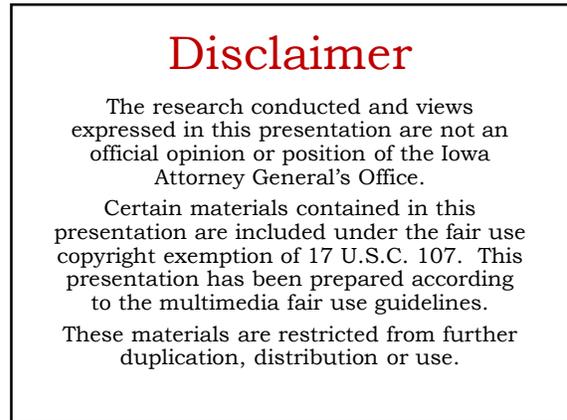




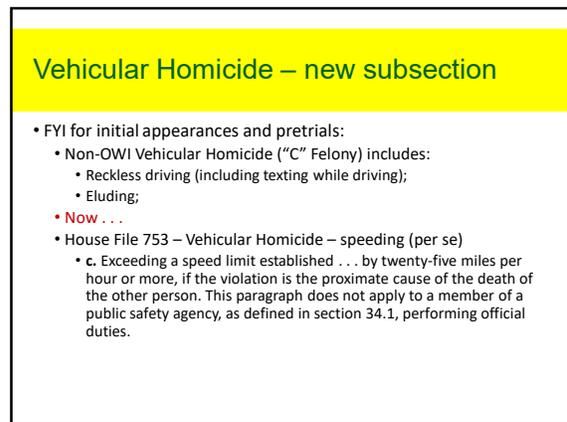
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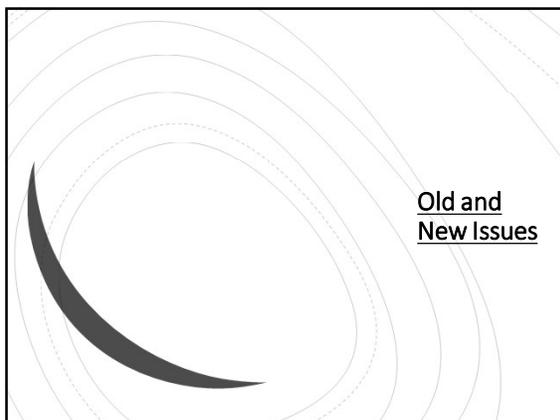
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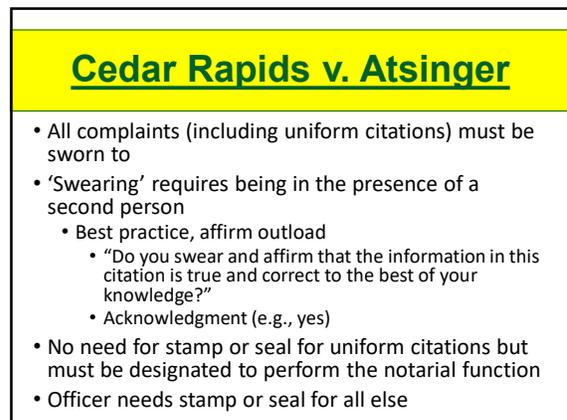
3



4



5



6

**Iowa Code section 805.6(2)**

**805.6(2):**  
 The officer issuing the citation through a computerized device shall . . . give **two copies of the citation to the person cited . . .**

7

**Iowa Code section 805.6(2) cont.**

- Court's Copy:

8

**Iowa Code section 805.6(2) cont.**

- Defendant's Copy:
  - Copy 1**
  - Copy 2**

9

**The Stop**

Why was the Stop made?

