.

The determination of whether a search warrant should have been issued is based entirely on affidavits and the magistrate's abstracts of oral testimony endorsed on the application. State v. Thomas, 540 N.W.2d 658, 661-62 (Iowa 1995). A warrant whose affidavit and application are lacking probable cause may not be rehabilitated or fortified by later testimony. Thomas, 540 N.W.2d at 662.

An affidavit must provide the magistrate with a substantial basis for determining the existence of probable

cause, and wholly conclusory statements fail to meet this requirement. Illinois v. Gates, 462 U.S. 213, 239 (1983). The quantum of information needed to establish probable cause is less than required for conviction. State v. Weir, 414 N.W.2d 327, 330 (Iowa 1987). However, "[m]ere suspicion, rumor or even strong reason to suspect a person's involvement with criminal activity is inadequate to establish probable cause." Weir, 414 N.W.2d at 330 (quotation omitted). If a search warrant application includes information that was obtained illegally and other information that was not, the warrant must be evaluated without the illegally obtained information to determine whether it still supports probable cause. State v. Watts, 801 N.W.2d 845, 853 (Iowa 2011).

Aside from the general information about Deputy Burton's training and experience, the description of the trash survey, and Hahn's criminal history, the search warrant application contains three facts. First, that Deputy Burton received an email from DHS worker Hirst raising concerns

about marijuana, pills, and frequent trips to Colorado. (Search Warrant Application ¶ 4) (Conf. App. p. 8). Second, that Burton met with Hirst, who described the contact with two of the children living with Hahn which gave rise to the concerns in her email. (Search Warrant Application, ¶ 7) (Conf. App. p. 9). Third, that when Hirst went to Hahn's house, he and Grimm would not let her inside. (Search Warrant Application, ¶ 7) (Conf. App. p. 9). This information, while perhaps enough to create suspicion, does not rise to the level of probable cause. As a result, all evidence obtained pursuant to the search warrant must be suppressed.

E. Conclusion

Because the search of Hahn's garbage was conducted in violation of both the United States and Iowa Constitutions, the district court erred in denying his motion to suppress the evidence located during that search. Because the search warrant relied on evidence from the garbage search, and without that evidence the application does not support a

finding of probable cause, all evidence obtained pursuant to the warrant search must be suppressed as fruit of the poisonous tree. See State v. Lane, 726 N.W.2d 371, 380 (Iowa 2007). Hahn's convictions should be vacated and the case remanded for further proceedings.

II. If the constitutional issues raised were waived or otherwise not preserved, counsel was ineffective.

A. Error Preservation.

The traditional rules of preservation of error do not apply to claims of ineffective assistance of counsel. See State v. Ondayog, 722 N.W.2d 778, 784 (Iowa 2006) (citation omitted).

B. Standard of Review.

Because claims of ineffective assistance of counsel are constitutional in nature, review is de novo. State v. Clay, 824 N.W.2d 488, 494 (Iowa 2012) (citation omitted). Claims may be decided on direct review if the record is adequate, or they may be preserved for postconviction relief proceedings. Id. (citations omitted).

C. Iowa Code Section 814.7 Does Not Preclude Hahn's Claim of Ineffective Assistance of Counsel on Direct Appeal.

The legislature recently amended Iowa Code section 814.7 to state ineffective-assistance-of-counsel claims "shall not be decided on direct appeal from the criminal proceedings". See Iowa Code § 814.7 (2019). This Court should find it is still able to rule on ineffective claims on direct appeal that have a sufficient record.

1. *The amended statutory language improperly restricts the role and jurisdiction of appellate courts.*

The change to section 814.7 improperly interferes with the separation of powers, with this Court's jurisdiction, and with the Court's role in addressing constitutional violations. "The separation-of-powers doctrine is violated 'if one branch of government purports to use powers that are clearly forbidden, or attempts to use powers granted by the constitution to another branch.'" Klouda v. Sixth Judicial Dist. Dept. of Corr. Serv., 642 N.W.2d 255, 260 (Iowa 2002) (citation

omitted). The doctrine means that one branch of government may not impair another branch in "the performance of its constitutional duties." Id.

