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 REPLY 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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I, Grant C. Gangestad, hereby certify that on May 6, 2020, I served a copy of the attached brief on all other parties to this appeal by electronically filing a copy of the attached brief:

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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: The State challenges the Appellant's preservation of error as to the "as applied" challenge to Iowa Code section 321J.16. State's Br. P. 11-12. Error was preserved as to both issues: (1) the Due Process challenge and (2) the constitutionality of Iowa Code section 321J.16 as applied to Ms. Kilby. As the State concedes, the district court "mention[ed] . . . the constitutionality of 321J.16, as applied to [Kilby]." Indeed, the court specifically mentioned it in a header (see pg. 2 of Ruling on Motion in Limine – "C. IOWA CODE SECTION 321J.[1]6 INFRINGES ON MS. KILBY'S FUNDAMENTAL RIGHTS"). In mentioning this issue in a header, the court specifically contemplated and sought to address this issue.

Generally, such clear contemplation and consideration of an issue that has unquestionably been raised is sufficient to satisfy the "decided" prong of error preservation. *See Meier v. Senecaut*, 641 N.W.2d 532, 540 (Iowa 2002) ("The claim or issue does not actually need to be used as the basis for the decision to be

preserved, but the record must at least reveal the court was aware of the claim or issue and litigated it."); *Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012) ("if the court's ruling indicates that the court *considered* the issue and necessarily ruled on it, even if the court's reasoning is 'incomplete or sparse,' the issue has been preserved.").

Furthermore, the State appears to misunderstand error preservation as it applies to this case. The State is actually challenging the scope of review of an issue that it concedes was unquestionably preserved. The State's distinction between the two issues with regards to error preservation— due process was preserved, but the as applied challenge was not preserved— mischaracterizes the relationship between those two issues. The "as applied" challenge was necessarily dependent on the due process challenge— i.e., if due process was violated, then 321J.16 was unconstitutional as applied; if due process was not violated, then 321J.16 was not unconstitutional as applied. No argument or claim was ever made to the contrary.

By clearly and specifically deciding the due process issue, the district court necessarily decided the "as applied" challenge. "[T]his assumption that the district court rejected claims not specifically addressed is not a rule of error preservation, but a rule governing out scope of review when an issue is raised and decided by the district court and the record or ruling on appeal contains incomplete

findings or conclusions." *Senecaut*, 641 N.W.2d at 539. The "as applied" challenge is properly before the court on appeal.

Legal Argument:

A. Right to Refuse to Consent to a Warrantless Search

The State, in brief, begins its legal argument by attempting to limit the application of the Court's decision in *State v. Pettijohn*, 899 N.W.2d 1 (Iowa 2017). The State first argues that *Pettijohn* only applies to boating and does not apply to the motor vehicle context because readers of its decision "should not jump to the conclusion that [its] analysis will make the statutory scheme governing the operation of a motor vehicle while under the influence unconstitutional." *See id*. at 38. For the reasons stated in Appellant's initial brief, there is no functional difference between the search at issue in *Pettijohn* and the search at issue here. See Appellant's Br. P. 22-24. Therefore, the *Pettijohn* article I section 8 analysis applies to the requested search in this case.

Further, the Appellant does not argue that the statutory scheme governing the operation of a motor vehicle while under the influence is unconstitutional *as a whole*. The Appellant is simply arguing that, under these specific circumstances, *as applied* to Ms. Kilby, the State may not use the valid exercise of a constitutional right to decline a breath test against her at trial.

Second, the State argues that *Pettijohn* is different from this case because, unlike *Pettijohn*, the Appellant in this case did not submit to a breath test and, therefore, there was no search. State's Br. P. 13-16. The State argues, therefore, that "Kilby does not have the right to be *free to refuse* to submit to a breath test." State's Br. P. 15 (emphasis original). In making this argument, the State relies upon *State v. Knous*, 313 N.W.2d 510, 512 (Iowa 1981). *Knous* stated that

> In giving the arrested person a right to refuse the test, the legislature obviously sought to give the person the right to make a voluntary decision. However, the arrested person's right to make the decision is not mandated by the due process, privilege against self-incrimination or right to counsel provisions of the United States Constitution.

313 N.W.2d at 512, citing *Schmerber v. California*, 384 U.S. 757, 761, 86 S.Ct. 1826, 1833, 16 L.Ed.2d 908, 916-17 (1966); *State v. Epperson*, 264 N.W.2d 753, 755 (Iowa), cert. denied, 439 U.S. 913, 99 S.Ct. 285, 58 L.Ed.2d 260 (1978).

