IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 19-0734

STATE OF IOWA,
Plaintiff-Appellee,

vs.

HANNAH MARIE KILBY,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT
OF POLK COUNTY
THE HONORABLE WILLIAM PRICE (TRIAL AND MOTION IN LIMINE)

APPELLANT'S FINAL BRIEF
AND
REQUEST FOR ORAL ARGUMENT

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I, Grant C. Gangestad, hereby certify that I have filed the attached Brief by filing an electronic copy thereof to the Clerk of the Supreme Court, Judicial Branch Building, 1111 East Court Avenue, Des Moines, Iowa, on May 6, 2020.

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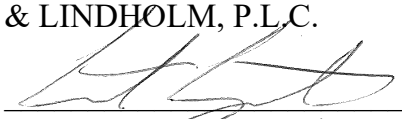

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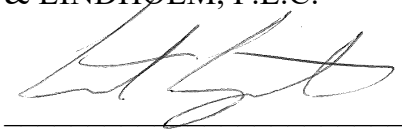

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STATEMENT OF THE CASE

Nature of the Case

This case is before the Court on Ms. Kilby's appeal from the District Court's order denying Ms. Kilby's motion in limine to declare evidence of Ms. Kilby's refusal to submit to a Datamaster breath test inadmissible at trial in an Operating While Intoxicated (OWI) prosecution. The District Court denied the motion in limine and allowed evidence of the refusal to be used as evidence of guilt at trial. Consequently, the District Court found Ms. Kilby guilty of OWI, and Ms. Kilby appealed the District Court's ruling.

Course of Proceedings

Ms. Kilby was charged by way of Trial Information filed on September 6, 2018, with Operating While Intoxicated, Second Offense, in violation of Iowa Code section 321J.2. Trial Information; App. P5-P6. The offense was alleged to have occurred on or about July 28, 2018. Trial Information; App.P5-P6. Prior to trial, Ms. Kilby filed a timely motion in limine seeking to exclude at trial all evidence of the refusal of the chemical breath test offered by the investigating officer. Motion in Limine; App. P20-P25. The trial court denied the motion. Ruling on Motion in Limine; App. P39-P47. The matter proceeded to a stipulated trial on the minutes of testimony, and the District Court found Ms. Kilby guilty of Operating While

Intoxicated, First Offense, a lesser included, in violation of Iowa Code section 321J.2, on April 29, 2019. Stipulation to Trial on the Minutes of Testimony; App. P48; Transcript of Bench Trial, P. 8-11. Ms. Kilby was sentenced in this matter on April 29, 2019. OWI Sentencing Order- Lesser Included (First Offense); App. P49-P52. Notice of Appeal was timely filed on May 9, 2019. Notice of Appeal; App. P53.

Statement of Facts

On July 28, 2018, Ms. Kilby, was pursued by a group of bikers as she left the parking lot of Extra Innings Bar in Des Moines because they believed she had committed a hit and run and was trying to leave. Additional Minutes of Testimony, P. 2; App. P19. Officers Kelley and O'Neill of the Des Moines Police Department arrived to the scene at approximately 10:59 p.m. Minutes of Testimony, P. 7; App. P13; Additional Minutes of Testimony, P. 2; App. P19. They immediately began to investigate Ms. Kilby for Operating While Intoxicated. At approximately 11:15 p.m., Officer Kelley contacted Officer Mock to come to the location to conduct standardized field sobriety tests and further investigate Ms. Kilby for OWI. Minutes of Testimony, P. 7; App. P13. Officer Mock of the Des Moines Police Department arrived to the scene at 11:25 p.m. Minutes of Testimony, P. 7; App. P13. He requested Ms. Kilby perform field sobriety

exercises. Minutes of Testimony, P. 7; App. P13. Ms. Kilby consented to the HGN test but declined to perform the walk and turn and the one leg stand exercises. Minutes of Testimony, P. 7; App. P13. At 11:45 p.m., Officer Mock requested that Ms. Kilby submit to a preliminary breath test. Minutes of Testimony, P. 7; App. P13. Ms. Kilby declined. Minutes of Testimony, P. 7; App. P13. Immediately thereafter, Officer Mock advised Ms. Kilby that she was under arrest for Operating While Intoxicated. Minutes of Testimony, P. 7; App. P13.

Officer Mock transported Ms. Kilby to the Des Moines Police station. Minutes of Testimony, P. 7; App. P13. At 12:02 a.m., Officer Mock read Ms. Kilby an implied consent advisory. Minutes of Testimony, P. 7; App. P13. The advisory read to her is the standard implied consent advisory read to individuals suspected of Operating While Intoxicated and its reading is captured on the implied consent video. State's Exhibit 1 (Implied Consent DVD). At 12:05 a.m., Officer Mock requested a chemical specimen of Ms. Kilby's breath for alcohol testing. At 12:32 a.m., Officer Mock requested that Ms. Kilby make a decision to submit to or refuse a Datamaster breath test. Ms. Kilby declined to consent. Minutes of Testimony, P. 7, 9; App. P13, P15. The State subsequently charged Ms. Kilby with Operating While

Intoxicated, Second Offense. See Iowa Code § 321J.2 (2018); Trial Information; App. P5-P6.

A motion in limine was filed on November 19, 2018. Motion in Limine; App. P20-P25. The motion sought to preclude the State from using Ms. Kilby's refusal to submit to chemical testing, pursuant to Iowa Code section 321J.16, as substantive evidence of guilt in her criminal trial. *Id.* The motion was denied by the District Court. Ruling and Order Following Hearing on Motion in Limine; App. P39-P47. The Court, in a stipulated bench trial on the Minutes of Testimony, found Ms. Kilby Guilty. Bench Trial Tr. P. 11. The Court specifically took into account Ms. Kilby's refusal of the chemical test and preliminary breath test in reaching its verdict. Bench Trial Tr. P. 11.

Routing Statement

Retention of this case by the Iowa Supreme Court is appropriate because the case presents A substantial issue of first impression that implicates the continuing validity of a statute- namely: whether Iowa Code section 321J.16 violates the substantive due process rights of Iowans in light of the court's recent decision on *State v. Pettijohn*, 899 N.W.2d 1 (Iowa 2017), and is, therefore, unconstitutional as applied. Iowa R. App. P. 6.1101(2)(a) and 6.1101(2)(c).

LEGAL ARGUMENT

I. MS. KILBY'S DUE PROCESS RIGHTS UNDER ARTICLE I, SECTION 9 OF THE IOWA CONSTITUTION WERE VIOLATED WHEN THE DISTRICT COURT ALLOWED THE STATE TO INTRODUCE EVIDENCE AT TRIAL, PURSUANT TO IOWA CODE SECTION 321J.16, OF MS. KILBY'S EXERCISE OF HER CONSTITUTIONAL RIGHT TO WITHHOLD CONSENT TO A SEARCH OF HER PERSON.