All judicial power in Iowa is vested in the Iowa Supreme Court and its inferior courts. Iowa Const. art. V, § 1. "Courts constitute the agency by which judicial authority is made operative. The element of sovereignty known as judicial is vested, under our system of government, in an independent department, and the power of a court and the various subjects over which each court shall have jurisdiction are prescribed by law." Franklin v. Bonner, 207 N.W. 778, 779 (Iowa 1926). Article V, sections 4 and 6 are related to the jurisdiction of the courts. Notably, the Iowa Constitution provides that limitations on the manner of the Court's jurisdiction can be prescribed by the legislature. See Iowa Const. art. V § 4. But the ability of the legislature to "prescribe" the "manner" of jurisdiction should not be confused with an ability to remove jurisdiction from the Court. Subject matter jurisdiction is

conferred upon Iowa's courts by the Iowa Constitution. In re Guardianship of Matejski, 419 N.W.2d 576, 577 (Iowa 1988). They have general jurisdiction over all matters brought before them and the legislature can only prescribe the manner of its exercise; the legislature cannot deprive the courts of their jurisdiction. Id. (citation omitted); Schrier v. State, 573 N.W.2d 242, 244-45 (Iowa 1997).

"Once the right to appeal has been granted, however, it must apply equally to all. It may not be extended to some and denied to others." In re Chambers, 152 N.W.2d 818, 820 (Iowa 1967) (citation omitted). Although Iowa Code section 602.4102 contemplates the Iowa Supreme Court handling criminal appeals, the amendment to section 814.7 would make claims of ineffective assistance of counsel unreviewable on direct appeal. Iowa Code § 602.4102(2) (2019). This is particularly problematic for the Court's inherent jurisdiction.

The Iowa Supreme Court has both the jurisdiction and the duty to invalidate state actions that conflict with the state

and federal constitutions. See Varnum v. Brien, 763 N.W.2d 862, 875-76 (Iowa 2009) (noting the courts have an obligation to protect the supremacy of the constitution). One of the rights enumerated in both the United States and Iowa Constitutions is the assistance of counsel. U.S. Const. amends. VI, XIV; Iowa Const. art. I, § 10. Having a constitutional right to counsel means the having a right to *effective* assistance of counsel. State v. Ambrose, 861 N.W.2d 550, 556 (Iowa 2015) (citations omitted).

A statute that seeks to divest Iowa's appellate courts of their ability to decide and remedy claimed deprivations of constitutional rights improperly intrudes upon the jurisdiction and authority of the judicial branch. The Iowa Supreme Court has eloquently stated:

> No law that is contrary to the constitution may stand. "[C]ourts must, under all circumstances, protect the supremacy of the constitution as a means of protecting our republican form of government and our freedoms." Our framers vested this court with the ultimate authority, and obligation, to ensure no law passed by the legislature impermissibly invades an interest protected by the constitution.

Planned Parenthood v. Reynolds ex rel. State, 915 N.W.2d 206, 212-13 (Iowa 2018) (internal citations omitted) (alteration in original). "The obligation to resolve this grievance and interpret the constitution lies with this court." Id.

By removing the court's consideration of ineffective-assistance-of counsel claims, the legislature is intruding on Iowa appellate courts' independent role in interpreting the constitution and protecting Iowans' constitutional rights. This action by the legislature violates the separation of powers and impermissibly interferes with the inherent jurisdiction of the Court. Accordingly, this Court should invalidate the statutory change prohibiting the consideration of claims of ineffective-assistance-of-counsel presented on direct appeal when an adequate record exists.

2. *The amended statute violates equal protection.*

The change to Iowa Code section 814.7 denies Hahn equal protection under the law. It deprives him of the ability to challenge his conviction on direct appeal because his

attorney failed to provide him with effective assistance. Both the United States and the Iowa Constitution provide for equal protection of citizens under the law. U.S. Const. amend. XIV; Iowa Const. art. I § 6. "Like the Federal Equal Protection Clause found in the Fourteenth Amendment to the United States Constitution, Iowa's constitutional promise of equal protection is essentially a direction that all persons similarly situated should be treated alike." Varnum, 763 N.W.2d at 878 (citations omitted) (internal quotation marks omitted); see also State v. Doe, 927 N.W.2d 656, 661 (Iowa 2019) (citation omitted).

