HIGHWAY SAFETY LAW UPDATE

April 4, 2014 Office of the Prosecuting Attorneys Training Coordinator Jan/Feb/March, 2014

"100% Pure Evil" is "controlled substance"

A recently published opinion of the Iowa Court of Appeals holds that possession of a substance packaged and sold as "100% Pure Evil" is a serious misdemeanor, even though the substance (a form of "synthetic marijuana") was not, at time of the offense, specifically identified in the Iowa Code.

In State v. Heinrichs, ___ N.W.2d ___ (Iowa App., 9/18/13) the defendant was found in possession of "100% Pure Evil" in December, 2011. The defendant told officers that the substance was "K-2" (various formulations of which had been added to the list of Iowa's controlled substances in 2011). If the substance had been one of the then-recognized "K-2" synthetics, it would have been specifically listed in the Code and specifically outlawed in Iowa.

However, laboratory analysis revealed that the substance contained in "100% Pure Evil" was "AM2201" a synthetic substance which, at the time of the arrest, was *not* a listed controlled substance. (In 2012, the General Assembly revisited synthetic controlled substances and specifically included "AM2201" to the list of controlled substances. See Iowa Code section 124.204(4)(ai)(5)(b)(xi) (2013).)

The defendant filed a motion to dismiss, arguing that because "AM2201" was not listed in the Iowa Code as a controlled substance at the time of the arrest, a prosecution for possession was a violation of due process. The State responded that Iowa Code section 124.204(4)(u) prohibited possession of such substances *even though they were not specifically identified in the statute.* The trial court denied the defendant's motion to dismiss. The defendant was found guilty and appealed.

The Court of Appeals affirmed the conviction. The Court determined that the following language from Iowa Code section 124.204(4)(u) sufficiently identified "100% Pure Evil" as a controlled substance:

(Controlled substances include, under Iowa Code section 124.204(4)(u):)

"u. Tetrahydrocannabinols, except as otherwise provided by rules of the board for medicinal purposes, meaning tetrahydrocannabinols naturally contained in a plant of the genus Cannabis (Cannabis plant) as well as ***synthetic equivalents of the substances contained in the Cannabis plant***, or in the resinous extractives of such plant, and synthetic substances, derivatives, and their isomers with similar chemical structure and pharmacological activity to those substances contained in the plant, such as the following:. . . . ." (emphasis added)

The Court held that the language of section 124.204(4)(u) was sufficiently specific so that an "ordinary person could understand a chemical substance designed to simulate the hallucinogenic effects of marijuana would be prohibited." Dictionary definitions of the terms "cannabis", "synthetic" and "equivalent" permit an ordinary person to understand that the substance (which the defendant described to police as "K-2") was in fact synthetic marijuana and therefore, a scheduled controlled substance.

Continued on page 2

INSIDE THIS ISSUE

Continued from page 1

Seven months after the defendant's arrest, the General Assembly specifically added "AM2201" to the list of controlled substances in Iowa. However, this legislative action does *not* force the conclusion that before legislative change, "AM2201" was *not* a controlled substance. Such statutory revisions "may indicate either a change in the law or a clarification of existing law. . ." Although the substance was included in the language in section 124.204(4)(u) "the legislature may have just wanted to take a belt-and-suspenders approach by specifically listing AM2201 and several other newly recognized compounds in section 124.204(4)(ai)(5)."

By its determination that unlisted synthetics may be considered "controlled substances", the Heinrichs decision has direct application to Iowa's OWI law, which forbids operation of a motor vehicle "(w)hile any amount of a controlled substance is present in the person, as measured in the person's blood or urine." See Iowa Code section 321J.2(1)(c).

Opinion of the Iowa Supreme Court

Prescription drug defense applies to license revocations

Bearinger v. Iowa Dept. Transp., Motor Veh. Div., __N.W.2d__ (Iowa, 3/14/14) (No. 13-0869, Iowa Supreme Court, filed March 14, 2014.) Justice Waterman. Bearinger "drove her car off the road and destroyed a brick mailbox." She was "upset, shaking, and unsteady on her feet" and told the officer she was taking prescription medicine. The officer believed she was impaired and asked her to go to the police station. A breath test revealed no alcohol in her system but the urine test revealed the presence of prescription medicine. At the DOT hearing, Bearinger's physician testified that the drugs in her system were indeed prescribed, and that the physician had not prohibited Bearinger to drive while using the drugs, but had warned that the drugs could cause "drowsiness." The DOT argued that the prescription drug defense of Iowa Code section 321J.2(11) applied to criminal charges but did not apply to license revocations for driving while impaired. The administrative law judge agreed and imposed the license revocation, which was affirmed by the district court on review. Bearinger appealed the decision to the Iowa Supreme Court.