Preservation of Error: Ms. Kilby preserved error by timely filing a Motion in Limine, obtaining a ruling on same, and timely filing her Notice of Appeal.

Standard of Review: "We review constitutional challenges to a statute de novo." *State v. Keene*, 629 N.W.2d 360, 363 (Iowa 2001); *State v. Cronkhite*, 613 N.W.2d 664, 666 (Iowa 2000).

Introduction: No law that is contrary to the constitution may stand. Iowa Const. art. XII, § 1. "[C]ourts must, under all circumstances, protect the supremacy of the constitution as a means of protecting our republican form of government and our freedoms." *Varnum v. Brien*, 763 N.W.2d 862, 875 (Iowa 2009). "Our framers vested the Iowa Supreme Court with the ultimate authority, and obligation, to ensure no law passed by the legislature impermissibly invades an interest protected by the constitution." *Planned*

Parenthood of the Heartland v. Reynolds ex rel. State, 915 N.W.2d 206, 213 (Iowa 2018).

"Constitutional guarantees, such as the rights to due process and equal protection of the law, limit the power of the majoritarian branches of government." *Id*. The purpose of such limitation is to "withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *Varnum*, 763 N.W.2d at 875 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638, 63 S.Ct. 1178, 1185, 87 L.Ed. 1628 (1943)).

Article I, section 9 of the Iowa Constitution guarantees that "no person shall be deprived of life, liberty, or property, without due process of law." Ia. Const. art. I, sec 9. This clause provides both substantive and procedural due process protections. Substantive due process "prevents the government from interfering with 'rights implicit in the concept of ordered liberty.'" *State v. Hernandez-Lopez*, 639 N.W.2d 226, 237 (Iowa 2002) (quoting *United States v. Salerno*, 481 U.S. 739, 746 (1986)).

The right to be free from warrantless search and seizure is a fundamental right under both the United States and Iowa Constitutions. *State v. Baldon*, 829 N.W.2d 785, 791 (Iowa 2013). A breath test is a search

which implicates fundamental constitutional protections under Article I section 8 of the Iowa Constitution. Because no warrant was procured and no warrant exception applied in this case which would allow law enforcement to compel the requested search (i.e. the breath test), Ms. Kilby had a fundamental constitutional right to withhold consent to the requested search.

Despite her fundamental right to withhold consent to the search, the State relies upon Iowa Code section 321J.16 to justify using Ms. Kilby's refusal to submit to a search of her person as substantive evidence of her guilt at trial. Because Ms. Kilby exercised a fundamental right to be free from an unreasonable search, any law abridging, limiting, or infringing upon the exercise of that fundamental right— here, Iowa Code section 321J.16— is subject to a strict scrutiny analysis. Iowa Code section 321J.16 does not survive strict scrutiny, and the use of Ms. Kilby's exercise of her fundamental right to refuse an unreasonable warrantless search pursuant to Iowa Code section 321J.16 is unconstitutional as applied to this case.

A. Absent a Search Warrant or Valid Exception to the Warrant Requirement, Ms. Kilby had a Fundamental Constitutional Right to Refuse Chemical Testing under article I section 8 of the Iowa Constitution.

A substantive due process analysis begins with identifying the nature of the right at issue. *State v. Russell*, 897 N.W.2d 717, 732 (Iowa 2017). If

a fundamental right is at issue, the government may not infringe upon that right, "no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Bowers v. Polk Cty. Bd. of Supervisors*, 638 N.W.2d 682, 694 (Iowa 2002) (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)). For those rights that are not fundamental, due process demands no more than "a reasonable fit between the government interest and the means utilized to advance that interest." *Russell*, 897 N.W.2d at 732 (quoting *Hernandez-Lopez*, 639 N.W.2d at 238).

Here, a fundamental right is at issue. Fundamental rights include those rights enumerated in the Bill of Rights of the Iowa Constitution. See Ia. Const. Art. I. Unlike the United States Constitution, the Iowa Constitution begins with the Bill of Rights. Our framers were mindful that the,

> annals of the world ... furnish many instances in which the freest and most enlightened governments that have ever existed upon earth, have been gradually undermined, and actually destroyed, in consequence of the people's rights not being guarded by written constitutions.

1 *The Debates of the Constitutional Convention of the State of Iowa* 100-101 (W. Blair Lord rep., 1857), http://www.statelibraryofiowa.org/services/collections/law-library/iaconst. Accordingly, "[t]he object of a Bill of Rights is to set forth and define

powers which the people seek to retain within themselves." *Id.* at 154. Some perceived Iowa's Bill of Rights to be "of more importance than all the other clauses in the Constitution put together, because it is the foundation and written security upon which the people rest their rights." *Id.* at 103; *cf. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 407, 91 S. Ct. 1999, 2010, 29 L.Ed.2d 619 (1971) (Harlan, J., concurring) ("[I]t must also be recognized that the Bill of Rights is particularly intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities ....").

Article I, section 8 of the Iowa Constitution guarantees Iowans the right to be free from unreasonable search and seizure. A search occurs whenever government agents intrude upon an area where a person has a reasonable expectation of privacy. *California v. Ciraolo*, 476 U.S. 207, 211 (1986). A search consists of a looking for or seeking out that which is otherwise concealed from view. See 1 W. LaFave, *Search and Seizure: A treatise on the Fourth Amendment*, section 2.1, at 222 (1978). This case involves a request for a sample of Ms. Kilby's breath. Obtaining a breath sample for the purpose of chemical analysis constitutes a search of the person subject to the requirements of the 4th Amendment.

The United States Supreme Court has held that "subjecting a person to a breathalyzer test, which generally requires the production of alveolar or 'deep lung' breath for chemical analysis, implicates similar concerns about bodily integrity and, like the blood-alcohol test we considered in *Schmerber*, should also be deemed a search." *Skinner v. Railway Labor Executives Association*, 489 U.S. 602, 616 (1989); citing 1 W. LaFave, *Search and Seizure*, section 2.6(a), p. 463 (1987). The Iowa Supreme Court has also held that breath testing implicates the search and seizure provisions of article 1, section 8 of the Iowa Constitution. *See State v. Pettijohn*, 899 N.W.2d 1 (Iowa 2017). In *Pettijohn*, the Court confirmed the right to refuse a warrantless breath test is a constitutional right under the Iowa Constitution.[1] *Id*., at 33-34. Furthermore, *Pettijohn* confirmed the Iowa Constitution does not distinguish between the various types of searches involving chemical testing. *See id.* at 17-18, 24 (refusing to attribute any significance, for article I, section 8 purposes, to the distinction between blood and breath tests made in *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2176-78 (2016)). Whether

