IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. BRIAN DE ARRIE MCGEE, Defendant-Appellant.	)))))))))	S.CT. NO. 19-1219

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
HON. WILLIAM PRICE, JUDGE (MOTION TO SUPPRESS),
HON. BECKY GOETTSCH, JUDGE (BENCH TRIAL ON THE MINUTES), & HON. CHRISTOPHER KEMP (SENTENCING)

APPELLANT'S BRIEF AND ARGUMENT AND REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF SERVICE

On August 12, 2020, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Brian McGee, 685 SE Prairie Park Lane, Waukee, Iowa 50263.

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Authorities

State v. Countryman, 572 N.W.2d 553, 557 (Iowa 1997)

State v. Turner, 630 N.W.2d 601, 606 (Iowa 2001)

State v. Louwrens, 792 N.W.2d 649, 651 (Iowa 2010)

State v. Lindeman, 555 N.W.2d 693, 695 (Iowa 1996)

1). Suppression was required because the warrantless blood draw violated the Fourth Amendment of the U.S. Constitution and Article I, Section 8 of the Iowa Constitution.

U.S. Const. amend. IV

Iowa Const. art. I, § 8

State v. Hoskins, 711 N.W.2d 720, 725-26 (Iowa 2006)

State v. Gaskins, 866 N.W.2d 1, 7 (Iowa 2015)

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Mitchell v. Wisconsin, 139 S. Ct. 2525, 2533 (2019)

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State v. Derby, 800 N.W.2d 52, 57 (Iowa 2011)

State v. Holbrook, 261 N.W.2d 480, 483-84 (Iowa 1978)

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Hassan Ahmad, Bloodied: How So-Called Exigencies Continue to Erode the Fourth Amendment, 57 Am. Crim. L. Rev. Online 1, 5–6 (2020)

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State v. Newton, 929 N.W.2d 250, 255 (Iowa 2019)

State v. Comried, 693 N.W.2d 773, 775 (Iowa 2005)

Iowa Code § 321J.2(1)(b)

Iowa Code § 321J.2(1)(c)

State v. Myers, 924 N.W.2d 823, 827 n.3 (Iowa 2019)

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Stacy A. Hickox, Drug Testing of Medical Marijuana Users in the Workplace: An Inaccurate Test of Impairment, 29 Hofstra Lab. & Emp. L.J. 273, 310 (2012)

Basic Facts About Drugs: Marijuana, Am. Counsel for Drug Educ., http://www.acde.org/health/ Research.htm

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Karen E. Moeller et. al., *Clinical Interpretation of Urine Drug Tests: What Clinicians Need to Know About Urine Drug Screens*, Mayo Clinic Proc., May 2017:92(5):774-796, 777

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State v. Cline, 617 N.W.2d 277, 292-93 (Iowa 2000)

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State v. Short, 851 N.W.2d 474 (Iowa 2014)

State v. Coleman, 890 N.W.2d 284 (2017)

2). Suppression was also required because an equal protection violation results from the implied consent statute's conferral upon conscious, but not unconscious, persons: (a) the right to revoke implied consent, and (b) the right to be free from unconsented-to warrantless blood draws absent the "officer[s] reasonabl[e] belie[f]... the delay necessary to obtain a warrant... threatens the destruction of evidence."

U.S. Const. amend. XIV

Iowa Const. art. I § 6

State v. Doe, 927 N.W.2d 656, 662 (Iowa 2019)

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a). Differential treatment re: right to revoke implied consent

State v. Pettijohn, 899 N.W.2d 1, 28 (Iowa 2017)

Lubka v. Iowa Dept. of Transp. Motor Vehicle Div., 599 N.W.2d 466 (Iowa 1999)

b). Differential treatment re: protection from unconsented-to warrantless blood draws absent the "officer['s] reasonabl[e] belie[f]... the delay necessary to obtain a warrant... threatens the destruction of evidence."

Iowa Code § 321J.10A

Iowa Code § 321J.7

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Iowa Code § 321J.7 (2017)

4). Not Harmless Error.

State v. Garrity, 765 N.W.2d 592, 597 (Iowa 2009)

State v. Moorehead, 699 N.W.2d 667, 672 (Iowa 2005)

State v. Dudley, 856 N.W.2d 668, 678 (Iowa 2014)

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State v. Myers, 924 N.W.2d 823, 832 (Iowa 2019)

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Authorities

State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1983)

Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984)

1). If not preserved, Ineffective Assistance.

U.S. Const. amend VI

Iowa Const. art. I, § 10

Strickland v. Washington, 466 U.S. 668, 694 (1984)

State v. Ambrose, 861 N.W.2d 550, 556 (Iowa 2015)

State v. Carrillo, 597 N.W.2d 497, 500 (Iowa 1999)

2). § 31 of Senate File 589 (seeking to prohibit this Court's consideration of ineffective assistance claims on direct appeal) is unconstitutional and inapplicable here.

a). Separation of Powers

Planned Parenthood v. Reynolds, 915 N.W.2d 206, 212 (Iowa 2018)

Iowa Const. art. V § 1

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Matter of Guardianship of Matejski, 419 N.W.2d 576, 577 (Iowa 1988)

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Hensley v. Davidson Bros. Co., 112 N.W. 227, 227–28 (1907)

State v. Abrahamson, 696 N.W.2d 589, 593 (Iowa 2005)

b). Equal Protection

Waldon v. District Court of Lee County, 130 N.W.2d 728, 731 (1964)

U.S. Const. amend. XIV

Iowa Const. art. I § 6

State v. Doe, 927 N.W.2d 656, 662 (2019)

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Evitts v. Lucey, 469 U.S. 387, 396 (1985)

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Authorities

United States v. Atkinson, 297 U.S. 157, 160 (1936)

U.S. v. Olano, 507 U.S. 725, 732-34 (1993)

Johnson v. United States, 520 U.S. 461, 466-467 (1997)

Jon M. Woodruff, Note, Plain Error by Another Name: Are Ineffective Assistance of Counsel Claims a Suitable Alternative

to Plain Error Review in Iowa?, 102 Iowa L. Rev. 1811, 1815 (May 2017)

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Tory A. Weigand, Raise or Lose: Appellate Discretion and Principled Decision-Making, 17 Suffolk J. Trial & App. Advoc. 179, 199-241 (2012)

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State v. Johnson, 272 N.W.2d 480, 484 (Iowa 1978)

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State v. McCright, 569 N.W.2d 605, 607 (Iowa 1997)

State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978)

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State v. Lucas, 323 N.W.2d 228, 232 (Iowa 1982)

State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994)

Iowa Const. art V, § 4

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ROUTING STATEMENT

The Supreme Court's guidance is sought on the question of whether and when a warrantless blood draw under the implied consent statute at § 321J.7 ("Dead or Unconscious Persons") will be deemed constitutional in light of search and seizure and equal protection requirements imposed by the Federal and Iowa Constitutions. Retention is appropriate. Iowa R. App. P. 6.1101(2)(c).

Defendant urges that a warrantless § 321J.7 blood draw must be deemed an unconstitutional search, except where the State establishes an exception to the warrant requirement. First, this Court is requested to hold that the consent exception is inapplicable to such blood draws, as no actual and constitutionally voluntary consent can be received from a driver who is (by definition) "incapable of consent or refusal" at the time of the blood draw. Second, this Court is requested to hold that any presumption of exigency applied to unconscious drivers suspected of *alcohol*-impairment under the reasoning

of Mitchell v. Wisconsin, 139 S. Ct. 2525 (2019), does not logically extend (under the US or Iowa Constitutions) to cases like the present one where only *drug*- (and not alcohol-) impairment is suspected, given the substantially longer window of time available to test for controlled substances as compared with alcohol.

Defendant also urges that an equal protection violation results from the implied consent statute's unwarranted differential treatment of conscious and unconscious persons with regard to both (a) the right to revoke implied consent, and (b) protection from unconsented-to warrantless blood draws in the absence of the "officer[s] reasonabl[e] belie[f]… the delay necessary to obtain a warrant… threatens the destruction of evidence." Iowa Code §§ 321J.7, 321J.10A(1)(c) (2017).

STATEMENT OF THE CASE

Nature of the Case: McGee appeals from his conviction following a bench trial on the minutes for Operating While

Intoxicated, 1st Offense, a Serious Misdemeanor in violation of Iowa Code section 321J.2 (2017).

Course of Proceedings: The State charged McGee with OWI First Offense on March 13, 2019. (TI) (App. pp. 4-5).

On April 11, 2019, McGee filed a motion to suppress evidence obtained as a result of a warrantless 4:10 p.m. blood draw obtained from McGee while under sedation at the hospital following his involvement in an earlier 1:59 p.m. multi-vehicle accident. The blood draw was conducted without any request for McGee's consent or refusal, after obtaining a § 321J.7 certification from a registered nurse stating McGee was "in a condition rendering [him] incapable of consent or refusal". McGee argued that such warrantless blood draw was unconstitutional under the U.S. and Iowa Constitutions. (Def.Mot.Suppress) (App. pp. 6-7). His subsequent brief argued that any statutorily "Implied consent" purportedly secured from McGee did not amount to the "voluntary consent" required to satisfy the consent exception

to the warrant requirement. (5/3/19 Def.Br.3-4) (App. pp. 10-11).

A suppression hearing was held May 7-8, 2019. (Suppr.Tr.1:1-3:8, 31:20-32:14). At that time, the State orally resisted McGee's motion to suppress, arguing that the implied consent scheme of chapter 321J (including § 321J.7) fell within the consent exception to the warrant requirement. (Suppr.Tr.39:17-43:5, 63:1-8, 65:22-24, 64:25-65:65).

The State placed in evidence at the hearing: (1) testimony from the officer who had invoked implied consent to secure the blood draw under section 321J.7 (Officer Tim Fricke); and (2) the Certification form signed by a registered nurse some 12 minutes prior to the blood draw, stating that McGee was at that time incapable of consent or refusal (Exhibit 1) (App. p. 12). (Suppr.Tr.1:1-2:25, 4:12-25, 6:19-6:13, 9:4-13:11). Additionally, McGee placed in evidence: (3) a portion of Officer Fricke's body camera video depicting the 12 minutes between the nurse's initial certification and the ultimate blood draw

later conducted by a different medical professional (the medical examiner). (Exhibit A, at 1:00-13:33). (Suppr.Tr.20:1-23:9, 66:11-21); (5/9/19 Exhib.Maint.Order) (App. pp. 15-17).

