

IN THE SUPREME COURT OF IOWA

NO. 17-1232

**STATE OF IOWA
Plaintiff-Appellee,**

vs.

**JEREMY M. WERNER
Defendant-Appellant.**

**APPEAL FROM THE IOWA DISTRICT
COURT FOR IOWA COUNTY
THE HONORABLE MITCHELL E. TURNER, JUDGE**

APPELLEE'S BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	2
TABLE OF AUTHORITIES	4
STATEMENT OF THE ISSUES PRESENTED FOR REVIEW	7
ROUTING STATEMENT.....	11
STATEMENT OF THE CASE.....	13
STATEMENT OF FACTS	14
ARGUMENT	17
I. DOT OFFICER GLADE WAS WITHIN HIS AUTHORITY. HE MADE A VALID STOP OF MR. WERNER’S BMW AFTER HE WITNESSED A PUBLIC OFFENSE COMMITTED IN HIS PRESENCE UPON INTERSTATE 80 WITHIN A MARKED ROAD WORK ZONE	17
A. What Werner Overlooks in his Legislative and Judicial History Presentation	17
B. <i>Merchants Motor Freight</i> No Longer Controlling.....	22
(1) Today DOT’s officers are peace officers under Iowa law.....	22
(2) Today a valid citizen’s arrest can result regardless of whether a peace officer purports to act in an official capacity.....	28
(3) Today a peace officer may charge a violator by means of a citation or summons when the officer’s conduct is covered by Iowa Code section 804.9(1).....	31

C.	<i>State v. Lloyd</i> Governs When Considering Whether a Peace Officer’s Conduct Has Resulted in an Arrest Under Iowa Code section 804.9(1)	32
D.	Werner’s Failure to Fully Address the 1990 Iowa Attorney General’s Opinion	48
(1)	Attorney General says citizen’s arrest is available to DOT’s officers	49
(2)	Officer Glade qualified as a peace officer under Iowa Code chapter 321J.....	52
E.	<i>State v. A-1 Disposal</i> Did Not Address Iowa Code section 804.9(1)	53
II.	THE AMENDMENT TO IOWA CODE SECTION 321.477 (2016) WAS NOT ARGUED TO THE DISTRICT COURT. THEREFORE, ERROR WAS NOT PRESERVED. HOWEVER, EVEN IF THIS COURT CONSIDERS THE AMENDMENT, IT OFFERS PROOF VALIDATING THE STATE’S POSITION	55
A.	Iowa Code Section 321.477 (as amended) Affirms the Citizen’s Arrest Doctrine	55
B.	Newspaper Articles Are Not Legal Authority	59
C.	Legislators’ Legal Conclusions.....	61
	CONCLUSION.....	66
	REQUEST FOR ORAL ARGUMENT	67
	CERTIFICATE OF COMPLIANCE.....	68
	CERTIFICATE OF FILING AND CERTIFICATE OF SERVICE	69

TABLE OF AUTHORITIES

Cases:

<i>Ballalatak v. All Iowa Agriculture Ass’n</i> , 781 N.W.2d 272 (Iowa 2010).....	39
<i>Chiodo v. Section 43.24 Panel</i> , 846 N.W.2d 845 (Iowa 2014)	60
<i>City of Cedar Rapids v. State</i> , 478 N.W.2d 602 (Iowa 1991)	25
<i>Horse v. Kirkgard</i> , 2014 WL 5365245 (D. Montana 2014)	59
<i>In re Marriage of Keith</i> , 513 N.W.2d 769 (Iowa App. 1994)	59
<i>Iowa State Education Association v. Public Employment Relations Board</i> , 269 N.W.2d 446 (Iowa 1978).....	62-63
<i>Jacobson v. Benson Motors, Inc.</i> , 216 N.W.2d 396 (Iowa 1974).....	60
<i>Kester v. Bruns</i> , 326 N.W.2d 279 (Iowa 1982)	63
<i>Long v. Lauffer</i> , 797 N.W.2d 621 (Table), 2011 WL 222530 (Iowa App. 2011).....	47
<i>Meier v. Senecaut</i> , 641 N.W.2d 532 (Iowa 2002)	16, 55
<i>Merchants Motor Freight v. State Highway Commission</i> , 239 Iowa 888, 32 N.W.2d 773 (1948).....	11-13, 22-25, 27-2931, 32, 46, 47, 49, 50, 53-54
<i>Northwestern Bell Tel. Co. v. Hawkeye State Tel. Co.</i> , 165 N.W.2d 771 (Iowa 1969).....	45
<i>Rife v. D.T. Corner, Inc.</i> , 641 N.W.2d 761 (Iowa 2002).....	65
<i>State v. A-1 Disposal</i> , 415 N.W.2d 595 (Iowa 1987)	22, 53, 54
<i>State v. Brooks</i> , 888 N.W.2d 406 (Iowa 2016).....	27
<i>State v. Doe</i> , 903 N.W.2d 347 (Iowa 2017).....	62
<i>State v. Hedlund</i> , 662 N.W.2d 372 (Table), 2003 WL 190768 (Iowa App. 2003).....	64
<i>State v. Hillehiem</i> , 291 N.W.2d 314 (Iowa 1980).....	54
<i>State v. Lloyd</i> , 513 N.W.2d 742 (Iowa 1994)	12, 13, 17, 20, 21,30-36, 38, 39, 42-44, 46, 47, 50-51, 54, 59, 67
<i>State v. Moore</i> , 609 N.W.2d 502 (Iowa 2000).....	41, 42
<i>State v. O’Kelly</i> , 211 N.W.2d 589 (Iowa 1973), <i>cert. denied</i> , 417 U.S. 936, 94 S.Ct. 2652, 41 L.Ed.2d 240 (1974)	21, 39
<i>State v. Plain</i> , 898 N.W.2d 801 (Iowa 2017).....	60
<i>State v. Wagner</i> , 359 N.W.2d 487 (Iowa 1984).....	53
<i>Tiano v. Palmer</i> , 621 N.W.2d 420, 423 (Iowa 2001)	59

Statutes and Other Authorities:

Iowa Code § 4.4(2) (2016).....	18
Iowa Code § 4.4(3) and (5) (2016)	19
Iowa Code § 80.9A(7).....	65
Iowa Code § 80.22 (2016)	42-45
Iowa Code § 80B.6(1)(k) (2016)	52
Iowa Code § 80B.11B(2)(a) (2016).....	52
Iowa Code § 306.4(1) (2016).....	41
Iowa Code § 307.2 (2016)	40
Iowa Code § 313.12 (2016)	20, 41
Iowa Code § 313.36 (2016)	40
Iowa Code ch. 321 (2016).....	18, 19, 21, 24-27, 37, 45
Iowa Code § 321.1(45) (1946).....	24, 25
Iowa Code § 321.1(50) (2016).....	13, 18, 22, 24, 25, 27, 66
Iowa Code § 321.1(66) (2016).....	20
Iowa Code § 321.2(1) (2016).....	19, 44, 45
Iowa Code § 321.2(2) (2016).....	19, 44, 45
Iowa Code § 321.2(3) (2016).....	19, 43-45
Iowa Code § 321.3 (2016)	18, 19, 21, 40, 44, 45
Iowa Code § 321.229 (2016)	26
Iowa Code § 321.232 (2016)	26
Iowa Code § 321.253(2) (2016).....	20
Iowa Code § 321.285 (2016)	41
Iowa Code § 321.372 (2016)	27
Iowa Code § 321.380 (2016)	27
Iowa Code § 321.433 (2016)	35
Iowa Code § 321.476 (2016)	45
Iowa Code § 321.477 (1946)	22, 25, 46
Iowa Code § 321.477 (1985)	54
Iowa Code § 321.477 (1989)	25, 49, 51, 56, 57
Iowa Code § 321.477 (2016)	16, 18, 19, 26-28, 44-46, 56-59, 65
Iowa Code § 321.477 (as amended).....	16, 55, 58
Iowa Code § 321.477(1) (as amended).....	55
Iowa Code § 321.477(3) (as amended).....	56
Iowa Code § 321.477(4) (as amended).....	56, 66
Iowa Code § 321.492 (1946)	23
Iowa Code § 321.492 (2016)	23
Iowa Code ch. 321J (2016)	14, 52, 53
Iowa Code § 321J.1(7)(e) (1989).....	52

Iowa Code § 321J.1(8)(e)	13, 18, 22, 52
Iowa Code § 321J.21 (2015).....	13, 14, 52, 53
Iowa Code § 701.2 (2016)	50
Iowa Code § 748.3 (1946)	24
Iowa Code § 755.5 (1946)	31
Iowa Code § 801.1 (2016)	23
Iowa Code § 801.2 (2016)	23
Iowa Code § 801.4 (2016)	24
Iowa Code § 801.4(11)(h) (2016)	13, 18, 22-24, 26, 52, 66
Iowa Code § 804.6 (2016)	51
Iowa Code § 804.7 (1989)	51, 57
Iowa Code § 804.7 (2016)	25, 49, 56, 57
Iowa Code § 804.7(2) (2016).....	58
Iowa Code § 804.9 (2016)	31-33, 35, 42, 44, 48, 50, 51, 56-59
Iowa Code § 804.9(1) (2016).....	11, 12, 21, 29-30, 33, 40, 42, 47, 48, 50, 51, 54, 56, 57, 61, 65, 67
Iowa Code § 804.24 (2016)	32, 36-38, 42, 43
Iowa Code ch. 805 (2016).....	36
Iowa Code § 805.6(1)(a) (2016)	37
Iowa Code § 805.8A(14)(i) (2016)	20
Iowa R. App. P. 6.801	59
Iowa R. App. P. 6.903(2)(g)(1).....	15
Iowa R. App. P. 6.1101(2)(d)	11
1939 Iowa Acts, ch. 120	44
1939 Iowa Acts, ch. 120 § 8	44
1974 Iowa Acts ch. 1180, §§ 2 and 200.....	12, 18
1976 Iowa Acts ch. 1245, § 104(7)(i).....	23
2017 Iowa Acts ch. 149 § 3 (H.F. 463).....	16, 55
2017 Iowa Acts ch. 149 § 4 (H.F. 463).....	55
1990 Iowa Op. Atty. Gen. 100 (Iowa A.G.), Opinion No. 90-12-8, 1990 WL 484921	22, 25, 49, 53
6A C.J.S. <i>Arrest</i> § 12 (1975).....	21
DPS vehicle inspectors, http://www.dps.state.ia.us/ISP/specialty/mcsap.shtml	45
Restatement (Second) of Torts § 121, comment d	12-13, 30-31, 34, 47-48, 50
Merriam Webster Collegiate Dictionary (Tenth Edition) (1995)	20
McCullough, David, <i>Truman</i> (Simon & Schuster 1992).....	60
Singer & Singer, <i>Sutherland Statutory Construction</i> (7 th Edition), § 48:4.....	61

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. DOT OFFICER GLADE WAS WITHIN HIS AUTHORITY. HE MADE A VALID STOP OF MR. WERNER'S BMW AFTER HE WITNESSED A PUBLIC OFFENSE COMMITTED IN HIS PRESENCE UPON INTERSTATE 80 WITHIN A MARKED ROAD WORK ZONE.

