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IN THE SUPREME COURT OF IOWA
Supreme Court No. 22-1531

STATE OF IOWA,
Plaintiff-Appellant,

vs.

MORGAN MARIE MCMICKLE,
Defendant-Appellee.

ON DISCRETIONARY REVIEW FROM THE
IOWA DISTRICT COURT FOR BOONE COUNTY
THE HONORABLE STEPHEN A. OWEN, JUDGE

APPELLANT'S REPLY BRIEF

BRENNA BIRD
Attorney General of Iowa

THOMAS E. BAKKE
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
(515) 281-8894 (fax)
Thomas.Bakke@ag.iowa.gov

MATTHEW SPEERS
Boone County Attorney

DANIEL BREITBARTH
Assistant Boone County Attorney

ATTORNEYS FOR PLAINTIFF-APPELLANT

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Implied Consent Procedures are Not the Exclusive Means to Obtain Chemical Testing, and it Offends Neither Due Process nor Equal Protection for an Officer to Obtain a Search Warrant.

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ROUTING STATEMENT

The State again asserts retention is unnecessary. As stated in the State's initial brief, the district court's grant of suppression conflicts with authority published by both the Iowa Supreme Court and the Iowa Court of Appeals. McMickle's brief underscores the point. Appearing to recognize the district court's order conflicted with established law, she spends much of her brief arguing for the first time on appeal that decades of published authority conflicting with the district court's order should be overruled. *See* Appellee's Br. at 32–40 (asking the court to overrule or limit the holdings in *State v. Oakley*, 469 N.W.2d 681 (Iowa 1991), *State v. Demaray*, 704 N.W.2d 60 (Iowa 2005), and *State v. Frescoln*, 911 N.W.2d 450 (Iowa Ct. App. 2017)). But the existence of these published authorities shows all that is required is the application of existing legal principles.

This conclusion is also bolstered because following submission of McMickle's proof brief the Iowa Court of Appeals issued a publication order for its opinion in *State v. Dewbre*, No. 21-1150, ___ N.W.2d ____, 2022 WL 10861226, at *1–5 (Iowa Ct. App. Oct. 19, 2022). That opinion recognized no due process violation exists where an officer has provided more process and safeguards by pursuing a

search warrant rather than invoking implied consent, directly undermining the district court's erroneous order here. *Dewbre*, ___ N.W.2d at ____, 2022 WL 10861226, at *3. Transfer is appropriate. Iowa R. App. P. 6.1101(3)(a).

ARGUMENT

I. Implied Consent Procedures are Not the Exclusive Means to Obtain Chemical Testing, and it Offends Neither Due Process nor Equal Protection for an Officer to Obtain a Search Warrant.

Preservation of Error

McMickle argues the State cannot challenge the district court's grant of her motion to suppress. Appellee's Br. at 45. She reasons that because the State did not "mention[] the words[] 'due process', 'equal protection' or even 'constitution' in [its] written resistance or in the record" below, the State has "waived any constitutional arguments on this issue . . . ." Appellee's Br. at 45. This argument misapprehends preservation of error for appeal.

In support of her assertion error is not preserved, McMickle cites *State v. Baldon*, 829 N.W.2d 785, 789 (Iowa 2013). But that was a case in which the State—as Appellee—failed to present an alternative ground to deny a motion to suppress to the district court.

Accord DeVoss v. State, 648 N.W.2d 56, 63 (Iowa 2002). The procedural posture of this case is easily distinguishable.

Here, McMickle urged the court to grant suppression, and a portion of her reasoning was based on a violation of due process and equal protection. Mot. Supp.; App. 6–11. The State resisted her motion, requesting the court issue an order "denying the motion to suppress." Resistance at 1; App. 12. Directly on point with the issues raised in this appeal, the State specifically argued "implied consent isn't the exclusive way for law enforcement to obtain a sample from a suspected intoxicated driver, the search warrant is a tool dedicated for this purpose as well." Resistance at 4; App. 15. The district court overruled the State's objection. Ruling Granting Supp.; App. 17–36. The State—as Appellant not Appellee—now challenges the district court's order granting McMickle's motion to suppress over the State's objections. The State's argument was preserved.