**Reasonable Suspicion**

10

**Reasonable Suspicion**

- A reasonable belief that criminal activity may be afoot. (Mclver)
  - Criminal activity confronting the officer at that time (Mclver)
  - Not evaluated on each circumstance standing alone, but all circumstances together. (Mclver)
    - Document all/multiple reasons if they exist
  - "Mere suspicion, curiosity, or hunch of criminal activity is not enough." (Tague)
  - "When a peace officer observes any type of traffic offense, the violation establishes both probable cause to stop the vehicle and reasonable suspicion to investigate." (Mclver)

11

**State v. Struve (Iowa 02/19/2021)**

- Officers observed for approximately 10 seconds:
  - Phone in front of the defendant's face;
  - Defendant manipulating the screen;
- Traffic stop initiated;

**321.276(2) A person shall not use a hand-held electronic communication device to write, send, or view an electronic message while driving a motor vehicle unless the motor vehicle is at a complete stop off the traveled portion of the roadway.**

12

**State v. Struve (Iowa 02/19/2021)** cont.

- **QUESTION:** Was there reasonable suspicion to stop the motor vehicle to investigate a violation of 321.276?
  - Yes; “observations of a driver holding a phone in front of his face and actively manipulating the screen for at least ten seconds as involved in this case justified stopping the driver to resolve any ambiguity about whether the driver was violating section 321.276.”
  - “[P]olice officers need not rule out all possibility of innocent behavior before briefly detaining a driver.” *State v. Kregs*, 650 N.W.2d 636, 641-42 (Iowa 2002).
  - “While an officer is not required to look for corroborating facts, ‘the presence of additional facts might dispel reasonable suspicion.’” *quoting Kansas v. Glover*, 589 U.S. \_\_\_, 140 S. Ct. 1183 (2020).

13

**State v. Struve (Iowa 02/19/2021)** cont.

1. “an officer is expected to rely on their common sense and understanding of human behavior in determining whether observed activity raises their suspicions above a “mere hunch” of criminal activity.”
2. “the officer’s suspicion need not be infallible or even rise to a fifty-fifty chance the individual is engaged in criminal activity to be reasonable.”
3. “an officer is not required to engage in additional investigation to confirm their suspicions as long as the initial suspicions are in fact reasonable.”

14

**State v. Struve (Iowa 02/19/2021)** cont.

**Footnote 2:**

**“We make no judgment as to whether browsing or accessing an app instead of an internet site while driving violates section 321.276.”**

15

OWIs:  
SFSTs, PBT,  
& Implied  
Consent

Standard: substantial compliance  
Remember the two 2-hour rules!

**Me: it’s not about how many times you fall, it’s about how many times you get back up**

**Cop: that’s not how field sobriety tests work**

16

**SFSTs**

- Don’t forget the **S** stands for **Standardized**
- Remember your training:
  - Do not modify the tests;
  - Follow the order you were trained:
    1. HGN – 6 total possible clues (3 for each eye)
    2. Walk and Turn – 8 possible clues
    3. One Leg Stand – 4 possible clues
  - Does it matter if this order is not followed?
    - No
    - E.g., if a suspect shows 4 clues on the HGN, that does not determine the clues that will be on the Walk and Turn or One Leg Stand

17

**Preliminary Breath Tests**

321J.5(2). The results of this preliminary screening test may be used for the purpose of deciding whether an arrest should be made or whether to request a chemical test authorized in this chapter, but shall not be used in any court action except to prove that a chemical test was properly requested of a person pursuant to this chapter.

Do **not** use PBT results at trial (Ness)

18

## Preliminary Breath Tests cont.

**Iowa Administrative Code Section 661-157.5(2)**  
 Any peace officer using an approved device shall follow the instructions furnished by the manufacturer for use of such a device. The calibration of each unit **shall be checked at least once per month**, and **the device shall be calibrated**, if necessary, using a dry gas standard. The officer or officer's department **shall maintain a record** of each calibration. **This record shall include:**

- a. The identity of the officer performing the calibration.
- b. The date.
- c. The value and type of standard used.
- d. The unit type and identification number.