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Ballalatak v. All Iowa Agriculture Ass'n, 781 N.W.2d 272 (Iowa 2010)
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Long v. Lauffer, 797 N.W.2d 621 (Table), 2011 WL 222530 (Iowa App. 2011)
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Iowa Code § 80.22 (2016)
Iowa Code § 80B.6(1)(k) (2016)
Iowa Code § 80B.11B(2)(a) (2016)
Iowa Code § 306.4(1) (2016)
Iowa Code § 307.2 (2016)
Iowa Code § 313.12 (2016)
Iowa Code § 313.36 (2016)
Iowa Code ch. 321 (2016)
Iowa Code § 321.1(45) (1946)
Iowa Code § 321.1(50) (2016)

Iowa Code § 321.1(66) (2016)
Iowa Code § 321.2(1) (2016)
Iowa Code § 321.2(2) (2016)
Iowa Code § 321.2(3) (2016)
Iowa Code § 321.3 (2016)
Iowa Code § 321.229 (2016)
Iowa Code § 321.232 (2016)
Iowa Code § 321.253(2) (2016)
Iowa Code § 321.285 (2016)
Iowa Code § 321.372 (2016)
Iowa Code § 321.380 (2016)
Iowa Code § 321.433 (2016)
Iowa Code § 321.476 (2016)
Iowa Code § 321.477 (1946)
Iowa Code § 321.477 (1985)
Iowa Code § 321.477 (1989)
Iowa Code § 321.477 (2016)
Iowa Code § 321.492 (1946)
Iowa Code § 321.492 (2016)
Iowa Code ch. 321J (2016)
Iowa Code § 321J.1(7)(e) (1989)
Iowa Code § 321J.1(8)(e) (2016)
Iowa Code § 321J.21 (2015)
Iowa Code § 701.2 (2016)
Iowa Code § 748.3 (1946)
Iowa Code § 755.5 (1946)
Iowa Code § 801.1 (2016)
Iowa Code § 801.2 (2016)
Iowa Code § 801.4 (2016)
Iowa Code § 801.4(11)(h) (2016)
Iowa Code § 804.6 (2016)
Iowa Code § 804.7 (1989)
Iowa Code § 804.7 (2016)
Iowa Code § 804.9 (2016)
Iowa Code § 804.9(1) (2016)
Iowa Code § 804.24 (2016)
Iowa Code ch. 805 (2016)
Iowa Code § 805.6(1)(a) (2016)
Iowa Code § 805.8A(14)(i) (2016)
1939 Iowa Acts, ch. 120

1939 Iowa Acts, ch. 120 § 8
1974 Iowa Acts ch. 1180, §§ 2 and 200
1976 Iowa Acts ch. 1245, § 104(7)(i)
1990 Iowa Op. Atty. Gen. 100 (Iowa A.G.), Opinion No. 90-12-8,
1990 WL 484921
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Merriam Webster Collegiate Dictionary (Tenth Edition) (1995) at 1314

**II. THE AMENDMENT TO IOWA CODE SECTION 321.477 (2016)
WAS NOT ARGUED TO THE DISTRICT COURT.
THEREFORE, ERROR WAS NOT PRESERVED. HOWEVER,
EVEN IF THIS COURT CONSIDERS THE AMENDMENT, IT
OFFERS PROOF VALIDATING THE STATE'S POSITION.**

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Statutes and Other Authorities:

Iowa Code § 80.9A(7) (2016)
Iowa Code § 321.477 (1989)
Iowa Code § 321.477 (2016)
Iowa Code § 321.477 (as amended)
Iowa Code § 321.477(1) (as amended)

Iowa Code § 321.477(3) (as amended)
Iowa Code § 321.477(4) (as amended)
Iowa Code § 804.7 (1989)
Iowa Code § 804.7 (2016)
Iowa Code § 804.7(2) (2016)
Iowa Code § 804.9 (2016)
Iowa Code § 804.9(1) (2016)
Iowa R. App. P. 6.801
2017 Iowa Acts ch. 149 § 3 (H.F. 463)
2017 Iowa Acts ch. 149 § 4 (H.F. 463)
McCullough, David, *Truman* (Simon & Schuster 1992)
Singer & Singer, *Sutherland Statutory Construction* (7th Edition), § 48:4

ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court. The district court correctly ruled the peace officer employed by the Iowa Department of Transportation (DOT) had authority to take enforcement action for a public offense committed in the officer's presence. This case, along with another case pending on appeal, *Rilea and Riley v. Iowa Department of Transportation*, Supreme Court No. 17-1803, presents the issue of whether DOT peace officers may perfect citizen's arrests pursuant to Iowa Code section 804.9(1).

In *Rilea*, a Polk County District Court ruled DOT officers had no authority to arrest under Iowa Code section 804.9(1). In this case, the district court ruled the conduct of the DOT officer resulted in a valid citizen's arrest. Consequently, a division of opinion exists. With this question presented from two different courts, it makes sense for the Iowa Supreme Court to resolve the matter.

The safety of the motoring public is seriously jeopardized if DOT peace officers cannot act when public offenses are committed in their presence. That makes this case a prime candidate for retention given the substantial issues relating to public safety. *See* Iowa R. App. P. 6.1101(2)(d) (cases are ordinarily retained when matters of broad public importance are at stake).

Additionally, the defendant's reference in his routing statement to *Merchants Motor Freight v. State Highway Commission*, 239 Iowa 888, 32

N.W.2d 773 (1948), illustrates another reason the Supreme Court should retain this case. *Merchants Motor Freight* was decided in 1948. This was long before the creation of DOT in 1974. See 1974 Iowa Acts ch. 1180, §§ 2 and 200. *Merchants Motor Freight* held the question of citizen's arrest was not implicated because (1) the highway commission employees were acting "officially" and (2) summonses were being issued, which meant there was no arrest. Also, the highway commission employees were not peace officers. 239 Iowa at 892-93, 32 N.W.2d at 776.

Much has changed since 1948. The *Merchants Motor Freight* rationale, at least as it pertains to citizen's arrest, is no longer applicable when viewed against principles articulated forty-six years later in *State v. Lloyd*, 513 N.W.2d 742 (Iowa 1994). *Lloyd* teaches a peace officer, who for whatever reason lacks official arrest authority, is regarded as a "private person" for purposes of Iowa Code section 804.9(1) and, as such, possesses the power to arrest a private person has under that statute. 513 N.W. 2d at 744-745. In accomplishing a citizen's arrest pursuant to Iowa Code section 804.9(1), it is immaterial whether the officer purports to act officially or as a private person, or whether the officer is even acting within the limits of the officer's official authority. *Id.* at 745 (officer making a citizen's arrest may employ "indicia" of office); see also Restatement (Second) of Torts § 121, comment d ("[I]t is immaterial whether he [peace officer] purports to act in his

capacity as a peace officer or ... within the territorial or *other limits of his designation ...*”) (emphasis added).

Consequently, *Merchants Motor Freight’s* analysis no longer applies because (1) in perfecting a citizen’s arrest in the modern era it makes no difference whether the peace officer purports to act privately or officially, and it is immaterial whether the officer is acting within the limits of the officer’s designated authority; (2) the use of a citation (summons) to make a citizen’s arrest is permissible in light of *Lloyd*, 513 N.W.2d at 743-744, rendering inapplicable any need to take a subject before a magistrate and (3) *Merchants Motor Freight* premised its analysis on the notion the highway commission employees were not even peace officers, which does not apply to today’s DOT officers who expressly hold the status of “Peace officers” pursuant to several provisions of the Iowa Code. *See* Iowa Code §§ 321.1(50), 321J.1(8)(e), 801.4(11)(h). Accordingly, the retention of this case by the Supreme Court is warranted.

STATEMENT OF THE CASE

Nature of the Case. This appeal involves the conviction of Mr. Werner for Operating a Motor Vehicle While License Under Suspension in violation of Iowa Code section 321J.21 (2015). Appendix (App.) pp. 62-64.

Course of Proceedings in District Court. Mr. Werner was charged by trial information filed August 30, 2016, for having operated a motor vehicle while his

license to drive was revoked under Iowa Code chapter 321J. App. pp. 12-13. Werner on December 20, 2016, challenged the validity of the vehicle stop through a motion to suppress. App. pp. 17-41, 42-52. The district court denied the motion to suppress, finding Officer Glade of the DOT had official authority to stop Werner's vehicle, but even if he did not have authority as a DOT officer to stop the vehicle, Officer Glade's conduct still "resulted in a valid citizen's arrest." App. pp. 53-56.

Mr. Werner stipulated to a bench trial on the minutes of testimony and was found guilty of violating Iowa Code section 321J.21 (2015) on June 22, 2017.¹ App. pp. 57-61. On July 17, 2017, the district court entered judgment and sentenced Werner to two days in jail, a fine of \$1,000, plus applicable surcharges. App. pp. 62-64. Werner filed a notice of appeal on August 3, 2010, followed by an amended notice of appeal filed August 10, 2017. App. pp. 65-66, 67-68.

STATEMENT OF FACTS

The stipulated trial was based on the minutes of testimony. The minutes demonstrated Officer Glade was on patrol in Iowa County on August 18, 2016, when he observed a black BMW traveling upon Interstate 80 in a marked construction zone at what appeared to be an excessive rate of speed. He utilized

¹The minutes of testimony contain a clerical error indicating Officer Glade was with the "Iowa State Patrol." He was employed by DOT as a peace officer as stipulated by the parties. Transcript, March 6, 2017, p. 4, line 17 - p. 5, line 6;

his LIDAR unit to verify the vehicle's speed. This confirmed the BMW was traveling at 72 miles per hour in a segment of the interstate which had its speed limit reduced to 55 miles per hour because it was within a road work zone. App. p. 10.

Officer Glade stopped Mr. Werner's vehicle. Upon encountering Mr. Werner, Werner admitted he did not have a valid driver's license. Officer Glade confirmed this when he performed a license check via state radio. App. p. 10. Werner had been driving his BMW while under revocation for an Operating While Intoxicated (OWI) test failure. App. pp. 10, 22. He was arrested for Driving While Revoked and taken to the Iowa County Jail in Marengo. App. p. 10. Mr. Werner was also charged with speeding 65 miles per hour in a 55-mile-per-hour construction zone. App. p. 24.

Preservation of Error and Standard of Review. Werner's brief makes a global proclamation of having preserved error on each issue without separately addressing how the issue was preserved under each division of his brief. *See Iowa R. App. P. 6.903(2)(g)(1)*.

The State agrees Werner preserved error in respect to those arguments asserted in his brief pertaining to the contention Officer Glade acted beyond his

statutory authority when he stopped Mr. Werner for speeding. The State also agrees the Court's review is for correction of errors at law.

The State, however, disagrees error was preserved regarding the argument beginning at page 45 of Werner's proof brief filed January 29, 2018, where Werner asserts an amendment to Iowa Code section 321.477 (2016) demonstrates Officer Glade lacked authority.^{2,3} The issue of Iowa Code section 321.477 (as amended) was never argued to the district court. There cannot be error preservation regarding arguments concerning the amended statute when the statute was not presented for consideration by the trial court. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (issues must be presented for decision by the district court).