The Supreme Court reversed the revocation. The Court determined that the license revocation of Iowa Code section 321J.13(2)(c) was dependent upon whether "a violation of section 321J.2" had been proven. "By definition, there can be no violation of section 321J.2 if the prescription drug-defense is established. And, without a violation of section 321J.2, a person appealing (the license) revocation decision is entitled to prevail." The prescription drug defense applies to license revocations. If a driver establishes the defense, there is no violation of Iowa Code section 321J.2, and therefore, there can be no license revocation.

Back to Page 1

(Recent Unpublished Decisions Arranged by County and by Date of Decision)

RECENT **UNPUBLISHED DECISIONS** INVOLVING ALCOHOL AND TRAFFIC SAFETY

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Black Hawk County State v. Kenneth James Shadlow, 4-003 / 11-2088 (Iowa Court of Appeals, filed February 19, 2014.) **"Operation."** Sufficient evidence of "operation" where citizen reported hearing "a loud bang and squealing tires" followed by a male's voice yelling "God help me"; defendant was found bloody and staggering down the middle of the road and he yelled that he had been in an accident; no other persons were in the area; car was found around a nearby curve; OWI 2nd conviction affirmed. (Defendant was also convicted of drug offenses.)

Black Hawk County State v. Andrea Kandace Donnan, 4-004 / 12-0955 (Iowa Court of Appeals, filed February 19, 2014.) **Suspicion to stop car: registered owner had restricted license and car was located outside of restriction.** Officer who ran vehicle's plate and learned that the registered owner had a temporary restricted license (a "work permit" for a residence 90 miles away) and then observed "conduct indicating she was reluctant to have police see her driving" had reasonable articulable suspicion to stop the vehicle.

Black Hawk County State v. Andrea Kandace Donnan, 4-004 / 12-0955 (Iowa Court of Appeals, filed February 19, 2014.) **No adverse inference attached to officer's turning off body mic for 20 seconds.** Fact that officer turned off his body mic when speaking with a colleague is not the basis for an adverse inference similar to a spoliation instruction; no law or authority requires officers to record their conversations, and nothing in the record supports a finding that any exculpatory evidence was involved or that anything occurred which implicated spoliation.

Black Hawk County State v. Alejandro Soilo Manzanares, 4-007 / 12-1897 (Iowa Court of Appeals, filed February 19, 2014.) **No license information for registered owner of car supports stop.** An officer who determines that the registered owner of a car has no known license information may, consistent with *Terry* analysis, stop an unknown person of the same gender to resolve the licensing ambiguity (it is just as likely that the person is unlicensed and driving illegally as it is that the licensing authority has an inaccurate or incomplete record of the registered owner.)

Black Hawk County State v. Dontrayius Eugene Carey, No. 3-1233 / 12-1423 (Iowa Court of Appeals, filed March 12, 2014.) **Prosecutor's rebuttal comments were not misconduct.** When, during closing argument, defense attorney asked why the State had not produced certain witnesses and the prosecutor responded by asking "why didn't they subpoena" the witnesses, the prosecutor's words amounted to "fair comment" and did not impermissibly shift the burden of proof to the defendant.

Cerro Gordo County State v. Larry Gene Morris, 3-1098 / 13-0080 (Iowa Court of Appeals, filed February 5, 2014.) **Probable cause to arrest for OWI.** Citizen report that a person was driving erratically, combined with officer's initial observation that defendant was "unsteady on his feet" and that the defendant had a strong odor of alcohol, blood shot eyes, and refused to perform SFSTs or submit to a PBT constitute probable cause to arrest for OWI

Cerro Gordo County State v. Larry Gene Morris, 3-1098 / 13-0080 (Iowa Court of Appeals, filed February 5, 2014.) **Officer may permit a test after a refusal.** There is no requirement that an officer permit an implied consent test after a defendant has refused, but the officer may, in his or her discretion, allow such a test ("an officer may deny an arrestee's request for chemical testing following an initial refusal, the officer is not required to do so.")