In comparison, the same argument McMickle attempts to use to assert the State has not preserved error for its appeal rules out aspects of her own arguments. For the first time on appeal, McMickle asks this Court to overrule decades of precedent that directly conflict with the district court's erroneous grant of suppression. *See*

Appellee's Br. at 32–40. But because this argument was not raised in the district court, it cannot now be raised on appeal. *See* Mot. Supp. (failing to even mention the cases McMickle now argues should be overruled or limited); App. 6–11.

Merits

McMickle's brief misunderstands the implied consent and search warrant framework. Although more could be said about the inaccuracy of many assertions contained in her brief, the State attempts to reply to the overarching themes contained in it. Her arguments are flawed and do not support the district court's order incorrectly finding an officer's decision to obtain a search warrant violated equal protection and due process principles.

"The concept of 'implied consent' was first introduced into law in 1963 as a purely administrative concept." Rachel Hjelmaas, *Iowa Legislative Services Agency*, *Legislative Guide to Operating While Intoxicated (OWI) Law in Iowa* at 1 (2007), *available at* https://www.legis.iowa.gov/DOCS/Central/Guides/OWI.pdf (footnote omitted). "The general purpose of the statute is 'to reduce the holocaust on our highways part of which is due to the driver who imbibes too freely of intoxicating liquor.' " *State v. Hitchens*, 294

N.W.2d 686, 687 (Iowa 1980) (*quoting Severson v. Sueppel*, 152 N.W.2d 281, 284 (Iowa 1967)). The State has a "paramount interest" in preserving the safety of its public highways, and this is all the more true because alcohol consumption continues to be "a leading cause of traffic fatalities and injuries." *Birchfield v. North Dakota*, 579 U.S. 438, 464–65 (2016). Chapter 808 search warrants further the State's interests in pursuit of this critical goal, and such search warrants neither offends equal protection nor due process principles.

At its essence there are two paths an officer may take when investigating a suspected intoxicated driver of which the invocation of implied consent is the turning point. *See Frescoln*, 911 N.W.2d at 453–54. Under current law, once an officer invokes implied consent, they ordinarily will not be able to obtain a bodily specimen if consent is refused. *Id.* (citing *Hitchens*, 294 N.W.2d at 687–88); Iowa Code § 321J.9(1). Even in this pathway exceptions still exist in limited circumstances, but ordinarily an officer will not be permitted to change over to the non-implied consent path by obtaining a search warrant. *See* Iowa Code § 321J.10 (authorizing warrants even after refusal of implied consent in cases involving death or injury likely to cause death). At the same time, this limitation does not mean an

officer is prohibited from not pursuing this path at all. *Demaray*, 704 N.W.2d at 63–64 ("[T]he statutory implied consent procedure must be followed, but only when the implied consent procedures are invoked."); *Frescoln*, 911 N.W.2d at 453–55.

The non-implied consent path is not as enigmatic or complex as McMickle portrays it. This would be the same path if an officer decided there was sufficient evidence of impairment and chemical testing would be unnecessary or overly time consuming. *See* Iowa Code § 321J.2(1)(a). In any event, McMickle's concerns are overstated. For example, McMickle questions whether she would be permitted to obtain an independent chemical test under section 321J.11. Appellee's Br. at 29. Yet the Iowa Court of Appeals has already recognized this statutory right applies when testing was conducted by warrant. *See State v. Chambers*, No. 20-1511, 2021 WL 3893906, at *5–7 (Iowa Ct. App. Sept. 1, 2021).

Similarly, McMickle questions whether it would be necessary for the testing procedures outlined in Iowa Code section 321J.11 to be followed. Appellee's Br. at 29. But again, nothing in 321J.11 (or section 321J.15) states its provisions applies exclusively to testing conducted after the invocation of implied consent. And, the

legislature recognized, and approved of, the possibility that evidence may be obtained through means other than those outlined in chapter 321J. *See* Iowa Code § 321J.18. And because the testing procedures contained in section 321J.11 would appear to apply, a defendant would still be eligible for deferred judgment by the plain language of the statute. *See* Iowa Code § 321J.2(3)(b)(2)(a) (permitting a deferred judgment when analysis of a bodily specimen "withdrawn in accordance with this chapter" does not exceed .15 BAC). In any event, our courts will certainly be capable of sorting out which provisions apply to the non-implied consent pathway, and McMickle's assertions and questions exceed the scope of this appeal.

