IN THE SUPREME COURT OF IOWA
Supreme Court No. 23–1448
Dubuque County No. OWCR148265

STATE OF IOWA,
Plaintiff-Appellant,

vs.

JEFFREY FLYNN,
Defendant-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR DUBUQUE COUNTY
THE HON. ROBERT J. RICHTER, DISTRICT ASSOCIATE JUDGE

APPELLANT'S REPLY BRIEF

BRENNA BIRD
Attorney General of Iowa

LOUIS S. SLOVEN
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
Louie.Sloven@ag.iowa.gov

SCOTT J. NELSON
Dubuque County Attorney

RYAN J. GALLAGHER
Assistant Dubuque County Attorney

ATTORNEYS FOR PLAINTIFF-APPELLANT

FINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Case

State Cases

State Statutes

STATEMENT OF THE ISSUE IN THE REPLY BRIEF

I. Did the district court err in ruling that implied consent was mandatory, and that Flynn's voluntary consent to provide a breath sample (without a revocation threat) was cause to *suppress* the results of that breath test?

Authorities

Birchfield v. North Dakota, 579 U.S. 438 (2016)
Ackelson v. Manley Toy Direct, LLC, 832 N.W.2d 678 (Iowa 2013)
State v. Demaray, 704 N.W.2d 60 (Iowa 2005)
State v. Frescoln, 911 N.W.2d 450 (Iowa Ct. App. 2017)
State v. Kilby, 961 N.W.2d 374 (Iowa 2021)
State v. Knous, 313 N.W.2d 510 (Iowa 1981)
State v. Lindeman, 555 N.W.2d 693 (Iowa 1996)
State v. McGee, 959 N.W.2d 432 (Iowa 2021)
State v. Overbay, 810 N.W.2d 871 (Iowa 2012)
State v. Palmer, 554 N.W.2d 859 (Iowa 1996)
State v. Thompson, 836 N.W.2d 470 (Iowa 2013)
State v. Vietor, 261 N.W.2d 828 (Iowa 1978)
State v. Wallin, 195 N.W.2d 95 (Iowa 1972)
Iowa Code § 321J.2(3)(b)(2)(d)
Iowa Code § 321J.2(4)(c)
Iowa Code § 321J.4(1)
Iowa Code § 321J.4(2)
Iowa Code § 321J.4(3)
Iowa Code § 321J.6(1)
Iowa Code § 321J.6(2)
Iowa Code § 321J.7
Iowa Code § 321J.8
Iowa Code § 321J.9
Iowa Code § 321J.16
Iowa Code § 321J.18

RESPONSE TO APPELLEE'S ARGUMENT

Flynn cobbles together an assortment of useful-sounding dicta about implied consent, while taking pains to avoid understanding the actual holding of *Demaray*. His policy arguments are also unavailing.

I. Caselaw and statutes that pertain to implied consent limit an officer's power to *demand* a chemical sample under other exceptions to the warrant requirement. Actual consent given in the absence of such a demand is unaffected by those limitations.

Ordinarily, a person has a constitutional right to refuse to give a breath sample, and they cannot be penalized for exercising that right. But once that person is arrested for OWI, it becomes constitutional to *demand* a breath test. That is why an OWI arrestee may be penalized for a test refusal (or even criminally prosecuted for it, in other states). *See State v. Kilby*, 961 N.W.2d 374, 377–83 (Iowa 2021); *State v. Knous*, 313 N.W.2d 510, 511–12 (Iowa 1981); *Birchfield v. North Dakota*, 579 U.S. 438, 458–78 (2016).

Iowa statutes on implied consent limit an officer's ability to use that exception to the warrant requirement to *demand* a chemical test. That is what *Lindeman* meant when it said that Iowa's framework for implied consent "reflects [the legislature's] desire to protect citizens from indiscriminate testing or harassment." *See* Def's Br. at 14, 23–24

(quoting *State v. Lindeman*, 555 N.W.2d 693, 695 (Iowa 1996)). And that is what *Palmer* meant when it stated that implied consent statutes were the legislature's way of "limiting the circumstances under which Iowa peace officers may require submission to chemical testing." *See State v. Palmer*, 554 N.W.2d 859, 862–63 (Iowa 1996); *accord* Def's Br. at 11, 27–28 (citing and quoting *Palmer*, 554 N.W.2d at 862–63).