19

## Preliminary Breath Tests cont.

- Substantial Compliance Required for PBTs. See State v. Bird, 663 N.W.2d 860 (Iowa 2003)
- Substantial Compliance Found:
  - Calibration log to date except "value and type of standard used" was not recorded (Thompson (IA Ct. App.));
  - Failure to calibrate within thirty days (Ethan Wendall Boyer v. Iowa DOT (unpublished))

20

## Implied Consent

- Must properly invoke . . . But what does that mean?

Look at Iowa Code section 321J.6(1)

21

## Implied Consent cont.

- Must properly invoke . . . But what does that mean?
- Need:
  - Written Request;
  - Reasonable Grounds of violation of 321J.2 or 2A; and
    - a. Placed under arrest for violating 321J.2
    - b. "in a motor vehicle accident or collision resulting in personal injury or death"
    - c. Refused PBT
    - d. PBT > .08

22

## Implied Consent cont.

- Must properly invoke . . . But what does that mean?
- Need:
  - Written Request;
  - Reasonable Grounds of violation of 321J.2 or 2A; and
    - e. Commercial motor vehicle & PBT > .04
    - f. PBT < .08 and "reasonable grounds to believe that the person was under the influence of a controlled substance, a drug other than alcohol, or a combination of alcohol and another drug"
    - g. PBT = ".02 or more but less than .08 and the person is under the age of twenty-one"

23

## Implied Consent cont.

- State v. Dion Caldwell, No. 19-0894 (Iowa Court of Appeals, filed January 21, 2021) (unpublished)
  - Attempted traffic stop;
  - Defendant attempted to walk away;
  - Defendant arrested for interference with official acts (handcuffed);
  - Defendant transported to jail for SFSTs;
  - Handcuffs removed and Defendant refuses SFSTs in hallway of jail;
  - Defendant handcuffed;
  - Implied consent invoked;
    - No PBT offered;
  - Refused chemical test;

24

### Implied Consent cont.

- **Caldwell** (unpublished)
  - **HELD**, evidence of the defendant’s refusal of the chemical test should have been suppressed.
  - Held, to properly invoke implied consent under 321J.6(1)(a), an officer must tell a person they are under arrest for OWI before invoking implied consent. 321J.6(1)(a); 804.14.
  - **Suppression Hearing Tip:** put into evidence the implied consent form at a suppression hearing!!!

25

## Can I Talk About 804.20?

26

## CAUTION!

Everyone’s Words Matter!

27

### 804.20 after SFST/PBT

- No right to 804.20 consultation before completion of SFSTs, even if transported to the jail’s sally port for completion due to weather **(Davis)**
  - A defendant’s 804.20 rights are triggered after two conditions: (1) arrest or restraint of liberty (i.e., in custody) and (2) “arriving at the place of detention.” **(Davis)**
  - Sally port not a place of detention **(Davis)**

28

### 804.20 after SFST/PBT cont.

- **“[T]he officer’s delayed advisory of [the defendant’s] rights satisfied the purpose of section 804.20” and the test refusal was properly admitted.** **(Colocho** (unpublished))
  - At traffic stop, defendant indicated he needed to use the bathroom before he would consider performing any SFSTs.
  - Defendant transported to police station and used bathroom.
  - Another request for SFSTs.
  - Defendant requested an attorney, which was denied.
  - Refused SFSTs and PBT.

29

### 804.20 after SFST/PBT cont.

- **“[T]he officer’s delayed advisory of [the defendant’s] rights satisfied the purpose of section 804.20” and the test refusal was properly admitted.** **(Colocho** (unpublished))
  - Arrest and 804.20 rights read to defendant.
  - Defendant given an opportunity to make calls, but does not.
  - Defendant refuses chemical test.
  - District Court suppressed defendant’s refusal of SFSTs, but allowed the refusal of the chemical test because it was after 804.20 was read.
  - Court of Appeals affirmed; the refusal of the chemical test was properly admitted (violation cured when 804.20 read and opportunity)

30

**804.20 after SFST/PBT** cont.

- “[T]he officer’s delayed advisory of [the defendant’s] rights satisfied the purpose of section 804.20” and the test refusal was properly admitted. (Colocho (unpublished))

**NOTE:**  
The Court of Appeals did not make a finding on whether “the district court properly found an initial violation of section 804.20.”