Cerro Gordo County State v. Todd A. Bitker, 3-1215 / 13-0520 (Iowa Court of Appeals, filed February 5, 2014.) **Inventory search upheld; officer followed departmental policy.** Police who decided to impound and inventory a vehicle followed departmental policy in making the decision; the policy provided that police

Continued on page 4

Back to Page 1

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were to attempt alternatives to impoundment when the operator requested such an accommodation; but no such request was made in this case.

Cerro Gordo County State v. Jorge Michael De Hoyos, No. 13-0915 (Iowa Court of Appeals, filed March 26, 2014.) **No "independent test" violation where defendant did not make a request for such a test.** Defendant who, before SFSTs, told officer he would "rather take a blood test, than do this test" (i.e., the walk-and-turn test) did not request an independent test; "(a) vague comment that he would prefer a blood test over the field sobriety test does not amount to an invocation of (the defendant's) right to an independent test under section 321J.11."

Des Moines County State v. Laura E. Loots, 3-1089 / 12-1924 (Iowa Court of Appeals, filed February 19, 2014.) **Justification for "noise ordinance" stop lacked necessary facts.** Officer's stop of vehicle for violating a local noise ordinance improper where the ordinance required proof of two elements—noise which could be heard 50 feet from a vehicle *and* proof that the noise constituted a disturbance; the State's evidence did not contain facts upon which a judge could find that a "disturbance" had been created and, in the absence of any testimony that the noise constituted a "disturbance" it was not possible to say whether the stopping officer had objective grounds to believe the ordinance was being violated; drugs seized pursuant to the stop should have been suppressed; conviction reversed.

Des Moines County State v. Laura E. Loots, 3-1089 / 12-1924 (Iowa Court of Appeals, filed February 19, 2014.) **Officer's misunderstanding of noise ordinance made vehicle stop a "mistake of law."** Officer who understood local noise ordinance to outlaw a noise which could be heard 50 feet from a vehicle was incorrect; in fact, the ordinance also required that the noise be considered a "disturbance" by a person of ordinary sensibilities, and no evidence of that element was present in the record; officer's vehicle stop based upon a misunderstanding of the ordinance made the stop a "mistake of law" stop and, as such, required suppression of evidence seized pursuant to the stop. See State v. Tyler, 830 N.W.2d 288 (Iowa, 4/26/13).

Des Moines County State v. Jack Raymond Carr, 4-011 / 12-2164 (Iowa Court of Appeals, filed February 19, 2014.) **Counsel has no duty to ensure a transcription of proceedings.** The rule of criminal procedure which provides that transcriptions are to occur can be waived; this defendant signed such a waiver, and in such circumstances, counsel cannot be deemed to be ineffective by simply allowing the proceeding to go forward without a transcription; this defendant "has cited no legal authority for the proposition that transcription of the guilty plea and sentencing hearings could not be waived in this case, nor do we find any"; driving while barred convictions affirmed.

Des Moines County State v. Jack Raymond Carr, 4-011 / 12-2164 (Iowa Court of Appeals, filed February 19, 2014.) **Form used in guilty plea creates ambiguous record; issues preserved for possible post conviction relief.** Written guilty plea does not definitively show that the defendant was informed of the mandatory minimum for the offense of driving while barred; convictions affirmed and issue of informing the defendant of the mandatory minimum punishment preserved for possible post conviction relief.

Dubuque County State v. Scott Robert Robinson, No. 3-930 / 12-1323 (Iowa Court of Appeals, filed January 23, 2014**.) "Barrier free" pre-trial access to attorney discussed.** Defendant in kidnapping case argued that he should have "barrier free" access to his attorney during pre-trial consultations, to effectively extend to all pre-trial attorney contact the Iowa Code section 804.20 rule of State v. Walker, 804 N.W.2d 284 (Iowa, 9/30/11) (which holds that, in the absence of any special security concerns, attorney who comes to the jail in response to a call under 804.20 may personally see the defendant without video or audio monitoring); Court of Appeals "assumed without deciding" that the rule of Walker applied to all pre-trial attorney contacts but denied defendant's request for a new trial for the purported violation; defendant "has pointed

Continued on page 5

Back to Page 1

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us to no authority" that would entitle him to a new trial; further, the defendant made no showing of prejudice for a purported Sixth Amendment violation; kidnapping conviction affirmed.