To the extent that the *Knous* Court found that the right to refuse a breath test was a statutory or legislatively created right, instead of a constitutional one, the holding of *Knous* has been overruled by the *Pettijohn* decision. The Court specifically found that a person's right to refuse chemical testing pursuant to article I section 8 is a fundamental constitutional right under the Iowa Constitution. *See Pettijohn*, 899 N.W.2d at 29, n. 10. Therefore, the State's argument that Ms. Kilby has no right to refuse the breath test under Iowa law is false.

With regard to additional Iowa precedent pertaining to this case, the State also responds to arguments made by Ms. Kilby considering the Iowa Court of Appeals' published decision in *State v. Thomas*, 766 N.W.2d 271 (Iowa Ct. App. 2009). See State's Br. P. 18. In *Thomas*, the Court of Appeals found a defendant's refusal to consent to a warrantless search of her home was irrelevant and unfairly prejudicial pursuant to the rules of evidence. *Thomas*, 766 N.W.2d 270-71 (avoiding the due process issue raised pursuant to the doctrine of constitutional avoidance). While the *Thomas* decision was not decided on Due Process grounds, the reasoning from that decision is sound. If the Court of Appeals would not admit evidence of a refusal to submit to a search of a person's home on evidentiary grounds because of its irrelevance and unfair prejudice, it is hard to imagine how a statute which allows, and indeed mandates, evidence of a refusal to submit to a search of a person's body (which is deserving of as much, if not more, constitutional protection as a person's home) could pass constitutional strict scrutiny.

Significantly, the State never actually addresses the constitutional nature of the right to withhold consent to search in the breath testing context under the Iowa Constitution. The State's failure to do so is an implicit but telling admission that Ms. Kilby, under these circumstances, does in fact possess a constitutional right to withhold her consent to a breath test. Further, the State never responds to the

Appellant's arguments regarding the specific level of due process scrutiny which must be applied to this case. Again, the State's failure to do so highlights the weaknesses within, if not outright failure of, its argument.

The State also recites a handful of cases from other states purporting to hold that Ms. Kilby does not have a constitutional right to withhold consent to a breath test under the Iowa Constitution. See State's Br. P. 15-17. Reliance on this extra-jurisdictional authority is misplaced for two reasons. First, other states do not and cannot explore and interpret the Iowa Constitution. The Iowa Supreme Court has already determined that a constitutional right to refuse a breath test exists under the Iowa Constitution. *See Pettijohn*, 899 N.W.2d 1, 29, n. 10. Secondly, all of the cases cited by the State that allegedly support its position are decisions dealing solely with claims under the Fourth Amendment to the United States Constitution. Unlike the issues raised in those cases, the issue in the instant case is raised solely under the Iowa Constitution.

Despite their general applicability to the instant case, Appellant will address the out of state decisions cited by the State. The State relies most heavily upon *Fitzgerald v. People*, 394 P.3d 671 (Colo. 2017). The Colorado Supreme Court relied exclusively on Fourth Amendment precedent from the United States Supreme Court in making its determination that using a refusal of a breath test against a defendant at trial did not violate the subject's Fourth Amendment rights.

"[T]he Supreme Court has all but said that anything short of criminalizing refusal does not impermissibly burden or penalize a defendant's Fourth Amendment right to be free from an unreasonable warrantless search. We take that short leap today and conclude that introducing evidence of Fitzgerald's refusal to consent to a blood or breath test to determine his BAC did not impermissibly burden his Fourth Amendment right." *Fitzgerald*, 394 P.3d 676. In short, the *Fitzgerald* Court finds that the right to refuse is merely a statutory right under the Fourth Amendment.

As the Appellant has indicated in her initial brief, the issue raised in this appeal does not emerge from the Fourth Amendment but rather article I section 8 of the Iowa Constitution. The Supreme Court in *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016) clearly indicated that a breath test could be constitutionally compelled under the search incident to arrest exception to the Fourth Amendment; there is no constitutional right under the Fourth Amendment to refuse a breath test, and, therefore, a refusal of a breath test can be criminalized. 136 S.Ct. at 2183-84. By contrast, our Iowa Supreme Court has found that a breath test could not be compelled under the search incident to arrest exception to article I section 8. The Court found that a warrantless breath test could only be procured through two means: voluntary consent, or probable cause coupled with exigent circumstances. *See Pettijohn*, 899 N.W.2d at 24-38. Since the State has proven neither exception

here, Ms. Kilby had a constitutional right under the Iowa Constitution to refuse the test, unlike the defendant in *Birchfield* or *Fitzgerald*.