During the hearing, in addition to arguing (1) that the warrantless blood draw was unconstitutional in that it did not fall within the consent exception to the warrant requirement (Suppr.Tr.43:15-46:9, 47:7-51:4, 55:3-55:22, 60:9-61:13), McGee alternatively argued also (2) that the section 321J.7 statute was not adequately complied with as McGee's state of consciousness (and therefore his possible ability to consent/refuse) had changed in that he'd regained consciousness during the 11-12 minutes intervening between the nurse's certification and the ultimate blood draw, triggering the officer's obligation to have the nurse recertify that McGee remained unable to consent or refuse at the time of the draw (Suppr.Tr.55:23-60:8). McGee also argued (3) that an unconstitutional equal protection problem would arise if unconsented-to warrantless blood draws were automatically

authorized from unconscious (but not conscious) drivers where there was opportunity to obtain a warrant. (Suppr.Tr.51:5-52:10).

As to the warrant requirement, McGee's position was that section 321J.7 was "not a standalone exception" to the warrant requirement; and that "implied consent" under Chapter 321J could fall within the consent exception to the warrant requirement, but only upon a finding that the consent was voluntary. McGee urged, "when you have someone who is by definition incapable of providing consent, you cannot proceed under a consent-based exception." (Suppr.Tr.45:15-46:9). McGee argued section 321J.7 must be "read in light of the warrant requirement", meaning officers can secure a sample for testing in the case of unconscious defendants, but only if officers either (a) obtain a warrant, or (b) have exigent circumstances which, when combined with probable cause, excuses the obligation to secure a warrant. (Suppr.Tr.45:15-20, 47:7-9, 48:7-10). McGee emphasized Birchfield v. North

Dakota, 136 S. Ct. 2160 (2016) and State v. Pettijohn, 899 N.W.2d 1 (Iowa 2017) as supportive of his position under the US and Iowa Constitutions. (Suppr.Tr.43:2-46:9, 47:10-51:4, 47:10-51:4, 60:9-61:1).

The State argued Birchfield was inapposite because it involved an implied consent scheme which (unlike Iowa's scheme) criminalized refusals, and that Pettijohn was inapposite because it pertained only to Iowa's implied consent scheme for boating while intoxicated rather than driving while intoxicated. The State further argued: that both Birchfield and Pettijohn indicate "implied consent is an exception to the warrant requirement" in the OWI context; that because the section 321J.7 statutory provision involved herein "is part of the implied consent scheme itself" it too must be excepted from the warrant requirement; that section 321J.7 contains no requirement of either a warrant or any showing of exigent circumstances, being "just part of the scheme of implied consent"; that once someone is unconscious "they have not

withdrawn their consent" under the implied consent scheme and "[w]e can't do breath [testing] at that point due to the fact that they are either dead or unconscious" leaving only urine or blood testing; and that "[a]ll of this taken together is the exception to the warrant requirement". (Suppr.Tr.39:19-43:5, 61:19-63:14, 65:15-66:7). The State also argued the officer properly "followed the procedure laid out in 321J.7" (Suppr.Tr.42:10-19, 63:15-65:15).

At the conclusion of the suppression hearing, the district court orally announced its ruling and denied McGee's motion to suppress in its entirety. (Suppr.Tr.66:8-71:25); (5/8/19 Suppr.Ruling) (App. pp. 13-14). The court reasoned: that Birchfield does not "in any way appl[y] to this case" as it dealt with criminalization of refusals, which is not involved herein; that Pettijohn applies only under the BWI scheme and does not apply to "321J cases or OWIs"; and that "321J cases" are an "exception to the warrant requirement" meaning that no warrant was required. The Court also determined that the

State met its burden of showing the statutory requirements of section 321J.7 were properly complied with as the events occurring in the 12 minutes between the nurse's certification and the blood draw did not require the medical professional's recertification that McGee remained unable to consent or refuse. The court concluded Defendant's "motion to suppress should be and the same is hereby denied." (Suppr.Tr.66:8-71:25).

The parties subsequently reached an agreement to resolve the OWI 1st charge via a bench trial on the minutes. (5/20/19 Mot.Contin.¶2; 5/20/19 Order Setting TOM; 6/25/19 Stipulation to TOM; 6/25/19 Jury Waiver) (App. pp. 18-23).

A bench trial on the minutes was ultimately held June 25, 2019. (TrialTr.1:1-7:9). The court then orally stated its findings of fact and conclusions of law, finding McGee guilty of OWI 1st offense on the "any amount of controlled substances… present in his blood" statutory alternative set

forth in section 321J.2(1)(c). The court declined to also base its verdict on the other charged alternative of being "under the influence" (§ 321J.2(1)(a)), concluding the evidence was insufficient to establish that alternative. (TrialTr.7:10-15:4).

Sentencing was held July 22, 2019, with "reporting and record" thereof waived. (Sent.Order.1) (App. p. 24). The court's written sentencing order entered judgment against McGee for Operating While Intoxicated, 1st Offense, a Serious Misdemeanor in violation of Iowa Code section 321J.2 (2017). The court sentenced McGee to one year incarceration, suspending all but 7 days (with credit for 1 day served), and placed him on probation. (Sent.Order) (App. pp. 24-28). McGee appealed. (NOA) (App. p. 29).

Facts:

Bench Trial on the Minutes:

At the conclusion of the June 25, 2019 bench trial on the minutes, the court found the following facts beyond a reasonable doubt based on the stipulated minutes:

> That on or about December 8th of 2018, officers did respond to a traffic accident where there was injuries, and that they discovered the defendant driving a black G6, and he was in critical condition. At that point he -- witnesses indicated he was driving, and that was confirmed by those officers on scene.
>
> And he was taken to the hospital where medical staff indicated that he would be unable to perform any of the initial screening tests for impairment, and he would be unable to consent to any sort of further testing.
>
> Also, the officers involved indicated that they noted a strong odor of marijuana coming from his person as -- the defendant's person as he was taken from the vehicle.
>
> At that point the officers did have a medical examiner investigator arrive at the hospital where the defendant was taken, and conducted a blood drop.
>
> As we previously discussed, the DCI lab did analyze the blood of the defendant, Mr. McGee, and they did find the presence of benzodiazepines as well as a positive screening for marijuana metabolites.
>
> Based on these findings and a review of the minutes testimony, the Court does find, beyond a reasonable doubt, that the defendant is guilty of operating while intoxicated because he was operating a motor vehicle while under the influence of any amount of controlled substances that was present in his blood at the time.

(TrialTr.8:23-10:5). The court thereafter clarified it found McGee guilty only on the "any amount" alternative (§

321J.2(1)(c)), concluding that the evidence failed to prove guilt on the "under the influence" alternative (§ 321J.2(1)(a)). (TrialTr.10:6-15:4).

Suppression Hearing:

The evidence presented at the suppression hearing stated the following facts:

On December 8, 2018, City of Des Moines Police Officer Tim Fricke was at home but on-call with the traffic unit, when he received a phone call from another officer advising him of a 1:59 p.m. two-vehicle accident with injuries and requesting that Officer Fricke "respond to the hospital for the testing of a suspected impaired driver… involved in the accident" (McGee). (Suppr.Tr.5:19-8:6, 9:7-12, 27:3-5, 33:21-34:5, 35:9-12, 38:3-7). The other officer advised Officer Fricke: that McGee had been "observed traveling at a high rate of speed" prior to the accident, and had then "broadsided" or "T-bone[d]" the other vehicle; that both McGee and the driver of the other vehicle had been injured; and that at the scene of the accident,

officers had noticed the "strong odor of marijuana coming from" McGee. (Suppr.Tr.6:17-9:3, 14:5-24, 15:14-16:5).

Officer Fricke then drove to the hospital, arriving there 30-40 minutes after having received the phone call. He met with another officer that had been at the scene and that had followed the medics transporting McGee to the hospital. The other officer provided Officer Fricke with the same information that had earlier been provided to Officer Fricke over the phone. (Suppr.Tr.9:4-12, 33:5-24, 35:23-36:19). McGee was not under arrest. (Suppr.Tr.16:6-8).

Officer Fricke then spoke to Advanced Registered Nurse Clinton Smith, presenting him with a certification form for withdrawal of a body specimen from McGee. At that point, McGee was "sedated in a medical state", having received several medications at the hospital in treatment of his injuries. After signing the certification at 1559, Smith left and did not return. (Suppr.Tr.9:11-17, 10:8-10, 11:10-13:25, 24:13-25:5, 31:1-19); (Exhibit 1) (App. p. 12). Approximately 12 minutes

later at 1610, a medical examiner executed a warrantless blood draw upon McGee, giving the sample to Officer Fricke for submission to the DCI. (Suppr.Tr.14:1-4, 14:25-15:11,18:16-19:14, 22:18-23:9, 26:8-25).

Officer Fricke acknowledged there was nothing "preventing [him] from getting a warrant in this case". He testified the standard operating procedure of the police department was not to seek warrants "for an OWI first [offense] that did not result in a fatality". However, he acknowledged the law permitted a warrant to be procured on probable cause. (Suppr.Tr.16:22-18:10, 29:24-30:14, 36:24-37:7).

Officer Fricke also admitted he "hadn't made any efforts to procure a warrant" herein and that no one else involved in the investigation had either. (Suppr.Tr.18:11-12, 26:16-27:2, 36:20-23). Though it took Officer Fricke 30-40 minutes to get to the hospital after the phone call from other law enforcement, he acknowledged he did not make any efforts

during this 30-40 minutes to secure a search warrant. Neither did he (as the lead officer for the OWI investigation) instruct the officer who'd initially contacted him on the phone to make any efforts toward securing a warrant. (Suppr.Tr.34:6-35:12). After arriving at the hospital, Officer Fricke spoke with another officer (who was also personally present), before ultimately presenting the certification to the medical professional. (Suppr.Tr.35:13-36:7). Again, no efforts were made by anyone to procure a warrant during this period of time. (Suppr.Tr.36:8-23).

At the time of Smith's certification, McGee had been wholly "unresponsive" as a result of the medical sedation (Suppr.Tr.18:13-18). The officer had asked Smith only if McGee could consent or refuse "in his current state", and it was that inquiry to which Smith certified "no". (Suppr.Tr.31:1-19).

During portions of the ensuing 12 minutes between the certification and the blood draw, McGee's level of

responsiveness and physical activity changed, as he stood up and made various statements captured on Officer Fricke's body cam video. (Suppr.Tr.23:10-24:12). The officer did not believe McGee's ability to consent or refuse changed, but acknowledged he was "not a medical doctor". (Suppr.Tr.19:15-25). The certifying medical professional (Smith), never returned to the room after the certification, and the officer never spoke to him after McGee's behavior and activity level changed. (Suppr.Tr.25:6-22, 26:8-11). While other medical professionals were in the room during this 12-minute period, the officer didn't have any of them sign or confirm "a form like Exhibit 1…." (Suppr.Tr.26:12-15).

ARGUMENT

I). The district court erred in denying McGee's motion to suppress the warrantless blood draw obtained under Iowa Code § 321J.7 ("Dead or Unconscious Persons").