²Werner has noted Iowa Code section 321.477 (2016) was amended effective May 11, 2017. *See* 2017 Iowa Acts ch. 149, § 3 (H.F. 463). The State will cite "section 321.477 (2016)" when referring to the statute in effect on August 18, 2016, the date of Werner's criminal offenses. By contrast, it will cite "section 321.477 (as amended)" to reference the statute as amended by H.F. 463. In addition, references to other Code provisions, unless otherwise specified, are statutes in effect as of August 18, 2016.

³References to pages in Werner's brief are to the page numbers in Werner's proof brief. The State is aware after appendix citations are included, pagination can deviate from the page numbers set forth in the proof brief versus those in the final brief.

ARGUMENT

I.

DOT OFFICER GLADE WAS WITHIN HIS AUTHORITY. HE MADE A VALID STOP OF MR. WERNER'S BMW AFTER HE WITNESSED A PUBLIC OFFENSE COMMITTED IN HIS PRESENCE UPON INTERSTATE 80 WITHIN A MARKED ROAD WORK ZONE.

The State of Iowa agrees Werner has preserved error on those questions encompassed within this division of the State of Iowa's brief. The State also agrees the scope of review is for correction of errors at law.

A. What Werner Overlooks in his Legislative and Judicial History Presentation.

Werner devotes considerable time to a historical review. He does so purporting to describe the scope of DOT's authority. Werner, however, has overlooked some important statutory provisions. He also fails in the portion of his brief subtitled "Legislative and Judicial History" to discuss a case the district court relied upon for its ruling denying his motion to suppress, *State v. Lloyd*, 513 N.W.2d 742 (Iowa 1994).

Under Werner's worldview, DOT's peace officers are devoid of authority to take enforcement action beyond offenses relating to "operating authority, registration, size, weight, and load of motor vehicles and trailers and registration of a motor carrier's interstate transportation service with the department." Werner's brief, p. 31. Even when a public offense is committed in their presence, except for

the specified offenses in section 321.477 (2016), DOT's officers are powerless to act according to Werner.

DOT came into existence in 1974. *See* 1974 Iowa Acts ch. 1180, §§ 2 and 200. One must be mindful any statutes or cases referenced by Werner prior to 1974 involved operations of what was then the "Iowa State Highway Commission." There is, as will be discussed, a substantial difference in the status of the highway commission's employees who had responsibility for size, weight and load issues in the 1940s versus today's DOT officers who are certified peace officers by law. *See, e.g.*, Iowa Code §§ 321.1(50), 321J.1(8)(e), 801.4(11)(h).

One statute conspicuously omitted from Werner's brief is Iowa Code section 321.3 by which DOT's director is "vested with the power" and "charged with the duty of observing, administering, *and enforcing* the provisions of this chapter [321]." (Emphasis added). Section 321.3, like any other statute, must be accorded meaning. *See* Iowa Code § 4.4(2) ("The entire statute is intended to be effective.").

Iowa Code section 321.3 is unqualified in the power it vests in DOT's director vis-à-vis Iowa Code chapter 321. Read by itself, section 321.3 stands as a broad grant of statutory authority to DOT, including the sorts of police powers one would expect necessary in carrying out the "enforcing" authority it explicitly confers.

On the other hand, Iowa Code section 321.2(1) provides for DOT to enforce and administer the chapter 321 provisions “[e]xcept as otherwise provided by law.” And Iowa Code section 321.2(2) provides for the state patrol of the department of public safety (DPS) to enforce the chapter 321 provisions “relating to traffic on the public highways of the state.” But that provision is followed by Iowa Code section 321.2(3) which obliges *both* DOT and DPS to “cooperate to insure the proper and adequate enforcement of the provisions” of Iowa Code chapter 321.

What do all these provisions mean in terms of DOT’s role in the enforcement of Iowa Code chapter 321? Can Iowa Code section 321.477 (2016) *in all circumstances* bar enforcement for offenses beyond those itemized in that statute as Werner advocates? And can this be so in the face of Iowa Code section 321.3 which vests the “power” and the “duty” in DOT’s director for “enforcing” the provisions of chapter 321, including speeding? Frankly, if all these statutes are to be given meaning, and if the interpretations of these provisions are consistent with the legislature’s direction to construe its enactments reasonably with the public interest favored over the private, *see* Iowa Code §§ 4.4(3) and (5), at a minimum it must be concluded DOT has a *substantial* role assigned to it in the enforcement of *all* provisions of chapter 321, not just those few offenses enumerated in Iowa Code section 321.477 (2016). After all, with the vesting of the “power” and the “duty” of enforcing chapter 321 in DOT’s director, it would be

irrational to think DOT is a mere “minor player” in the enforcement scheme. The word “vested” means “fully and unconditionally guaranteed as a legal right, benefit, or privilege.” Merriam Webster Collegiate Dictionary (Tenth Edition) (1995) at 1314.

Mr. Werner was stopped because Officer Glade observed him speeding in a road work zone. The legislature has granted DOT wide discretion and authority in the supervision of highway work zones. *See* Iowa Code § 313.12. Substantially increased fines for speeding are imposed in road work zones. *See* Iowa Code § 805.8A(14)(i). DOT, under Iowa Code section 321.253(2), is the agency charged with the responsibility for erecting signs informing motorists of the increased penalties for traffic violations in road work zones. The signs DOT erects define the beginning and ending of the work zone. *See* Iowa Code § 321.1(66) (“Road work zone” defined). This alone casts severe doubt upon Werner’s notion DOT has absolutely no role in the enforcement of work zone violations.

In *State v. Lloyd*, 513 N.W.2d 742 (Iowa 1994), the Iowa Supreme Court held an officer who was without authority to act as a peace officer nonetheless retained the right to arrest which any “private person” possesses. The officer came into Iowa from South Dakota. Once in Iowa the officer no longer had status as a peace officer. But the Court, consistent with prior authority, concluded that does not mean officers without official authority “cease to be persons.” *Id.* at 745,

quoting *State v. O'Kelly*, 211 N.W.2d 589, 595 (Iowa 1973), *cert. denied*, 417 U.S. 936, 94 S.Ct. 2652, 41 L.Ed.2d 240 (1974). *Lloyd* held the officer could make a valid citizen's arrest under section 804.9(1) for any public offense "committed in the officers' presence." 513 N.W.2d at 744. The Court held citizen's arrest could even be used to charge a defendant with low-level traffic offenses such as "failure to have lighted taillights" and "expired registration." *Id.*

This analysis should also hold true for a DOT peace officer. If the officer is without official arrest authority in relation to a specific public offense, the DOT officer does not cease to be a person. Instead, the officer as a private person may arrest for any offense committed in the officer's presence pursuant to the citizen's arrest powers in Iowa Code section 804.9(1). *See also* 6A C.J.S. *Arrest* § 12 at 21 (1975) (police officers have the powers of arrest of a private person). Hence, if Iowa Code section 321.3 is to be accorded any weight at all, then at the very least a DOT officer pursuant to Iowa Code section 804.9(1) should be able to stop Mr. Werner's vehicle for speeding when the offense is committed in the officer's presence. Otherwise, the broad enforcement power over chapter 321 "vested" in DOT by section 321.3 becomes illusory.

Werner's brief argues the citizen arrest power in Iowa Code section 804.9(1) is unavailable to DOT peace officers. Under this view, DOT officers cease to be persons. But can this be right? Obviously, it cannot. Werner's presentation under

the subtitle “Legislative and Judicial History” cites two cases and a 1990 Iowa Attorney General Opinion as support for his argument. *See State v. A-1 Disposal*, 415 N.W.2d 595 (Iowa 1987) and *Merchants Motor Freight v. State Highway Commission*, 239 Iowa 888, 32 N.W.2d 773 (1948); *see also* 1990 Iowa Op. Atty. Gen. 100 (Iowa A.G.), Opinion No. 90-12-8, 1990 WL 484921. All three of these authorities will be examined in greater detail below, but it is *Merchants Motor Freight* for which Werner extends the greatest emphasis. The State will explain why Werner’s reliance upon *Merchants Motor Freight* is misplaced.

B. *Merchants Motor Freight* No Longer Controlling.

(1) *Today DOT’s officers are peace officers under Iowa law.*

The decision in *Merchants Motor Freight* was handed down seventy years ago. Werner’s brief, however, would have this Court conclude the law is frozen in 1948. But much has changed since the *Merchants Motor Freight* decision of the Truman era.

Merchants Motor Freight did not recognize the highway commission officers as “peace officers.” 239 Iowa at 892-93, 32 N.W.2d at 776. They had merely been “conferred the authority of a peace officer” under Iowa Code section 321.477 (1946). In contrast, DOT officers today are peace officers as provided in several provisions of the Iowa Code. *See, e.g.*, Iowa Code §§ 801.4(11)(h), 321J.1(8)(e), 321.1(50). The district court correctly noted the criminal code

revision in 1976, following DOT's creation in 1974, included the DOT officers within the definition of "Peace officers." *See* 1976 Iowa Acts ch. 1245, § 104(7)(i) (today codified in Iowa Code § 801.4(11)(h)). App. pp. 53-55.

The district court also correctly observed the inclusion of the DOT officers as "Peace officers" in Iowa Code section 801.4(11)(h) placed them within the Iowa Code of Criminal Procedure. App. p. 55. *See also* Iowa Code § 801.1 (chapters 801 to 819 known as the Iowa Code of Criminal Procedure). Significantly, the "Iowa code of criminal procedure shall govern in the courts of Iowa in all criminal proceedings except where a different procedure is specifically provided by law." Iowa Code § 801.2.

In *Merchants Motor Freight*, the highway commission argued Iowa Code section 321.492 (1946) could be read to give expanded authority to the highway commission's officers. The wording of Iowa Code section 321.492 (1946) closely parallels Iowa Code section 321.492 (2016). Both provisions, for instance, respectively authorized the highway commission employees and DOT officers to "serve a summons or memorandum of traffic violation." But the 1948 Court held in *Merchants Motor Freight*: "[T]he fallacy of [the highway commission's] position lies in the fact that the employees are not peace officers." 239 Iowa 892-93; 32 N.W.2d 776.

Merchants Motor Freight noted Iowa Code section 321.1(45) (1946) defined a peace officer to mean “every officer authorized to direct or regulate traffic or to make arrests for violations of traffic regulations in addition to its meaning in section 748.3.” 239 Iowa at 893, 32 N.W.2d at 776. This shows a major distinction between the law in 1948 from the law when Werner was stopped in 2016. Iowa Code section 748.3 (1946) did not define “Peace officers” to include the highway commission’s employees. Today, for purposes of chapter 321, the term “Peace officer” means “every officer authorized to direct or regulate traffic or to make arrests for violations of traffic regulations *in addition to its meaning in section 801.4.*” Iowa Code § 321.1(50) (emphasis added). Iowa Code section 801.4(11)(h) explicitly designates the DOT officers as “Peace officers.” Therefore, today’s meaning of “Peace officer” in chapter 321 includes DOT’s officers, unlike the highway commission officers of 1948.

The district court held the inclusion of DOT’s officers in the Iowa Code of Criminal Procedure as “Peace officers” pursuant to Iowa Code section 801.4(11)(h), together with the “Peace officer” definition in section 321.1(50) which incorporates the 801.4 designation and defines “Peace officer” to be an officer “authorized” to arrest for violations of traffic regulations, was an expression of legislative intent imbuing DOT officers with “authority to conduct a traffic stop of those they have reasonable cause to believe are speeding.” App. p. 55.