Flynn's brief uses snippets of seemingly applicable language to claim that provisions of chapter 321J that govern implied consent are also limits on an officer's power to obtain a chemical sample through actual consent—when the test is *offered*, without any sort of assertion of authority to invade that ordinarily protected privacy interest (or to penalize any refusal to submit to that invasion). That makes no sense because those cases are all about a totally different scenario: when an officer invokes implied consent to demand a chemical test sample and threaten/impose penalties for refusal (either through a monetary fine, license revocation, or evidentiary consequences). The difference is that a request to submit to testing under implied consent asserts a right to invade an already-diminished privacy interest—and so the legislature limits when/how officers can assert that right to make such a demand. *See Lindeman*, 555 N.W.2d at 695; *Palmer*, 554 N.W.2d at 862–63.

Asking for *actual consent* to a chemical test is very different because it involves no such assertion of a right to invade that privacy interest, nor any claim that the privacy interest is no longer valid or applicable. Instead, this request assumes the validity of that privacy interest and *honors it*—the person can still decline to provide the test sample and suffer no licensing, evidentiary, or monetary penalty as a result.

Flynn is right that sections 321J.6 and 321J.8 set out limits on what officers can do. But he is wrong to argue that they limit anything other than when and how officers can *demand* a chemical test sample. The legislature recognized that those demands would not violate any constitutional right, so it created a set of limited statutory rights that attach when such a demand is made—including a right to receive this specific advisory on potential consequences of failing/refusing the test (which, like the right to receive that advisory, are contingent upon and only triggered by that formal demand), and an implied right to suppress evidence if the demand for testing is unsupported or improperly made.

But none of that matters when an officer asks for actual consent to a chemical test. Actual consent to a search, when voluntarily given, *waives* a valid privacy interest. Asking for actual consent *honors* that privacy interest, effectively disclaiming any right to barge through it

(at least for the moment in which actual consent is sought). So there is no tension between the idea that these provisions of chapter 321J limit officers' power to demand a chemical test under implied consent, and the idea that those provisions do not apply when officers ask for actual consent to a similar test *without* asserting a right to demand it or threatening consequences for refusal.

The structure of sections 321J.6 and 321J.8 support this. When section 321J.6(1) describes "[t]he withdrawal of the body substances and the test or tests . . . at the written request of the peace officer," it is referring back to the prior sentence—which states that a motorist "is deemed to have given consent to the withdrawal of specimens" if certain conditions are met. *See* Iowa Code § 321J.6(1).[1] So any testing that relies on that imputed/implied consent is within the scope of the "written request" requirement—but testing that does not rely on that imputed consent is *not* subject to that requirement. Section 321J.6(2) picks up the baton by referencing "[t]he peace officer" who is making that request under implied consent, and assigning them the authority

[1] Implied consent is not actual consent. It does not even need to be voluntarily or knowingly given. *Cf.* Iowa Code § 321J.7 (permitting reliance on "the consent provided by section 321J.6" when a motorist is "in a condition rendering the person incapable of consent").

to choose what kind of sample to request—which triggers the option of "[r]efusal to submit." *See id.* § 321J.6(2).[2] And section 321J.8, in turn, only requires an advisory when a person "has been requested *to submit* to a chemical test." *Id.* § 321J.8 (emphasis added). That only happens when a request for a specific test is made under section 321J.6(2), by "[t]he peace officer" who invokes a right to request "the withdrawal of body substances," based on imputed/implied consent that the person "is deemed to have given" when the public's interest in OWI prevention and enforcement are sufficiently strong (in the legislature's view) that they overcome presumptively applicable privacy/autonomy interests and justify threatening or imposing penalties for refusing such a test. *See id.* §§ 321J.6(1)–(2); *accord id.* § 321J.9.

But if the officer simply offers a test and asks for actual consent, there is no request to submit in reliance on imputed/implied consent that is "deemed" already "given." So there are no penalties for refusal, and the advisory set out in section 321J.8 is neither required nor useful (nor accurate). So this reading makes sense and avoids absurd results.