There are three classes of review for an equal protection claim based upon the underlying classification or right involved. See City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439-41 (1985) (discussing different levels of scrutiny under federal equal protection analysis). The Court evaluates classifications based on race, alienage, or national origin and classifications impacting fundamental rights using strict

scrutiny. Varnum, 763 N.W.2d at 879 (citation omitted). Such classifications are "presumptively invalid and must be narrowly tailored to serve a compelling governmental interest." Id. It applies intermediate or heightened scrutiny to "quasi-suspect" groups. Id. "To survive intermediate scrutiny, the law must not only further an important governmental interest and be substantially related to that interest, but the justification for the classification must be genuine and must not depend on broad generalizations." Id. (citation omitted). The Court evaluates all other classifications using rational basis review, in which a complainant has the "heavy burden of showing the statute is unconstitutional and must negate every reasonable basis upon which a classification may be sustained." Id.

"[T]o truly ensure equality before the law, the equal protection guarantee requires that laws treat all those who are similarly situated with respect to the purposes of the law alike." Varnum 763 N.W.2d at 883. Hahn is within a group

of criminal defendants who have been convicted and sentenced based upon errors made by the district court. Within this group, the amendment to section 814.7 has singled out those defendants who were provided ineffective assistance of counsel for disparate treatment. Whereas a properly represented defendant can obtain relief on direct appeal, an improperly represented defendant may not get relief on direct appeal and must instead pursue postconviction relief. The legislature has treated Hahn differently based upon his assertion of an underlying violation of the right to effective assistance of counsel.

This claim of disparate treatment involves the deprivation of a fundamental right—the right to counsel. Kimmelman v. Morrison, 477 U.S. 365, 374 (1986) (citing Gideon v. Wainwright, 372 U.S. 335, 344 (1963)). The right to counsel "assures the fairness, and thus the legitimacy, of our adversary process." Id. Because the right to counsel is so vital to the accused, courts have long recognized that the right

to counsel means the right to effective counsel. United States v. Cronic, 466 U.S. 648, 654 (1984) (citation omitted); Evitts v. Lucey, 469 U.S. 387, 395 (1985). By divesting Hahn of his right to direct review of a claim based upon an assertion of ineffective assistance of counsel, where the record is sufficient to decide it, the legislature has deprived him of a fundamental right. Accordingly, the Court should review his claim on appeal under strict scrutiny. Varnum, 763 N.W.2d 862, 879 (Iowa 2009).

Regardless of the level of scrutiny the Court applies, it should find the statutory change is unconstitutional. Video from the legislature's discussions regarding the bill indicates the amendments were designed to reduce "waste" caused by "frivolous appeals" in the criminal justice system. Senate Video 2019-03-28 at 1:49:10-1:49:20, statements of Senator Dawson, available at https://www.legis.iowa.gov/dashboard?view=video&chamber=S&clip=s20190328125735925&dt=2019-03-28&offset=3054&bill=SF%20589&status=i. To the extent

the statutory changes prevent appellate court from ruling on ineffective-assistance-of-counsel claims for which the appellate record is adequate, the law is neither narrowly tailored nor rationally related to its legislative purpose. Such claims can be decided on direct appeal because they require no additional record. State v. Truesdell, 679 N.W.2d 611, 616 (Iowa 2004). "Preserving ineffective assistance of counsel claims that can be resolved on direct appeal wastes time and resources." Id. Therefore, the amendment of Senate File 589 to Iowa Code section 814.7 is not only not narrowly tailored or rationally related to the government's professed purpose, but directly contravenes it. The Court should find the amended language of section 814.7 denies Hahn equal protection under the law and should not be applied to his appeal.

3. *Section 814.7 denies Hahn due process and the right to effective counsel on appeal.*

Both constitutions ensure criminal defendants are accorded due process of law. U.S. Const. amend XIV; Iowa Const. art. I, § 9. As discussed above, the right to counsel is

a fundamental right. Kimmelman, 477 U.S. at 374 (citation omitted). It is so fundamental to due process that it has been made obligatory on the states. Evitts, 469 U.S. at 394. This guarantee of effective counsel extends to the first appeal as of right. Id. at 396.

"A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." Id. An appellate attorney does not have to submit every argument urged by an appellant, but "the attorney must be available to assist in preparing and submitting a brief to the appellate court . . . and must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim." Id. at 394 (citations omitted).