[1] The State may argue that the right to refuse chemical testing cannot be a constitutional right because driving is a privilege. *Pettijohn* undercuts the legitimacy of such an argument because boating is also a "privilege" (*see Pettijohn*, N.W.2d at 40-41 (Cady, C.J., concurring)), yet a boater has a constitutional right to refuse chemical testing. The same is true for a driver of a motor vehicle. *See State v. Ryce*, 368 P.3d 342, 369, 363 (Kan. 2016) (concluding a driver has a constitutional right to refuse chemical testing despite the fact that driving is a "privilege"); *id.*at 372 (distinguishing the "right" to be free from an unreasonable search from the "privilege" to possess a driver's license).

the test involves blood, breath, or urine, it is an intensely personal search of one's body and is subject to constitutional protection.[2] Therefore, it is subject to the stringent protections of article I, section 8. Nothing could be more private than the integrity of a person's body. That is why the Iowa Constitution protects the search of a person's body to the highest degree. *See* Iowa Const. art. I, sec. 8 ("The right of the *people* to be secure in their *persons*, houses, papers and effects, against unreasonable seizures and searches shall not be violated." (emphasis added)). The sanctity of a person's body lies at the core of article I, section 8.

In *Pettijohn*, the Court unequivocally held that a breath analysis test to detect blood alcohol levels is a search subject to the requirements of article I section 8 of the Iowa Constitution. *See Pettijohn*, 899 N.W.2d 1. Therefore, in order to constitutionally compel Ms. Kilby to comply with the requested search (the breath test), the State must prove the existence of a valid search warrant for the sample of her breath or a valid exception to the warrant requirement which would otherwise allow law enforcement to obtain the sample. Conversely, if the State cannot prove the existence of a

[2] An evidentiary breath test requires deep, inner-lung breathing. *Olevik v. State*, 806 S.E.2d 505, 518 (Ga. 2017). This type of breath, also referred to as alveolar breath, requires "sustained strong blowing into a machine for several seconds." *Id.* "[T]he State is not merely collecting breath expelled in a natural manner." *Id.* Instead, a breath test "requires a suspect to breathe unnaturally for the purpose of generating evidence against himself." *Id.* A breath test is intensely personal, unnatural, and invasive.

warrant or valid exception to the warrant requirement, the search is illegal and Ms. Kilby is completely within her constitutional right to refuse the officer's warrantless request for a breath sample and to remain free from an unreasonable search. As will be explained below, no such warrant or exception exists in this case, and Ms. Kilby's withholding of consent to the breath test was constitutionally authorized.

Before examining the existence of a warrant or the viability of any exceptions to the warrant requirement to this case, the applicability of *Pettijohn*'s search and seizure analysis to operating a motor vehicle while intoxicated cases should be addressed. The State may attempt to limit *Pettijohn*'s constitutional analysis to boating cases. Such a limitation is misguided. The State will undoubtedly fixate on a cautionary statement in *Pettijohn*— "A person reading this decision should not jump to the conclusion that our analysis will make the statutory scheme governing the operation of a motor vehicle while under the influence unconstitutional." 899 N.W.2d at 38. However, this cautionary statement, when read in context, pertains to the constitutionality of the OWI statutory scheme as a

whole, not the specific issue of whether an individual has a constitutional right to refuse a warrantless breath test.[3]

While *Pettijohn* involved a Datamaster breath test in the boating while intoxicated context, there is no reason to treat the nature of the search in the driving while intoxicated context any differently for the purposes of a search and seizure analysis under article I section 8. In fact, the cases cited in *Pettijohn*'s analysis of the search and seizure issue are all cases involving motor vehicle operation. *See id*. The testing procedure is exactly the same in the driving while intoxicated context and implicates the same constitutional search issue. There is no functional difference in the search method used in a BWI or OWI investigation. The same breath testing machines are used in both OWI and BWI. The same testing procedures are used. The training that the officers receive to operate the machines is the same. In short, there is absolutely no coherent reason to determine that a breath test on a Datamaster is a search in a boating while intoxicated prosecution but not in a vehicular operating while intoxicated prosecution.

[3] The *Pettijohn* court identified the most significant difference between the OWI and the BWI statutory schemes—"a mandatory monetary civil penalty" for refusing testing in a BWI case. *See* 899 N.W.2d at 38 (emphasizing the importance of the mandatory civil penalty); *see also id.* at 39-41 (Cady, C.J., concurring) (identifying the mandatory civil penalty as the reason for concluding "the statutory implied-consent scheme for boating in Iowa is inherently coercive"). This difference does not undermine the constitutionality of the right to refuse chemical testing in an OWI case. Although this difference is relevant in determining whether the right is voluntarily waived (i.e., voluntariness of consent), it has no bearing on the nature of the right itself. The right to refuse a warrantless breath test is constitutional in either context.

Therefore, the analytical framework for examining the validity of a search in the OWI and BWI contexts are identical.

B. No Warrant or Valid Exception to the Warrant Requirement Applied to Compel Ms. Kilby to Provide a Breath Sample.

"Warrantless searches and seizures are per se unreasonable unless one of several carefully drawn exceptions to the warrant requirement applies." *Pettijohn*, 899 N.W.2d at 14. "To establish the constitutionality of a warrantless search or seizure, the State must prove by a preponderance of the evidence that a recognized exception to the warrant requirement applies." *Id.* These exceptions are "jealously and carefully drawn." *State v. Coleman*, 890 N.W.2d 284, 286 (Iowa 2017) (quoting *State v. Strong*, 493 N.W.2d 834, 836 (Iowa 1992)). It is uncontested that no warrant was procured to authorize the search in this case. Therefore, the only purported justification for compelling a search must be an exception to the warrant requirement. No warrantless exception applied here.

1. Consent

First, Ms. Kilby refused to consent to the warrantless breath test. Under article I, section 8, a warrant is not required to authorize a search based on consent. *State v. Baldon*, 829 N.W.2d at 791. Rather, effective consent to a warrantless search establishes a waiver of an individual's right

to be free from unreasonable searches and seizures under article I, section 8. *Id*. In *Pettijohn*, the court considered whether consent implied under the Iowa Code's boating while intoxicated statute constituted effective consent justifying the administration of a warrantless breath test pursuant to article I section 8 of the Iowa Constitution. See *Pettijohn*, 899 N.W.2d at 25; see also Iowa Code section 462A.14A. The Iowa Supreme Court examined the U.S. Supreme Court's decision in *Missouri v. McNeely*, 569 U.S. 141, 133 S. Ct 1552, 185 L.Ed.2d 696 (2013), and, in doing so, determined that statutorily implied consent was not consent for purposes of the Fourth Amendment. *Pettijohn*, at 26-27. ("[W]e conclude the clear implication of the *McNeely* decision is that statutorily implied consent to submit to a warrantless blood test under threat of civil penalties for refusal to submit does not constitute consent for purposes of the Fourth Amendment."). The Court found the same under the Iowa Constitution: "We conclude the consent implied by the statutory scheme set forth in chapter 462A of the Code does not automatically permit a warrantless search consistent with article I, section 8." *Id*., at 29.