The State cites other cases, all of which solely cite Fourth Amendment precedent from the United States Supreme Court and all of which find that there is only a statutory right to refuse (as opposed to a constitutional one) a breath test. For example, *People v. Gaede*, 20 NE.3d 1266 (Ill. 2014), cited by the State, predates even *Birchfield*. The *Gaede* Court stated

> Defendant erroneously believes he always has a constitutional right to refuse a breath test. This is not true. In *McNeely,* the Supreme Court rejected a *per se* approach to warrantless blood draws based on the exigency of dissipation of alcohol in the blood over time. *McNeely,* ––– U.S. at ––––, 133 S.Ct. at 1556. However, the Court noted natural dissipation of alcohol in the blood *may* support a finding of exigency in a specific case based on the totality of the circumstances. *Id.* at ––––, 133 S.Ct. at 1563.

Gaede, 20 N.E.3d at 1271. *Gaede* is distinguishable in that it applies only Fourth Amendment precedent. Further, *Gaede* states that a finding of exigency may support a warrantless test. *See id.* Neither of those factors are at issue here. The other cases cited by the State are inapplicable for the same reasons: all of the cases cited only recognize a statutory rather than a constitutional right to refuse a breath test and all examine the issue through the lens of Fourth Amendment precedent. *See South Dakota v. Neville*, 459 U.S. 553, 564 (1983); *Commonwealth. v. Bell*,

267 A.3d 7440 (Pa. Sup. Ct. 2017); *State v. Baird*, 386 P.3d 239, 246 (Wash. 2016); *State v. Rajda*, 196 A.3d. 1119 (Vt. 2018).

In support of its position, the State also cites commentary from a single author who advocates for the ability to use a refusal to submit to a search as evidence of guilt at trial. *See* Kenneth J. Millilli, "*The Consequences of Refusing Consent to a Search or Seizure: The Unfortunate Constitutionalization of an Evidentiary Issue*," 75 SCALR 901 (May 2002). The commentator attempts to draw a distinction between the use of a person's rights under the Fourth and Fifth Amendments in order to draw an adverse inference from the exercise of the right at trial. *Id*. The author's position, stated simply, is this: the ability to introduce evidence of a person's right to be free from self-incrimination enjoys constitutional protection while the introduction of the individual's right to be free from a warrantless search is simply an evidentiary issue. *See id*. This distinction is an arbitrary one and is not supported by the text of the Iowa Constitution nor Iowa precedent. To the undersigned's knowledge, no Iowa case has held that the right to be free from unreasonable search and seizure under the Iowa Constitution is an inferior right to the right against self-incrimination.

The commentator's position is also not supported by leading academic commentators on the matter. Professor Wayne R. LaFave, whose treatises, including *Criminal Procedure*, 2 Crim. Proc. §3.10(b) (4th Ed. 2019), have been

called a "guidepost . . . on search and seizure law" and noted that "[o]ur court frequently cites this treatise," *State v. Angel*, 893 N.W.2d 904 (Iowa 2017) (Mansfield, J., majority), disagrees with the State's cited commentator. Professor LaFave stated the following with regard to the use of breath test refusal evidence at a criminal trial:

> While it has been established *as a Fifth Amendment matter* that a defendant being prosecuted for driving under the influence may not object to the admission in evidence against him his refusal to submit to a sobriety test at the time of arrest, what of the claim that such evidence is inadmissible as a Fourth Amendment matter? The Court in *Birchfield* noted in passing (just as it did earlier in *McNeely*) that "evidence of the motorist's refusal is admitted as evidence of likely intoxication in a drunk-driving prosecution," and later cautioned that "nothing we say here should be read to cast doubt" on such "evidentiary consequences on motorists who refuse to comply," which has been relied upon by those post-*Birchfield* lower court decisions that have upheld admission of such refusal evidence in those circumstances.
>
> *But that assertion is misleading at best*, for *Birchfield*'s emphasis on the distinction between when a defendant's refusal to submit is constitutionally significant (i.e., for a blood test absent exigent circumstances) and when it is not (i.e., for all breath tests and for other blood tests) is, by well-established pre-existing authority, also relevant to the question of whether refusal may be admitted into evidence to show defendant's guilt. *What the cases indicate is that when defendant's refusal was within a context of a recognized search-warrant-required category, then the Fourth Amendment prohibits admission of that refusal into evidence.* (Some courts avoided the constitutional issue by reaching the same result as purely an evidentiary matter.) But on the other hand, when it is first determined that no warrant was required in any event (e.g., taking a breath sample), comment on the refusal is permissible.