Much of McMickle's complaints center on the premise that permitting an officer to choose between invoking implied consent and applying for a warrant grants them unfettered discretion. Appellee's Br. at 24–25. This is not so.

McMickle notes the implied consent procedures include limitations that, in part, protect the public from indiscriminate testing or harassment. Appellee's Br. at 20. True. The Iowa Supreme Court has recognized "the legislature incorporated limitations on the State's ability to conduct a *warrantless search* of a suspected drunk

driver." *State v. Palmer*, 554 N.W.2d 859, 862 (Iowa 1996) (emphasis added). These protections make sense considering the warrantless nature of the searches. That is, because police conduct them without prior court oversight, additional measures are necessary to avoid indiscriminate testing or harassment.

McMickle then pivots to assert that if an officer can instead obtain a search warrant their decision to do so is unfettered. Appellee's Br. at 21, 24–25. Not true. When an officer seeks a search warrant, the discretion to obtain chemical testing is removed from their hands:

> Implied consent is invoked based on the judgment made by the officer. In contrast, a warrant is issued based on probable cause findings of a neutral and detached third party—the judicial officer issuing the warrant. . . . By seeking a warrant, the officer provide[s] . . . more safeguards than if the officer had relied on implied-consent procedures.

Dewbre, ___ N.W.2d at ___, 2022 WL 10861226, at *3.

Because more safeguards are in place by obtaining a judicially approved warrant, McMickle and other defendants will receive more protection and more process than they would under implied consent. *Cf. id.* ("We find Dewbre's claim unpersuasive that her due process rights protecting her against self-incrimination were violated by

providing her with more process and more judicial oversight than Iowa Code chapter 321J requires."). A neutral and detached magistrate will evaluate whether probable cause exists to obtain a specimen. The requirements for issuance of warrants that chapter 808 provides furthers the legislature's intent.

When an officer takes the time to obtain a search warrant before obtaining a sample for chemical testing they should be commended, not condemned. Such action is precisely what our appellate courts have gestured. *E.g.*, *State v. Pettijohn*, 899 N.W.2d 1, 22–23 (Iowa 2017), *overruled by State v. Kilby*, 961 N.W.2d 374, 378 (Iowa 2021); *see State v. Angel*, 893 N.W.2d 904, 911 (Iowa 2017) (noting preference for warrants). Little surprise officers and prosecutors have complied. At the same time, although they are not entitled to it, defendants subject to these search warrants receive more safeguards than they would if the officer had simply invoked implied consent. *See Dewbre*, ___ N.W.2d at ___, 2022 WL 10861226, at *3.

The implied consent regime was not created to provide defendants greater rights than they already possessed. It facilitates testing of suspected impaired drivers. *See* Iowa Code § 321J.23.

Recognizing this, the Wisconsin Supreme Court has explained that implied consent laws should be liberally construed:

> It is not our understanding, however, that the implied consent law was intended to give greater rights to an alleged drunken driver than were constitutionally afforded theretofore. . . . It was intended to facilitate the taking of tests for intoxication and not to inhibit the ability of the state to remove drunken drivers from the highway. In light of that purpose, it must be liberally construed to effectuate its policies.

Scales v. State, 219 N.W.2d 286, 291–91 (Wis. 1974); *accord Parsons v. Comm'r of Pub. Safety*, 488 N.W.2d 500, 502 (Minn. Ct. App. 1992) ("[T]he implied consent law is remedial in nature, and the laws are liberally interpreted in favor of the public interest, and against the private interests of the drivers."); *State Dep't of Motor Vehicles & Pub. Safety v. Brough*, 796 P.2d 1089, 1092 (Nev. 1990) ("[T]his court has consistently followed a liberal interpretation of the implied consent laws for sound public safety reasons."). The Iowa Supreme Court has similarly used a liberal interpretation for our implied consent laws. *See Schmoldt v. Stokes*, 275 N.W.2d 209, 210 (Iowa 1979) (recognizing when interpreting implied consent statute, the court should "place on it a reasonable or liberal construction which will best serve its purpose rather than one which will defeat it"

(quoting *Krueger v. Fulton*, 169 N.W.2d 875, 877–78 (Iowa 1969)). In this context, it makes little sense to find that officers cannot obtain test results through other constitutionally permissible means. Such undermines the intent of the legislature to protect the highways with prompt intervention[1] and deter drunk driving by obtaining convictions for violations. Iowa Code § 321J.23.