The attorney general in 1990, with reliance upon *Merchants Motor Freight*, reached the conclusion DOT officers did not have general arrest powers under Iowa Code section 804.7 but were limited by Iowa Code section 321.477 (1989) to arrests “for violations of the motor vehicle laws relating to the operating authority, registration, size, weight, and load of motor vehicles and trailers and registration of a motor carrier’s interstate transportation service with the department.” 1990 WL 484921 *2. Yet, the district court’s differing view is cogent and presents an alternative ground for affirmance. *See also City of Cedar Rapids v. State*, 478 N.W.2d 602, 605 (Iowa 1991) (in the context of a weight enforcement case DOT officers said to have enforcement authority to “ticket city vehicles for *state law violations* within the city, including overload violations”) (emphasis added).

The result in *Merchants Motor Freight* was based upon the premise the definition of “Peace officer” in then Iowa Code section 321.1(45) (1946) could not expand the grant of authority in Iowa Code section 321.477 (1946) because the highway commission officers were not peace officers. That is no longer the case as the district court noted. Remarkably, Werner at page 31 of his brief contends the definition of peace officer in Iowa Code chapter 321 “remains materially unchanged from the time of *Merchants Motor*.” But that is not true. Iowa Code section 321.1(50), with its inclusion of the definition of “Peace officers” found in “Iowa Code section 801.4,” now undeniably embraces the DOT officers for

purposes of the chapter 321 definition of “Peace officer.” That represents a most material change contrary to Werner’s assertion.

At page 33 of his brief Werner argues the district court “went awry” because the definition of “Peace officers” in section 801.4(11)(h) includes officers designated by resolution “under section 321.477.” Werner contends the analysis must circle back to section 321.477 (2016), and this means the DOT officers must be limited to enforcing only those offenses enumerated in that statute. However, if that is so, consider the hypothetical below.

There is no question the officers have authority to stop vehicles and issue citations under section 321.477 (2016) for “size, weight, and load.” But assume a semi driver, whose rig’s size, weight and load checks out, but who is observed maintaining within the vehicle an illegal speed detection jamming device. *See* Iowa Code § 321.232 (speed detection jamming device may be seized by a “peace officer”). What if the driver, in response to a DOT officer’s inquiry about the device, tells the officer to “Jump in a lake!” and proceeds to drive away in defiance of the officer’s order. The DOT officer, who Werner admits is a peace officer under Iowa law, should be able to pursue the fleeing driver, stop the vehicle and arrest the driver for willful failure to comply with the order of a “peace officer.” *See* Iowa Code § 321.229. However, under Werner’s analysis, the officer is precluded from doing this because DOT officers would have no enforcement

authority beyond the offenses itemized in section 321.477 (2016). Werner does not recognize the DOT officers as falling within the definition of Iowa Code section 321.1(50). The district court, therefore, was correct in recognizing as very significant the modern era's defining of the DOT officers as "Peace officers." The status of individuals as peace officers means "they have authority to make arrests that the general public does not have." *State v. Brooks*, 888 N.W.2d 406, 414 (Iowa 2016).

This significance can also be illustrated within the context of Iowa's laws relating to school bus safety. Iowa has enacted statutes designed to afford school children with broad protection when entering and exiting school buses. This legislation is referred to as the "*Keep Aware Driving – Youth Need School Safety Act*." See Iowa Code § 321.372. The legislature in Iowa Code section 321.380 made it the duty "*of all peace officers and of the state patrol to enforce the provisions of sections 321.372 to 321.379*" (emphasis added). "All" peace officers include DOT's officers.

But if the *Merchants Motor Freight* analysis is extended to DOT, Iowa's school children are denied protection from DOT's officers when entering and exiting their buses because the DOT officers would not be peace officers for purposes of chapter 321. Nor is the *Keep Aware Driving – Youth Need School Safety Act* included within the offenses listed in section 321.477 (2016).

Therefore, under Werner’s view, a motorist could illegally pull around a stopped school bus with its stop arm and red flashing warning lamps activated in the presence of a DOT officer, but the officer has no authority to act because that offense is not embraced within Iowa Code section 321.477 (2016). This is why the unbending application of the *Merchants Motor Freight* rationale is not viable given today’s statutory framework.

- (2) *Today a valid citizen’s arrest can result regardless of whether a peace officer purports to act in an official capacity.*

Merchants Motor Freight’s basing of its decision, at least in part, upon the notion the highway commission officers were not even peace officers is not the only example where today’s law varies from that applied by the Court in 1948. Werner raises an issue about Officer Glade having pulled Werner over while Glade was “on patrol, acting in his official capacity.” Werner brief, p. 36. He noted the officer’s use of “State-issued equipment – uniform, badge, radar detector, marked vehicle, flashing overhead lights, and siren,” along with Officer Glade’s assertion of “the authority of the State when he detained and cited Mr. Werner.” Werner’s brief, p. 36. This was the analysis *Merchants Motor Freight* employed as well:

Appellants state that even though no statutory authorization exists for enforcing the motor vehicle laws, as to license and registration, a violation thereof constitutes a misdemeanor, Section 321.17. That when committed in his presence any person may arrest, and the fact that the defendants are clothed with the authority of peace officers, does not prevent them from acting as individuals. This no doubt is true, but is not a question presented here for determination. The

record clearly shows that defendants acted, and in the future will act, officially and under orders from the Highway Commission. Furthermore, the appellants do not threaten arrests and have not arrested. They have issued summonses which are not authorized by Section 755.5. There is not merit in this contention.

239 Iowa at 893, 32 N.W.2d at 776.

Merchants Motor Freight concluded a valid citizen's arrest could not be made by highway commission employees unless they acted as "individuals" instead of acting "officially." This same argument appears in the brief *Merchants Motor Freight* filed with the Iowa Supreme Court clerk on March 25, 1948, where it was argued at page 26:

The defendants have not been acting as private citizens, but have been acting in their official capacity only and at the expense of the State. The defendants have issued summonses for improper registration. But a private person has no authority to issue a summons. See Section 321.485, Code of Iowa, 1946 which authorizes issuance of a summons by a peace officer.

(Citations to the record omitted).

This sort of argument, while valid in 1948, is now outdated. Today it does not matter whether a peace officer has acted "officially" in determining whether a valid citizen's arrest has resulted. The officer's subjective intent has no relevance, *i.e.*, whether he or she thinks the arrest is being made "officially" or as a "private person." Iowa Code section 804.9(1) provides:

A private person may make an arrest:

1. For a public offense committed or attempted in the person's presence.

What matters is whether the public offense giving rise to the arrest was committed or attempted in the presence of the person making the arrest. A peace officer's use of the "indicia" of office in making a citizen's arrest was, in fact, authorized in *State v. Lloyd*. Lloyd complained the South Dakota officer lacked authority in Iowa to signal Lloyd to pull over by turning on the squad car's "overhead lights." 513 N.W.2d at 745. This argument was premised on the idea "a private citizen" would have lacked those means to stop someone and would be constrained from pursuing a violator because of speed restriction laws, or the prohibition on equipping a non-emergency vehicle with "sirens and bells." *Id.*

The *Lloyd* Court rejected this position:

We believe that officer Sandage's use of the indicia of his office was proper and that this conclusion is consistent with the limitations on ordinary private citizens in making citizen's arrests.

Id. The Court noted the inability of a peace officer to employ the means of a peace officer to stop a lawbreaker would result in unsound public policy. *Id.*

The Court in *Lloyd*, 513 N.W.2d at 745, also approvingly cited to Restatement (Second) of Torts § 121, comment d. Comment d provides:

The peace officer has all the privileges of arrest which, by the rules stated in §§ 119 and 120, are conferred upon one not a peace officer. In such a case, his privilege to arrest is not dependent upon his being a

peace officer; and *it is immaterial whether he purports to act in his capacity as peace officer or as a private person or whether he is or is not acting within the territorial or other limits of his designation.*

(Emphasis added). The *Merchants Motor Freight* holding under which an officer acting “officially” is deemed unable to effectuate a citizen’s arrest is, therefore, no longer valid.

(3) *Today a peace officer may charge a violator by means of a citation or summons when the officer’s conduct is covered by Iowa Code section 804.9(1).*

Yet a third reason exists for concluding *Merchants Motor Freight* no longer sets forth the law pertaining to offenses committed in an officer’s presence. The Court in *Merchants Motor Freight* held: “[T]he appellants [highway commission officers] do not threaten arrests and have not arrested. They have issued summonses which are not authorized by Section 755.5.” 239 Iowa at 693, 32 N.W.2d at 776. Section 755.5 (1946) was Iowa’s citizen’s arrest statute at the time of *Merchants Motor Freight*. Once again, the decision in *Lloyd* establishes why this rationale is no longer operable. *Lloyd* directly addressed the citation (summons) issue. Officer Sandage in *Lloyd* had issued a citation and a warning ticket. The Court in *Lloyd* upheld this procedure within the context of Iowa Code section 804.9 concluding even if Officer Sandage’s conduct amounted to “something less than a technical arrest,” it was “no less valid than a formal citizen’s arrest.” 513 N.W.2d at 744.

Today, because of *Lloyd*, a peace officer, consistent with Iowa Code section 804.9, may lawfully issue a citation in lieu of formal arrest. If the officer's conduct would authorize a full-blown arrest using the citizen's arrest doctrine, the officer can also charge the person through a citation. *See Lloyd*, 513 N.W.2d at 744. ("Officer Sandage could have made a valid citizen's arrest for Lloyd's failure to have lighted taillights and for his expired registration."). There is no need, if citation procedure is used, to hold the defendant for appearance before a magistrate pursuant to Iowa Code section 804.24. The authority to issue a citation is subsumed within the authority to arrest.

C. *State v. Lloyd* Governs When Considering Whether a Peace Officer's Conduct Has Resulted in an Arrest Under Iowa Code section 804.9(1).

Just as a matter of appropriate legal method, in determining today whether a peace officer's conduct resulted in a citizen's arrest under Iowa Code section 804.9, does it make sense to travel back to 1948 and *Merchants Motor Freight* where the Court determined highway commission employees were not even "peace officers" and where citizen's arrest authority was rejected because it was concluded the highway commission employees were acting "officially" and issuing "summons"? 239 Iowa at 893, 32 N.W.2d at 776. And a case, too, decided almost three decades before Iowa's revision of its criminal code in 1976?

Doesn't it make more sense to look to *State v. Lloyd*, 513 N.W.2d 742 (Iowa 1994)? *Lloyd* was decided in the modern era of Iowa criminal procedure. It involved a peace officer, and it directly implicated the question of whether the officer's conduct resulted in a valid citizen's arrest since he otherwise lacked law enforcement authority. Logically, as did the district court here, one would look to *Lloyd* because that case sets forth the applicable principles pertaining to arrest when a peace officer is confined to the authority a "private person" possesses.

Lloyd provides relevant instruction on several points. First, *Lloyd* makes clear the citizen's arrest provisions in Iowa Code section 804.9 apply to any "public offense" including felonies and misdemeanors. 513 N.W.2d at 745. Second, the citizen's arrest provisions extend to traffic offenses. *Id.* at 744. Third, citation issuance is permissible as part of a citizen's arrest. *Id.* at 743-744. Fourth, though Officer Sandage awaited an Iowa officer to process an OWI charge, the Court held he did not have to and could have taken "Lloyd into custody on the basis of his belief that Lloyd was operating his truck" in violation of Iowa's OWI law. *Id.* at 744. Fifth, when a peace officer's conduct triggers Iowa Code section 804.9(1), the officer retains the "indicia of his office." *Id.* at 745.