No one can argue that the defendant actually consented to the search requested in this case because she clearly refused. It is evident from the video at the jail where implied consent was invoked, as well as the "Request

and Notice under Iowa Code Chapter 321J" form that the defendant signed, that the defendant clearly did not provide her consent to be searched via a Datamaster breath test. See State's Ex. 1; Minutes of Testimony, P. 9; App. P54, P15. Because no consent was provided to the test, consent may not be relied upon to provide a waiver of the warrant requirement of article 1 section 8. This exception to the warrant requirement must fail as a justification to compel a breath test search. Because no consent to search was obtained from Ms. Kilby, the State may not rely upon this exception to justify the requested search.

2. Search Incident to Arrest

Second, the search-incident-to-arrest exception does not apply. The search incident to arrest exception authorizing a warrantless search, which is intended to prevent imminent destruction of evidence, is inapplicable in cases involving breath alcohol evidence. While the United States Supreme Court has justified criminalizing a breath test refusal, they did so under the "evidence gathering" rationale of the search incident to arrest exception. See *Birchfield*, 136 S. Ct. 2160. Iowa, however, has specifically rejected the "evidence gathering" justification for a search incident to arrest under Article I, section 8 of the Iowa Constitution. See *State v. Gaskins*, 866 N.W.2d 1 (Iowa 2015). Under the Iowa Constitution, the search incident to

arrest exception does not apply unless the evidence to be preserved is in danger of imminent destruction, just like exists in situations involving "exigent circumstances." *Gaskins*, 866 N.W.2d at 14. Under Article I, section 8 of the Iowa Constitution, the search incident to arrest exception may not be used for "broad evidence-gathering purpose[s]." *Id*.

In 2017, the Iowa Supreme Court re-affirmed the holding in *Gaskins*, limiting the application of the search incident to arrest exception. In *Pettijohn*, the Iowa Supreme Court examined a constitutional challenge to a chemical test in boating while intoxicated case under article I section 8 of the Iowa Constitution. The Court found that, like in *Gaskins*, a general evidence-gathering rationale did not fit with the purpose of search and seizure protections under article 1, section 8 and declined to find that the search incident to arrest exception authorized a search of a person to determine their alcohol or drug content under the Iowa Constitution. *Id*. at 24 ("[W]e decline the State's invitation to conclude the search-incident-to-arrest exception applies to this category of cases across the board").

Here, as in *Pettijohn*, the search requested was a breath test on a Datamaster machine. Just as in *Pettijohn*, the rationale for the search incident to arrest exception fails, and the exception is inapplicable to the State's ability to compel a search of the defendant's bodily substances for

chemical testing. *See Pettijohn*, 899 N.W.2d at 24 ("[T]he application of the categorical search-incident-to-arrest exception to the warrant requirement to this class of cases [i.e. OWI cases] would eviscerate the protections guaranteed by article I, section 8."). As such, the search incident to arrest exception similarly does not apply to compel breath tests in OWI prosecutions.

3. Exigent Circumstances and Probable Cause

Third, no exigent circumstances existed here. "The exigent circumstances exception allows a warrantless search when an emergency leaves police insufficient time to seek a warrant." *Birchfield*, 136 S. Ct. 2160, 2173-74 (2016). "[T]he natural dissipation of alcohol in the bloodstream and the potential loss of BAC evidence do not automatically constitute exigent circumstances that subvert the warrant requirement under the Fourth Amendment or article I, section 8." *Pettijohn*, 899 N.W.2d at 25; *accord Birchfield*, 136 S. Ct. at 2174; *McNeely*, 569 U.S. at 145; *State v. Harris*, 763 N.W.2d 269, 272 (Iowa 2009). Just as the search incident to arrest exception was rejected by the Supreme Court in *Pettijohn*, so too does the exigent circumstances exception to the warrant requirement fail to allow the State to compel a warrantless breath test on a categorical basis. *Pettijohn*, at 24. "[A]s the State rightly concedes, the natural dissipation of alcohol in

the bloodstream and the potential loss of BAC evidence do not automatically constitute exigent circumstances that subvert the warrant requirement under the Fourth Amendment or Article 1, Section 8". *Id*., at 25. The Court held the natural dissipation of alcohol does not create a per se exigency. *Id*., at 27. "[W]hile the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, ... it does not do so categorically." *Id*., at 25, citing *McNeely*, 569 U.S. at 156, 133 S.Ct. at 1563.

There is no fact or factor in this particular case, other than the natural dissipation of alcohol in the defendant's blood, that would support any exigency implicating this specific warrant exception. Indeed, the State's ability to obtain a warrant was never even entertained during the particular investigation in question. The State can point to no circumstances triggering this specific exception. As such, it is inapplicable to the instant case and the exception cannot justify a constitutionally permissible compelled search. Here, the State has put forth no evidence that this case involved any exigency other than the natural dissipation of alcohol. There were no emergency circumstances that applied, and the State has put forth zero evidence that they did not have sufficient time to seek a warrant.[4] The State

[4] The two-hour presumptive window of Iowa Code section 321J.2(12)(a) is not controlling for an exigent circumstances analysis. However, even if it were, the State had nearly thirty minutes remaining after Ms. Kilby had refused chemical testing to obtain a warrant within the two-hour

simply failed to seek one. Ms. Kilby should not bear the burden of the State's failure.[5] *See Pettijohn*, 899 N.W.2d at 22-23 ("Whenever practicable, the state should obtain a warrant prior to conducting a search.").

Because no warrant was procured and no exception to the warrant requirement was applicable to the search in this case, under these circumstances, Ms. Kilby had a fundamental constitutional right to be free from the requested search, and her refusal to submit, consent, or otherwise acquiesce to the requested search was wholly lawful and protected under article I section 8 of the Iowa Constitution.

C. Iowa Code Section 321J.16 Infringes on Ms. Kilby's Fundamental Right to Be Free From A Warrantless, Exceptionless Search, in Violation of Article I, Section 9 of the Iowa Constitution.

Section 321J.16 provides, "If a person refuses to submit to a chemical test, proof of refusal is admissible in any civil or criminal action or

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window. The State had ample opportunities to obtain a warrant both before and after Ms. Kilby refused chemical testing. *See Pettijohn*, 899 N.W.2d at 22 (discussing law enforcement's ability to seek a warrant electronically during the "necessary window[s] of delay" in an OWI investigation). "[A]n officer who has probable cause to suspect an individual of operating while intoxicated should ordinarily be able to complete and submit an electronic warrant application within minutes." *Id.* at 22. "[L]aw enforcement officers in Iowa have around-the-clock access to our electronic court system." *Id.* at 23. "Our electronic document management system (EDMS) allows the police to get a warrant almost instantaneously." *Id.* "[T]he delays inherent in administering reliable breath tests generally provide ample time to obtain a warrant." *Id.* (quoting *Birchfield*, 136 S. Ct. at 2191 (Sotomayor, J., dissenting)).