Now that electronic warrants are becoming an available investigative tool, officers may utilize them in a more streamlined manner than what was possible in the past. If issued, the warrants produce identical evidence to that of implied consent. And they equally promote safety of the highways by ensuring compliance with drunk driving laws. They equally reduce the possibility of accident or injury to the motoring public.

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[1] Although search warrants are necessarily not as expeditious as simply invoking implied consent because they require completion of a search warrant package and judicial review, the recently expanded electronic warrant pilot project has made search warrants a viable option in some OWI investigations and they can be obtained without all the delays that accompanied the traditional process, such as travelling to the magistrate's location. *See* Iowa Sup. Ct. Supervisory Order, *In the Matter of Establishment of the Electronic Search Warrant Pilot Project* (Apr. 27, 2020); Iowa Sup. Ct. Second Amended Memorandum of Operation, *In the Matter of Establishment of the Electronic Search Warrant Pilot Project* (Sept. 1, 2022) (updating and expanding the operation of the pilot project to all counties).

The review of whether a search is permissible comes down to whether the search is reasonable. Disregarding this, McMickle argues permitting officers to obtain search warrants will lead to a "slippery slope which allows the state to withdraw *any* bodily substance without limitation which could theoretically include semen, bile, a section of skin, a toenail, an organ, an egg, or even an embryo that has not yet reached vitality." Appellee's Br. at 44 (emphasis in original). This argument is illogical. McMickle's argument is necessarily premised on a fundamental mistrust of our courts and judicial officers that is not shared by the State. It is implausible that a magistrate or judge of our courts would grant the extreme warrants McMickle envisions in an OWI investigation. Reasonableness will control, and unlike the examples above, a blood draw pursuant to a warrant is reasonable. *See Schmerber v. California*, 384 U.S. 757, 770 (1966) ("[W]e are satisfied that the test chosen to measure petitioner's blood-alcohol level was a reasonable one. Extraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol. Such tests are a commonplace in these days of periodic physical examination and experience with them teaches that the quantity of

blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain." (internal citation and footnote omitted)). In any event, having increased judicial oversight and approval prior to chemical testing occurring will lessen, not increase, the likelihood of unreasonable searches.

McMickle asserts the legislature intended the implied consent statutes to apply to all operating while intoxicated cases. *See* Appellee's Br. at 25. Her argument largely focuses on the language providing the enactment date of the revised version of implied consent, Iowa Code chapter 321J, which replaced the then-current version, Iowa Code chapter 321B. *See* Appellee's Br. at 25. This argument mischaracterizes the enactment of chapter 321J. It makes sense the legislature would define a date certain when the newly enacted chapter of the Code should be used in place of the prior version. It defies accepted principles of statutory construction to read the language setting an enactment date as implicitly prohibiting search warrants under Iowa Code chapter 808 where no such language is included. *See State v. Schultz*, 604 N.W.2d 60, 62 (Iowa 1999); *cf. Frescoln*, 911 N.W.2d at 454 (declining attempt to read implied consent statute in a manner that would make it the exclusive

means for law enforcement to obtain test results). If the legislature wanted to prohibit search warrants under chapter 808 it could have included language to do so. It did not. In fact, the legislature appears to have done the opposite by specifically declaring other competent evidence may be used in an OWI investigation. Iowa Code § 321J.18; *see Demaray*, 704 N.W.2d at 63–64 (recognizing section 321J.18 answers the exclusive-means question).

McMickle then asserts the Iowa Supreme Court has already recognized section 321J.6 contains the "conditions limiting the circumstances under which Iowa peace officers may require submission to chemical testing." Appellee's Br. at 26 (quoting *State v. Palmer*, 554 N.W.2d 859, 862 (Iowa 1996)). But in making this argument McMickle hurts her own position because she omits critical language in the sentence immediately preceding the one she quoted. True, the court did recognize section 321J.6 provides limiting conditions, but it did so in the clear context of recognizing "the legislature incorporated limitations on the State's ability to conduct a *warrantless* search of a suspected drunk driver." *Palmer*, 554 N.W.2d at 862 (emphasis added). It is logical that a statutorily crafted mechanism to implement a warrant exception would come with

limitations that would be unnecessary for a search warrant because prior judicial oversight is absent. When an officer seeks a warrant, the court acts as the limitation and check on reasonableness.