The amendment to section 814.7 violates Hahn's right to counsel on appeal, and therefore his right to due process, by interfering with appellate counsel's ability to effectively represent him. The amendment purports to prohibit an

appellate court from deciding his underlying claim of ineffective assistance of counsel on direct appeal even though the record is clearly sufficient that it could be decided on direct appeal. Cf. State v. Lopez, 872 N.W.2d 159, 169–70 (Iowa 2015); Wiborg v. United States, 163 U.S. 632, 658 (1896). Where a state provides an appeal as of right but refuses to allow a defendant a fair opportunity to obtain an adjudication on the merits of his appeal, the "right" to appeal does not comport with due process. See Evitts, 469 U.S. at 405 (citation omitted); Griffin v. Illinois, 351 U.S. 12, 17-18 (1956).

> A system of appeal as of right is established precisely to assure that only those who are validly convicted have their freedom drastically curtailed. A State may not extinguish this right because another right of the appellant-the right to effective assistance of counsel-has been violated.

Evitts, 469 U.S. at 399–400. Accordingly, the Court should conclude the amended statutory language denies Hahn due process, and it should consider any ineffective-assistance-of-counsel claims.

D. If Counsel Waived or Otherwise Failed to Preserve the Constitutional Claims Discussed Above, Counsel was Ineffective.

Hahn asserts the previous arguments are preserved, based on the arguments raised by both the Defendant and the State during the motion to suppress as well as the language used by the district court in denying that motion. See also Paredes, 775 N.W.2d at 561 (citing Williams, 695 N.W.2d at 27–28) ("We have previously held that where a question is obvious and ruled upon by the district court, the issue is adequately preserved."). However, to the extent the Court concludes error was not preserved for any reason, counsel was ineffective.

The United States and Iowa Constitutions both guarantee defendants of criminal cases the right to effective assistance of counsel. U.S. Const. amends. VI, XIV; Iowa Const. art. I, § 10; Ambrose, 861 N.W.2d at 555 (Iowa 2015). To prevail on an ineffective-assistance-of-counsel claim, a defendant must establish (1) counsel failed to perform an essential duty and (2)

the defense was prejudiced as a result. State v. Brothern, 832 N.W.2d 187, 192 (Iowa 2013)(citation omitted).

1. *Counsel Failed to Perform an Essential Duty.*

Where trial counsel failed to raise an issue of first impression, the appropriate question is "whether a normally competent attorney could have concluded that the question . . . was not worth raising." State v. Schoelerman, 315 N.W.2d 67, 72 (Iowa 1982). Additionally, counsel has a duty to preserve error for appellate review. See State v. Hrbek, 336 N.W.2d 431, 435-36 (Iowa 1983) (citation omitted).

This case deals with an issue of first impression for the Iowa Supreme Court: the constitutionality of searches and seizures of garbage. As discussed above, a substantial number of state courts, as well as academic scholarship, have criticized the Greenwood Court's finding that seizing garbage contained in garbage bags and garbage cans is constitutionally permissible. Reasonable trial counsel would have been aware of the state of the law, and would have raised a challenge to

the deputies' actions on each of the grounds outlined above. Challenges on these grounds are meritorious, may have been successful before the district court, and at the very least would have preserved the issues for appellate review. If counsel waived the issues or otherwise failed to preserve error, they failed to perform an essential duty.

2. *Hahn was prejudiced by counsel's failure.*

Proof of prejudice requires a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Ledezma v. State, 626 N.W.2d 134, 143 (Iowa 2001) (quoting Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The arguments that the seizure and subsequent search of Hahn's garbage violated his rights under both the Fourth Amendment to the United States Constitution and Article I Section 8 of the Iowa Constitution had merit. Had those

arguments been adequately pursued, the results of that search would have been struck from the search warrant application. Without those results, the application would not have supported a finding of probable cause, and the evidence located during the search of Hahn's home would have been suppressed at trial. This would have left the State with no evidence that Hahn possessed either marijuana or Vyvanse. There is a reasonable likelihood that, had counsel adequately raised the arguments above, the outcome of the proceeding would have been different. If this Court finds that trial counsel waived or did not adequately preserve those arguments, Hahn was prejudiced by that failure.

Because Hahn's trial counsel failed to perform an essential duty, and because Hahn was prejudiced by that failure, his conviction must be reversed and the case must be remanded for further proceedings.

E. Conclusion

As outlined above, if the Court finds that any of the issues presented in section I of this brief were waived or otherwise not preserved, trial counsel was ineffective. Hahn's convictions should be vacated and that the case remanded for further proceedings.

REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $5.80, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR BRIEFS

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

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/s/ Josh Irwin Dated: 10/2/20

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