> *This conclusion still makes good sense even after Birchfield,* which (i) offers no evidence supporting an assumption that the exercise of Fourth Amendment rights in the context of a DUI stop is within the exclusive province of intoxicated drivers; and (ii) highlights the uniquely intrusive aspect of blood tests (said to explain "why many States' implied consent laws… specifically prescribe that breath tests be administered in the usual drunk-driving case instead of blood tests or give motorists a measure of choice over which test to take"), which might well influence any driver, guilty or innocent, to decline a blood test absent a judicial mandate. Indeed, there is much to be said for the broader view sometimes taken, such as the holding in *State v. Banks*, rejecting "the state's argument that because the police had a lawful basis for obtaining a breath sample from defendant without a warrant–probable cause and exigent circumstances–defendant's refusal to provide consent is admissible as evidence of his guilt," in favor of the notion that "[a]n individual should be able to act on the presumption that a warrantless search is unreasonable."

LaFave, 2 Crim. Proc. §3.10(b) (emphasis added).

As Professor LaFave indicates in his treatise, the State's position that the right to refuse a search is somehow an evidentiary issue instead of a fundamental constitutional right finds no universal support amongst state Supreme Courts. LaFave, 2 Crim. Proc. §3.10(b), n. 90.80, 90.90. Professor LaFave cites numerous examples of both federal and state decisions which support his conclusion that refusal evidence of the exercise of a constitutional right to withhold consent to a search is not admissible. LaFave, 2 Crim. Proc. §3.10(b), n. 90.50, 90.60. While some states have found that the Fourth Amendment permits consideration of refusal evidence in operating while intoxicated cases based upon interpretation of federal precedent, other states, who have addressed the issue independently under

their own state constitutions, have prohibited the use of refusal evidence in a criminal trial. *See, e.g., State v. Banks*, 364 Or. 332, 434 P.3d 361 (2019) (finding refusal evidence in OWI case inadmissible under state constitution and citing numerous cases where refusal evidence was barred from admission at trial); *Elliott v. State*, 305 Ga. 179, 824 S.E.2d 265 (2019) (finding chemical test refusal evidence inadmissible under state constitution).

Recent Iowa caselaw also provides some support to the Appellant's position. The Court recently decided the case of *State v. Gibbs*, No. 18-1298 (Iowa 2020), which addressed a defendant's rights under the Fifth Amendment in the context of a jury instruction in a "stand your ground" homicide case. *See id*. In *Gibbs*, the defendant was on trial for homicide and raised a justification defense under the "stand your ground" legislation. *Id*., at *2. The jury was instructed that

> A person using deadly force is required to notify or cause another to notify a law enforcement agency about his use of deadly force within a reasonable time period after the use of the deadly force, if the Defendant or another person is capable of providing such notification.

Gibbs at *13-14, citing Jury Instruction 36.

The Court found that this instruction impermissibly burdened the Defendant's exercise of his right against self-incrimination. *See Gibbs*, at *19. The Court stated that

> The United States Supreme Court has found that the Fifth Amendment can be violated even when the government does not directly coerce

> testimony from the defendant. It also forbids the use of a penalty that might compel the defendant into offering testimony against himself or herself. *Spevack v. Klein*, 385 U.S. 511, 514–15, 87 S. Ct. 625, 627–28 (1967). Thus, the Fifth Amendment generally protects "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." Id. (quoting Malloy, 378 U.S. at 8, 84 S. Ct. at 1493–94).
>
> …The district court's implementation of section 704.2B through a jury instruction puts someone who has used deadly force in a dilemma. Either the person gives up his or her right to remain silent, or in a later prosecution, the person faces a jury told that he or she violated the law in not doing so. The question, as before, is whether this imposes an improper penalty on the exercise of the constitutional right to remain silent. We think it does.
>
> *Gibbs*, at *8-9, 14.

Although the *Gibbs* case involved Fifth Amendment protections and the instant case involves rights under article I section 8, similarities between *Gibbs* and the instant case emerge. Like the use of the instruction provided in *Gibbs*, Iowa Code section 321J.16 indirectly coerces a person into offering testimony against themselves. A prosecutor is allowed to comment on the refusal of the person to take a breath test and to ask the fact finder to draw an adverse inference from that exercise of their right to do so. Making matters worse, the fact finder is routinely and specifically instructed on the refusal evidence. Iowa Model Jury Instruction 2500.7 specifically highlights that piece of evidence:

> The defendant was asked to give a [breath] [blood] [urine] sample so it could be analyzed to determine the percent of alcohol in [his] [her] blood. [The defendant refused.] [It is alleged the defendant refused.]