Hancock County State v. Donald Ray Finch, No. 4-008 / 12-2133 (Iowa Court of Appeals, filed March 12, 2014.) **No misconduct in closing argument.** Prosecutor's closing argument characterization of defendant as "agitated" "was an insignificant error, which the defendant had ample opportunity to address" in closing argument; no prejudice shown; OWI 3rd conviction affirmed.

Hancock County State v. Donald Ray Finch, No. 4-008 / 12-2133 (Iowa Court of Appeals, filed March 12, 2014.) **Use of prior testimony to refresh memory was not improper.** Defendant's complaint that law enforcement officer was permitted to use DOT testimony to refresh his recollection was without merit; the defendant's complaint was premised on rules regarding admissibility of evidence—but the writing in this case was not admitted into evidence; OWI 3rd conviction affirmed.

Hancock County State v. Donald Ray Finch, No. 4-008 / 12-2133 (Iowa Court of Appeals, filed March 12, 2014.) **OWI guilty verdict is not "contrary to the weight of the evidence."** This defendant "was discovered passed out behind the wheel of his truck on the wrong side of the road. Witnesses testified he smelled of alcoholic beverage." Despite defense testimony that the defendant had sleep apnea, "the jury could rationally determine he was operating while intoxicated."

Jasper County State v. Michael Lee Querry, No. 11-1613 (Iowa Court of Appeals, filed March 26, 2014.) **"Pacing" which reveals speeding is grounds to stop vehicle.** Officer has probable cause to stop a vehicle for speeding when "pacing" of that vehicle shows a speed that exceeds the speed limit.

Johnson County State v. Amy Nicole Smidl, No. 3-1094 / 12-2182 (Iowa Court of Appeals, filed January 9, 2014.) **Evidence of PBT *refusal* is admissible.** Iowa Code section 321J.5(2), which provides that the *results* of a PBT are inadmissible, does not bar admission of a defendant's *refusal to submit* to a PBT; such a refusal can be an admission of consciousness of guilt.

Johnson County State v. Amy Nicole Smidl, No. 3-1094 / 12-2182 (Iowa Court of Appeals, filed January 9, 2014.) **Daughter's statements not hearsay.** Evidence that defendant's daughter urged the defendant to take a PBT was not inadmissible hearsay, as it was not offered to prove the truth of the matter asserted; "(r)ather, it was offered to show (the defendant's) reaction to her daughter's statements, i.e., that her refusal to take the test despite her daughter's urging showed consciousness of guilt."

Marshall County State v. Brett Michael Ladehoff, No. 3-1167 / 13-0586 (Iowa Court of Appeals, filed March 12, 2014**.) No abuse of discretion in 360 day jail sentence for two aggravated misdemeanors.** Sentence of 180 days in jail for operating while intoxicated consecutive to 180 days for aggravated assault (as well as five years, suspended, for child endangerment) was within statutory limits and affirmed; defendant who was OWI with a child passenger "had several opportunities to think twice. . .and to prevent it from happening. . .and even told the child (passenger) to put his seatbelt on because they were 'going for a ride.'"

Marshall County State v. Willie John Hilson, No. 4-052 / 13-0895 (Iowa Court of Appeals, filed March 12, 2014.) **Failure to file motion in arrest of judgment precludes challenge to guilty plea on appeal.** Where defendant signed a document which described the motion in arrest of judgment and the necessity of filing such a motion to challenge a plea, and where, in the document itself, the defendant waived his right to file a motion in arrest of judgment and asked for immediate sentencing, the defendant is precluded from challenging the plea on appeal; "(t)he language used in the written plea was concise. The procedure to contest the pleas was delineated, and the time frame was set out." Public intoxication and harassment convictions affirmed.

Continued on page 6

Back to Page 1

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Polk County State v. Damian Derae Ware, No. 13-0465 (Iowa Court of Appeals, filed March 26, 2014.) **"No merit" to claim that there was no factual basis for driving while barred charge.** Defendant claimed that the State had failed to prove that the offense occurred in Polk County and that counsel was ineffective for failing to file a motion in arrest of judgment on this issue; "(t)here is simply no merit to his claim. Because the minutes clearly provide a factual basis for (the guilty) plea, his trial counsel was not ineffective for permitting him to plead guilty."