One would not know from reading Mr. Werner's brief *Lloyd* had already settled assertions Werner makes in seeking the district court's reversal. Consider these points from Werner's brief:

1. “One, IDOT Officer Glade was not acting as a ‘private person’ when he pulled Mr. Werner over for speeding.” Werner brief, p. 36.
2. “Two, IDOT Officer Glade did not take Mr. Werner before a magistrate or deliver Mr. Werner to a peace officer and accompany the officer before the magistrate.” Werner brief, p. 37.

Both of Werner’s points are refuted by simply reading *Lloyd*. *Lloyd* made it crystal clear it is *immaterial* for determining the validity of a citizen’s arrest whether the officer acts in the capacity of a peace officer or as a private person. Indeed, *Lloyd* cited with approval to Restatement (Second) of Torts § 121, comment d, and the Restatement’s use of the word “immaterial” in concluding it does not matter. 513 N.W.2d at 745.

Werner argues a citizen “who observed a violation of a traffic law would not have the ability to pull another motorist over and run that motorist’s license and registration through a law enforcement database.” Werner brief, p. 36. Then, at pages 36-37 of Werner’s brief, Werner cites to *Lloyd* as authority quoting out of context this passage from the opinion:

Although a private citizen would have had the *authority* to arrest [a motorist] for the public offense of driving with defective taillights, such a private citizen would have lacked the *means* to flag [a motorist] down and ensure that the violation be sanctioned.

513 N.W.2d at 745 (emphasis original to the Court’s opinion; emphasis omitted by Werner in his quote from the opinion). Werner follows this quote from *Lloyd* with

citation to Iowa Code section 321.433, also cited in *Lloyd*, barring the use of sirens and bells in vehicles, except in the case of authorized emergency vehicles.

Werner has engaged in an astounding display of forensic legerdemain in the way he has quoted *Lloyd*. By quoting the portion of the *Lloyd* decision referenced above, one might come away with the idea *Lloyd* had adopted Werner's argument, *i.e.*, citizen's arrest is not available to a peace officer because a private person would not have the means to use a police car's flashing lights to pull someone over. But that is not what the Court concluded. *Lloyd*, in the context of an arrest validated under section 804.9, *endorsed* the officer's use of the "indicia of his office" meaning the officer could use his squad car's overhead lights to accomplish the traffic stop. 513 N.W.2d at 745.

The Court's characterization of *Lloyd*'s argument fits the argument Werner makes in his brief: "When the officer takes police action as a private citizen, the argument goes, he must act like a private citizen." *Id.* But *Lloyd* rejected that argument unequivocally. It was that argument *Lloyd* was referencing when the Court noted its "symmetry" was undermined by "its unwise policy." *Id.*

Lloyd also stands for the proposition a valid citizen's arrest under Iowa Code section 804.9 may be accomplished through a citation. The citation procedure obviates the need for formally arresting the subject with the requirement of an appearance before a magistrate to gain release. This refutes Werner's argument a

valid citizen's arrest could not have been made if the arrestee was not taken before a magistrate pursuant to Iowa Code section 804.24.⁴ *Lloyd* noted the defendant's argument: "We first consider defendant's contention that no valid citizen's arrest could have occurred because officer Sandage only issued him a citation and a warning." 513 N.W. 2d at 743. *Lloyd* rejected this argument noting a "citation in lieu of arrest is merely a procedure used by police to avoid taking a suspect of minor violations into custody." *Id.*

Therefore, *Lloyd* concluded if an officer has the authority to make a formal arrest with placement of the subject in custody, the less restrictive process of citation issuance provided by Iowa Code chapter 805 may be properly used. 513 N.W. 2d at 744 ("But if, as we believe, officer Sandage's conduct amounted to something less than a technical arrest, it was not thereby less lawful.").

The citation process offers further example why the district court was right in finding significant the modern law's inclusion of DOT officers as "Peace officers" within the Iowa Code of Criminal Procedure. Under the criminal procedure code DOT plays an integral role in the establishment of the uniform citation and complaint form utilized by Iowa law enforcement officers in charging

⁴Interestingly, Werner's argument is implicit with an admission against interest. In making this argument he essentially concedes the officer would have authority to make the arrest but he merely quibbles about a point of procedure concerning whether the arrest was perfected if the detainee was not presented before a magistrate pursuant to section 804.24.

traffic offenses. *See* Iowa Code § 805.6(1)(a) (directing the commissioner of public safety, the director of transportation and the director of the department of natural resources to “adopt a uniform, combined citation and complaint which shall be used for charging all traffic violations in Iowa under state law or local regulation or ordinance ...”). This, too, is at odds with the notion DOT’s role in the enforcement of Iowa Code chapter 321 is as severely limited as urged by Werner. The availability of the citation procedure renders unnecessary the need for an appearance before a magistrate under Iowa Code section 804.24.

But a more basic reason exists to reject Werner’s contention: Werner was afforded a timely appearance before a magistrate. Werner’s brief at page 37 states in relevant part:

IDOT Officer Glade did not take Mr. Werner before a magistrate or deliver Mr. Werner to a peace officer and accompany the peace officer before the magistrate. IDOT Officer Glade dropped Mr. Werner at the Iowa County Jail and filed a Complaint and Affidavit with the clerk of court.

Werner was not merely “dropped” at the jail. He had been arrested as the defendant admits. He, therefore, underwent formal booking procedures, meaning he received an initial appearance before a magistrate as a prerequisite to gaining pretrial release. An initial appearance order issued by Magistrate Leinen is in the record. App. pp. 7-9.

Magistrate Leinen's order is silent about who was with Werner at the initial appearance. But it is immaterial whether Officer Glade accompanied Werner to the initial appearance. Werner received appropriate due process having been accorded the initial appearance without delay. The scenario where a peace officer has effected a citizen's arrest must be distinguished from the situation where the arresting party is not a peace officer. The officer, as noted before, retains "indicia" of office. Officer Glade completed a complaint and affidavit consistent with typical law enforcement procedure. App. pp. 5-6. The obvious reason for having a subject accompanied by the "private citizen who has arrested another," *see* Iowa Code § 804.24, is to ensure there is an appearance before a magistrate, along with an explanation why the citizen's arrest occurred. That reason was achieved by Officer Glade's completion of the complaint and affidavit which set forth the factual basis for Werner's arrest, and the record is clear a timely appearance took place. The purpose behind section 804.24 was fulfilled. Werner's argument is without merit.

Werner also formulates four other reasons why he thinks *Lloyd's* analysis is inapplicable. First, he argues the officer in *Lloyd* would have had authority to stop Lloyd in South Dakota. Werner brief, p. 40. Therefore, the initial pursuit was lawful. But Lloyd was not stopped in South Dakota; he was stopped in Iowa. Therefore, Werner has coined a distinction without a difference. Once the South

Dakota officer entered Iowa he had no more arrest authority than a private person. It was Iowa's citizen's arrest statute, and nothing else, which validated his stop and citation issuance. Similarly, if a DOT peace officer does not have official authority as a DOT officer to stop a motorist, the DOT officer, like the officer in *Lloyd*, has the authority of a "private person" to arrest. *See also State v. O'Kelly*, 211 N.W.2d 589, 595 (Iowa 1973), *cert. denied*, 417 U.S. 936, 94 S.Ct. 2652, 41 L.Ed.2d 240 (1974) (a peace officer without official authority is treated in the law as a "private person" and the officer's arrest will be deemed lawful if the circumstances would permit a private person to make an arrest).

Next, Werner argues *Lloyd* did not "involve an official law enforcement policy of citizen's arresting to avoid statutory restrictions on power." Werner brief, p. 40. Werner argues there is an internal DOT policy to "enforce all traffic laws, irrespective of the type of vehicle." Werner brief, p. 41. The policy is not internal; it is in plain view for the public to see. It is found in Iowa Code section 804.9(1). The statute is a clear public policy expression empowering individuals to arrest when a person commits a public offense within their presence. *Cf. Ballalatak v. All Iowa Agriculture Ass'n*, 781 N.W.2d 272, 278 (Iowa 2010) (workers' compensation statutes are public policy expressions that employers are required to compensate employees for injuries in the workplace).

DOT is charged with the duty of “enforcing” the traffic laws. Iowa Code § 321.3. DOT’s mission statement contemplates the agency’s involvement in the “regulation” of transportation in this state. Iowa Code § 307.2. It would be absurd to think DOT had instructed its peace officers to ignore traffic violations occurring in their presence. Of course, its officers have been told they may enforce the traffic laws when they witness offenses. Iowa Code section 804.9(1) specifically permits it. This is entirely consistent with DOT’s public safety mission, including its obligation for maintenance of the primary highway system. *See, e.g.*, Iowa Code § 313.36.

Nor is there a limit on the number of times citizen’s arrest authority can be applied. The doctrine exists to promote a civil society and public safety. A shopkeeper, for example, may make as many citizen’s arrests as necessary to stop shoplifters from stealing the store’s inventory. If the doctrine did not exist, the shopkeeper would be powerless and would have to await police arrival to stop the theft from the store. But it is unlikely many thieves would accommodate the shopkeeper by voluntarily remaining on premises until police arrive. Similarly, if a roadway infraction occurs in the presence of a DOT officer, the officer’s ability to promote public safety will be eviscerated if the officer is powerless to act upon what has taken place in the officer’s presence.

The Iowa Supreme Court has held peace officers have a separate “public safety function” permitting them to stop vehicles. In relation to the authority of a park ranger it was held:

In the present case, the park ranger’s authority to stop defendant’s vehicle was derived from two sources. First, it is specified in Iowa Code section 321.285 that

[a]ny person driving a motor vehicle on a highway shall drive the same at a careful and prudent speed not greater than nor less than is reasonable and proper, having due regard to the traffic, surface, and width of the highway and of any other conditions then existing.

The ways of travel in state parks are public highways if open to the general public. Iowa Code §§ 321.1(78), 461A.8. Although a violation of Iowa Code section 321.285 may be a misdemeanor, *see* Iowa Code section 321.482, *we believe the statute confers a public safety function on Iowa peace officers as well as a law enforcement function.* The second source of the park ranger’s authority is found in Iowa Code section 461A.3, which grants to the Department of Natural Resources and its employees regulatory authority in regard to “proper public access” within the state park system. *Either or both of these statutes support the park ranger’s action in stopping defendant’s vehicle.*

State v. Moore, 609 N.W.2d 502, 504 (Iowa 2000) (emphasis added).