31

**804.20 after SFST/PBT** cont.

- **Caldwell** (unpublished)
  - Attempted traffic stop;
  - Defendant attempted to walk away after stopping;
  - Defendant arrested for interference with official acts;
  - Odor of alcohol detected;
  - Due to defendant’s behavior transported to jail for SFSTs;

32

**804.20 after SFST/PBT** cont.

- **Caldwell** (unpublished)
  - Unlike in Davis, the sallyport is not level, so used the hallway “within the jail facility”;
  - Defendant refused HGN;
  - Defendant requests to call his mom.
  - **QUESTION: Is this a valid 804.20 request?**
    - Yes, it is to a family member.
  - Officer denies defendant’s request;
  - Defendant refuses the next two SFSTs;

33

**804.20 after SFST/PBT** cont.

- **Caldwell** (unpublished)
  - Implied consent read;
  - Defendant given the opportunity to make phone calls;
  - Refuses chemical test;
  - **QUESTION: Should the refusal of the second two SFSTs and the chemical test be suppressed?**
    - No, although the defendant was at the place of detention and properly invoked his right to an 804.20 phone call after the first SFST, the officer did not violate his 804.20 rights by requesting the remaining two SFSTs before giving him the opportunity to make phone calls because it resulted in only an approximately six minute delay.
    - The Court of Appeals found the delay was extremely short, not due to officer misconduct or laziness, and the defendant had the opportunity to make calls before deciding whether to take the chemical test

34

**804.20 after SFST/PBT** cont.

- **Caldwell** (unpublished)
  - **Best Practice:**
    - If transporting suspect due to weather, behavior, etc., try to stay as far away from the Datamaster as possible.

35

**Leave Arrestee Unsupervised? What?**

- **804.20:**
  - “An attorney shall be permitted to see and consult confidentially with such person alone and in private at the jail or other place of custody without unreasonable delay.”
- Attorney call can be made in the presence of officer, but if person wants privacy, officer has to inform of right to **in-person consultation without any observation whatsoever** (Hellstern)

36

**Leave Arrestee Unsupervised? What?** cont.

- What about private phone calls?
  - No private consultations by phone (Senn)
- So you would think this is settled right, there are no private phone calls . . .
- What if they call an attorney?

37

**Leave Arrestee Unsupervised? What?** cont.

- State v. Sewell (Iowa 06/04/2021)
  - OWI investigation;
  - At the jail:
    - Implied consent, breath sample request;
    - Opportunity for 804.20 phone calls;
      - Used his cellphone for numbers;
      - Calls made from recorded jail phone;
      - Talks to an attorney;
      - Requested a private/confidential phone call with attorney;

38

**Leave Arrestee Unsupervised? What?** cont.

- State v. Sewell (Iowa 06/04/2021)
  - Private/confidential phone call denied;
  - Defense attorney claimed he could not advise defendant over recorded line;
  - Defendant appealed arguing an 804.20 violation, a violation under Article I, Section 10, and a violation of due process (Article I, Section 9).

39

**Leave Arrestee Unsupervised? What?** cont.

- State v. Sewell (Iowa 06/04/2021)
  - **Held:**
    - 804.20 does not provide a defendant the opportunity to have private/confidential phone call with an attorney;
    - Article I, section 10 of the Iowa Constitution does not give a defendant a right to counsel prior to deciding whether to provide a chemical sample under the implied consent procedures because a “prosecution or case” has not been commenced;
    - No due process violation under “article I, section 9 of the Iowa Constitution” when the defendant was denied a private/confidential phone call during the implied consent procedures

40

**Leave Arrestee Unsupervised? What?** cont.

- State v. Sewell (Iowa 06/04/2021)
  - **Takeaway:**
    - No right private/confidential phone calls (even if it is an attorney);
    - Private/confidential consultations must be:
      - Attorney; **and**
      - In-person;
  - **CAUTION:**
    - the Court made special mention but did not decide whether 804.20 allows law enforcement to record *and* listen to the recorded phone calls with an attorney

41

**Leave Arrestee Unsupervised? What?** cont.

- State v. Sewell (Iowa 06/04/2021)
  - **Best Practice:**
    - Do not record phone calls with attorneys; or
    - A policy that the State does not listen to any recordings involving attorneys;

42

### 804.20 after SFST/PBT

- Remember, 804.20 does afford the defendant a right to call **PRIOR** to a chemical test!