A. <u>Preservation of Error</u>: Error was preserved by McGee's pretrial motion to suppress, and the court's ruling denying the same. (Def.Mot.Suppress; Def.Suppr.Brief;

Suppr.Ruling) (App. pp. 6-11, 13-14); (Suppr.Tr.66:12-71:25). In seeking suppression of the blood draw evidence, McGee argued (1) that the warrantless blood draw from the unconscious or unable-to-consent-McGee was unconstitutional under the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Iowa Constitution (Mot.Suppr.2) (App. p. 7) (Suppr.Tr.43:2-46:9, 47:7-51:4, 47:10-51:4, 55:3-22, 60:9-61:13); (2) that suppression was also required because an equal protection violation arose from the implied consent statute's differential treatment of conscious persons and unconscious persons, which differential treatment was unwarranted where (as here) there was opportunity to obtain a warrant (Suppr.Tr.51:5-52:10); and (3) that in any event section 321J.7 had not been statutorily complied with, as McGee's changed condition between the certification and blood draw required the nurse to recertify McGee's continued inability to consent or refuse

(Suppr.Tr.55:23-60:8). The district court denied the motion to suppress in its entirety. (Suppr.Tr.71:24-25).

Alternatively, to the extent this Court concludes error was not preserved for any reason, McGee respectfully requests the issue be considered under the Court's familiar ineffective assistance of counsel framework as discussed below in Division II, or alternatively under plain error review as discussed below in Division III.

B. Standard of Review: Denial of a motion to suppress which allegedly involves a violation of constitutional rights is reviewed de novo. State v. Countryman, 572 N.W.2d 553, 557 (Iowa 1997). De novo review requires the appellate court's "independent evaluation of the totality of the circumstances as shown by the entire record." State v. Turner, 630 N.W.2d 601, 606 (Iowa 2001). The reviewing court may give deference to the trial court's findings regarding witness credibility, but it is not bound by such findings. Id; State v. Louwrens, 792 N.W.2d 649, 651 (Iowa 2010).

Where suppression is sought on statutory rather than constitutional grounds (such as a failure to comply with implied consent statutes) review is instead for errors at law. State v. Lindeman, 555 N.W.2d 693, 695 (Iowa 1996).

C. Discussion:

1). Suppression was required because the warrantless blood draw violated the Fourth Amendment of the U.S. Constitution and Article I section 8 of the Iowa Constitution.

The Fourth and Fourteenth Amendments to the U.S. Constitution and Article I, Section 8 of the Iowa Constitution prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Iowa Const. art. I, § 8; State v. Hoskins, 711 N.W.2d 720, 725-26 (Iowa 2006). Pursuant to these provisions, a warrantless search is per se unconstitutional unless one of the limited exceptions to the warrant requirement applies. State v. Gaskins, 866 N.W.2d 1, 7 (Iowa 2015). The burden lies with the State to prove, by a preponderance of the evidence, that a warrantless search falls

within an exception. State v. McGrane, 733 N.W.2d 671, 676 (Iowa 2007).

The withdrawal of a suspect's blood or the taking of a breath sample constitutes a search, and is therefore subject to the constraints of the Fourth Amendment and Article I section 8 of the Iowa Constitution. Birchfield v. North Dakota, 136 S. Ct. 2160, 2173, (2016); State v. Pettijohn, 899 N.W.2d 1, 14 (Iowa 2017). As such, a warrant must be secured before a blood, urine, or breath sample may constitutionally be collected, subject only to the State's ability to establish one of the limited exceptions to the warrant requirement - exigent circumstances, search incident to arrest, or voluntary consent to search. Birchfield, 136 S. Ct. at 2173 & 2185; Pettijohn, 899 N.W.2d at 17 & 25. While the search-incident-to-arrest exception applies "categorically" any time there has been a

lawful arrest[1], the applicability of the exigent-circumstances and voluntary consent exceptions turn on case-by-case evaluations of the circumstances surrounding the warrantless search at issue. Birchfield, 136 S. Ct. at 2174, 2176, 2180, 2183, and 2187; Pettijohn, 899 N.W.2d at 17.

In the present case, the State relied on the consent exception to justify the warrantless blood draw. (Suppr.Tr.39:19-43:5, 61:19-63:14, 65:15-66:7). But implied consent laws purporting to deem drivers to consent to future chemical testing upon suspicion of impaired driving have never been held to create actual (advance) consent to future chemical testing. Mitchell v. Wisconsin, 139 S. Ct. 2525, 2533 (2019); Pettijohn, 899 N.W.2d at 28. Rather, the consent exception applies only if the driver provides actual and voluntary consent contemporaneously to the blood draw – that is, *at the time the blood draw request is made by the officer*.

[1] Though applying categorically (upon arrest) under both the Federal and State Constitutions, the scope of the search permitted pursuant to the search-incident-to-arrest exception is narrower under than Iowa Constitution than under the Federal Constitution. Pettijohn, 899 N.W.2d at 20; Gaskins, 866 N.W.2d at 13-14.

Here, the consent exception was not triggered as the officer neither requested nor obtained McGee's consent to the blood draw conducted upon his sedated and/or unconscious person.

The exigent circumstances exception to the warrant requirement was not relied on by the State below. But even if it had been, such exception would not apply. The window of time available to complete chemical testing for controlled substances is significantly longer than the very limited time-window within which blood alcohol concentration (BAC) testing must be completed. The State failed demonstrate that, under the totality of the circumstances, a warrant could not feasibly be obtained within this lengthier time-window without threatening the imminent destruction of the suspected drug evidence (e.g., the dissipation of the controlled substance from the body so as to become undetectable by chemical testing).

a). Consent

The consent exception to the warrant requirement applies only if one provides true and voluntary consent to

search. Birchfield, 136 S. Ct. at 2185-86; Pettijohn, 899 N.W.2d at 28. The "voluntariness of consent to a search must", in turn, "be 'determined from the totality of all of the circumstances.'" Birchfield, 136 S. Ct. at 2186. The existence of an implied consent statute is pertinent to, but does not control this analysis.

Importantly, the US Supreme Court has never held implied consent statutes purporting to deem drivers to provide advance consent by the mere act of driving on the roadways "do what their popular name might seem to suggest — that is, create actual consent to all the searches they authorize." Mitchell, 139 S. Ct. at 2533. The Iowa Supreme Court has similarly held. Pettijohn, 899 N.W.2d at 28 ("statutorily implied consent cannot function as an automatic exception to the warrant requirement.").

That is, the purported consent constructively 'implied' under such statutes does not establish the constitutionally valid consent required to trigger the exception. Rather, the

relevant inquiry for the consent exception is whether the driver has provided actual and voluntary consent *at the time* of the search – that is, when the blood or other bodily sample is collected. See Birchfield, 136 S. Ct. at 2186; Pettijohn, 899 N.W.2d at 29.

The pertinence of implied consent laws to this inquiry is that, by establishing consequences for refusal, such laws can encourage persons to consent rather than refuse *at the point in time that the officer requests a sample*. Birchfield, 136 S. Ct. at 2186; See also Pettijohn, 899 N.W.2d at 39 ("…[I]mplied-consent laws do not mandate consent to testing, but require the driver to make a choice when suspected of… while under the influence" to either submit to testing or refuse and face the consequences of refusal) (Cady, C.J., concurring specially); Pettijohn, 899 N.W.2d at 29 (majority opinion, similarly stating as to Iowa's implied consent scheme for Boating While Intoxicated).

Even where a driver provides an *affirmative response* to the officer's request for body sample, however, the question of whether such affirmative response equates to truly voluntary (and thus constitutionally adequate) *consent* must still be determined from a case-by-case evaluation of the totality of the circumstances. Included in this totality-of-the-circumstances analysis is consideration of the consequences of a refusal under applicable implied consent statutes.

To qualify as constitutionally valid consent, there must be "consent to a warrantless search that 'was in fact voluntarily given, and not the result of duress or coercion, express or implied'". Pettijohn, 899 N.W.2d at 30 (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 248 (1973)). "The mere fact an individual [is] forced to choose between two unpalatable alternatives does not necessarily defeat the voluntariness of his or her consent to a warrantless search." Pettijohn, 899 N.W.2d at 36. But, "[w]hen an individual agrees to submit to a warrantless search upon request in order to

avoid the imposition of undesirable consequences by the government", the law recognizes that the person "put to such a choice may have essentially 'no choice at all' such that coercion may arise" and render his or her verbalized 'consent' involuntary. Id. Indeed, the U.S. Supreme Court's decision in Birchfield and the Iowa Supreme Court's decision in Pettijohn involved cases wherein, upon request by a law enforcement officer, individuals affirmatively agreed to provide body specimen samples (either breath or blood) for chemical testing but, nevertheless, were found not to have provided constitutionally adequate consent so as to trigger the consent exception to the warrant requirement.

In Birchfield, the US Supreme Court first held the Fourth Amendment categorically permits "a *breath* test, but not a *blood* test,… as a search incident to a lawful arrest for drunk driving." Birchfield, 136 S. Ct. at 2185 (emphasis added). In drawing this distinction between breath and blood, the Court recognized blood testing implicates far more significant privacy

concerns as it "require[s] piercing the skin", "extract[s] a part of the subject's body", and (perhaps most crucially) "places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading." Id. at 2178 (quotation marks and citations omitted). See also Mitchell, 139 S. Ct. at 2543 (Sotomayor, J., dissenting; joined by Ginsburg and Kagan, JJ.) (additional information extractable from a blood sample includes "whether a person is pregnant, is taking certain medications, or suffers from an illness.").

"Having concluded the search incident to arrest doctrine does not justify the warrantless taking of a *blood* sample", the Court in Birchfield found it necessary to "address [the government's] alternative argument" that the warrantless blood tests fell within the consent exception to the Fourth Amendment's warrant requirement, based on the motorists' "legally implied consent to submit to them." Birchfield, 136 S. Ct. at 2185 (emphasis added). Importantly, the existence of

an implied consent statute purporting to deem drivers to have constructively consented in advance did not control or automatically trigger the consent exception. Rather, the question was whether the motorists provided true and voluntary consent *at the time the sample was collected*. The Court held the statutory implied consent scheme's threat of criminal sanction for a refusal rendered non-voluntary the drivers' purported election between consent or refusal. That is, the Court held the motorists could not "be deemed to have consented to submit to a blood test" when they did so "on pain of committing a criminal offense" if they refused. Id. at 2186.

In addressing McGee's motion to suppress herein the prosecutor and district court concluded Birchfield was inapposite because it involved a statutorily implied consent scheme which (unlike Iowa's implied consent scheme) imposed criminal penalties for refusal to submit to testing. But this overlooks the reality that Birchfield stated the State's *ability to criminalize a driver's refusal* to submit a sample (which is

effectively a refusal to allow a search) turns on *whether the underlying warrantless search was itself constitutionally authorized*. That is, "when '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.…" Pettijohn, 899 N.W.2d at 17-18 (quoting Birchfield). It is on this basis Birchfield held that, because the Fourth Amendment categorically permitted the administration of warrantless *breath tests* under the search-incident-to-arrest exception, the criminalization of a refusal to submit to a warrantless *breath test* was *constitutional*. Birchfield, 136 S. Ct. at 2186. But, because a warrantless *blood test* was not there "justified under any exception to the warrant requirement" (including search-incident-to-arrest or consent), the criminalization of a refusal to submit to a warrantless *blood test* was held *unconstitutional*. Id.