Werner was speeding in a work zone. DOT has regulatory authority over road work zones within its jurisdiction. *See* Iowa Code § 306.4(1) (vesting jurisdiction and control of the primary highway system in DOT); *see also* Iowa Code § 313.12 (DOT oversight of road work). The DOT officer was authorized by that same “public safety function” in Iowa Code section 321.285 which the Court upheld in *Moore*. In short, take away the right to stop and arrest for offenses

occurring in the officer's presence and the "public safety function" extolled as a virtue in *Moore* is seriously undermined. That is why *Lloyd's* principles cannot be confined solely to out-of-state officers coming into Iowa. *Lloyd* sets forth the law of citizen's arrest in Iowa. That law applies to each "person" for purposes of Iowa Code section 804.9. It just happens *Lloyd* has the added benefit of spelling out pertinent citizen's arrest principles in the context of a peace officer stop that resulted in a proper citizen's arrest. Nor is there any "illegal" enforcement of the law when a citizen's arrest results. A valid citizen's arrest under section 804.9 is not a means of avoiding "statutory restrictions on power." To the contrary, it is the lawful exercise of a statutory power.

Third, Werner argues *Lloyd* "never confronted" Iowa Code section 80.22. He disparages the Court in *Lloyd* calling the opinion "a classic example of strange facts making bad law." Werner brief, p. 41. He even claims the application of *Lloyd* would render Iowa Code sections 80.22 and 804.24 superfluous. Werner brief, pp. 41-42. These contentions all lack validity.

First off, Werner, as previously noted, was timely presented before a magistrate for an initial appearance. The purpose behind Iowa Code section 804.24 was met. Werner's argument concerning section 804.24 is a red herring. Plus, there was no need for *Lloyd* to "confront" Iowa Code section 80.22. The decision in *Lloyd* dealt with Iowa Code section 804.9(1), a statutory authorization

to arrest available to all persons, including peace officers, whenever a public offense is attempted or committed in a person's presence. The power conferred by section 804.9 is independent.

Werner suggests DOT is "usurping" the authority of DPS, Werner brief, p. 41, and later argues DOT has committed a "separation of powers" violation. Werner brief, p. 43. First, as a matter of basic civics, there are three branches of government: executive, legislative and judicial. Both DOT and DPS are in the executive branch. There is no "separation of powers issue."

Furthermore, notwithstanding Iowa Code section 80.22, there is no wall of separation between DPS and DOT. Iowa Code section 321.2(3) requires both agencies to "cooperate to insure the proper and adequate enforcement of the provisions of [Iowa Code chapter 321]." It is doubtful fellow peace officers at DPS would appreciate a DOT peace officer, upon witnessing a vehicle recklessly speeding 100 miles per hour down Interstate 80 past a DOT weigh station, taking a stance of nonchalance with the attitude: "It's not my job – let DPS do it." That would hardly qualify as cooperating with DPS to insure proper and adequate enforcement as required by section 321.2(3).

Therefore, contrary to Werner's argument, the application of *Lloyd* to these facts does not render Iowa Code sections 80.22 and 804.24 superfluous. Moreover, section 80.22 pertains to strictures on employing officers to enforce

provisions “specifically reserved by 1939 Iowa Acts, ch. 120” to DPS. Iowa Code section 804.9 is what was in issue in *Lloyd*. That statute represents an independent provision of law not contained within the reservation in 1939 Iowa Acts, ch. 120.

The statutes involving DOT and DPS authority regarding traffic offense enforcement, including Iowa Code sections 80.22, 321.2(1), 321.2(2), 321.2(3) and 321.3, should be read *in pari materia*. They embrace similar subject matter – the goal of promoting highway safety. They should be considered together to achieve a cohesive whole and not deemed antagonistic to one another.

For example, the legislation in 1939 Iowa Acts, ch. 120, referenced in Iowa Code section 80.22, gave DPS authority to enforce “all state laws” and “all laws relating to traffic on the public highways of the state, including those relating to the safe and legal operation of passenger cars, motorcycles, motor trucks and busses” *See* 1939 Iowa Acts, ch. 120 § 8. This would include, for instance, laws relating to size, weight and load of vehicles. Werner at page 43 of his brief argues it is “the State Patrol’s responsibility to enforce noncommercial traffic laws – not the IDOT’s responsibility,” implying there is an iron-clad separation whereby DOT is involved with commercial traffic while DPS is concerned with noncommercial traffic.⁵

⁵Werner’s position is contradictory. Though he implies DOT may enforce laws involving commercial vehicles, if DOT is limited in enforcement solely to the offenses in section 321.477 (2016), DOT’s officers would also lack the authority to

DPS, however, also employs staff engaged in the enforcement of matters encompassed by the Federal Motor Carrier Safety Assistance Program, including activities such as driver license checks, equipment inspection, log book inspections and vehicle registration checks. These activities include commercial vehicles and, therefore, also fall within the domain of DOT's officers under Iowa Code sections 321.476 and 321.477 (2016). DPS maintains ten full-time inspectors and approximately 200 part-time inspectors for these sorts of commercial vehicle matters. See <http://www.dps.state.ia.us/ISP/specialty/mcsap.shtml>

If Werner's position was taken to its extreme, does this mean the authorization in section 321.477 (2016) for DOT peace officers to enforce laws relating to size, weight and load is invalid because it, too, usurps an authority specifically reserved to DPS by the 1939 legislation? Obviously not, which is why these provisions must be interpreted *in pari materia*. DPS and DOT both work on commercial vehicle oversight; DPS and DOT both are involved in the enforcement of provisions in Iowa Code chapter 321. See Iowa Code §§ 80.22, 321.2(1), 321.2(2), 321.2(3), 321.3. The provisions involving DOT and DPS should be viewed in harmony so each provision is "afforded a field of operation." See *Northwestern Bell Tel. Co. v. Hawkeye State Tel. Co.*, 165 N.W.2d 771, 774 (Iowa 1969) (discussing the *in pari materia* doctrine).

stop a semi they witness going 100 miles per hour in a DOT road work zone.

Finally, Werner argues “*Lloyd* does not govern because *Merchants Motor Freight* does.” Werner brief, p. 42. This is not an argument; it is a tautology. Werner’s tautological prose persists when he asserts *Merchants Motor Freight* dealt with the “exact same (*sic*) issue facing this Court: a departmental policy to exceed the scope of authority granted by Iowa Code § 321.477.” Werner contends *Lloyd* is “fact-specific” and does not arise from “any wrong-doing of an Iowa officer acting pursuant to departmental policy.” Werner brief, p. 42.

Merchants Motor Freight held the highway commission employees did not have authority under then Iowa Code section 321.477 (1946) to enforce laws pertaining to registration. At the time of *Merchants Motor Freight*, Iowa Code section 321.477 (1946) did not specify “registration” among the offenses for which authority had been conferred. The Court rejected the highway commission’s argument the word “control” in section 321.477 (1946) gave its employees authority over registration and licenses. 239 Iowa at 892, 32 N.W.2d at 775-76.

Merchants Motor Freight also deemed the citizen’s arrest issue to be a question which could not be properly considered. But it was not because of some illegal policy. Rather, it was because the Court concluded the employees were acting “officially” and issuing summonses which someone in their individual capacity would not be permitted to do. 239 Iowa at 893, 32 N.W.2d at 776.

Speeding does not fall within the offenses itemized in section 321.477 (2016).

Otherwise, as even the Court in *Merchants Motor Freight* conceded, the highway commission officers would have had authority to act under the citizen's arrest law:

[T]he fact that the defendants are clothed with the authority of peace officers, does not prevent them from acting as individuals. *This no doubt is true*, but is not a question presented here for determination.

Id. (emphasis added).

As noted earlier, it was the status of the officers, official capacity versus individual capacity, that was critical to the *Merchants Motor Freight* analysis and its conclusion citizen arrest power was not implicated. That is why, at least in respect to the citizen's arrest issue, *Merchants Motor Freight* is no longer viable. When the question is whether a peace officer acting beyond the scope of "official" authority may act as a "private person" pursuant to Iowa Code section 804.9(1), *Lloyd* governs. Moreover, *Lloyd's* analysis has been subsequently cited with approval. *See Long v. Lauffer*, 797 N.W.2d 621 (Table), 2011 WL 222530, *6-8 (Iowa App. 2011) (approving *State v. Lloyd's* analysis concerning Iowa Code section 804.9 to uphold a citizen's arrest made by an off-duty Polk County deputy sheriff).

The previously cited Restatement comment is worth noting for an additional reason. Not only is it immaterial for citizen's arrest purposes whether the officer purports to act as a peace officer or as a private person, it is likewise immaterial whether the officer is acting within the "limits of his designation." Restatement

(Second) of Torts § 121, comment d. That also addresses Werner’s complaint about a policy to avoid statutory restrictions on power. The Restatement comment assumes the officer may be acting outside “the limits of his designation,” but it does not undercut an otherwise valid citizen’s arrest. The only relevant considerations under Iowa Code section 804.9(1) are: (1) whether a public offense was attempted or committed and (2) whether the public offense was attempted or committed in the presence of the person making the arrest. If those two items are satisfied, the arrest is valid under Iowa Code section 804.9(1).

Therefore, a lawful citizen’s arrest by a peace officer does not involve the officer in “wrong-doing.” Werner should not be permitted to project his lawlessness upon Officer Glade. The only “wrong-doing” here involved Werner’s operation of his BMW at an excessive rate of speed in a road work zone when Werner knew he was not supposed to be driving because his license was revoked for an OWI test failure. Werner’s position, which would exclude DOT peace officers from the authority conferred in Iowa Code section 804.9(1), should be rejected. The legislature did not exclude DOT’s officers from the scope of section 804.9.

D. Werner’s Failure to Fully Address the 1990 Iowa Attorney General’s Opinion.

Werner cites to the Iowa Attorney General’s opinion from 1990. Werner brief, pp. 29-30. He notes the attorney general opined DOT’s officers do not have

“general arrest powers.” But that is as far as Werner goes. Werner fails to note what else the attorney general said. Perhaps that is because the opinion, on two points pertinent to Werner’s appeal, supports the position of the State.

- (1) *Attorney General says citizen’s arrest is available to DOT’s officers.*

The attorney general did opine DOT peace officers do not have the general arrest powers conferred by Iowa Code section 804.7. It was the attorney general’s opinion Iowa Code section 321.477 (1989) limited the arrest authority of DOT officers to the offenses itemized in that provision. 1990 WL 484921, *1-2. But the attorney general also noted the following in answer to a specific question regarding OWI enforcement:

Moreover, DOT peace officers may make arrests for OWI if, in the performance of their regular duties, the offense is committed or attempted in the officer’s presence, pursuant to the citizen arrest powers of Iowa Code section 804.9 (1989). *See also* Iowa Code § 804.24 (1989) (arrests by private persons and disposition of prisoner); *State v. O’Kelly*, 211 N.W.2d 589, 595 (Iowa 1973), *cert. denied*, 417 U.S. 936, 94 S. Ct. 2652, 41 L.Ed.2d 240 (1974) (arrest by Nebraska police officer of a person in Iowa treated as an arrest by private person); *Merchants Motor Freight v. State Hwy. Com’n.*, 239 Iowa 888, 893, 32 N.W.2d 773, 776 (1948); 1988 Op. Att’y Gen. 66 (L) (an arrest by municipal police officer outside of jurisdiction, treated as an arrest by private person).

Id. at *3.

It is interesting to note the attorney general cited *Merchants Motor Freight* as authority on this point. Understandably so. As noted before, *Merchants Motor*

Freight conceded the highway commission employees would have been able to make a citizen's arrest, but held citizen arrest concepts were inapplicable to that case because the officers had acted "officially."