---

[2] Also, note that "a test is not required" if the actual test is not offered within two hours of a PBT, a PBT refusal, or the arrest—which means that submission to a test *is required*, when a test is requested and offered within that timeframe. *See id.* § 321J.6(2).

II. *Demaray* is clear: freestanding actual consent to waive a privacy interest in a chemical sample may be used to collect admissible evidence, in lieu of implied consent. Nothing in *Demaray*'s analysis supports Flynn's claim that it requires some showing of exigency or necessity.

Flynn argues that *Demaray* does not mean what it says about the validity of consent given outside of implied consent, because that requires "extenuating circumstances that prevented [the officer] from complying with the mandatory implied consent procedures." *See* Def's Br. at 20–22. But *Demaray* did not rely on any showing of exigency or necessity as a basis for concluding that officers could use "a means not included within the statute." *See State v. Demaray*, 704 N.W.2d 60, 63 (Iowa 2005). Any such requirement would have no support in the language in chapter 321J. And inferring such a requirement would conflict with section 321J.18, which states that "[t]his chapter does not limit the introduction of any competent evidence . . . including the results of chemical tests of specimens . . . obtained more than two hours after the person was operating a motor vehicle." *See id.* at 63–64 (quoting Iowa Code § 321J.18). Moreover, if the State needed to show necessity or exigency in order to rely on actual consent to waive privacy interests in a test sample, then *Demaray* would have analyzed whether the State made that showing. But it did not do that, anywhere in the opinion.

Neither Flynn's advocacy nor the district court's ruling can withstand the actual text, holding, and logic of *Demaray*:

> We read *Wallin* to stand for the proposition that the statutory implied consent procedure must be followed, but only when the implied consent procedures are invoked. . . . In fact, we specifically stated in *Wallin* that "[c]onsent may be given independent of [chapter 321J]; and the requirement of the implied consent law may be waived." [*State v. Wallin*, 195 N.W.2d 95, 98 (Iowa 1972)].
>
> We now reiterate that the implied consent law is not the exclusive means by which the State may obtain blood test evidence from a defendant in an OWI proceeding. *See* Iowa Code § 321J.18 ("This chapter does not limit the introduction of any competent evidence bearing on the question of whether a person was under the influence of an alcoholic beverage...."). In this case, the officer did not invoke the implied consent procedures, and consequently, we do not judge the admissibility of the blood test under the standards applicable to the implied consent standards. Instead, the blood test was obtained by means of a release of medical records. Thus, we turn to the standard described in section 321J.18, which requires evidence obtained outside the implied consent law to be "competent," . . . .
>
> [. . .]
>
> . . . The district court relied on the broad authority given to the State under the implied consent law to obtain and use blood test results at trial as a reason to strictly limit the scope of the release to use for investigatory purposes, not use in a subsequent criminal prosecution. We disagree with this reasoning.
>
> . . . [T]here is no reason to limit the scope of a medical records release by a defendant because the State *could have* invoked implied consent procedures. Such rationale is contrary to the legislative intent expressed in section 321J.18 for the implied consent statute not to limit other competent evidence of intoxication, including evidence of other tests.

Demaray, 704 N.W.2d at 64–66. This is not circumscribed by a need to establish necessity or exigency—no such requirement exists, because inferring the existence of such a requirement would do precisely what section 321J.18 prohibits: it would read provisions of chapter 321J to limit the admission of otherwise competent evidence of intoxication. That is why *Demaray* did not apply or describe any such limitation.[3] Its statements that "[c]onsent may be obtained independently of the [implied consent] statute" required no qualification. *See id.* at 64, 66.

The legislature could have responded to *Demaray* by amending chapter 321J to *make* it the "the exclusive means by which the State may obtain . . . test evidence from a defendant in an OWI proceeding." *See id.* at 64. But it never did. The argument for reading chapter 321J to prohibit alternative routes to obtaining a valid test sample/result is even worse now than it was when *Demaray* was decided, because the legislature saw no reason to amend section 321J.18 or chapter 321J to abrogate *Demaray*—because everything *Demaray* said was correct. *See Ackelson v. Manley Toy Direct, LLC*, 832 N.W.2d 678, 688 (Iowa 2013).