[5] The State is precluded from using Ms. Kilby's refusal against her at trial. Even assuming exigent circumstances existed, "evidence of a refusal to consent to a search is inadmissible *regardless of the legality of the search*." *See Elson v. State*, 659 P.2d 1195, 1199 (Alaska 1983) (emphasis added).

proceeding arising out of acts alleged to have been committed while the person was operating a motor vehicle in violation of section 321J.2 or 321J.2A." Section 321J.16 is unconstitutional as applied to Ms. Kilby because it violates her substantive due process rights under article I section 9 of the Iowa Constitution. Specifically, it infringes on her fundamental right to be free from an unreasonable search and punishes her assertion of her rights under article I, section 8. Further, 321J.16 is not narrowly tailored to serve a compelling government interest and therefore fails the strict scrutiny analysis.

The Iowa Constitution guarantees "no person shall be deprived of life, liberty, or property, without due process of law." Iowa Const. art. I, § 9. The provision is "nearly identical in scope, import and purpose" to the Federal Due Process Clause. *State v. Hernandez-Lopez*, 639 N.W.2d 226, 237 (Iowa 2002). "Despite this likeness, we 'jealously guard it as our right and duty to differ from the Supreme Court, in appropriate cases, when construing analogous provisions in the Iowa Constitution.'" *Planned Parenthood*, 915 N.W.2d at 232–33, citing *Hensler v. City of Davenport*, 790 N.W.2d 569, 579 n.1 (Iowa 2010). Accordingly, while we may draw upon precedent from federal courts when persuasive, we exercise our right to conduct an independent interpretation of our constitution. *Planned Parenthood*, 915

N.W.2d at 233. Substantive due process claims are grounded in our nation's long history of interpreting the text of the Due Process Clause to "impose nothing less than an obligation to give substantive content to the words 'liberty' and 'due process of law.'" *Planned Parenthood*, 915 N.W.2d at 233, citing *Washington v. Glucksberg*, 521 U.S. 702, 764, 117 S.Ct. 2258, 2281, 138 L.Ed.2d 772 (1997).

When Iowans bring claims alleging a deprivation of substantive due process, we employ a two-stage inquiry. First, we "determine the nature of the individual right involved." *Hensler*, 790 N.W.2d at 580. Second, we determine "the appropriate level of scrutiny to apply." *Id*. "If government action implicates a fundamental right, we apply strict scrutiny" and determine whether the disputed action is "narrowly tailored to serve a compelling government interest." Id. Conversely, if the right at stake is not fundamental, we apply the "rational-basis test," which considers whether there is a "reasonable fit between the government interest and the means utilized to advance that interest." *Hernandez-Lopez*, 639 N.W.2d at 238.

As stated above in brief, the right in question— the right to be free from unreasonable searches (specifically in this case, a Datamaster breath test)— is a fundamental right, being explicitly enumerated in the Bill of Rights at the forefront of the Iowa Constitution. Therefore, the law

impinging on this fundamental right, Iowa Code section 321J.16, is subject to strict scrutiny. Section 321J.16 fails strict scrutiny. It is not "narrowly tailored to serve a compelling state interest." *See Bowers*, 638 N.W.2d at 694.

Generally, Appellant concedes that the purpose behind the implied consent law, as a whole, does serve a compelling government interest. "[T]he purpose of the Implied Consent Law is to reduce the holocaust on our highways part of which is due to the driver who imbibes too freely of intoxicating liquor." *Welch v. Iowa Dept. of Transp., Motor Vehicle Div.*, 801 N.W.2d 590, 594 (Iowa 2011), citing *Severson v. Sueppel,* 260 Iowa 1169, 1174, 152 N.W.2d 281, 284 (Iowa 1967); *see also Shriver v. Iowa Dep't of Transp.,* 430 N.W.2d 921, 924 (Iowa 1988) (reiterating that the primary purpose behind chapter 321J is to "promote the public safety by removing dangerous drivers from the highways").

The issue that Appellant takes is not with the general purpose of the implied consent scheme under Iowa Code Chapter 321J. By and large, the statutory scheme set forth under 321J does promote the government's interest in reducing damage and death caused by impaired driving. Appellant takes issue with Iowa Code section 321J.16 specifically. Evaluating the compelling nature of the government's interest is only one

part of the strict scrutiny analysis. The second part of the analysis— the narrow tailoring requirement— is where Iowa Code section 321J.16 fails.

"A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). Iowa Code section 321J.16 fails to clear this high hurdle. Instead, the statute authorizes the admission of a person's decision to withhold consent to submit to an otherwise illegal search in *any* criminal proceeding for *any* reason whatsoever. Such a broadly written statute contravenes the very definition of "narrow tailoring."

The only logical purpose of Iowa Code section 321J.16 is to use a person's withholding of consent to a search to use as evidence of guilt to obtain a conviction. Although generally a person's withholding of consent to a search may be admitted "for some purpose other than simply to penalize the defendant for exercising a constitutional right," *State v. Thomas*, 766 N.W.2d 263, 270 (Iowa Ct. App. 2009), it "cannot be used as evidence of [the defendant's] guilt if the constitutional protection against unreasonable search and seizure is to have any meaning." *Longshore v. State*, 399 Md. 486, 537 (2007). Due process prohibits penalizing the exercise of a constitutional right. *See United States v. Jackson*, 390 U.S. 570, 581-82 (1968) ("If the provision had no other purpose or effect than to chill the

assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional."). That is exactly what 321J.16 endeavors to do: to use an individual's constitutionally protected decision to withhold consent against a person as evidence of guilt.

The State, however, insists the constitutional right at issue here— the right to be free from a warrantless breath test— is different from *all* other constitutional rights. Essentially, the State seeks an "OWI exception" to Due Process. But Due Process does not distinguish between the various constitutional rights. A constitutional right is a constitutional right for due process purposes. *See United States v. Prescott*, 581 F.2d 1343, 1351-52 (9th Cir. 1978) (prohibiting the government from using a defendant's refusal to consent to a warrantless search as evidence at trial, reasoning that such use would be similarly problematic to using a defendant's silence as evidence against them at trial); *State v. Palenkas*, 933 P.2d 1269, 1279 (Ariz. Super. Ct. 1996) ("We can see no valid distinction between the privilege against self-incrimination and the right to be free from warrantless searches, when invoked, that would justify a different rule about the admissibility as evidence of guilt."). Due Process demands respecting a person's exercise of their constitutional right regardless of which right they exercised. The State seeks an OWI exception to the Constitution for the sake

of expediency. But our Constitution has never been aimed at expediency. *See Riley v. California*, 134 S. Ct. 2473, 2493 (2014) (discussing the warrant requirement and stating it is "not merely an inconvenience to be somehow weighed against the claims of police efficiency" (quotations omitted)). Due process requires that which is due, not that which is expedient.