Subsequent to the US Supreme Court's decision in Birchfield, our Iowa Supreme Court decided State v. Pettijohn, 899 N.W.2d 1 (Iowa 2017). Pettijohn, applied the principles set forth in Birchfield under the Federal Constitution, and extended certain of those principles under the Iowa Constitution.

Pettijohn recognized that Birchfield, though decided in the context of drunk *driving*, applied equally to the context of *drunk boating* – meaning that pursuant to Birchfield the search incident to arrest exception to the Fourth Amendment's warrant requirement categorically "permits the administration of a warrantless *breath* test, but not a [warrantless] *blood* test, to determine the BAC [blood alcohol content] of an individual lawfully arrested on suspicion of boating while intoxicated". Pettijohn, 899 N.W.2d at 19 (emphasis added). Because Pettijohn involved a breath test rather than a blood test, Birchfield compelled a conclusion that the taking of the breath sample from Pettijohn was *authorized* as a search-incident-to-

arrest *under the Fourth Amendment*. Nevertheless, because the scope of the search-incident-to-arrest exception is narrower under the Iowa Constitution[2], Pettijohn held that even "a warrantless *breath* test to determine the BAC of an arrestee suspected of operating a boat while intoxicated does not fall within the search-incident-to arrest exception to the [*Iowa Constitution's*] warrant requirement…." Id. at 20 & 25 (emphasis added).

Having concluded the warrantless breath test could not be justified as a permissible search-incident-to-arrest under the Iowa Constitution, the Court next "turn[ed] to the question of whether the warrantless search was justified based on [the] consent" exception to the warrant requirement under the U.S. and Iowa Constitutions. Pettijohn, 899 N.W.2d at 25. In discussing the nature of consent sufficient to authorize a warrantless search, our Court noted "it is well-settled law that

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[2] The narrower search-incident-to-arrest exception under the Iowa Constitution authorizes only searches "serv[ing] either the purpose of 'protecting arresting officers' or 'safeguarding any evidence the arrestee may seek to conceal or destroy'", but not "general evidence-gathering". Pettijohn, 899 N.W.2d at 20.

consent must be voluntarily given", and that "effective consent to a warrantless search may be limited, qualified, or withdrawn." Id. at 28.[3] "From these general observations…, it follows that *statutorily implied consent cannot function as an automatic exception to the warrant requirement*." Id. (emphasis added).

As such, our Court "conclude[d] 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" of the Iowa Constitution. Id. at 29. Rather, a case-by-case determination must be made "under the totality of the circumstances" surrounding the particular search at issue (there, a breath test), to determine "whether Pettijohn effectively consented to submit to the breath test" *at*

[3] See also Byars v State, 336 P.3d 939, 946 (Nev. 2014) (holding unconstitutional statutory implied consent scheme under which the motorist's purported consent cannot be revoked, in light of the constitutional requirement that consent always must be revocable; under Federal Constitution); State v. Wulff, 337 P.3d 575, 581 (Idaho 2014) (same); State v. Won, 372 P.3d 1065, 1080 (Hawaii 2015) (same, but under State Constitution).

the time the sample was obtained – that is, "after [the officer] read him the implied-consent advisory". Id.

In Pettijohn, the officer had read Defendant the implied-consent advisory and then requested that he submit a breath sample. Having been so-advised of the consequences of a refusal under the implied consent statute, Pettijohn assented to the officer's request for a breath sample. The question under the consent exception was thus whether this affirmative assent to give a sample (when judged against the threatened consequences of a refusal) amounted to constitutionally voluntary and uncoerced consent. Unlike the OWI implied consent scheme found to have coerced drivers into consenting to law enforcement's request for a blood sample in Birchfield, Iowa's implied consent scheme for BWI threatened only *civil* and not *criminal* penalties for a refusal. Nevertheless, our Court recognized that even certain *civil* penalty consequences of a refusal can undermine constitutionally valid consent. Pettijohn, 899 N.W.2d at 26-27 (The "clear implication" of the

US Supreme Court's decision in Missouri v. McNeely, 569 U.S. 141, 151 (2013) "is that statutorily implied consent to submit to a warrantless blood test under threat of" even certain "*civil* [rather than criminal] penalties for refusal to submit does not constitute consent for purposes of the Fourth Amendment.").

Our Court thus proceeded to apply the totality of the circumstances test to determine whether Pettijohn's assent to the officer's request for a breath sample amounted to constitutionally valid consent when judged against the civil penalty consequences he would face if he refused.

Our Court concluded that under the totality of the circumstances involved – including in particular the fact that under the statutory implied consent scheme for BWIs (Chapter 462A (2013)) Pettijohn "faced the prospect of significant [civil] penalties if he refused to submit" to the search – "the choice to consent to the warrantless search [t]here was merely illusory" and coerced, such that it "did not constitute effective consent"

under article I, section 8 of the Iowa Constitution. Pettijohn, 899 N.W.2d at 37-38.

In addressing McGee's motion to suppress herein, the prosecutor and the District Court reasoned that Pettijohn would be inapposite as limited to the Boating While intoxicated context. (Suppr.Tr.40:1-41:9, 45:4-6, 61:19-63:14, 65:15-17, 69:14-17, 70:2-22). But the aspect of Pettijohn that is limited to the BWI context is the specific conclusion that even when a boater affirmatively assents to an officer's request for a breath sample, constitutionally valid consent is nevertheless lacking in light of the coercive impact of the threatened civil penalties for a refusal under the BWI implied consent scheme.[4] It is *this conclusion* – reached in light of the specific civil consequences of a refusal under the statutory implied consent scheme for *BWIs* – which may not necessarily

[4] Note that the Court in Pettijohn did not hold that a similar conclusion would necessarily *be foreclosed* under the Driving While Intoxicated context of Chapter 321. Pettijohn cautioned only that such question was not raised, reached, addressed, or resolved by the Court's decision in that case and, rather, would have to await another case involving such a challenge raised in the Driving While Intoxicated context. See Pettijohn, 899 N.W.2d at 38.

apply to the *OWI* context, given the *differing* consequences of a refusal under the separate statutory implied consent scheme governing OWIs. That is, one cannot necessarily conclude from the decision in Pettijohn that a *driver* who answers "yes" when asked if they will consent to submission of a sample under the OWI implied consent scheme (and its attendant consequences of a refusal) necessarily fails to provide voluntary and constitutionally adequate consent.

One circumstance under which the absence of voluntary consent may be found is the one presented in Birchfield and Pettijohn – where the motorist affirmatively expresses assent to the officer's request for sample, but such expressed assent is not truly voluntary in light of the coercion surrounding the decision. But that is certainly not the only circumstance in which the absence of voluntary consent may be found. Another is the circumstance involved in the present case – where no choice to consent or refuse was even offered to (much less voluntarily exercised by) the motorist from whose

sedated and/or unconscious person the blood sample was collected. Pursuant to the very certification obtained by the officer and required by the Statute (§ 321J.7), McGee was in a condition rendering him unable to consent or refuse. Such a person does not provide voluntary consent.

Indeed, subsequent to both Birchfield and Pettijohn, the US Supreme Court made explicit, in the context of a blood draw from an unconscious driver suspected of drunk driving, that statutory implied consent to future testing will not satisfy the consent exception to the warrant requirement. See e.g., Mitchell, 139 S. Ct. at 2533 ("our decisions [referring approvingly to the general concept of implied consent-laws] have not rested on the idea that these laws do what their popular name might seem to suggest — that is, create actual consent to all the searches they authorize."). The implied consent statute involved there (similar to Iowa Code section 321J.7), "deem[ed] drivers to have consented to breath or blood tests if an officer has reason to believe they have

committed one of several drug- or alcohol-related offenses" and stated that "'[a] person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have' withdrawn it." Mitchell, 139 S. Ct. at 2531-32 (quoting Wisconsin statute). Such statutorily 'implied consent' was not found to trigger the consent exception.

In the present case, to justify the warrantless blood draw under the consent exception to the warrant requirement, the State was required to show that McGee provided actual and voluntary consent at the time of the blood draw. The State failed to carry that burden, as the officer neither requested nor obtained McGee's consent to the blood draw before extracting such blood from his sedated or unconscious person. The consent exception did not apply.

b). Exigent Circumstances

Another exception to the warrant requirement applies where probable cause combines with an exigency which makes it infeasible to obtain a warrant without threatening the

imminent destruction of the evidence sought. State v. Naujoks, 637 N.W.2d 101, 108 (Iowa 2001); State v. Lovig, 675 N.W.2d 557, 566–67 (Iowa 2004); Mitchell v. Wisconsin, 139 S. Ct. 2525, 2533 (2019).

The State did not rely upon the exigency exception below, relying only on the consent exception. (Suppr.Tr.39:19-43:5, 61:19-63:14, 65:15-66:7). As such, the State would appear to be precluded from relying upon the exigency exception on appeal. See State v. Gaskins, 866 N.W.2d 1, 7–8 (Iowa 2015) ("The only exception to the warrant requirement litigated in the district court—and thus the only one at issue in this appeal—is search incident to arrest (SITA)", and not the automobile exception); State v. Baldon, 829 N.W.2d 785, 789 (Iowa 2013) (considering only consent exception to warrant requirement, and not State's alternative argument seeking to uphold search under special needs doctrine where State did not rely on special needs doctrine in the district court); State v. Beller, No. 17-1552, 2018 WL 330236, at *2 (Iowa Ct. App.

July 5, 2018) ("Had Beller [the prevailing party] urged this argument in the district court, we could consider it as an alternative means to affirming the suppression ruling.").