---

[3] Nor did it remand to the district court to make findings of fact on whether the State had carried a burden to make such a showing—which is what it would likely have done, if the State had such a burden and if the district court had needed to make findings on that issue. *See, e.g.*, *State v. McGee*, 959 N.W.2d 432, 441–42 (Iowa 2021).

Flynn had no choice but to try to characterize most of *Demaray* as dicta, because its actual holding foreclosed his motion to suppress. The district court erred in failing to recognize that *Demaray*'s holding is not limited by any of the arbitrary distinctions that Flynn offered up. *Demaray* made it clear that "[c]onsent may be given independent of [chapter 321J]" and separate from "the implied consent law"—that is what it said, and that statement was a necessary plank of its analysis. *See Demaray*, 704 N.W.2d at 64 (quoting *Wallin*, 195 N.W.2d at 98); *accord id.* ("[T]he officer did not invoke the implied consent procedures, and consequently, we do not judge the admissibility of the blood test under the standards applicable to the implied consent standards."). That is not dicta—it is a holding, and it forecloses Flynn's challenge. The district court erred in failing to recognize that.

III. This is not an expansion of state power, nor does it enable officers to force anyone to give a test sample.

In *Demaray*, there was no need to analyze the voluntariness of Demaray's waiver decision, because Demaray never argued that it was not voluntary. *See id.* at 65. But if there *were* a voluntariness problem, that would render the evidence inadmissible (and also not "competent," so it would be outside the scope of section 321J.18). *See id.* at 64–65. Outside of implied consent, ordinary rules on admissibility still apply.

So Flynn is wrong to argue that reversing the district court's ruling would "seriously curtail the statutory rights and protections afforded to Iowa motorists." *See* Def's Br. at 9–10, 25–26. He still had the right to turn down that request for actual consent, without penalty. He had a right not to have a test specimen drawn without his consent (or without some other legally valid basis for drawing a test sample). And if the State subsequently tried to use such a refusal as through it triggered consequences for "refusal to submit" under implied consent, he could (correctly) point out that none of those could apply, because there was never a "request to submit" that invoked and complied with the statutory framework for implied consent. *See* Def's Br. at 26–27.[4]

---

[4] Flynn raises a number of questions about how to apply various provisions of chapter 321J. *See* Def's Br. at 26–27. The availability of penalties and restrictions that are made contingent on implied consent shows why Flynn is wrong to claim that applying *Demaray* leaves police with no incentives to invoke implied consent in OWI investigations. For example, if Flynn declined this request for actual consent, that would not make him ineligible for a deferred judgment. *See* Iowa Code § 321J.2(3)(b)(2)(d). A deferred judgment would be especially appealing at sentencing in this case, because it provides a route to a license revocation that is not triggered by implied-consent decisions. *See* Iowa Code § 321J.4(3). But that is a rare exception; most routes to revocation *are* contingent on a refusal or a result *via implied consent*. *See* Iowa Code §§ 321J.2(4)(c); 321J.4(1)–(2); 321J.9; & 321J.12. The statute that makes "proof of refusal" automatically admissible at trial is also contingent on "refusal to submit." *See* Iowa Code § 321J.16. So officers have very strong incentives to invoke implied consent if the suspect is anything less than cooperative, or if the stakes are high.

Flynn's reading that makes section 321J.8 *always* mandatory would require officers to read that implied-consent advisory even if they are offering a chemical test as part of an investigation that has nothing to do with OWI, at all. In *State v. Thompson*, police/deputies administered a chemical breath test to an arrestee who was suspected of deliberate and intentional murder—it had nothing to do with OWI and there was no chance of triggering any consequence mentioned in the implied-consent advisory. *See State v. Thompson*, 836 N.W.2d 470, 475 (Iowa 2013). Flynn's advocacy would require police to comply with section 321J.8 anyway, and give an inapplicable/misleading advisory. All that misinformation would be fodder for a voluntariness challenge. Of course, in Flynn's view, there should have been no breath test *at all*: if section 321J.6 is the exclusive route to chemical testing, then it would have been impossible to offer such a test without reasonable grounds to believe that Thompson committed OWI (which they did not have, as he did not operate a vehicle—he just shot his girlfriend in the head). That outcome would make no sense. Fortunately, *Demaray* makes it clear that consent to a chemical test "may be obtained independently of the implied consent law" and "the statutory implied consent procedure." *See Demaray*, 704 N.W.2d at 64–66. That is the only sensible approach.