Ms. Kilby exercised her constitutional right to refuse a warrantless search and she may not be punished for choosing to do so. "To punish a person because [s]he has done what the law plainly allows [her] to do is a due process violation of the most basic sort." *United States v. Goodwin*, 457 U.S. 368, 372 (1982). "[T]he constitutional right to refuse to consent to an unlawful search would be effectively destroyed if, when exercised, it could be used as evidence of guilt." *Elson*, 659 P.2d at 1198 (quotation omitted); *see also Grunewald v. United States*, 353 U.S. 391, 425 (1957) (Black, J., concurring) ("The value of constitutional privileges is largely destroyed if persons can be penalized for relying on them."); *Bargas v. State*, 489 P.2d 130, 132 (Alaska 1971) ("It would make meaningless the constitutional protection against unreasonable searches and seizures if the exercise of that right were allowed to become a badge of guilt."); *State v. Glover*, 89 A.3d 1077, 1082 (Maine 2014) ("It would seem . . . illogical to extend protections against unreasonable searches and seizures, including the obtaining of a

warrant prior to implementing a search, and to also recognize an individual's right to refuse a warrantless search, yet allow testimony regarding such an assertion of that right at trial in a manner suggesting that it is indicative of one's guilt."). Because Iowa Code section 321J.16 comprehensively and absolutely sacrifices the protections of article I section 8 against unreasonable searches, it is not even remotely narrowly tailored, as it provides the State an absolute right to hold the exercise of a fundamental constitutional right against a person without question in all circumstances and situations.

The State essentially argues that 321J.16 is narrowly tailored because the purpose of the implied consent scheme as a whole would somehow disintegrate unless the State was able to comprehensively and without exception use a person's exercise of their right to withhold consent against them pursuant to Iowa Code section 321J.16. Contrary to the State's assertion, however, the statutory scheme of Iowa Code Chapter 321J is still able to accomplish its purpose of reducing the "holocaust on the highways" even if this Court were to find that Iowa Code §321J.16 was unconstitutional as applied to this case. The implied consent law as a whole is still fully functional even without Iowa Code §321J.16. A person will still face numerous penalties aimed at reducing the perils of drunk driving. License

revocations, driving restrictions, fines, jail time, substance abuse evaluations, and educational programming all still exist within the implied consent scheme to address the dangers associated with operating while intoxicated.

First, invalidating section 321J.16 as applied to this case will not nullify the State's ability to revoke a person's driver's license administratively. Assuming, *arguendo*, that the Court finds that 321J.16 is unconstitutional as applied to this case, a person who refuses to submit to a breath test will still be subject to an administrative driver's license revocation. See Iowa Code §321J.9. This is because a person does not have a constitutional right to a driver's license; a driver's license is simply a privilege, which can be taken away if an officer has reasonable grounds to believe that an individual is operating while under the influence and the individual refuses a chemical test. *See id*.; *see also Gottschalk v. Sueppel,* 258 Iowa 1173, 1181, 140 N.W.2d 866, 870 (1966). Finding that 321J.16 is unconstitutional as applied to this case does nothing to take that tool to combat drunk driving away from the State.

Second, a finding that Iowa Code §321J.16 is invalid as applied to this case will not take away the State's ability to punish and deter drunk driving. A person, if convicted of operating while intoxicated, faces mandatory jail

time, even for a first offense. See Iowa Code section 321J.2(3)(a) (mandatory minimum 48 hours in jail for 1st offense; maximum 1 year in jail); Iowa Code §321J.2(4)(a) (min. 7 days in jail; max. 2 years in prison); Iowa Code §321J.2(5)(a) (max. 5 years in prison, with minimum confinement of 30 days in jail for 3rd or subsequent offense). A person also faces hefty fines if convicted. In fact, the fines for OWI are the highest mandatory fines levied for a misdemeanor in Iowa. See Iowa Code §321J.2(3)(c) ($1,250 minimum fine for 1st offense); Iowa Code §321J.2(4)(b) ($1,875 to $6,250 fine for 2nd offense); Iowa Code §321J.2(5) ($3,125 to $9,375 for 3rd of subsequent offense). These penalties serve as a powerful deterrent in fighting drunk drivers and preventing recidivism. None of these penalties are jeopardized by the Court finding that Iowa Code §321J.16 is unconstitutional as applied to the instant case.

Third, should the Court find that §321J.16 is unconstitutional as applied, the State will still have strong treatment and educational tools at its disposal to address substance abuse concerns and to educate drivers about the dangers of drinking and driving. A person convicted of OWI must undergo a substance abuse evaluation and complete all recommended treatment. See Iowa Code §§321J.2(3)(e), 321J.2(4)(d), 321J.2(5)(d). Further, a person who experiences an administrative revocation of their

driver's license due to a refusal of a chemical test or a test result over .08% must participate in a course for drinking drivers as a precondition to getting their driving privileges reinstated. See Iowa Code §321J.2(3)(e), 321J.2(4)(d), 321J.2(5)(d). Again, a finding that 321J.16 is unconstitutional applied to this case does not touch these provisions.

Fourth, should the Court find that 321J.16 is unconstitutional as applied to this case, the State will still have vigorous driving requirements and restrictions in place that protect the public from drivers accused of driving while under the influence. When a person experiences a driver's license revocation due to refusal or "failure" of a chemical test, upon reapplying to operate a motor vehicle upon public highways, the person must prove that they have an ignition interlock device installed in their vehicle. See Iowa Code section 321J.4 ("Revocation of license — ignition interlock devices — temporary restricted license."). A person will also be required to post proof of financial responsibility (i.e. SR-22 or "high risk" insurance) for a mandatory period following a license revocation. See Iowa Admin. Code 761-620.5(321J). The State will still possess these administrative tools even if the Court finds that a "refusal" cannot be used against a person as evidence of guilt in a criminal trial.

Iowa Code section 321J.16, in and of itself, does little to nothing to remove dangerously intoxicated drivers from Iowa's roadways. It merely allows a prosecutor to impermissibly and unconstitutionally use the person's refusal as evidence of their guilt at trial. The statute's only purpose can be construed as a tool to obtain a criminal conviction. A criminal conviction is not what stops the "holocaust on the highways" and does little to nothing to remove an intoxicated driver from the roadway. The accomplishes that purpose. The administrative sanctions, such as the revocation of the driver's license of the individual under investigation for OWI, ignition interlock device requirement, substance abuse treatment, impaired drivers education programs, and the requirement that a person obtain and show proof of SR-22 high-risk insurance coverage accomplish that purpose. These safety measures will still be in place if the Court declares Iowa Code section 321J.16 unconstitutional as applied to this case.