Alternatively, if the suppression ruling is deemed an evidentiary issue, it may be subject to affirmance on any ground established in the existing record even if not relied upon by the State below. See Gaskins, 866 N.W.2d at 41-43 (Waterman, J., dissenting; joined by Mansfield and Zager, JJ.) (taking view that "A motion to suppress on constitutional grounds is a challenge to the admissibility of evidence seized from a defendant. Therefore, [pursuant to DeVoss v. State, 648 N.W.2d 56, 62 (Iowa 2002)] we may affirm the district court's suppression ruling on any ground appearing in the record, whether urged by the parties [in the district court] or not."); State v. Tostenson, No. 19-0014, 2019 WL 5063333, at *2 (Iowa Ct. App. Oct. 9, 2019) ("A motion to suppress on constitutional grounds is a challenge to the admissibility of evidence seized from a defendant. Therefore, we may affirm

the district court's suppression ruling on any ground appearing in the record, whether urged by the parties [in the district court] or not."); Mitchell v. Wisconsin, 139 S. Ct. 2525, 2534 n.2 (2019) (Plurality Opinion; upholding warrantless blood draw under exigency exception, though government had only sought to uphold search on basis of consent).[5]

Even if the exigency exception is considered, it would not apply here. "…[U]nder the exception for exigent circumstances, a warrantless search is allowed when 'there is compelling need for official action *and no time to secure a warrant.*'" Mitchell v. Wisconsin, 139 S. Ct. 2525, 2534 (2019) (quoting Missouri v. McNeely, 569 U.S. 141, 149 (2013)) (emphasis added). The exception "allows warrantless searches 'to prevent the *imminent* destruction of evidence.'" Id. at 2533 (2019) (emphasis added).

[5] The US Supreme Court's approach to error preservation is not binding on the Iowa Supreme Court. See State v. Daly, 623 N.W.2d 799, 801 (Iowa 2001) (declining to follow error preservation rule set forth in recent US Supreme Court decision which was "contrary to established precedent in this state."). See also State v. Derby, 800 N.W.2d 52, 57 (Iowa 2011) (discussing Daly); State v. Holbrook, 261 N.W.2d 480, 483-84 (Iowa 1978).

Both the US Supreme Court and the Iowa Supreme Court have held the mere fact that blood-alcohol evidence is always dissipating due to "natural metabolic processes" does not itself establish the requisite necessity to trigger the exigency exception. McNeeley, 569 U.S. at 152. See also Birchfield v. North Dakota, 136 S.Ct. 2160, 2174 (2016) (discussing McNeely's rejection of government's request for per se rule of exigency based on inherent evanescence of BAC evidence); Pettijohn, 899 N.W.2d at 27 (same); Mitchell, 139 S. Ct. at 2534 (2019) ("we do not revisit" that question presented in McNeeley). Thus, the mere fact that alcohol (or drug) evidence dissipates from the body through the natural metabolic process does not itself generate an automatic exigency so as to categorically allow warrantless collection of body samples for chemical testing in all cases in which officers have probable cause for drunken (or drugged) driving. Rather "In those drunk-driving [or drugged-driving] investigations where police officers can reasonably obtain a warrant before a blood sample

can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." McNeely, 569 U.S. at 152.

In the most recent of the above cases, Mitchell v. Wisconsin, the US Supreme Court reaffirmed its longstanding rejection of any automatic exigency rule in drunk driving cases, despite the inherently evanescent nature of BAC evidence. Mitchell, 139 S. Ct. at 2534 ("we do not revisit" the question presented in McNeeley). But a plurality of the Court did hold that, for *a certain category of drunk driving cases*, the exigency exception will "almost always" be triggered – namely those involving probable cause for a drunk-driving offense

committed by a now-unconscious driver. Id. at 2531.[6] In such a case, the Plurality held, the exigency exception will "almost always" be triggered because, given the very short two-hour window of time available for obtaining an accurate Blood Alcohol Concentration (BAC) reading, officer delays

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[6] The Mitchell Court "split four ways on the application of the exigency doctrine to the facts of the case":

> The plurality, per Justice Alito, held that the exigent circumstances exception to Fourth Amendment's warrant requirement almost always permits a warrantless blood draw where a DWI suspect is unconscious. Justice Thomas concurred in the judgment, but would have instead overruled McNeely and created a broad per se rule that *always* permits a blood draw whenever a person is suspected of DWI, regardless of whether they are unconscious. In accordance with the "Marks [v. United States, 430 U.S. 188, 193 (1977)] rule," the narrower decision of the plurality stands as the Mitchell Court's holding. Justice Sotomayor, joined by Justices Ginsburg and Kagan, dissented, and would have held that exigent circumstances could not have been present because the officer had time to get a warrant. Dissenting separately, Justice Gorsuch would have dismissed the writ of certiorari as improvidently granted, rather than decide the exigency issue that was not argued by the State or decided by the state courts.

Hassan Ahmad, Bloodied: How So-Called Exigencies Continue to Erode the Fourth Amendment, 57 Am. Crim. L. Rev. Online 1, 5–6 (2020) (footnotes omitted).

necessitated by the driver's unconsciousness will typically make it infeasible for law enforcement to timely obtain a warrant before this 2-hour window lapses and the BAC evidence is lost. Mitchell, 139 S. Ct. at 2539. Thus, in this limited context involving probable cause for "a drunk-driving offense" with an unconscious driver, law enforcement "may almost always order a warrantless blood test to measure the driver's BAC without offending the Fourth Amendment", subject only to the "unusual case" in which "a defendant would be able to show" that "police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties." Id. That is, in this limited category of cases, a presumption of exigency appears to apply, pursuant to which the burden (normally on the State to prove exigency – e.g., the infeasibility of timely obtaining a warrant) shifts to the Defendant to establish a warrant was *not* infeasible in his or her particular case.

Crucially, the plurality rule from Mitchell (as well as the reasoning behind it) applies only to chemical testing of unconscious persons *for alcohol* – not *controlled substances*. See Mitchell, 139 S. Ct. at 2359 (where "police have probable cause to believe [an unconscious] person has committed *a drunk-driving offense*", police may almost always "order a warrantless blood test to measure the driver's *BAC [Blood Alcohol Concentration]* without offending the Fourth Amendment.").

In recognizing and understanding this limitation, it is important to keep in mind important distinctions between chemical testing for alcohol as compared with drugs, given: (1) the differing statutory schemes governing each (criminalization of driving with a BAC *over* a specified limit, versus with "any amount" of a controlled substance in the body without regard to level or quantity present), and (2) differences concerning how quickly each substance metabolizes through a person's body (the quick rate of alcohol dissipation, as compared with

controlled substances which do not so quickly dissipate). These distinctions, in turn, impact whether and when the crucial showing required under the exigency exception (proof that there was no time for police to feasibly obtain a warrant without risking "the imminent destruction of [the] evidence" sought) is made for controlled substances as compared with alcohol. Specifically, there is a much shorter window of time within which the chemical sample must be collected (and therefore within which any required warrant must be secured) for alcohol as compared with controlled substances. See e.g., State v. Lovig, 675 N.W.2d 557, 566–67 (Iowa 2004) (In evaluating exigency "the natural dissipation of the blood alcohol level of a person… cannot be properly assessed without some reference to the time frame in which a chemical test can be administered", meaning "the actual time to obtain a warrant" in comparison to the time frame within which a chemical test must be administered "becomes the important factor."); State v. Johnson, 744 N.W.2d 340, 343 (Iowa 2008)

("The destruction of evidence in alcohol-related offenses is unique" given the rapid rate at which alcohol dissipates from the body).

"Iowa Code section 321J.2(1) criminalizes the operation of a motor vehicle" when the operator is in any one of three listed conditions. State v. Newton, 929 N.W.2d 250, 255 (Iowa 2019). "The first [statutory subsection] criminalizes driving while under the *influence* of alcohol or drugs", while "[t]he next two subsections delineate specific concentrations of those substances that automatically trigger a violation." State v. Comried, 693 N.W.2d 773, 775 (Iowa 2005). "Under these [latter two] subsections, the State need not prove the defendant was under the influence – only that he was driving a motor vehicle with a specific amount of alcohol or drugs in his body." Id. As to alcohol, the "specific amount" that will violate the statute is "a blood-alcohol concentration of" 0.08. Id.; Iowa Code § 321J.2(1)(b). But, "[a]s to controlled substances, 'any amount' violates the statute", creating a "per se ban" on

driving with "any amount of controlled substances in their bodies". Comried, 693 N.W.2d at 775 & 778; Iowa Code § 321J.2(1)(c).

Thus, under this statutory scheme, one can lawfully operate a motor vehicle with alcohol in their system *unless* the amount present exceeds the legal limit – making proof of the *quantity* of alcohol present at the time of operation critical to determining whether a law violation occurred. But as to controlled substances there *is no legal limit* – meaning all that must be shown by the chemical test is the presence of *any detectible amount* of the controlled substance in the person's body, without the need to prove the *quantity or amount* present at a given earlier point in time. Thus while both alcohol and controlled substances dissipate from the body over time, *the point at which evidence loss occurs* differs as to each. As to alcohol, evidence loss occurs when the *amount or level* of alcohol present *at the time of the vehicle's operation* can no longer reliably be established by chemical testing. But as to

controlled substances, evidence loss occurs only when the controlled substance has dissipated to the point that it becomes *wholly undetectable* by chemical testing.[7]

The rate at which dissipation from the body occurs also differs between alcohol and controlled substances. "…[I]t is 'a biological certainty' that '[a]lcohol dissipates from the bloodstream at a rate of 0.01 percent to 0.025 percent per hour", meaning BAC evidence is "literally disappearing by the minute.'" Mitchell, 139 S. Ct. at 2536 (quoting McNeely, 569 U.S. at 169 (Roberts, C.J., concurring in part and dissenting in part; joined by Alito, J.)). This highly rapid rate of alcohol dissipation both is well-established, and was central to the plurality rule adopted in Mitchell. In contrast, controlled substances (and in particular marijuana, the controlled substance for which probable cause existed herein) can

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[7] Unless the driver could have ingested the controlled substance *after* last operating the vehicle (impossible where the driver was unconscious or in police custody), the presence of a detectible amount of controlled substance in the driver's body at the time of sample collection would necessarily also establish the substance's presence at the earlier point of the vehicle's operation.

remain detectible in the body for "days after consuming a controlled substance." Newton, 929 N.W.2d at 256. See also State v. Myers, 924 N.W.2d 823, 827 n.3 (Iowa 2019) ("The tendency of controlled substances, like marijuana metabolites, to "accumulate in body fat, creat[es] higher excretion concentrations and longer detectability.") (citing Ctrs. for Disease Control, *Urine Testing for Detection of Marijuana: An Advisory, CDC: Mortality Weekly Report* (Sept. 16, 1983), https://www.cdc.gov/mmwr/preview/mmwrhtml/ 00000138. htm.); Stacy A. Hickox, Drug Testing of Medical Marijuana Users in the Workplace: An Inaccurate Test of Impairment, 29 Hofstra Lab. & Emp. L.J. 273, 341 n.6(2012) (citing Basic Facts About Drugs: Marijuana, Am. Counsel for Drug Educ., http://www.acde.org/health/ Research.htm (last visited Mar. 25, 2012), as "highlighting that traces of THC can be picked up by sensitive blood tests up to four weeks after taking in marijuana"); State v. Childs, 898 N.W.2d 177, 179 (Iowa 2017) (marijuana metabolite "can be detected in the body more than

three weeks after the impairing effects of marijuana have dissipated.") (citing Priyamvada Sharma et al., *Chemistry, Metabolism, & Toxicology of Cannabis: Clinical Implications*, 7 Iran J. Psychiatry 149, 152 (2012)); State ex rel. Montgomery v. Harris, 322 P.3d 160, 163 (Ariz. 2014) (marijuana metabolite "can remain in the body for as many as twenty-eight to thirty days after ingestion"); Karen E. Moeller et. al., *Clinical Interpretation of Urine Drug Tests: What Clinicians Need to Know About Urine Drug Screens*, Mayo Clinic Proc., May 2017:92(5):774-796, 777 (listing detection times for various drugs via urine tests); Mark P. Stevens & James R. Addison, Interface of Science & Law in Drug Testing, Champion, December 1999, at 18, 20-21 (listing detection times for various drugs via blood tests and urine tests; concluding "that drug tests, via urine or blood samples, are simply able to detect the presence of drugs in a person's system for quite some time after consumption.").