McMickle attempts to argue the legislature has included language in chapter 321J that expressly precludes warrants under chapter 808. *See* Appellee's Br. at 24, 27. To come to this conclusion McMickle relies on sections 321J.9, 321J.10, and 321J.10A. Her interpretation and application of these sections is incorrect.

Section 321J.9 provides "[i]f a person refuses to submit to the chemical testing, a test shall not be given." But the application of this section is not as broad as McMickle believes. The application of this section is specifically invoked when implied consent is refused. Iowa Code § 321J.6(2) ("Refusal to submit to a chemical test of urine or breath is deemed a refusal to submit, *and section 321J.9 applies*." (emphasis added)). If the section was intended to apply broadly to every chemical test, including chemical testing pursuant to a search warrant or other means, it is illogical the legislature would find it necessary to specifically invoke the section when implied consent is refused. *See also* Iowa Code § 321J.10(5) ("Also, if the withdrawal of a specimen is so resisted or obstructed, sections 321J.9 and 321J.16

apply.”). This leads to the logical and sensible conclusion that the section was only intended to apply to refusals of implied consent or where it is otherwise specifically invoked by the legislature. This is reinforced because section 321J.9 includes administrative penalties when a refusal occurs, and presumably McMickle is not asserting the legislature intended such sanctions to apply implicitly where the legislature has not expressly stated they do.

McMickle next wonders why the legislature felt it necessary to enact sections 321J.10 and 321J.10A, which provide mechanisms to conduct chemical testing despite a refusal of implied consent in cases of accidents resulting in death or injury reasonably likely to cause death. *See* Appellee’s Br. at 27–28. There is no reason to wonder. Iowa Code section 321J.10 was enacted after the Iowa Supreme Court’s decision in *State v. Hitchens* which held that adherence with the language of section 321J.9 requires that a warrant may not be obtained after implied consent is refused. 294 N.W.2d at 687–88. In a partial showing of legislative dissent, less than two years after *Hitchens* was decided, the legislature enacted the predecessor to section 321J.10 for cases involving accidents resulting in a death or injuries likely to cause death. 1982 Iowa Acts ch. 1167 § 16 (codified at

Iowa Code § 321B.14 (1983)). The legislature thus crafted a means to permit search warrants in certain cases even after implied consent was refused: "[r]efusal to consent to a test under section 321B.3[, now section 321J.6,] does not prohibit the withdrawal of a specimen for chemical testing pursuant to a search warrant . . . ." *Id.* It appears clear the legislature's intent in enacting this statute was to ensure testing could still be performed in death cases even if an officer first invoked implied consent and the suspected drunk driver refused testing. In contrast, if implied consent was never invoked then its accompanying limitations would not apply. An officer would not need special legislative authorization to obtain a warrant because *Hitchens*'s prohibition would not apply. *Oakley*, 469 N.W.2d at 682–83; *cf. Demaray*, 704 N.W.2d at 63–64 ("[T]he statutory implied consent procedure must be followed, but only when the implied consent procedures are invoked."). McMickle's interpretation that this section reveals a legislative intent to prohibit search warrants in any other cases is flawed. The language of the statute does not support this position as nothing states this section provides the sole or exclusive means to obtain a search warrant in an OWI investigation. *Oakley*, 469 N.W.2d at 682–83.