43

### Independent Testing

321J.11

(2) The person may have an independent chemical test or tests administered at the person's own expense in addition to any administered at the direction of a peace officer . . .

- A suspect may have independent testing, but they must submit to the test requested by the officer first. (Bloomer)
  - Defendant that refuses, has no right to independent testing (Daniel (unpublished))

44

### Independent Test cont.

- So what steps **have** to be taken to further a defendant's request for independent testing?
  - Issuing a citation and releasing the defendant does not "hinder" the defendant's ability to obtain an independent test. (Cheney Jr. (unpublished))

45

### Beware of Traps

- Suspect mentions phone call at any time during interaction: offer call after arrest, prior to request for chemical test
- Suspect says he wants to call his girlfriend: advise call must be to family member or attorney
- Suspect asks for legal advice: advise of 804.20 right
- Suspect asks for privacy: advise of private consultation **IF** attorney meets face to face
- Suspect argues about accuracy or wants "re-test," advise of right to independent test

46

### Confused???

- Remember the Advisory!

47

#### 804.20 Communications by Arrested Persons

Any peace officer or other person having custody of any person arrested or restrained of the person's liberty for any reason whatever, shall permit that person, without unnecessary delay after arrival at the place of detention, to call, consult and see a member of the person's family or an attorney of the person's choice, or both. Such person shall be permitted to make a reasonable number of telephone calls as may be required to secure an attorney. If a call is made, it shall be made in the presence of the person having custody of the one arrested or restrained. If such person is intoxicated, or a person under eighteen years of age, the call may be made by the person having custody. An attorney shall be permitted to see and consult confidentially with such person alone and in private at the jail or other place of custody without unreasonable delay. A violation of this section shall constitute a simple misdemeanor.

- You have the right to call anyone for any reason, including a family member and attorney.
- You have the right to see and consult a member of your family or an attorney or both, should they come to the place of detention.
- If you wish to speak confidentially with an attorney, you have the right to a face-to-face, unobstructed, confidential, and private meeting with an attorney should they come to the place of detention, free from video and audio recording.
- You have until \_\_\_\_\_ to exercise these rights.

48

**321J.11 Taking Sample for Test**

The person may have an independent chemical test or tests administered at the person's own expense in addition to any administered at the direction of a peace officer. The failure or inability of the person to obtain an independent chemical test or tests does not preclude the admission of evidence of the results of the test or tests administered at the direction of the peace officer. Upon the request of the person who is tested, the results of the test or tests administered at the direction of the peace officer shall be made available to the person.

- Any test result or refusal of the offered chemical test will be used against you or admissible in administrative and criminal proceedings. You have a right to refuse the offered chemical test.
- You have the right to an independent chemical test, only after consenting to the officer's requested chemical test and submitting a satisfactory sample for testing. This test will be at your expense.