The attorney general's opinion, however, went one step further than *Merchants Motor Freight* on the citizen's arrest question. The attorney general agreed the officers could make citizen's arrests, but also deemed it immaterial if they did so in their official capacities. Note the attorney general's conclusion an arrest for OWI could be made by the officers "in the performance of their regular duties." Four years later in *State v. Lloyd*, 513 N.W.2d at 745, the propriety of the attorney general's advice found confirmation when the Court concluded it was immaterial in perfecting a citizen's arrest whether the officer purported to act officially or as a private citizen. The attorney general's view was also consistent with Restatement (Second) of Torts § 121, comment d discussed throughout this brief.

But was the attorney general's rationale limited only to OWI? Of course not. Nor could it be. Iowa Code section 804.9 is not limited to one offense. Iowa Code section 804.9(1) applies to any "public offense." The term "public offense" includes "that which is prohibited by statute and is punishable by fine or imprisonment." See Iowa Code § 701.2. See also *State v. Lloyd*, 513 N.W.2d at 745 ("Thus, the status of an offense as a felony or misdemeanor has no bearing on

the grant of authority in section 804.9.”). The attorney general answered the specific question concerning OWI enforcement but his rationale regarding the citizen arrest powers in section 804.9 applies to any public offense.

Nor does the attorney general’s endorsement of the citizen’s arrest doctrine negate any other advice the attorney general imparted to DOT. The attorney general’s conclusion DOT officers lacked “general” arrest authority under Iowa Code section 804.7 (1989) stands separately. Under the attorney general’s rationale, when a peace officer lacks “general” arrest authorization there remains the separate authorization to act as a private person under the independent citizen arrest powers in section 804.9. Indeed, had the attorney general thought Iowa Code section 321.477 (1989) precluded the ability of DOT officers to make a citizen’s arrest as Werner urges, there would have been no reason for the attorney general to take up section 804.9 in replying to the question concerning OWI enforcement. However, the attorney general concluded even when general arrest authority is absent, a peace officer still possesses all the power to arrest of a “private person.” *See also* Iowa Code § 804.6 (arrest by warrant is to be made by a peace officer, but in all other cases arrest may be made by a peace officer or a “private person”). That means Iowa Code section 804.9(1) validates any arrest for any public offense if attempted or committed in the officer’s presence.

- (2) *Officer Glade qualified as a peace officer under Iowa Code chapter 321J.*

The attorney general's opinion also noted one other element which supports the State's position. The crime from which this appeal is taken involves a violation of Iowa Code section 321J.21 (2015). Officer Glade was a peace officer with DOT as defined in Iowa Code section 801.4(11)(h). DOT, Officer Glade's employer, is assessed the full cost "to provide the training course which is designed to meet the minimum basic training requirements for a law enforcement officer." Iowa Code § 80B.11B(2)(a). DOT is also a voting member of the Iowa law enforcement academy council. Iowa Code § 80B.6(1)(k). These provisions demonstrate DOT's peace officers meet basic levels of competency required of law enforcement officers in Iowa.

The attorney general in the 1990 opinion noted the definition of "Peace officer" codified in Iowa Code section 321J.1(7)(e) (1989) [codified today as Iowa Code § 321J.1(8)(e)]. The term "Peace officer" for purposes of Iowa Code chapter 321J includes any law enforcement officer who has satisfactorily completed an approved course relating to drunk driving enforcement "at the Iowa law enforcement academy or a law enforcement training program approved by the department of public safety." *See* Iowa Code § 321J.1(8)(e). The attorney general, therefore, expressed the view DOT officers with the requisite training are

separately empowered to enforce OWI violations under Iowa Code chapter 321J. 1990 WL 484921, *2-3.

Mr. Werner was charged with a violation of Iowa Code chapter 321J. In fact, his violation of Iowa Code section 321J.21 stemmed from the fact his driver's license had been revoked for an OWI test failure. App. pp. 5, 10, 22. Consequently, for this separate reason, Officer Glade was empowered to stop Mr. Werner's vehicle and charge him with *both* speeding and driving while his license was revoked. Mr. Werner had no right to be upon the roadway in the first place. His license had been revoked. Regardless of whatever prior knowledge Officer Glade may have had concerning the status of Werner's driver's license, Officer Glade was empowered to stop Werner's vehicle as a "statutory agent" of DOT "for purposes of administering the laws of this state pertaining to revocation in Iowa of an Iowa drivers (*sic*) license." See *State v. Wagner*, 359 N.W.2d 487, 490 (Iowa 1984) (recognizing law enforcement officers in respect to chapter 321J operate as agents of DOT for administering the laws relating to driver's license revocation). For this separate reason, the district court should be affirmed.

E. *State v. A-1 Disposal* Did Not Address Iowa Code section 804.9(1).

The other case relied upon by Werner for his contentions regarding Officer Glade's authority is *State v. A-1 Disposal*, 415 N.W.2d 595 (Iowa 1987). He asserts the decision "reaffirms" *Merchants Motor Freight*. Yet, *Merchants Motor*

Freight is never cited in *A-1 Disposal*. It is hard to reaffirm that which is not mentioned.

A-1 Disposal predates *State v. Lloyd* by seven years. The case, unlike *Lloyd*, never addressed issues under Iowa Code section 804.9(1) pertaining to a peace officer's authority as a "private person" to act upon traffic offenses committed in the officer's presence. *A-1 Disposal*, in fact, extended broad authority to DOT to make stops of trucks subject to regulation regardless of whether DOT implemented checkpoint protocols typically required of passenger cars. See, e.g., *State v. Hillehiem*, 291 N.W.2d 314 (Iowa 1980). Specifically, *A-1 Disposal* recognized the authority of DOT pursuant to Iowa Code section 321.477 (1985) to conduct random stops of commercial vehicles at temporary checkpoints in daylight hours to weigh and inspect regulated carriers for registration, weight and load. 415 N.W.2d at 601. The case resolved a statutory conflict concerning whether reasonable cause was needed to stop the commercial vehicles for weight inspection.

Most significantly, *A-1 Disposal* never represented itself as closing the door in relation to other stops which might be permitted under other statutes. Note this caveat in the decision: "We defer until a later time decisions concerning validity of stops that may occur *in other factual and legal contexts than the ones present here.*" *Id.* (Emphasis added). Therefore, *A-1 Disposal* is not controlling within

the context of a DOT peace officer who witnesses a vehicle speeding through a road work zone for which DOT has oversight responsibility.

II.

THE AMENDMENT TO IOWA CODE SECTION 321.477 (2016) WAS NOT ARGUED TO THE DISTRICT COURT. THEREFORE, ERROR WAS NOT PRESERVED. HOWEVER, EVEN IF THIS COURT CONSIDERS THE AMENDMENT, IT OFFERS PROOF VALIDATING THE STATE’S POSITION.

The State of Iowa, as previously noted, does not believe Werner preserved error regarding any issues presented by Iowa Code section 321.477 (as amended). The amended statute was never argued to the trial court. The amendment, as noted in this brief at footnote 2, went into effect May 11, 2017. The stipulated trial in this case took place June 5, 2017. *See* transcript, pp. 1-5 (stipulated bench trial).

It is fundamental arguments raised on appeal will not be considered if they were not also presented to the district court. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). Nevertheless, even if error is found to have been preserved, the amended statute supports the State’s position.

A. Iowa Code Section 321.477 (as amended) Affirms the Citizen’s Arrest Doctrine.

The legislature’s amendment gave DOT officers general arrest powers, at least for one year. *See* Iowa Code § 321.477(1) (as amended) (officially authorizing a DOT peace officer to “enforce all laws of the state”); *see also* 2017 Iowa Acts ch. 149 §§ 3 and 4 (H.F. 463). This grant of general arrest authority was

not unlimited. Certain limitations were retained regarding the exercise of “general powers” within cities. Iowa Code § 321.477(3) (as amended). However, it is noteworthy Iowa Code section 321.477(4) (as amended) provides:

The limitations specified in subsection 3 shall in no way be construed as a limitation on the power of employees designated as peace officers pursuant to this section when a public offense is being committed in their presence.

(Emphasis added).

The retention of the power to act for an offense “committed in their presence,” notwithstanding the limitations otherwise imposed within cities, was obviously intended to preserve the statutory authority in Iowa Code section 804.9(1). Consequently, the recent amendment demonstrates citizen’s arrest authority is always available whenever an offense is committed in the presence of another person even if that person is a peace officer.

Werner argues the State’s interpretation would render any limitations in Iowa Code section 321.477 (2016) superfluous. Werner’s brief, pp. 42-43. But it is Werner whose position would read a statute right out of the Code book. Werner’s position simply refuses to apply Iowa Code section 804.9 to DOT peace officers. The attorney general’s opinion recognized section 321.477 (1989) as imposing a limit upon DOT general arrest authority under Iowa Code section 804.7. But the attorney general also recognized DOT officers in the performance

of their regular duties retain authority to arrest for offenses committed in their presence. This interpretation does not render any statutory provision superfluous.

Werner's position reveals a fundamental misunderstanding of the citizen's arrest doctrine. Notwithstanding any limitation on official police power, any "private person" may act to arrest whenever an offense is attempted or committed in their presence. Werner's argument that citizen's arrest renders limitations on general arrest authority superfluous can be made whenever the citizen's arrest power is exercised. If the shopkeeper detains a shoplifter as part of a citizen's arrest, does that mean the general arrest authority provisions in Iowa Code section 804.7 are rendered superfluous? Obviously not. Citizen's arrest is an independent particularized grant of arrest authority confined to those circumstances embraced in Iowa Code section 804.9. If the attorney general in 1990 was correct that Iowa Code section 321.477 (1989) did not confer general arrest powers from Iowa Code section 804.7 (1989) upon DOT officers, it means for any offense beyond those enumerated in section 321.477 (1989), the DOT officer would have no police authority to act. But that does not mean the officer as a private person loses the separate power to arrest under section 804.9(1) when an offense occurs in the officer's presence.

What does this mean in practical application? Consider if in June 2017, subsequent to the effective date of the amendment to section 321.477 (2016), three

highly credible eyewitnesses reported to a DOT peace officer a person had driven a car upon Interstate 80 outside city limits going the wrong way almost causing a pileup. The officer under section 321.477 (as amended) has police authority to act against the errant driver once the officer has reasonable grounds to believe the driver committed the offense. *See* Iowa Code § 804.7(2).

On the other hand, before the amendment to section 321.477 (2016), if the attorney general's opinion of 1990 is correct, that same DOT officer having received those identical three eyewitness accounts would be precluded from taking any enforcement action because the officer lacked general arrest authority and the officer had not observed the vehicle going the wrong way, *i.e.*, the offense did not take place in the officer's presence. This represents a material change of law consistent with the idea a legislative amendment intends to effectuate change. Nothing is rendered superfluous under the attorney general's opinion. All statutory enactments are accounted for. It is Werner's approach that reads section 804.9 out of the Iowa Code.

Furthermore, Werner is incorrect in suggesting a legislative amendment can never be interpreted as clarifying the law. Werner's brief, as an example, offers up matter reflective of legislative intent to clarify the enforcement missions of DPS and DOT. Werner's brief, p. 50. This Court has recognized the "time and circumstances" of an amendment may, in fact, "indicate that the legislature merely

intended to clarify the intent of the original enactment.” *Tiano v. Palmer*, 621 N.W.2d 420, 423 (Iowa 2001).