In an attempt to undermine the published authority that directly contradicts her arguments, McMickle asserts there is a conflict between those authorities and *State v. Rains*, 574 N.W.2d 904 (Iowa 1998). She relies on *Rains*'s interpretation of dicta contained in a footnote from another opinion, *State v. Stanford*, 474 N.W.2d 573, 575 n.1 (Iowa 1991), to assert that warrants for production of specimens for chemical testing are not permissible. *See Rains*, 574 N.W.2d at 913; Appellee's Br. at 39–40; *see also Boyles v. Cora*, 6 N.W.2d 401, 413 (Iowa 1942) (defining dictum as "passing expressions of the court, wholly unnecessary to the decision of the matters before the court"). But when examined closer, the language McMickle relies on has minimal significance. The Court was clear what it was "interpreting" was the footnote in *Stanford*, not the statutes themselves. *Rains*, 574 N.W.2d at 913. Because the footnote in *Stanford* was merely dictum, and thus itself of limited value, the value of the later interpretation of that dictum in *Rains* is just as limited and not binding on the question. *See Brady v. Welsh*, 204 N.W. 235, 237 (Iowa 1925) (observing even if prior statement is correct expression of the Court, if it is dictum then it is not binding).

This Court should decline to find *Rains*'s passing discussion controlling as McMickle urges.

Finally, McMickle's attempt to breathe life into the district court's underdeveloped due process and equal protection analyses should be rejected. As noted in the State's initial brief, the district court did not apply traditional equal protection or due process principles before concluding that these rights were violated by the officer's action of obtaining a judicially approved search warrant. Appellant's Br. at 30. Although McMickle attempts to incorporate such analysis now, her attempt should be rejected. This Court should find no constitutional violation occurred when an officer sought a warrant rather than invoke implied consent.

At the outset, McMickle attempts to confuse the equal protection analysis by arguing the court need not find she is similarly situated to defendants who endured implied consent procedures. *See* Appellee's Br. at 46. But skipping this threshold question is unreasoned and should be rejected. *See, e.g.*, *State v. Tucker*, 959 N.W.2d 140, 146 (Iowa 2021); *Nguyen v. State*, 878 N.W.2d 744, 758 (Iowa 2016) ("The first step in our equal protection analysis under the

Iowa Constitution is to determine whether there is a distinction made between similarly situated individuals.”).

McMickle claims she is similarly situated to those who have had implied consent invoked by an officer. *See* Appellee’s Br. at 48. But this is not so. When an officer invokes implied consent, they are effectively requesting to perform a warrantless search and they have also triggered various administrative consequences and driving restrictions. *See* Iowa Code §§ 312J.9, .12. Suspects in those cases must decide whether to consent or to refuse and they must contemplate the consequences of doing so. In contrast, when an officer requests a search warrant, they must obtain prior approval from the court and the administrative sanctions are not implicated as part of the chemical testing. The two are not similarly situated. *Cf. State v. Melchert*, No. 20-1301, 2021 WL 4592647, at *4 (Iowa Ct. App. Oct. 6, 2021) (declining to find all persons under investigation by an officer for OWI similarly situated).

In any event, McMickle has still failed to show the officer’s exercise of discretion to obtain a search warrant from the court deprived her of her Fourth Amendment rights or was based on invidious discrimination or bad faith by the State, and so no equal

protection violation has been shown. *Cf. State v. Apt*, 244 N.W.2d 801, 804 (Iowa 1976); *State v. Walker*, 236 N.W.2d 292, 295 (Iowa 1975); *Yachnin v. Village of Libertyville*, 803 F. Supp. 2d 844, 855 (N.D. Ill. 2011) ("[T]he hearing to issue a search warrant required a neutral judge to find probable cause to further investigate Yachnin's blood-alcohol-level. This finding of probable cause satisfies the rational basis requirement for Defendants' actions relating to the search warrant."); *Boutto v. Comm'r of Pub. Safety*, No. A16-0391, 2016 WL 4497541, at *1 (Minn. Ct. App. Aug. 29, 2016). "[E]qual protection is not violated every time public officials apply facially neutral state laws differently." *Sheehan v. Franken (In re Contest of Gen. Election)*, 767 N.W.2d 453, 464 (Minn. 2009) (per curiam).

The argument that principles of due process were violated because an officer sought, and obtained, a search warrant is puzzling. There simply is no fundamental unfairness when an officer declines to do only the constitutional minimum (a warrantless search through the invocation of implied consent) and instead seeks judicial approval before conducting chemical testing. As discussed earlier, the Iowa Court of Appeals has recently noted in a published opinion that an analogous argument was "unpersuasive" because an officer's decision

to request a warrant "provid[ed] . . . more process and more judicial oversight than Iowa Code chapter 321J requires." *Dewbre*, ___ N.W.2d at ___, 2022 WL 10861226, at *3. The same is true for McMickle's claim. She received more process—or at a minimum more judicial oversight—than she was entitled because the officer could have instead relied on a warrantless search, and she would have received administrative sanctions as a result of the invocation of implied consent whether she had consented or refused. *See* Iowa Code §§ 321J.6, .9, .12. The issuance and execution of a warrant does not violate McMickle's due process rights. *Cf. Walden v. Carmack*, 156 F.3d 861, 874 (8th Cir. 1998) (finding no due process violation by issuance or execution of search warrant obtained following finding of probable cause by neutral and detached judicial officer).