Signature \_\_\_\_\_ Date \_\_\_\_\_ Time \_\_\_\_\_

Signature \_\_\_\_\_ Date \_\_\_\_\_ Time \_\_\_\_\_

49

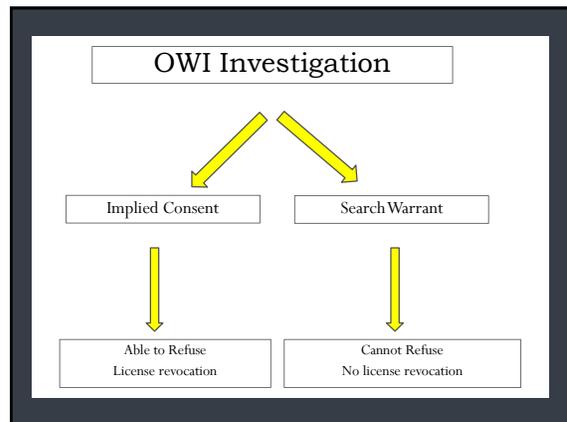
Search  
Warrants for  
Blood Draws

50

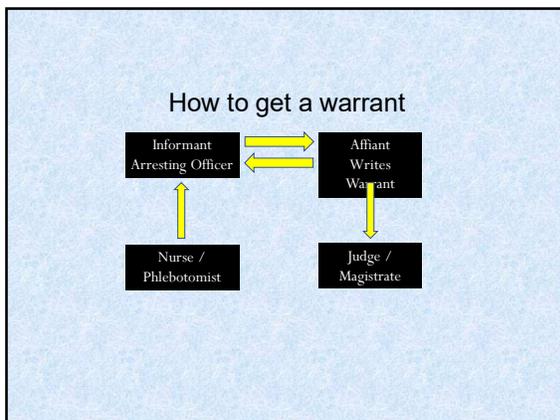
**State v. Frescoln**

- Defendant's motion to suppress denied
- Defendant was convicted of OWI 2<sup>nd</sup>
- Defendant appealed
- Court of Appeals:
  - Implied Consent NOT the exclusive means by which we can obtain a sample
  - AS LONG AS implied consent is **COMPLETELY AVOIDED!**

51



52

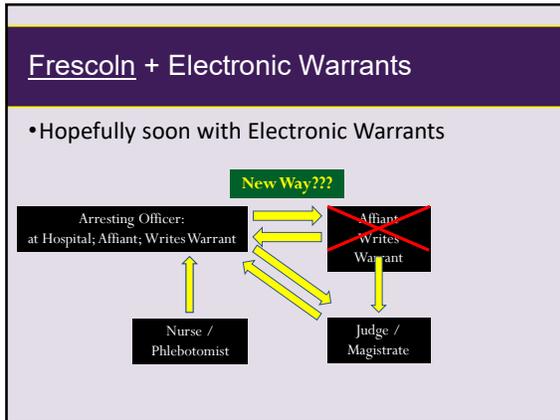


53

**Electronic Search Warrant Pilot Project**

- On April 27, 2020, the Iowa Supreme Court authorized 4 counties (Fremont, Mills, Montgomery, and Page) to start using Electronic Search Warrants.

54



55



56

### 321J.7 allows me to just withdraw blood right?

A person who is dead, unconscious, or otherwise in a condition rendering the person incapable of consent or refusal is **deemed not to have withdrawn the consent provided by section 321J.6, and the test may be given** if a licensed physician, physician assistant, or advanced registered nurse practitioner certifies in advance of the test that the person is unconscious or otherwise in a condition rendering that person incapable of consent or refusal. If the certification is oral, a written certification shall be completed by the physician, physician assistant, or advanced registered nurse practitioner within a reasonable time of the test.

57

### U.S. Supreme Court: Mitchell v. Wisconsin?

If they are unconscious, doesn't that satisfy the exigency requirement for a warrantless blood draw?

58

### Just the Facts

- Report of intoxicated driver;
- Defendant found stumbling, slurring words, and trouble standing;
- No SFSTs due to his conditions;
- PBT = .24
- Arrested, but unconscious when arrived at the police station
- No opportunity for chemical test
- Transported to the hospital
- Warrantless blood draw pursuant to a statute similar to §321J.7

59

### What DID Mitchell say?

- When a “driver is unconscious and therefore cannot be given a breath test[,] . . . the exigent-circumstances rule almost always permits a blood test without a warrant.”
  - There is an exigency when: “(1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application.”