The Appellant is simply saying that, in a criminal prosecution, the valid exercise of a constitutional right cannot be held against a person, and no factfinder can be allowed to draw any inference from that exercise if Due Process is to have any significance. The Appellant is merely asking that the Court treat the exercise of the right to be free from unreasonable searches in the OWI context the same as the exercise of any other fundamental right,

such as the invocation of the right to counsel or the right against self-incrimination.

As it specifically pertains to an individual's constitutional right to withhold consent to search, article I, section 8 of the Iowa Constitution, much like the Fourth Amendment to the United States Constitution, "gives him a constitutional right to refuse to consent to entry and search. . . . His asserting it cannot be a crime nor can it be evidence of a crime." (emphasis added) *Prescott*, 581 F.2d at 1351. "One cannot be penalized for passively asserting this right, regardless of one's motivation. . . . Just as a criminal suspect may validly invoke his Fifth Amendment privilege in an effort to shield himself from criminal liability, [citations omitted] so one may withhold consent to a warrantless search, even though one's purpose be to conceal evidence of wrongdoing." *Id*.

The Court found similarly in *State v. Kern*, 831 N.W.2d 149, 175 (Iowa 2013), that neither the invocation of constitutional rights nor the refusal to grant consent to an officer to perform a search can be used to support reasonable suspicion or probable cause. *Kern*, citing *State v. Maddox*, 670 N.W.2d 168, 173 (Iowa 2003). The *Kern* Court went onto say:

> Any other rule would make a mockery of the reasonable suspicion and probable cause requirements, as well as the consent doctrine. These legal principles would be considerably less

> effective if citizens' insistence that searches and seizures be conducted in conformity with constitutional norms could create the suspicion or cause that renders their consent unnecessary. *United States v. Hunnicutt,* 135 F.3d 1345, 1351 (10th Cir.1998).
>
> We agree. If such a refusal of consent or invocation of constitutional rights could supply officers with the requisite suspicion or cause to conduct a search, then citizens would be exposed to a dangerous catch-22 when officers request consent to conduct a search. If consent is given, the search occurs. If consent is refused, the officer may nevertheless conduct the search pursuant to the probable cause generated by the refusal. This is an unacceptable consequence under our constitutional framework.

Kern, 831 N.W.2d at 175-76. The same can be said of the breath test refusal evidence in this case. A person suspected of OWI would be forced to either consent or their refusal will be allowed to generate the requisite proof beyond a reasonable doubt to convict them. Such a result is constitutionally unacceptable.

The principle that a person's exercise of their constitutional rights cannot be held against them applies to other guaranteed rights as well, such as the right to counsel or the right against self-incrimination. Certainly, we don't allow a prosecutor to say "The Defendant asked for a lawyer while he was being questioned. What is he hiding? That must mean that he is guilty." We don't allow the prosecutor to argue that "Defendant did not testify in this

trial. He must be guilty." These inferences are certainly impermissible when a Defendant invokes their rights under those fundamental protections. The same must apply in this instance. The Court should find that Iowa Code §321J.16 impermissibly allows a prosecutor to imply and a jury to infer guilt from the exercise of a fundamental constitutional right to withhold consent to search.

This conception is completely consistent with the way that breath tests were originally used against a person when the process of breath alcohol testing was first developed. In fact, the use of breath test results and refusals was initially only used against individuals in administrative driver's license proceedings and not in criminal prosecutions. While this Court may be reluctant to find the refusal inadmissible, and, in effect, overturn Iowa Code §321J.16 based upon what it perceives as years of precedent in favor of the validity of the driving while intoxicated implied consent law, a bit of history is instructive as to why the Court should not be so quick to accept this belief as unassailable truth.

The use of breath test results and refusals were initially only used against individuals in administrative licensing contexts and not in criminal proceedings but quickly morphed into the implied consent refusals statutes, such as Iowa Code section 321J.16, that we see today being used as evidence

in criminal cases. These types of statutes were approved by state appellate courts following the United States Supreme Court's decision in *Schmerber v. California*, 384 U.S. 757 (1966). In that case, the Court concluded that "under stringently limited circumstances" law enforcement could perform a warrantless forced blood draw from an individual arrested for operating while intoxicated. *Id*. at 772. A warrantless forced blood draw was acceptable according the Court, in these "stringently limited circumstances" pursuant to the probable cause/exigent circumstances exception to the warrant requirement. *Id*. at 771.

Schmerber was followed by *South Dakota v. Neville*, 459 U.S. 553 (1983), nearly seventeen years later. In *Neville*, the United States Supreme Court was confronted with the case of arising out of State laws that permitted the prosecution to use a defendant's refusal of a properly requested chemical test against him at trial, as evidence of guilt. According to the Court in *Neville*, *Schmerber* "clearly" allowed "a State to force a person suspected of driving while intoxicated to submit to a blood alcohol test." *Neville*, 459 U.S. at 559. However, the Court explained how states such as Iowa, statutorily permitted a person to refuse the test when it could otherwise be forcibly withdrawn, in exchange for enhanced statutory consequence regarding driving privileges and also use of that refusal used

against him at trial. *Id*. at 560. According to *Neville*, and State cases that followed, use of a person's refusal against them at trial was acceptable because the individual did not have the constitutional right to refuse that search. See also *State v. Knous*, 313 N.W.2d 510, 512 (Iowa 1981) (arrested person's right to refuse consent is a statutory right not a constitutional right based upon *Shmerber v. California*). The right to refuse the search was merely a "legislative gift" which came with a justifiable and reasonable price – the use of the refusal against the defendant at trial. *Id*.

Now, the state of the law surrounding the constitutionality of implied consent testing and the rationale underlying it has shifted dramatically, especially in Iowa since the *Pettijohn* decision, which further interpreted the *McNeeley* and *Birchfield* decisions under the Iowa Constitution. When an exception to the warrant requirement does not authorize a forced search of a person's body, the "legislative gift" justification for use of a defendant's refusal against him at trial no longer exists.

Both the Iowa Supreme Court and the United States Supreme Court have now definitively stated that the body's natural dissipation of alcohol does not create a per se exigency that forgoes the need to obtain a search warrant. *State v. Johnson*, 744 N.W.2d 340 (Iowa 2008); *Harris*, 763 N.W.2d 269; and *McNeely*, 133 S.Ct at 1558. The exceptions to the warrant

requirement are "jealously and carefully drawn." *Jones v. Unites States*, 3567 U.S. 493, 499 (1958). There simply is no "creature of statute" exception to the warrant requirement that has ever been recognized by the United States Supreme Court or Iowa Supreme Court. Had the legal fiction of statutorily imposed consent been a legitimate argument, it most certainly would have been advanced by the government and addressed by the United States Supreme Court in *McNeely* and *Birchfield*, and potentially accepted by the Iowa Supreme Court in *Pettijohn*. It was not.