But most importantly, the authority in Iowa Code section 804.9 to arrest for an offense committed in one’s presence existed prior to the amendment to section 321.477 (2016), and the authority in Iowa Code section 804.9 remains in place today as well. The district court’s reliance upon the citizen’s arrest doctrine, and *State v. Lloyd*, was proper.

B. Newspaper Articles Are Not Legal Authority.

Hyperlinks are provided in footnotes 10 and 11 of Werner’s brief to no less than four articles in the Des Moines Register. This includes stories in which Mr. Werner’s counsel is quoted. It also includes audio from third parties purporting to describe a vehicle stop by a DOT officer in a wholly separate incident which did not even involve Mr. Werner. The quoted matter was not part of the “record on appeal” as defined in Iowa R. App. P. 6.801. *See In re Marriage of Keith*, 513 N.W.2d 769, 771 (Iowa App. 1994) (“We are limited to the record before us and any matters outside the record on appeal are disregarded.”).

Newspaper articles are not legal authority. *See, e.g., Horse v. Kirkgard*, 2014 WL 5365245 (D. Montana 2014) *2 (“Newspaper articles are not legal authority, neither binding nor persuasive.”). There is a reason for the adage: “Don’t believe everything you read in the papers.” News articles can be

incomplete, and regarding technical legal issues may omit or overlook relevant legal authority. In addition, the articles can be wrong. The year 1948 has been mentioned several times in this brief. That same year one newspaper, the Chicago Tribune, regaled readers of its early morning edition with this front-page headline concerning that November's election results: "Dewey Defeats Truman." David McCullough, *Truman* at 718 (Simon & Schuster 1992).

Plus, the writers of these news articles were not witnesses in the district court. The characterizations regarding DOT's ticket issuances and related matters are not the product of sworn testimony. There was no opportunity for cross-examination. Newspaper articles normally are not received as evidence because their contents constitute impermissible hearsay. *Jacobson v. Benson Motors, Inc.*, 216 N.W.2d 396, 399-400 (Iowa 1974).

The newspaper has been cited in opinions of this Court to illustrate statistical information, societal trends or awareness, or even countervailing points of view. *See, e.g., State v. Plain*, 898 N.W.2d 801, 826 (Iowa 2017) (referencing statistics on African-American arrest and incarceration rates); *see also Chiodo v. Section 43.24 Panel*, 846 N.W.2d 845, 863 (Iowa 2014) (Mansfield, J., specially concurring) (citing Des Moines Register editorial to demonstrate it common knowledge Iowa law barred voting by convicted felons). But that is not what Werner is doing with his citations to news articles. He is, instead, citing the

articles as legal authority where the sole issue in this case is a legal question about Officer Glade's authority. The Court's opinions have never countenanced the receipt of news articles as competent evidence concerning the meaning to be accorded Iowa statutes.

Likely anticipating eyebrows would be raised by his efforts to offer the newspaper as authority, Werner disingenuously cites to 2A Sutherland Statutory Construction § 48:4 (7th ed.), offering a quote about events prior to when an act becomes law being useful to learn about legislative intent. Werner's brief, p. 45. First, what Werner purports to offer, newspaper articles, have nothing to do with Iowa Code section 804.9(1) which affords arrest authority whenever a public offense is attempted or committed in the presence of another. Second, the quote from Sutherland does not stand as an endorsement of newspaper articles as legal authority. What Sutherland is largely referring to by prior events, is the "history of events during the process of enactment, from its introduction in the legislature to its final validation." *See, e.g.,* Singer & Singer, *Sutherland Statutory Construction* (7th Edition), § 48:4 at 562.

C. Legislators' Legal Conclusions.

Mr. Werner, in footnotes 12 through 15 and 16 through 18, offers hyperlinks to various comments attributed to the following legislators: Baudler, Breitbach, Danielson, Gaskill, Johnson and Taylor. That makes six which itself flags a basic

difficulty with Werner’s approach. There are one hundred members in the Iowa House and fifty members in the Iowa Senate. That means the contingent of six from which Werner offers quotes comprise four percent of Iowa’s legislature.

Reference to floor debate videos have appeared in the opinions of this Court. *See, e.g., State v. Doe*, 903 N.W.2d 347, 354 (Iowa 2017) (describing events which lead up to legislative debate). But Werner is offering this matter as legal conclusions. For instance, at page 47 of the brief, Representative Baudler is quoted as saying: “They’re using [the authority] but they don’t have it.” At page 48 of the brief, Representative Gaskill is quoted as saying “I think it was illegal and it was wrong for them to do the behavior that they’d already done” And on page 48 Representative Baudler is quoted: “If we do this amendment and bill, what we’re doing is rewarding illegal behavior” This is akin to calling a witness at trial and asking the witness if he or she has an opinion about whether a specific undertaking was “legal.” Such a question would be properly objected to as calling for a legal conclusion. It is no more appropriate to offer this form of “testimony” simply because it was uttered on the floor of the legislature. Plus, as shown by the record below, the district court found DOT’s behavior to be legal.

Iowa has rejected consideration of statements by individual legislators in determining the meaning of statutory provisions. In *Iowa State Education*

Association v. Public Employment Relations Board, 269 N.W.2d 446, 448 (Iowa 1978), it was said:

At first blush it might seem reasonable to rely upon an individual legislator's opinion of legislative intent. But we believe such testimony is generally unpersuasive.

The legislative process is a complex one. A statute is often, perhaps generally, a consensus expression of conflicting private views. Those views are often subjective. A legislator can testify with authority only as to his own understanding of the words in question. What impelled another legislator to vote for the wording is apt to be unfathomable.

Accordingly, we are usually unwilling to rely upon the interpretations of individual legislators for statutory meaning. This unwillingness exists even where, as here, the legislators who testify are knowledgeable and entitled to our respect. See generally 2A Sutherland Statutory Construction, § 48:16, p. 222 (Fourth Ed. 1973).

This salutary view stands rooted in the notions of the separation of powers doctrine and the inherent unreliability of political comments. The roles of the legislature and the courts are distinct. Courts construe the laws the General Assembly has made. The statutory text finally passed typically represents an endless series of compromises. To the extent individual comments are presented as proof of "the law," Werner's proffer invades the ultimate legal issue to be decided by the Court. See *Kester v. Bruns*, 326 N.W.2d 279, 281 (Iowa 1982) ("The defense attorney should have known that police officers would not be permitted to express opinions on fault. See *Grismore v. Consolidated Products Co.*, 232 Iowa 328, 361, 5 N.W.2d 646, 663 (1942).")

Talk can be cheap in political debates. The views expressed may be dependent upon the way the question is pondered. Is every legislator, for example, prepared to hold to the notion there is absolutely nothing a DOT peace officer can do, except ironically call for police, if a DOT law enforcement officer witnesses the following?

- A. A motorist traveling 100 miles per hour in a 55 mile-per-hour roadway work zone where workers are present and where there have been recent fatalities due to excessive speed.
- B. A driver traveling eastbound in the westbound lanes of Interstate 80.
- C. A child being molested by an assailant at a rest area along Interstate 35.
- D. A person seen firing a gun out the window of the vehicle in the direction of children on a playground.
- E. A semi driver passing through a DOT weigh scale with illicit drugs in the driver's compartment. *See, e.g., State v. Hedlund*, 662 N.W.2d 372 (Table), 2003 WL 190768 (Iowa App. 2003) (DOT officers' stop and seizure of semi at weigh facility held permissible where driver showed signs of drug consumption and marijuana was ultimately found in a compartment behind the driver).
- F. An animal being abused at an interstate rest stop.
- G. An individual tailgating another vehicle on the highway in a fit of road rage.
- H. The school bus scenario discussed earlier in this brief where a person is observed illegally passing a stopped school bus. But add to that scenario the additional assumption a little girl is struck and the errant driver flees the scene.

- I. A fugitive from justice wanted on charges involving violent crimes.
- J. A criminal wanted on charges who is traveling on the interstate with a child he has abducted which is part of an Amber Alert.

None of these scenarios involve offenses enumerated in Iowa Code section 321.477 (2016). Therefore, under Werner's view, the DOT officer cannot intercede by arrest to stop the lawlessness the officer has observed. Regardless of whatever interpretation one ascribes to section 321.477 (2016), it can reasonably be expected many people, including most Iowa legislators, might think there was "law" in place permitting a trained, certified DOT peace officer to act if such occurrences take place in an officer's presence. In fact, many people might be outraged if the officer did nothing when faced with one or more of the above scenarios. Their intuitions would be correct. Whatever else may be in the Iowa Code, legal predicate authorizing vehicle stop, citation issuance and formal arrest exists whenever a public offense is committed in the presence of another pursuant to Iowa Code section 804.9(1). This is not a new twist in the law. A statutory citizen's arrest provision first appeared in the Iowa Code in 1851. *See Rife v. D.T. Corner, Inc.*, 641 N.W.2d 761, 769 (Iowa 2002). *See also* Iowa Code § 80.9A(7) (despite certain limitations on their powers DPS officers may always arrest when an offense is committed in their presence).

Werner is attempting to suggest by his selective use of legislator quotes the *entire* legislature found fault with DOT. But if the entire legislature regarded as odious the notion a law enforcement officer lacking general arrest authority may act under the citizen's arrest doctrine, the legislature would not have taken care in its amendment to preserve the citizen's arrest power for DOT officers within cities when "a public offense is being committed in their presence." *See* Iowa Code § 321.477(4) (as amended). The legislature understandably believed it critical to avoid the utterly absurd situation where a lawbreaker can commit with impunity an offense in the very presence of an officer. The law is not determined from individual comments of legislators. Instead, the law comes from what the legislature as a body passes and the governor signs into law.

CONCLUSION

Werner's use of newspaper articles and links to select legislator commentary is improper. It injects matter of a testimonial nature outside the record. His brief in this regard should be stricken. Such matter cannot be considered.

There was no need to extend the remedy of suppression. This Court may affirm the district court's view Officer Glade, as a peace officer pursuant to Iowa Code section 801.4(11)(h), was authorized to stop Werner's vehicle because of the violation of "traffic regulations." *See* Iowa Code § 321.1(50).

If it is concluded Officer Glade lacked general arrest powers, the fact remains he witnessed a public offense. His stopping of Werner's vehicle was authorized by Iowa law, including the cogent analysis set out in *State v. Lloyd* relied upon by the district court. There is no need to look to decisions from other jurisdictions, as does Werner, with *Lloyd* on the books in Iowa. Iowa Code section 804.9(1) permitted Officer Glade to act upon what he witnessed. A valid citizen's arrest resulted. The district court should be affirmed.

REQUEST FOR ORAL ARGUMENT

The State of Iowa requests to be heard in oral argument upon submission of this case.

Respectfully submitted,

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**CERTIFICATE 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 this Brief contains 13,677 words, excluding the parts of the Brief exempted by Iowa R. App. p. 6.903(1)(g)(1).

This Brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this Brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in size 14 Times New Roman.

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CERTIFICATE OF FILING AND CERTIFICATE OF SERVICE

We, David S. Gorham and Robin G. Formaker, hereby certify that on April 20, 2018, a copy of Appellee's Brief 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 brief on that same date to:

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