60

### How is Mitchell limited?

- Must have:
  - Probable Cause of impairment
  - Driver unconscious or condition requires transportation to hospital before a breath test can be given
- **CAUTION Invalid test if:**
  - Blood drawn for the purpose of obtaining BAC; **and**
  - There was no reasonable “pressing needs or duties” preventing law enforcement from obtaining a warrant

61

### How is Mitchell limited?

Mitchell involved alcohol, what about drug impaired driving?

62

### State v. McGee – Unconscious Impaired Driver

- Facts:
  - Crash;
  - Odor of marijuana from the defendant;
  - The defendant transported to hospital;
  - Officer arrives, but defendant is unconscious;
  - Nurse practitioner certifies defendant unconscious;
    - However, 5 minutes later **and** before a blood sample is obtained: the defendant made “irregular movements”, stated “pee”, and urinated
    - The defendant then became unconscious again;
  - No recertification of unconsciousness;
  - Warrantless blood draw pursuant to §321J.7 eleven minutes after the initial certification of unconsciousness;

63

### State v. McGee – Unconscious Impaired Driver cont.

- **QUESTION:** If a suspect temporarily regains consciousness and then becomes unconscious again, do you have to obtain a recertification of unconsciousness?
  - “Iowa Code section 321J.7 does not usually require recertification when the blood draw occurs within eleven minutes of the initial certification[,]” even if the suspect regains consciousness for a brief period during that time.

64

### State v. McGee – Unconscious Impaired Driver cont.

- **QUESTION:** Was the warrantless blood draw constitutional?
  - When the driver is unconscious and there is probable cause to suspect impairment by drugs, the exigent circumstances rule under Mitchell v. Wisconsin is “almost always” going to allow for a warrantless blood draw.
    - Mitchell: “(1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application.”

65

### State v. McGee – Unconscious Impaired Driver cont.

- Law Enforcement must determine whether there is time to get a warrant
- “Exigent circumstances, in other words, is defined generously, and is based on law-enforcement workload.” (footnote omitted).

66

### State v. McGee – Unconscious Impaired Driver cont.

- The Court discussed that although the marijuana “nonimpairing metabolites” still violate 321J.2, there are reasons the State may want to show the driver had the active ingredient in their system, as opposed to the “nonimpairing metabolite”.
  - the “criminalization of marijuana use has become increasingly controversial” and the active ingredient may help avoid jury nullification;
  - in vehicular homicide cases, the State must establish a causal connection in the defendant’s impairment and the death of the victim; and
  - awarding restitution.

67

### State v. McGee – Unconscious Impaired Driver cont.

*Despite the ruling in McGee and Mitchell, the best practice is to always try to obtain a search warrant if possible.*

68

**DO NOT FORGET**

STILL need “a licensed physician, physician assistant, or advanced registered nurse practitioner” to certify unconsciousness.  
§321J.7

69

### Invalid Warrantless Blood Draw Example

- State v. Romano, 800 S.E.2d 644 (NC 2017)
  - Issued prior to Mitchell, but instructive.
  - North Carolina has statute allowing warrantless blood draws of unconscious motorists.
  - North Carolina allows for search warrants for blood draws.
  - Magistrate office a few miles from hospital.
  - During the middle of the day, a driver so intoxicated he was transported from the scene to the hospital for treatment.
  - Two officers at the hospital, one is a DRE.

70

### Invalid Warrantless Blood Draw Example cont.

- State v. Romano, 800 S.E.2d 644 (NC 2017)
  - Driver combative at the hospital;
    - Nurse going to medicate defendant;
    - Defendant not informed of implied consent;
    - Nurse medicates defendant;
    - Nurse draws blood for medical purposes and enough for officers;
  - DRE attempts to get consent from defendant prior to accepting blood sample, but defendant is now unconscious (unable to consent due to medication);

71

### Invalid Warrantless Blood Draw Example cont.

- State v. Romano, 800 S.E.2d 644 (NC 2017)
  - No one attempted to get a search warrant for a blood draw;
  - Relied on the North Carolina Statute;
  - Court found nothing prevented the officers from leaving to get a search warrant for a blood draw;
    - Court did not that after obtaining the blood draw, the officer left, obtained an arrest warrant, returned to the hospital, and served the arrest warrant on defendant.
  - **Held**, the North Carolina Statute was unconstitutional as applied to this defendant.