> A person is not required to give a sample of any bodily substance; however, you may consider a refusal in reaching your verdict.

Therefore, the Defendant facing prosecution for an OWI in a refusal case is, like *Gibbs*, also faced with a dilemma: testify as to why they exercised their right to remain free from an unconstitutional search or sit there and remain silent in the face of the prosecutor's argument and judge's instructions that the jury can (and indeed, should) infer guilt from that refusal to submit. "It is one thing for parties in litigation to make various arguments from the evidence based on common sense and experience. It is quite another for the court in an official instruction to tell the jury that the defendant whose innocence or guilt they are determining has already, in effect, violated the law by not making a report. The latter puts a heavy thumb on the State's side of the scale. An instruction coming from the judge, and received by the jurors as law they must follow, is very different from a litigant's argument, which the jury can weigh as they wish and choose to ignore." *Gibbs*, at *15.

"And what is the point of giving the instruction? The State never says, but there can only be one answer—so the jury holds it against the defendant in some significant but indeterminate way. This penalizes the defendant, and it does so without serving a valid regulatory end." *Id*., at 18. Like *Gibbs*, allowing the prosecutor to introduce the refusal evidence and for the fact finder to specifically

be instructed on their use of that evidence can only have one goal- "so the jury holds it against the defendant in some significant but indeterminate way." *See id*.

In short, the State's position is not supported by relevant precedent, leading academic commentators, nor by the Iowa Constitution itself. The Iowa precedent relied upon by the State is outdated and overruled. The decisions relied upon by the Appellee from other states are irrelevant and unhelpful in that they do not independently analyze the question presented under state constitutional provisions. The sole commentator relied upon by the State takes a position that is contrary to leading academic commentators on criminal procedure and search and seizure law. The fact that the State did not even attempt to supply any argument as to the level of scrutiny that should be applied to Iowa Code section 321J.16 or comment on the ability of the statute to pass such a test lends further support to the Appellant's argument. For the reasons set forth above and in the Appellant's initial brief, the Court should find that Ms. Kilby exercised a constitutional right to withhold consent to a search of her breath under article I section 8 of the Iowa Constitution. The Court should further find that, as applied to this case, the use of Ms. Kilby's constitutional exercise of her refusal to submit to a breath test at trial, pursuant to Iowa Code section 321J.16, is unconstitutional.

B. Harmless Error

Contrary to the State's assertion, error in the admission and consideration of the refusal evidence was not harmless. The State cites several observations made by the officer in conducting his investigation and adopted by the district court in its findings of fact that the State claims support a finding that Ms. Kilby was guilty beyond a reasonable doubt. The State's recitation of the relevant factors is both incomplete and insufficient to find Ms. Kilby guilty beyond a reasonable doubt.

First, the State seems to have purposely omitted critical statements made by the Court in finding Ms. Kilby guilty. In brief, the State recited the following:

> . . . on or about July 28, 2018, Ms. Hann[a] Marie Kilby was operating a motor vehicle in Polk County, Iowa, in the general vicinity of the 500 Block of East Livingston. This motor vehicle was a 2002 Chrysler, Town & Country.
>
> This occurred shortly before 11:00 p.m. on July 28, 2018.
>
> That prior to officer –an officer of the Des Moines police department coming to the 500 Block of East Livingston, Ms. Kilby had been operating this vehicle in the vicinity of a bar called Extra Innings—
>
> That a motor vehicle accident occurred at Extra Innings and various people followed her to the 500 Block of East Livingston and cause police to come to the 500 Block of East Livingston.
>
> That when Officer Brian Kelly of the Des Moines Police Department observed Ms. Kilby in the driver's seat of the Chrysler Town & Country, vehicle in the 500 Block of East Livingston, he observed that she had red and watery bloodshot eyes, the strong odor of an alcoholic beverage emanating from her breath, and stated that she had two or three drinks before driving.