The rapid rate at which alcohol dissipates from the body (commencing from the point the person stops drinking), means that "a significant delay in testing will negatively affect the probative value of the results." McNeely, 569 U.S. at 152. "*This fact was essential to [the US Supreme Court's] holding in Schmerber [v. California*, 384 U.S. 757, 770-71 (1966)]," where the Court "recognized that… further delay in order to secure a warrant after the time spent investigating the scene of the accident and transporting the injured suspect to the hospital to receive treatment would have threatened the destruction of evidence." McNeely, 569 U.S. at 152 (emphasis added).

This same fact was similarly essential to the rule adopted by the plurality in Mitchell (which was said to follow from Schmerber). Crucial to the Mitchell plurality's application of the exigency exception to unconscious drunk-driving suspects were the realities: (1) that OWI statutes "criminalize driving *with a certain BAC level*" (not just *any detectible amount* of alcohol); (2) that "it is 'a biological certainty' that '[a]lcohol

dissipates from the bloodstream at [the rapid] rate of 0.01 percent to 0.025 percent per hour", meaning BAC evidence is "literally disappearing by the minute'"; and (3) that "[e]nforcement of BAC limits… [thus] requires prompt testing", as "delays in BAC testing can 'raise questions about… [the chemical test's] accuracy" and reliability in establishing whether the driver's BAC had exceeded the legal limit at the earlier time he or she had operated the vehicle. Mitchell, 139 S. Ct. at 2535-36 (quoting McNeely, 569 U.S. at 169 (Roberts, C.J., concurring in part and dissenting in part; joined by Alito, J.)). It is this need for prompt BAC testing that creates the "almost always" exigency rule in the context of a suspected drunk driving case involving an unconscious driver. That is, given the *already very short time-window* available for obtaining an accurate BAC level for when the vehicle was operated, an even relatively brief additional delay needed to obtain a warrant will typically threaten the imminent loss of such BAC evidence in those cases where an accident or

unconscious driver (by increasing officer obligations or responsibilities) has already tightened up the timeline.

But while the delays resulting from a motor vehicle accident may generate an exigency rendering it "almost always" infeasible to obtain a warrant within the short window of time available *for BAC testing* of the unconscious driver, the same is not true for *drug testing* regarding which the pertinent window of time is substantially longer. Thus, Mitchell's "almost always" exigency rule for unconscious persons suspected of *drunk*-driving, does not extend or apply to unconscious persons suspected of *drugged*-driving. In the circumstance of drugged-driving, as is involved here, law enforcement must still obtain a warrant before conducting a blood draw from an unconscious defendant absent law enforcement's ability to affirmatively show it was infeasible to timely obtain a warrant in the particular case at issue. Because the State did not make any such showing herein, the exigency exception to the warrant requirement does not apply.

Alternatively, even if this Court concludes the rule set forth by the plurality in Mitchell v. Wisconsin in the context of unconscious *drunk*-driving suspects also applies to unconscious *drugged*-driving suspects under the Fourth Amendment, the circumstances here demonstrate McGee's is just the "unusual case" in which "police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties." Mitchell, 139 S. Ct. at 2359. Involved herein is the very situation contemplated by the Court's earlier decision in McNeely as one in which the exigency exception would not apply. McNeely noted that "because a police officer must typically transport a drunk-driving suspect to a medical facility and obtain the assistance of someone with appropriate medical training before conducting a blood test, some delay between the time of the arrest or accident and the time of the test is inevitable regardless of whether police officers are required to obtain a warrant." McNeely, 569 U.S. at 151. In "a situation in which

the warrant process will not significantly increase [this already inherent period of] delay before the blood test is conducted because *an officer can take steps to secure a warrant while the suspect is being transported to a medical facility by another officer*…, there would be no plausible justification for an exception to the warrant requirement" on the basis of exigency. McNeely, 569 U.S. at 154. See also Mitchell, 139 S. Ct. at 2534 (declining to disturb McNeely decision). This is precisely the circumstance which existed in McGee's case. Officer Fricke (who was home but on-call with the traffic unit) received a call from an at-the-scene officer, asking Fricke to "respond to the hospital for the testing of a suspected impaired driver" involved in an accident and smelling of marijuana. Meanwhile, another at-the-scene officer followed the medics transporting McGee to the hospital. It took Officer Fricke 30-40 minutes to get to the hospital, and the officer then spent additional time speaking with the other personally-present officer (that had followed McGee and the medics to the

hospital), before ultimately approaching a medical professional concerning certification. (Suppr.Tr.6:17-9:12, 15:14-16:5, 33:5-24, 35:23-36:19). Officer Fricke acknowledged that, though there was nothing "preventing [him] from getting a warrant" herein, neither he nor anyone else involved in the investigation made "any efforts" to do so – either during the 30-40 minute trip to the hospital or otherwise. (Suppr.Tr.16:22-18:12, 26:16-27:2, 29:24-30:14, 34:6-37:7). See also State v. Lovig, 675 N.W.2d 557, 567 (Iowa 2004) (record failed to establish exigency; "there was no evidence concerning any efforts by police to seek a warrant or to determine the amount of time it would take to secure a warrant."). Thus, even under the rule of the Mitchell plurality, suppression is still required.

Alternatively, if this Court concludes the Mitchell plurality rule applies but that the existing record does not establish the showing defendant must make to obtain chemical test exclusion thereunder, then the federal

constitution would at-minimum require this matter be remanded to permit McGee a chance to attempt to make that showing. Mitchell, 139 S. Ct. at 2539 ("Because Mitchell did not have a chance to attempt to make that showing, a remand for that purpose is necessary.").

Further, if this Court concludes that the Mitchell plurality's rule for unconscious *drunk*-driving suspects also applies to unconscious *drugged*-driving suspects under the *Fourth Amendment*, the same is not true under the Iowa Constitution. The search and seizure provision of the Iowa Constitution is more exacting than the parallel provision of the U.S. Constitution. See, e.g., State v. Ochoa, 792 N.W.2d 260 (Iowa 2010) (parole searches); State v. Pals, 805 N.W.2d 767, 782-83 (Iowa 2011) (consent searches); State v. Short, 851 N.W.2d 474 (Iowa 2014) (search of probationer's residence); State v. Coleman, 890 N.W.2d 284 (2017) (scope of stop limited by reasonable suspicion basis for stop). In particular, the Iowa Constitution more stringently *limits exceptions* to the

warrant requirement *to the purposes which they serve*. See e.g., State v. Cline, 617 N.W.2d 277, 292-93 (Iowa 2000) (good faith exception to exclusionary rule is incompatible with and inapplicable under Iowa Constitution); Gaskins, 866 N.W.2d at 13-14 (search-incident-to-arrest exception more limited under Iowa Constitution); Pettijohn, 899 N.W.2d at 20 (applying in context of chemical testing, the narrower scope of search-incident-to-arrest exception under Iowa Constitution). For the reasons discussed above, even if Mitchell's "almost always" presumption of exigency is deemed properly applied under the Iowa Constitution to unconscious persons suspected of *alcohol*-impairment, the same is not true for those suspected of *drug*-impairment given the much longer window of time available to test for controlled substances.

Indeed, even if this Court agrees with the general reasoning of Mitchell that the exigency exception will (as a *factual* matter) "almost always" be satisfied where the driver is unconscious, *the burden shifting aspect of Mitchell* should not

be applied under the Iowa Constitution. It is one thing to recognize that an unconscious driver is a factual circumstance which generally aids the State in its effort to establish exigency under the totality of the circumstances test – it is entirely another to wholly *relieve the State of its burden of proving exigency* under the totality of the circumstances based only on the existence of this singular fact (an unconscious driver), and to instead *shift the burden to the defendant* to affirmatively *disprove* exigency. Thus, even if this Court finds persuasive Mitchell's conclusion that the involvement of an unconscious driver can be an important fact weighing in favor of exigency, the *burden shifting* aspect of the Mitchell rule should not be applied under the Iowa Constitution at least where drug-impairment (rather than alcohol impairment) is suspected. The burden should remain with the State to establish that the totality of the circumstances demonstrates a warrant could not be obtained without threatening the imminent destruction of the evidence.

Finally, if a burden shift *is* applied under the Iowa Constitution, the nature of the showing a defendant must make to rebut the presumption of exigency may be different thereunder. Specifically, to the extent Mitchell, 139 S.Ct. at 2539 would require a defendant seeking to rebut the "almost always" presumption to show not only (1) "that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties", *but also* (2) "that his blood would not have been drawn if police had not been seeking BAC information" - the latter of these requirements must be dispensed with under the Iowa Constitution as it is not tied to the purposes of the exigency exception, namely the concern that the delay required to obtain a warrant will risk the imminent destruction of the evidence sought.

2). Suppression was also required because an equal protection violation results from the implied consent statute's conferral upon conscious, but not unconscious, persons: (a) the right to revoke implied consent, and (b) the right to be free from unconsented-to warrantless blood draws absent the "officer[s] reasonabl[e] belie[f]... the delay necessary to obtain a warrant... threatens the destruction of evidence."

Suppression was also required under equal protection requirements of the State and Federal constitutions. As argued by counsel below, section 321J.7's automatic authorization of blood draws from unconscious or unable-to-consent drivers generates an equal protection violation due to the statute's unwarranted differential treatment of conscious and unconscious persons. (Suppr.Tr.51:5-52:10)

Both the federal and Iowa constitutions provide for equal protection under the law. U.S. Const. amend. XIV; Iowa Const. art. I § 6. Equal protection requires equal treatment of persons who are similarly situated with respect to the purposes of the law. State v. Doe, 927 N.W.2d 656, 662 (Iowa 2019); Varnum v. Brien, 763 N.W.2d 862, 883 (Iowa 2009). In evaluating equal protection claims, strict scrutiny is applied if

a fundamental right is involved. Id. at 880. Under strict scrutiny, the use of the classification must be narrowly tailored to meet a compelling government interest. State v. Hernandez-Lopez, 639 N.W.2d 226, 238 (Iowa 2002). Where non-fundamental rights are involved a less-stringent rational basis standard applies, requiring a reasonable fit between the government interest and the means utilized to advance that interest. Id.