This Court should find—as it has before—that the implied consent procedures are not the exclusive means to obtain a sample for chemical testing in an OWI investigation. The district court's order was erroneous. It should be reversed.

II. The District Court's Overly Broad Application of the Exclusionary Rule was Untethered to the Improprieties it Found.

Preservation of Error

McMickle again attempts to challenge the State's arguments by asserting they were not preserved below. Appellee's Br. at 56–57. But her argument lacks merit because it overlooks the State's resistance to the motion to suppress. Resistance to Supp. at 1–3; App. 12–14. There, the State specifically argued the exclusionary rule should not be applied to the fruits of the search warrant obtained on evidence "gathered within the first few minutes of Deputy Benjamin's interaction with the defendant on the side of the road," and that suppression based on an 804.20 violation "would not coincide with the purpose of the exclusionary rule . . . ." Resistance to Supp. at 3; App. 14. The district court disagreed. *See* Ruling Granting Supp. at 18; App. 34. Error was preserved. *Lamasters v. State*, 821 N.W.2d 856, 862 (Iowa 2012).

Merits

The State briefly responds in two points regarding the district court's overbroad application of the exclusionary rule. First, McMickle's assertion that the State's argument is precluded by *State v. Moorehead*, 699 N.W.2d 667 (Iowa 2005) is incorrect. Second, the

State objects to McMickle's assertion that the exclusionary rule should apply so drunk defendants going forward will be entitled to receive questionable legal advice that they may unlawfully object to, and physically resist, the execution of a judicially issued search warrants.

First, McMickle's reading of *Moorehead* is incorrect. She asserts that *Moorehead* requires suppression of "*any* evidence obtained following a violation" of section 804.20 unless the evidence is spontaneously provided. Appellee's Br. at 58 (emphasis in original). But *Moorehead* contains no such holding, nor should it. 699 N.W.2d at 674–75. Instead, *Moorehead* recognized any non-spontaneous statements observed after a violation of section 804.20 may be suppressed. *Id.* But that holding does not fit the issue before the Court.

As discussed in the State's initial brief, where evidence is obtained independent of an illegality, exclusion is not warranted. *E.g.*, *Nix v. Williams*, 467 U.S. 431, 443–44 (1984). Such is the case here. The search warrant was obtained with observations made by the officer within the first minutes of the encounter with McMickle. Resistance at p.3; *see* Search Warrant Appl.; App. 14, 39–49. Thus,

the application and the resulting search warrant were free from any possible taint of the purported 804.20 violation.

As a counterfactual, had the search warrant application been comprised entirely of non-spontaneous statements all obtained after an 804.20 violation occurred, it is likely exclusion of the fruits of the warrant may have been appropriate.[2] But that was not the case because *nothing* in the search warrant application included such statements. It was error to grant suppression.

Second, McMickle argues the exclusionary rule should apply because a defendant must receive an 804.20 advisory so they can be advised they may resist execution of the warrant. Appellee's Br. at 59. At the same time McMickle correctly recognizes this conduct would be "contemptuous." *Id.* This Court should reject her argument as unsound, encouraging violent confrontations and undermining compliance with the court's authority.