> That Officer Kelly called for assistance from Officer Mock of the Des Moines Police Department to further investigate the matter of Ms. Kilby,
>
> Officer Mock came to the Block of 500 East Livingston. That he observed Ms. Kilby too— that Officer Mock observed that Ms. Kilby's demeanor was that of being dull, drowsy, and at times crying. That Ms. Kilby's speech was slurred and at times she was confused and mumbling. Officer Mock noted a moderate odor of an alcoholic beverage on the breath of Ms. Kilby.
>
> That Ms. Kilby consented to the nystagmus gaze test; Officer Mock noticed that her balance was unsteady. That while she was participating in the NGT test or nystagmus gaze test, she was swaying. Ms. Kilby exhibited four of six clues of the nystagmus gaze test.
>
> That she did not a participant [sic] in the walk and turn test, and became emotional at that point.
>
> Ms. Kilby refused to submit a PBT. [. . .]

Appellee's Br. P. 20-22, citing Bench Trial Tr. 9-10. While true that these are all statements made by the court in finding Ms. Kilby guilty in the findings of fact at the bench trial, the State deliberately stopped short in its recitation of the court's findings after the acronym "PBT." Had the State continued, they would have recited the following: "Ms. Kilby refused to submit to a PBT *and refused to submit a breath sample for testing*." Bench Trial Tr. P. 10 (emphasis added). What is even more compelling is that the court specifically considered this evidence in finding Ms. Kilby guilty.

> The Court further takes into consideration the fact that Ms. Kilby refused to submit to a chemical test both as to the PBT and as to the Datamaster after the invocation of implied consent. Based upon all the foregoing, the Court finds that the State has established by evidence beyond a reasonable doubt that Ms. Kilby is guilty of OWI first offense in violation of Iowa Code Chapter 321J.2, and that her guilt has been established by evidence beyond a reasonable doubt.

Bench Trial Tr. P. 11 (emphasis added). It is abundantly clear that the evidence of the refusal was specifically contemplated by the court in finding Ms. Kilby guilty of operating while intoxicated.

Second, because the Court specifically took the refusal evidence into account in reaching its verdict, the error in doing so cannot be harmless. The Court in *State v. Moorehead*, 699 N.W.2d 667 (Iowa 2005) previously overturned a conviction in an operating while intoxicated bench trial where there was evidence of intoxication, including that of a breath test. The Court stated

> reversal is required if it appears the complaining party has suffered a miscarriage of justice or his rights have been injuriously affected. *See, e.g., State v. Henderson*, 696 N.W.2d 5, 12 (Iowa 2005); *State v. Sullivan*, 679 N.W.2d 19, 29 (Iowa 2004); *State v. Wixom,* 599 N.W.2d 481, 484 (Iowa Ct.App.1999). We presume prejudice unless the record affirmatively establishes otherwise. *Henderson,* 696 N.W.2d at 12; *Sullivan,* 679 N.W.2d at 30. A breath test result is important evidence in prosecutions for drunk driving. *Cf. Smith v. Shagnasty's Inc.,* 688 N.W.2d 67, 72 (Iowa 2004) (remarking in dramshop action that "[e]vidence of a person's blood-alcohol level, if available, is important evidence of intoxication")…
>
> It also appears the test result played a central role in the district court's decision. Because this matter was tried to the court, we have a written exposition of the fact finder's reasoning in the verdict. Moorehead's

> high breath test result is the very first fact cited as evidence of guilt. Mindful of a defendant's right to a fair trial and just application of our rules, *see Wixom,* 599 N.W.2d at 484, it cannot be fairly said that the breath test result did not injuriously affect Moorehead's rights. The district court's error in admitting this evidence clearly prejudiced Moorehead. Admission of the breath test result into evidence was therefore not harmless error. We vacate the decision of the court of appeals and remand for a new trial without use of the breath test result.

State v. Moorehead, 699 N.W.2d at 672–73.

The same analysis holds true here. Like the decision in *Moorehead*, we have a written exposition of the fact finder's reasoning in the finding of guilt. The district court specifically considered and relied upon the refusal of the breath test as a factor in determining that Ms. Kilby was guilty of operating while intoxicated. Bench Trial Tr. P. 11. While true that there was not a breath test result in this case as there was in *Moorehead*, "it cannot be fairly said that [consideration of] the breath test [refusal] did not injuriously affect [Kilby]'s rights. The district court's error in admitting this evidence clearly prejudiced [Kilby]. Admission of the breath test result into evidence was therefore not harmless error." *Moorehead* at 673.

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. Any error in admitting the refusal evidence was not harmless, and the case should be reversed and remanded for further proceedings.

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1. This brief complies with the type-volume limitations of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 5,135 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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Grant C. Gangestad

5-6-2020
Date

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