Blood draws implicate bodily integrity and privacy rights. Birchfield, 136 S. Ct. at 2178. The right to bodily integrity and privacy are fundamental rights. State v. Pilcher, 242 N.W.2d 348, 359 (Iowa 1976) (personal right of privacy is a fundamental right, triggering heightened scrutiny); Sanchez v. State, 692 N.W.2d 812, 820 (Iowa 2005) (right "to bodily integrity" is a fundamental right, which would trigger heightened scrutiny). Strict scrutiny should thus apply. Ultimately, however, regardless of whether strict or only rational basis scrutiny is applied, an equal protection violation

results from the implied consent statute's unwarranted differential treatment of conscious and unconscious persons. First, while conscious persons are given an opportunity to refuse testing and thereby revoke implied consent, unconscious persons are given no such ability to revoke implied consent and refuse testing under the statute. Second, while consent-less blood draws in the absence of a warrant can only be conducted on conscious persons if there is a showing of exigency, no such exigency showing is required as to unconscious persons regarding whom such blood draws are automatically authorized. These distinctions drawn by the statute's treatment of conscious and unconscious persons survive neither strict nor rational basis scrutiny.

a). Differential treatment re: right to revoke implied consent

The ability to revoke consent is an essential characteristic of voluntary consent. State v. Pettijohn, 899 N.W.2d 1, 28 (Iowa 2017). "…[I]mplied-consent laws do not mandate consent to testing, but [instead] *require the driver to*

make a choice when suspected of operating a motor vehicle while under the influence" *to either submit to testing or refuse and have "the entire arrangement… revoked*". Pettijohn, 899 N.W.2d at 39 (Cady, C.J., concurring specially) (emphasis added). Conscious and able-to-consent motorists regarding whom implied consent is invoked under section 321J.6 are permitted to make just such a choice to either submit to testing or to refuse and have the entire arrangement revoked. Under the implied consent procedure set forth in section 321J.7, however, a motorist who is unconscious or unable-to-consent is given no similar opportunity to revoke their purported consent and avoid a forced blood draw. Motorists are not, for example, permitted to designate another person to exercise their right of refusal on their behalf, in the event they are unable to do so themselves when implied consent is invoked by law enforcement. See e.g., Lubka v. Iowa DOT, 599 N.W.2d 466 (Iowa 1999) (motorist's spouse not authorized to make or communicate an implied-consent decision for

motorist). Nor does the statute provide motorists any opportunity to prospectively register a desire to revoke implied consent and refuse testing in the event of their incapacitation at the time implied consent is invoked by law enforcement. Such unwarranted distinction survives neither strict nor rational basis scrutiny. An equal protection violation results from the implied consent statute's unwarranted differential treatment of persons able to consent or refuse at the time implied consent is invoked (who are given the ability to elect between consenting to testing or instead refusing and revoking the entire implied consent arrangement), and those who are not able to consent or refuse at the time implied consent is invoked (for whom a warrantless blood draw is automatically authorized under section 356J.7 with no opportunity to refuse testing and revoke the implied consent arrangement).

b). Differential treatment re: protection from unconsented-to warrantless blood draws absent the "officer['s] reasonabl[e] belie[f]... the delay necessary to obtain a warrant... threatens the destruction of evidence."

An equal protection problem also arises in light of the fact that, (a) as to conscious motorists the statute authorizes a warrantless blood test to be administered "without the consent of the person" *only if* the "officer reasonably believes the officer is confronted with an emergency situation in which the delay necessary to obtain a warrant under section 321J.10 threatens the destruction of evidence" (§ 321J.10A(1)(c)); (b) but no similar exigent circumstances are required to permit a warrantless blood test to be administered without the consent of an unconscious person (§ 321J.7). Such differential treatment of conscious and unconscious motorists survives neither strict nor rational basis scrutiny. Where the officer invoking implied consent does *not* reasonably believe the delay necessary to obtain a warrant will threaten the destruction of evidence, there is no rational basis for protecting only the *conscious or able-to-consent* person, and not also the

unconscious or unable-to-consent person, from the warrantless and consent-less search. Such unwarranted distinction between conscious and unconscious persons survives neither strict nor rational basis scrutiny.

Section 321J.7 is unconstitutional as violative of equal protection. It therefore cannot apply or authorize the blood draw herein. Suppression of the blood draw should have been granted on equal protection grounds.

3). Even assuming no constitutional violation, the blood draw evidence must nevertheless be suppressed because the implied consent statute was not adequately complied with.

Even absent any constitutional violation, suppression should have been ordered on the basis that the implied consent statute was not adequately complied with.

It is clear that the statute requires the timing of the medical provider's evaluation of the subject's condition to be substantially contemporaneous with the blood draw – the purpose being that the certification will serve as assurance that the subject was incapable of consent or refusal at the

time the draw was conducted, as a statutory prerequisite to permitting the draw to move forward without the subject's consent. Iowa Code § 321J.7 (2017) (requiring certification "in advance of the test", and requiring that any oral certification by followed-up with completion of a written certification "within a reasonable time of the test.").

Thus, in the present case, the certification obtained by Officer Fricke established only that McGee was unable to consent or refuse *at the time* the registered nurse observed McGee and executed the certification. Upon execution of the certification, the nurse left the room and was no longer in a position to observe McGee. The blood draw was not conducted immediately after the nurse signed the certification but, rather, after a period of approximately 12 minutes had elapsed. While a 12-minute delay is not inherently excessive, McGee's condition (including his degree of consciousness and level of activity) meaningfully changed during this 12-minute period. At the time of the certification, McGee had been wholly

"unresponsive". But subsequent to the certification, McGee "stood up" and made a number of "statements" or "utterances" communicating (in a manner understood by both the officer and the medical staff) his need to urinate, and then urinated. (Suppr.Tr.9:11-17, 10:8-10, 11:10-13:25, 23:10-25:5, 31:1-19). Because the certifying nurse had left the room immediately following his signature on the certification, he did not observe these changes in McGee's state of consciousness and activity.

The change in McGee's behavior and condition during this 12-minute period was such that the original medical certification (obtained while McGee's levels of consciousness and activity were substantially different) could no longer be relied upon. Rather, a new certification was required from a medical professional verifying that, even in McGee's changed condition, he remained incapable of consent or refusal. Having failed to obtain such recertification or new certification from a medical professional to establish McGee's incapacity for

consent or refusal *at the time of the blood draw*, the statutory prerequisite to proceed with the blood draw without McGee's consent was not met. As the statute was not properly complied with, suppression of the blood draw evidence should have been granted.

4). Not Harmless:

A district court's erroneous failure to suppress evidence will require reversal unless the improper admission of the evidence at trial was ultimately harmless. Garrity, 765 N.W.2d at 597. Regardless of whether the error is of a constitutional or a nonconstitutional dimension, the burden of proving harmlessness lies with the State. Where the error is of only a statutory, rather than a constitutional, dimension, appellate courts will "presume prejudice" unless the State affirmatively establishes the that the record proves otherwise. Moorehead, 699 N.W.2d at 672. See also State v. Dudley, 856 N.W.2d 668, 678 (Iowa 2014). Where the error is of a constitutional dimension, the State must prove harmlessness "beyond a

reasonable doubt". State v. Harris, 741 N.W.2d 1, 10 (Iowa 2007).

In the present case, the erroneous failure to suppress the chemical testing evidence was not harmless, whether viewed as constitutional or only statutory (nonconstitutional) error. The chemical test result from the Blood Draw was the basis for the district court's finding of guilt at the bench trial. (TrialTr.8:23-10:5). See Moorehead, 699 N.W.2d at 672 (refusing to find error harmless, as a "breath test result is important evidence in prosecutions for drunk driving", and the breath test result was "the very first fact cited as evidence of guilt" in bench trial verdict). And the trial court found McGee guilty only on the "any amount" alternative (§ 321J.2(1)(c)), concluding McGee's guilt was not proven beyond a reasonable doubt on the "under the influence" alternative (§ 321J.2(1)(a)). (TrialTr.10:1-15:4). Under these circumstances, the State cannot establish that the erroneous admission of the chemical testing results was harmless.

5). Remedy:

The proper remedy is to reverse McGee's conviction and judgment, and remand for suppression of the blood draw evidence and all fruits thereof (including the chemical testing result). Further, given the district court's acquittal of McGee on the "under the influence" alternative, any new trial without the suppressed evidence must be limited only to the "any amount" alternative. Compare with State v. Pexa, 574 N.W.2d 344, 347 (Iowa 1998) ("A failure to consider an alternative definition of the offense charged does not constitute an acquittal of that offense for double jeopardy purposes."); State v. Myers, 924 N.W.2d 823, 832 (Iowa 2019) ("The same analysis applies here." Because "[t]he district court clearly did not acquit Myers of the section 321J.2(1)(a) alternative", "that alternative remains fair game on remand"). Unlike Pexa and Myers the district court here actually considered the "under the influence" alternative and found the evidence failed to establish that alternative beyond a reasonable doubt. Double

jeopardy therefore prohibits retrial on the acquitted "under the influence" alternative.

II). If error was not properly preserved on the issues raised in Division I, trial counsel rendered ineffective assistance.

A. Preservation of Error: Appellate review is not precluded if failure to preserve error results from a denial of effective assistance of counsel. State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1983).

B. Standard of Review: Ineffective assistance claims are reviewed de novo. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984).

C. Discussion:

1). If not preserved, Ineffective Assistance.

Criminal defendants are entitled to effective assistance of counsel. U.S. Const. amend VI; Iowa Const. art. I, §10; Strickland v. Washington, 466 U.S. 668, 694 (1984); State v. Ambrose, 861 N.W.2d 550, 556 (Iowa 2015). To establish ineffective assistance, a defendant must demonstrate (1) a

breach of essential duty, and (2) prejudice in the form of a reasonable probability of a different result sufficient to undermine confidence in the outcome. State v. Carrillo, 597 N.W.2d 497, 500 (Iowa 1999); Strickland, 466 U.S. at 694.

To the extent this Court concludes error was not preserved on one or more grounds for suppression raised in Division I, McGee respectfully requests that such issue(s) be considered under an ineffective assistance of counsel framework. For the reasons discussed in Division I, the constitutional and statutory grounds for suppression were meritorious, and counsel's failure to properly obtain suppression of the blood draw evidence on such grounds amounted to a breach of essential duty. Further, counsel clearly desired to obtain suppression of the blood draw evidence, demonstrating there was no strategic reason for failing to properly seek suppression. See e.g. (Def.Mot.Suppress) (App. pp. 6-7). Finally, the matter was prejudicial and warranted reversal even under the more

demanding Strickland standard, as the chemical test result from the Blood Draw was the basis for the district court's finding of guilt at the bench trial. (TrialTr.8:23-15:4).