And what, precisely, is Flynn claiming a right to be "informed" about before he consented to a chemical breath test? *See* Def's Br. at 25 (quoting *State v. Frescoln*, 911 N.W.2d 450, 453 (Iowa Ct. App. 2017)). There were no administrative consequences because the officer did not invoke implied consent. There was only the obvious consequence: that the officer would obtain the results of the test, which might be used as evidence to show Flynn's level of intoxication. Flynn cannot seriously contend that he needed to be informed of that. *See Knous*, 313 N.W.2d at 512 (citing *State v. Vietor*, 261 N.W.2d 828, 830–31 (Iowa 1978)) ("It strains credulity to suggest that a person arrested for OMVUI will not know that if he submits to a chemical test the results may be used against him at trial."). That consequence is so intuitively obvious that the implied-consent advisory need not even mention it. *See* Iowa Code § 321J.8. This means there is zero overlap between the consequences that Flynn suffered (or could suffer) and the content of the implied-consent advisory in section 321J.8—which makes sense, because this is not implied consent.

This illustrates how Flynn's challenge is wholly disconnected from any colorable claim that he was somehow taken advantage of, or that he was otherwise treated unfairly. He voluntarily chose to provide

a breath sample, *outside* of a framework that would have subjected him to fines, licensing penalties, or evidentiary consequences for refusal. The fact that he was not told about inapplicable penalties is not a valid claim of prejudice—indeed, it makes Flynn's decision *more* voluntary, because it was uncluttered with extraneous information about those inapplicable consequences. And the unavailability of those additional consequences redounds to Flynn's benefit, overall. It would be obvious to Flynn (and anyone else) that the officer would see the results of the breath test—and that was the only real consequence of Flynn's decision to provide the sample. Under implied consent, he would have faced the same consequence (without being specifically warned about it), *plus* a panoply of other adverse consequences, arranged to add incentives for him to submit to the request for a chemical test and provide a sample. So where is the prejudice? Flynn has never identified any, nor can he. This sabotages Flynn's claim that suppression is required. *See State v. Overbay*, 810 N.W.2d 871, 879 (Iowa 2012) (stating that suppression is not required if "the defendant would have made the same choice to undergo . . . chemical testing" without the alleged error). More broadly, it illustrates that beneath the rhetoric, Flynn's call to reject *Demaray* exalts technicalities over outcomes, to the benefit of nobody but him.

Implied consent still constrains an officer's power to *demand* a chemical sample without a warrant, and a court's power to impose the specified consequences is contingent on a valid invocation that follows those procedures as set out in the implied-consent statutes. But when a simple request for *actual* consent is made, none of that is applicable. And Flynn had no need for an advisory on inapplicable consequences. The bulwark against government overreach or abuse is a simple one: Flynn could have chosen *not* to consent. Or Flynn could ask a court, in retrospect, to determine that his consent was not voluntarily given. Flynn did neither. He waived his privacy interest in that test sample, outside of implied consent—just like the defendant in *Demaray*. And just like in *Demaray*, the officer could *choose* to rely on that consent and forego statutory procedures for invoking implied consent, because "the implied consent law is not the exclusive means by which the State may obtain [chemical] test evidence from a defendant in an OWI," and "[c]onsent may be obtained independently of the statute." *See Demaray*, 704 N.W.2d at 64, 66; *accord Wallin*, 195 N.W.2d at 98. And neither Flynn nor any other defendant is harmed if an officer selects that route (though officers are mostly incentivized not to). The ruling that granted suppression was clearly in error, and this Court should reverse it.

CONCLUSION

The district court erred in granting Flynn's motion to suppress. This Court should reverse and remand for further proceedings.

REQUEST FOR NONORAL SUBMISSION

This case should be set for nonoral submission. In the event argument is scheduled, the State asks to be heard.

Respectfully submitted,

BRENNA BIRD
Attorney General of Iowa

LOUIS S. SLOVEN
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
Louie.Sloven@ag.iowa.gov

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **3,856** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: January 3, 2024

LOUIS S. SLOVEN
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
Louie.Sloven@ag.iowa.gov