There is no mistaking what McMickle advocates: contempt of court. At the suppression hearing, McMickle's attorney stated that if

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[2] More accurately, the portions of the warrant application that were subject to exclusion would be excised, and the court would then determine if the remaining contents were sufficient to establish probable cause. *E.g.*, *State v. Watts*, 801 N.W.2d 845, 853 (Iowa 2011); *State v. Groff*, 323 N.W.2d 204, 206–07 (Iowa 1982).

she had been permitted to call him before the execution of the search warrant, he would have advised her she may resist to create a case of forcible execution of a warrant on a person:

> I would have explained to her that I think there's an argument to be made *that she does not have to comply with a search warrant issued under [chapter] 808*, and I would leave it up to her to make that determination as to whether or not she wanted to do that. And this may be a very different case. We have may—be litigating *whether or not [the officers] could have forcibly extracted blood from her had she called me.*

Supp. Tr. 23:2–9 (emphasis added). Nor has McMickle or her attorney backed down. In her resistance to the State's post-ruling motion, McMickle again argued:

> . . . Ms. McMickle may have contacted an attorney who advised her that she does not have to comply with the [search] warrant because they did not have legal authority to do so. An attorney may have advised her that the [S]tate cannot compel her to comply with a warrant for her blood.

Resistance to Mot. Enlarge at ¶ 10(B). Now on appeal, McMickle continues to argue she should have been entitled to consult an attorney or family member so they could have advised her that she could make the "contemptuous" decision to resist execution of the

judicially issued search warrant, intentionally causing a physical confrontation with the police. Appellee's Br. at 59.

McMickle's advocacy that the delay in providing her a phone call precluded her from receiving advice from an attorney that she could physically resist the execution of a warrant should trouble the Court. Resisting execution of a search warrant is a criminal act and constitutes contempt of court. Iowa Code §§ 665.2(3), 719.1(1)(a) ("A person commits interference with official acts when the person . . . knowingly resists or obstructs the service or execution by any authorized person of any civil or criminal process or order of any court."); *see Burns v. Reed*, 500 U.S. 478, 479 (1991) ("[T]he issuance of a warrant is unquestionably a judicial act . . . ."). It also inspires the untenable result of encouraging persons served with a warrant to resist execution through violence when they believe, under their independent interpretation of the law, the warrant to be invalid:

> To hold that an order improvidently issued can be violated with impunity is to invite litigants to resort to the use of force sufficient to maintain their rights as they understand them to be. Such a policy should not be adopted in a

> system of law that prides itself upon having a remedy for every wrong.

Critelli v. Tidrick, 56 N.W.2d 159, 163 (Iowa 1952) (quoting *Glein v. Miller*, 176 N.W. 113, 115 (N.D. 1920)). Additionally, such advice or encouragement likely strays beyond the fine line established by the Rules of Professional Conduct constraining the scope of advice an attorney may provide. *See* Iowa Rs. Prof'l Conduct 32:1.2(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyers knows is criminal or fraudulent . . . ."), 32:3.4(a) (providing an attorney shall not obstruct another party's access to evidence, nor conceal the same, and "shall not counsel or assist another person to do any such act"), 32:8.4(d).

The search warrant and the test results obtained from it were not themselves the product of any unlawful police conduct, and thus exclusion serves no legitimate interest. *See State v. Ramirez*, 895 N.W.2d 884, 897 (Iowa 2017) ("Where those purposes are not furthered, rigid adherence to a rule of exclusion can only frustrate the public interest in the admission of evidence of criminal activity." (quoting *Commonwealth v. Brown*, 925 N.W.2d 845, 851 (Mass. 2010)). McMickle's advocacy does nothing to support the application of the exclusionary rule to suppress the product of a search warrant

that was not itself based on any statements or conduct occurring after the purported violation of section 804.20. Such a result would not serve any legitimate public interest in deterring unlawful conduct. It would (1) encourage possibly violent physical confrontations with police, (2) encourage suspects to commit further crimes by resisting when they disagree with the validity of a warrant, (3) undermine the legitimacy of judicial writs and processes, (4) frustrate the public's interest in the admission of competent evidence at trial, and (5) create an exalted class of criminal defendants immune from lawful process. The public's interest in this evidence is paramount. *See Birchfield*, 579 U.S. at 464. Exclusion was neither appropriate nor justified.

The district court erred. This Court should reverse the order granting suppression.

CONCLUSION

This Court should reverse the district court's order granting suppression of evidence and remand for further proceedings.

Respectfully submitted,

BRENNA BIRD
Attorney General of Iowa

THOMAS E. BAKKE
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
Thomas.Bakke@ag.iowa.gov

CERTIFICATE OF COMPLIANCE

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THOMAS E. BAKKE
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
Thomas.Bakke@ag.iowa.gov