2). § 31 of Senate File 589 (seeking to prohibit this Court's consideration of ineffective assistance claims on direct appeal) is unconstitutional and inapplicable here.

a). Separation of Powers

The separation-of-powers doctrine prohibits one branch of government from impairing another branch in "the performance of its constitutional duties." Planned Parenthood v. Reynolds, 915 N.W.2d 206, 212 (Iowa 2018). All judicial power in Iowa is vested in the Iowa Supreme Court and its inferior courts. Iowa Const. art. V §§ 1, 4, 6.

The Iowa constitution confers upon District Courts general jurisdiction over all matters before them and the legislature can only prescribe the manner of its exercise, not deprive the courts of the jurisdiction. Matter of Guardianship of Matejski, 419 N.W.2d 576, 577 (Iowa 1988). Similarly, the Iowa constitution confers on the Iowa Supreme Court

jurisdiction over appeals and over correction of lower court errors, and the legislature can impose only reasonable restrictions and procedures which do not alter or destroy this fundamental character and function of the Supreme Court. Dunbarton Realty Co. v. Erickson, 120 N.W. 1025, 1027 (1909) (equity action; "our state Constitution (article 5, § 4) gives to the Supreme Court appellate jurisdiction in equitable cases", but legislature can impose "*reasonable* rules and regulations"); Tuttle v. Pockert, 125 N.W. 841, 842 (1910)(equity action; legislature can prescribe procedure for appeal, meaning trial de novo, and "The form of procedure is unimportant *if such right be not thereby destroyed.*"); Brenton v. Lewiston, 236 N.W. 28, 29–30, modified, 238 N.W. 714 (Iowa 1931)(law action; "The Legislature may impose restrictions as by limiting appeals by the amounts in controversy..., *but it may not, by the enactment of restrictions, so change the character of the court as that it shall be other in reviewing a law*

action than 'a court for the correction of errors at law.")
(emphasis added).

Although the Iowa Code contemplates the Iowa Supreme Court handling criminal appeals, S.F.589 would make constitutional claims of ineffective assistance of counsel specifically unreviewable on direct appeal *even where, in the appellate court's judgment, the record is adequate to do so.* Iowa Code § 602.4102(2) (2017). But the Iowa Supreme Court has the inherent jurisdiction and duty to invalidate state actions that conflict with the state and federal constitutions. See Varnum v. Brien, 763 N.W.2d 862, 875-76 (Iowa 2009); Planned Parenthood, 915 N.W.2d at 212-13. And the power to grant a new trial exists independent of statute as "one of the inherent powers of the court essential to the administration of justice." Hensley v. Davidson Bros. Co., 112 N.W. 227, 227–28 (1907).

By removing consideration of constitutional claims of ineffective assistance from the realm of direct appeal, even

where the *appellate court's judgment* is that the direct appeal record establishes the violation, S.F.589 intrudes on Iowa appellate courts' independent role in interpreting the constitution and protecting Iowans' constitutional rights. See State v. Abrahamson, 696 N.W.2d 589, 593 (Iowa 2005) (judgment exercised "must be that of the court – not the sheriff").

b). Equal Protection

"Once the right to appeal has been granted…, it must apply equally to all. It may not be extended to some and denied to others." Waldon v. District Court of Lee County, 130 N.W.2d 728, 731 (1964). S.F.589 violates equal protection by treating persons who are similarly situated with respect to the purposes of the law differently. U.S. Const. amend. XIV; Iowa Const. art. I § 6; State v. Doe, 927 N.W.2d 656, 662 (2019); Varnum, 763 N.W.2d at 883.

Within the group of criminal defendants who have been convicted based upon trial errors as shown by the record

made in the district court, S.F.589 has singled out for disparate treatment those wrongly-convicted defendants who assert a violation of their constitutional right to effective assistance of counsel. Strict scrutiny should apply because McGee's claim of disparate treatment involves the deprivation of a fundamental right – the right to effective counsel. U.S. v. Cronic, 466 U.S. 648, 654 (1984).

Regardless of whether considered under strict or rational scrutiny, S.F.589 cannot stand. The stated purpose of the bill is to reduce "waste" caused by "frivolous appeals" in the criminal justice system. Senate Video 2019-03-28 at 1:49:10-1:49:20, statements of Senator Dawson, available at https://www.legis.iowa.gov/dashboard?view=video&chamber=S&clip=s20190328125735925&dt=2019-03-28&offset=3054&bill=SF%20589&status=i. But "[p]reserving ineffective assistance of counsel claims that can be resolved on direct appeal wastes time and resources." State v. Truesdell, 679 N.W.2d 611, 616 (Iowa 2004). To the extent S.F.589

prevents appellate courts from ruling upon claims of ineffective assistance *even where the existing record establishes both the breach and prejudice prongs of the claim*, the bill is neither narrowly tailored nor rationally related to its legislative purpose – rather it directly contravenes it.

c). Due Process and Right to Effective Appellate Counsel

Both the Iowa and U.S. Constitutions ensure criminal defendants are accorded due process of law, and the right to effective assistance of counsel. U.S. Const. amends VI, XIV; Iowa Const. art. I §§ 9-10. The right to counsel (obligatory on states under the federal due process clause) extends to a first appeal as of right. Evitts v. Lucey, 469 U.S. 387, 396 (1985).

Section 31 of S.F.589 violates McGee's right to counsel on appeal and, therefore his right to due process, by interfering with appellate counsel's ability to effectively represent him. It purports to prohibit an appellate court from deciding his claims of ineffective assistance on direct appeal even though the direct appeal record conclusively establishes

his claim for relief. Where a state provides an appeal as of right but refuses to allow a defendant fair opportunity to obtain adjudication on the merits of the appeal, the "right" to appeal does not comport with due process. Evitts, 469 U.S. at 405. A state's system of appeal cannot "extinguish" a defendant's ability to invalidate his conviction merely because his "right to effective assistance of counsel… has been violated". Id. at 399-400. In doing just that, S.F.589 denies McGee due process and the right to effective assistance of counsel on appeal.

III). If error was not properly preserved on the issues raised in Division I, relief must be granted under Plain Error review.

A. Preservation of Error: Plain error review may be available despite the absence of error preservation below. United States v. Atkinson, 297 U.S. 157, 160 (1936).

B. Standard of Review: The U.S. Supreme Court utilizes a three-part standard for plain error review, requiring: (1) an error, meaning a "[d]eviation from a legal rule", which

has not been affirmatively waived; (2) that the error be plain, meaning clear or obvious; and (3) that the error affect substantial rights, meaning in most cases that the defendant must prove the error was prejudicial in that it affected the outcome below. U.S. v. Olano, 507 U.S. 725, 732-34 (1993). If these first three requirements are met, the appellate court may exercise its discretion to correct the error, if the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." Johnson v. United States, 520 U.S. 461, 466-467 (1997).

C. Discussion: Plain error review has been employed by federal courts since 1896. Wiborg v. United States, 163 U.S. 632, 658 (1896); Jon M. Woodruff, Note, Plain Error by Another Name: Are Ineffective Assistance of Counsel Claims a Suitable Alternative to Plain Error Review in Iowa?, 102 Iowa L. Rev. 1811, 1815 (May 2017). Similar authority has since been recognized by a majority of jurisdictions. Wayne R. LaFave et al., 7 Criminal Procedure, § 27.5(d) (4th ed.

November 2018 update); Tory A. Weigand, Raise or Lose: Appellate Discretion and Principled Decision-Making, 17 Suffolk J. Trial & App. Advoc. 179, 199-241 (2012).

Iowa courts have historically declined to adopt a plain error doctrine. State v. Johnson, 272 N.W.2d 480, 484 (Iowa 1978); State v. Rinehart, 283 N.W.2d 319, 324 (Iowa 1979); State v. Rutledge, 600 N.W.2d 324, 325 (Iowa 1999); State v. McCright, 569 N.W.2d 605, 607 (Iowa 1997). However, this position has co-existed with Iowa Appellate Courts' ability to nevertheless redress plain and prejudicial unpreserved errors on direct appeal under an ineffective assistance of counsel framework where the existing record is adequate to do so. See State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978). Some Iowa jurists have recognized that the ineffective assistance doctrine sometimes functions as a substitute for plain error review of unpreserved claims in Iowa. See e.g., Rhoads v. State, 848 N.W.2d 22, 33 (Iowa 2014) (Mansfield, J., specially concurring, joined by Waterman, J.); State v. Sahinovic, No. 15-0737,

2016 WL 1683039, at *2 (Iowa Ct. App. April 27, 2016) (McDonald, J., concurring).

Our Iowa Supreme Court has previously adopted exceptions to the usual error preservation rules. See State v. Lucas, 323 N.W.2d 228, 232 (Iowa 1982); State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994). It should do so again to recognize the plain error doctrine. The Iowa Constitution vests in our Supreme Court inherent supervisory authority over lower courts, which permits the Court to implement necessary procedures to protect the rights of criminal defendants. Iowa Const. art V, § 4; State v. Dahl, 874 N.W.2d 348, 350 (Iowa 2016). Additionally, Iowa Code section 814.20 gives the appellate courts broad authority to affirm, modify, or reverse a judgment, order a new trial, or reduce a defendant's punishment. Iowa Code § 814.20 (2017). See State v. Young, 292 N.W.2d 432, 435 (Iowa 1980).

Plain error review is applicable to suppression matters. See e.g., State v. Miller, 814 S.E.2d 81, 85 (N.C. 2018). To the

extent suppression issues are deemed evidentiary errors, plain error review is applicable to evidentiary errors also. See 12 Fed. Proc., L. Ed. § 33:21, *When may error be predicated upon an evidentiary ruling - Notice of plain error* (evidentiary errors); United States v. Williams, 133 F.3d 1048, 1051 (7th Cir. 1998); United States v. Hill, 749 F.3d 1250, 1251 (10th Cir. 2014); State v. Mendoza-Lazaro, 200 P.3d 167, 170 (Or. Ct. App. 2008); United States v. Morales, 477 F.2d 1309, 1315 (5th Cir. 1973).

For the reasons discussed in Divisions I and II, the improper admission of the chemical testing evidence amounted to constitutional and statutory error, plain on its face, and affected Defendant's substantial rights in that it affected the outcome of the trial proceeding below. If relief is not granted as preserved error or under an ineffective assistance of counsel framework, relief should nevertheless be afforded as plain error.

CONCLUSION

McGee requests the Court reverse his conviction, and remand for suppression of all evidence flowing from the stop, with directions that any retrial be limited only to the "any amount" alternative (as the district court already acquitted McGee on the "under the influence" alternative).

REQUEST FOR ORAL ARGUMENT

Counsel requests oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $7.84, and that amount has been paid in full by the Office of the Appellate Defender.

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/s/ Vidhya K. Reddy Dated: *8/12/20*

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