The history of the implied consent scheme instructs its purpose, what it was initially intended to do— to remove dangerous drivers from the road. That purpose is furthered by the administrative sanctions and not by statutes such as Iowa Code section 321J.16, which simply surrenders constitutional protections for expedient, assembly line administration of justice. The Court should resist the temptation to take the easy road and find that the statute is constitutional simply because it has "been around for awhile."

The State will also likely contend that 321J.16 is narrowly tailored to serve a compelling government interest because a refusal in an OWI investigation is important evidence of guilt. In the published Iowa Court of Appeals decision of *State v. Thomas*, the Iowa Court of Appeals determined that a defendant's refusal to grant law enforcement consent to search is "too

ambiguous to be relevant" even in a possession of narcotics case where knowledge of the presence of narcotics is an essential element of the offense. *Thomas*, 766 N.W.2d at 271-72. "Under these ordinary rules of evidence, generally exercising one's privilege to be free from warrantless searches is simply not probative (or has low probative value) to a determination of guilt and is unfairly prejudicial. Thus, the defendant's right not to be penalized for exercising such a privilege is paramount." *Id*.; *see also United States v. Moreno*, 233 F.3d 937, 941 (7th Cir. 2000) (Fourth Amendment entitles a defendant to withhold consent to search and admitting evidence of that refusal is inconsistent with due process); *United States v. Runyan*, 290 F.3rd 223, 250 (5th Cir.) ("The circuit courts that have directly addressed this question have unanimously held that a defendant's refusal to consent to a warrantless search may not be presented as evidence of guilt."); *Maddox*, 670 N.W.2d at 173 (mere refusal to consent to a search does not establish probable cause); and *State v. Ripperger*, 514 N.W.2d 740, 746 (Iowa App. 1994) ("Defendant's refusal to consent to a blood test cannot be used to support probable cause because such use denies the defendant's Fourth and Fifth Amendment rights.").

A refusal of a breath test in an operating while intoxicated case is no more important evidence of guilt than an alleged drug dealer, such as the

case in *Thomas*, refusing to allow law enforcement to search his car or home in the absence of a warrant in a possession of controlled substance with intent to deliver prosecution. If no inference can be drawn from the alleged drug dealer refusing an unwarranted search, certainly no inference can be drawn from a suspected impaired driver withholding consent to a breath alcohol test. No legally justifiable distinction exists. The refusal of the breath test must be treated the same as a refusal to provide consent to search in any other criminal case. When it comes down to it, the State's argument is simple: "We should be able to use a person's exercise of their right to refuse a breath test against them in order to more easily obtain a conviction, which we clearly cannot do in any other search context." The Court should resist the State's perplexing reasoning.

It is also important to point out that the State certainly has other evidence at its disposal in a criminal prosecution for OWI cases, even without the ability to hold a person's decision to withhold consent against them at trial. Performance on field sobriety tests, erratic driving behavior, physical observations such as odor of alcohol, slurred speech, bloodshot eyes, loss of coordination, open alcohol containers, admissions to consuming alcohol, etc., are all strong, direct evidence of intoxication.

Additionally, the State has access to breath test evidence when it is validly and voluntarily consented to or otherwise legally obtained. The State, for example, may obtain a warrant for the evidence. In *State v. Frescoln*, 2017 WL 6033870 (Iowa App.) (further rev. denied), the Court of Appeals found that a search warrant properly authorized a chemical test to be forcefully seized from an OWI defendant's body and tested over his objection, allowing the evidence to be presented at trial. Here, there is no evidence that a warrant was contemplated, sought, or obtained in this case. Nothing prevented the officer from obtaining a warrant in this case to compel a bodily sample for chemical testing. The bottom line is that the State has ample other evidence at its disposal to obtain a conviction without violating a Defendant's Due Process rights in the course of the trial. In light of the Court's holding in *Pettijohn*, the Appellant is simply asking the Court to return to the pre-*Schmerber* use and understanding of blood alcohol testing and to preclude the State from using the valid and lawful exercise of a constitutional right against a person in a criminal prosecution.

Further, it is also important to observe that this is an "as applied" challenge to Iowa Code section 321J.16, not a facial challenge. The State certainly has the ability to introduce a Defendant's refusal of a constitutionally authorized test. For example, the State would arguably be

able to introduce the fact that a person refused a test even in the face of a validly executed warrant. The State would also arguably be able to introduce the refusal of a test in the event that a valid exception to the warrant requirement existed, for example, if the State were able to prove that exigent circumstances existed. The United States Supreme Court has also made it clear that a person may be penalized (even with a criminal offense) for refusing to comply with a search that is constitutionally authorized. *See Birchfield*, 136 S. Ct. at 2172 ("If…such warrantless searches comport with the Fourth Amendment, it follows that a State may criminalize the refusal to comply with a demand to submit to the required testing, just as a State may make it a crime for a person to obstruct the execution of a valid search warrant.") (internal citations omitted).

The defendant is merely stating that, on these facts, because no constitutional basis applies to allow the search, the refusal of the search is constitutionally permitted, protected, and must not be able to be held against Ms. Kilby; Iowa Code section 321J.16 infringes on that fundamental right to refuse an unauthorized search, and it is not narrowly tailored to serve a compelling governmental interest. *See Ryce*, 368 P.3d at 380 (finding an OWI statute criminalizing a breath-test refusal unconstitutional because "the State's reasons are not good enough, and its law not precise enough, to

encroach on the fundamental liberty interest in avoiding an unreasonable search"). Therefore, the State must be precluded from the use of Ms. Kilby's assertion of a constitutional right against her at trial.

CONCLUSION

Allowing the State to present evidence of Ms. Kilby's assertion of her constitutional right to refuse a warrantless breath test at trial would violate article I, section 9 of the Iowa Constitution. To the extent that section 321J.16 states otherwise, it is unconstitutional as applied to Ms. Kilby. The Court's use of her refusal against her in its finding of guilt was constitutionally impermissible.

For all of the above reasons, Ms. Kilby respectfully requests the Court find that Iowa Code section 321J.16 is unconstitutional as applied to her, reverse her conviction, remand the case to the district court, and order that the State be prohibited from using her refusal as evidence against her at trial.

Request for Oral Argument

Request is hereby made that, upon submission of this case, counsel for Appellant requests to be heard in oral argument.

Certificate of Compliance with Type-Volume Limitations, Typeface Requirements, and Type-Style Requirements.

1. This brief complies with the type-volume limitations of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 9,669 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. 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 Times New Roman in size 14 font.

Grant C. Gangestad

5-6-20200
Date

Attorney's Cost Certificate

I, Grant C. Gangestad, attorney for the Appellant, hereby certifies that the actual cost of reproducing the necessary copies of this Brief was $0.00.

Respectfully Submitted,
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