72

**Mitchell and McGee Best Practice**

- ALWAYS try to obtain a search warrant
  - Why?
    - "While the United States Supreme Court has departed from the traditional warrant preference approach under the Fourth Amendment, we have declined to do so under the search and seizure provision of article I, section 8 of the Iowa Constitution." *State v. Ingram*, 914 N.W.2d 794, 816 (Iowa 2018).
    - The Iowa Supreme Court prefers search warrants. *State v. Ingram*, 914 N.W.2d 794, 816 (Iowa 2018).

73

**Mitchell and McGee Best Practice**  
cont.

If the question on a search warrant is whether there was sufficient probable cause, "[c]lose cases must be resolved in favor of upholding warrants, as public policy is promoted by encouraging officers to seek them."  
*State v. Green*, 540 N.W.2d 649, 655 (Iowa 1995) (citations omitted).

74

If you get a blood or urine sample with an 808 search warrant, **YOU MUST** send the DCI a preservation letter to avoid spoliation (DCI destroys samples after 90 days)

75

~~**State v. McGee – One Final Note**~~

~~The Court reiterated its position in *State v. Pettijohn* that the *Pettijohn* decision is expressly limited to only boating while intoxicated (BWI) cases.~~

76

What about Chemical Test Refusals under Implied Consent?

77

**Chemical Test Refusal as Evidence?**

- **Question:** Can you use a defendant's chemical test refusal as evidence during a criminal trial?

**321J.16**

If a person refuses to submit to a chemical test, proof of refusal is admissible in any civil or criminal action or 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.

78

### Chemical Test Refusal as Evidence?

- **Follow-up:** Is 321J.16 constitutional?

**321J.16**

If a person refuses to submit to a chemical test, proof of refusal is admissible in any civil or criminal action or 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.

79

### Chemical Test Refusal as Evidence?

- State v. Kilby, \_\_\_ N.W.2d \_\_\_ (Iowa 06/18/2021)
  - Hit and run call turns into an OWI investigation;
    - Watery and bloodshot eyes;
    - Odor of alcohol;
    - Slurred speech;
    - Crying, confused, and unsteady;
  - SFSTs:
    - 4 clues on HGN;
    - Refused W&T and OLS;
  - Admission to drinking;
  - Would not answer if she was sober
  - Refused chemical test;

80

### Chemical Test Refusal as Evidence?

- State v. Kilby, \_\_\_ N.W.2d \_\_\_ (Iowa 06/18/2021)
  - Chemical test refusal used under 321J.16;
  - Appealed to the Iowa Supreme Court
    - Argued 321J.16 unconstitutional;
    - Defendant argued State v. Pettijohn applied;
  - First things first . . . does Pettijohn apply to motor vehicles?
    - Well, McGee just said no, but . . . Kilby:  
 "Clearly Pettijohn's reasoning applied equally to driving cases, as defense counsel routinely argue."

81

### Chemical Test Refusal as Evidence?

- State v. Kilby, \_\_\_ N.W.2d \_\_\_ (Iowa 06/18/2021)
  - **Question:** Is the Court changing its mind on Pettijohn?
    - Yes, but not in the way you think!
  - The Court stated twice:
 

**Pettijohn is manifestly erroneous**

**Pettijohn is now overruled!**

82

### Chemical Test Refusal as Evidence?

- State v. Kilby, \_\_\_ N.W.2d \_\_\_ (Iowa 06/18/2021)
  - **What does Kilby mean?**
    1. §321J.16 is constitutional;
    2. You do not need a search warrant for chemical breath tests under implied consent;
    3. Defendants have a statutory right to refuse chemical testing under implied consent;
    4. But if they do, the State has a statutory right to use that refusal as evidence under 321J.16; and
    5. Implied consent is back in Boating While Intoxicated cases.

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## Questions

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