Polk County State v. Damian Derae Ware, No. 13-0465 (Iowa Court of Appeals, filed March 26, 2014.) **No duty to ask for a verbatim record where defendant has waived such a record.** Where defendant's guilty plea has a positive written waiver of a verbatim record and where the defendant does not challenge the voluntariness of the plea, counsel "had no duty to object" to the waiver, and "counsel was not ineffective for permitting" the defendant to waive the verbatim record; conviction for driving while barred affirmed.

Polk County State v. Stephanie Elizabeth Sexton, No. 12-1142 (Iowa Court of Appeals, filed March 26, 2014.) **Sentence was within statutory limits.** Defendant's sixty day sentence for driving while barred was not an abuse of discretion; in addition, there was no record supplied to support defendant's claim that she had been denied her right of allocution; "(w)here the record is silent, as it is here, we will presume that the court followed the law in pronouncing the sentence."

Scott County State v. Keith Hansen, No. 3-1200 / 12-2038 (Iowa Court of Appeals, filed January 23, 2014.) **"Arrest" occurred; speedy indictment violated.** Drug defendant who was asked for identification, patted down, read his *Miranda* rights, handcuffed, placed in a squad car, transported to the station where he was handcuffed for another twenty minutes, questioned over the course of two hours and told he was not "free to leave" was "arrested" for purposes of State v. Wing, 791 N.W.2d 243 (Iowa, 12/3/10) (which holds that the issue of arrest is determined from the point of view of whether a reasonable person, in the position of the defendant, would reasonably believe he or she was under arrest, without regard to police intention to arrest, formal statement of arrest, or normal incidents of arrest, i.e., booking or finger-printing.)

Scott County State v. Keith Hansen, No. 3-1200 / 12-2038 (Iowa Court of Appeals, filed January 23, 2014.) **"Simply telling someone he or she is not under arrest does not make it so."** Officers cannot avoid "arresting" a person for purposes of State v. Wing, 791 N.W.2d 243 (Iowa, 12/3/10) by simply saying "you are not under arrest"; "(a)n arrest may objectively occur even if the officer does not formally announce the arrest and even if the officer does not possess a subjective intent to arrest."

Scott County State v. Eric Scott Olsen, 3-1196 / 12-1490 (Iowa Court of Appeals, filed February 5, 2014.) **Sufficient evidence of recklessness.** Evidence supported jury verdict that defendant, who had been drinking at a bar with the victim and who ran over and killed the victim, acted in a reckless manner; he got his truck stuck in a yard and then revved the engine and spun his tires to get out and squealed his tires as he left the scene; injuries to the victim's body and to her clothing were consistent with having been run over by a truck while lying on the ground and not consistent with having received fatal injuries from jumping out of the truck.

Scott County State v. Eric Scott Olsen, 3-1196 / 12-1490 (Iowa Court of Appeals, filed February 5, 2014.) **Sufficient evidence of leaving the scene.** Evidence supported conviction for leaving the scene of a fatality where truck drove rapidly away from the scene where victim's body was found; less than 15 minutes later a security guard saw a person park a truck (owned by the defendant) and "power walk" away; the tire treads matched evidence on the victim's body and the scene of the fatality; defendant claimed that victim had jumped out of the truck although statements made during jail phone conversations indicated that he "thought he might have run over her."

Continued on page 7

Back to Page 1

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Scott County State v. Eric Scott Olsen, 3-1196 / 12-1490 (Iowa Court of Appeals, filed February 5, 2014.) **Character evidence properly excluded.** Defendant's proffer of evidence that victim had jumped out of a car once before was properly excluded by the court as inadmissible character evidence, where the only witness to the event could not say whether the victim had jumped out of a car or had been pushed out by the defendant or "what happened before (the victim) went out the car door, who opened the door, and what (the defendant) was doing at the time (the victim) went out the door."

Scott County State v. Eric Scott Olsen, 3-1196 / 12-1490 (Iowa Court of Appeals, filed February 5, 2014.) **Evidence of defendant's prior bad acts properly admitted.** Testimony that victim told a medical provider that her injuries from a previous incident were from the defendant pushing her out of a truck, as well as testimony of two officers regarding prior instances of violence by the defendant against the victim were properly admitted by the trial court to establish "the volatile and violent nature of the relationship" and helped establish that the victim's being run over by the defendant was not the result of mistake or accident, in light of the asserted defense that the victim voluntarily jumped from the defendant's truck.

Scott County State v. Eric Scott Olsen, 3-1196 / 12-1490 (Iowa Court of Appeals, filed February 5, 2014.) **Victim's mental health records properly withheld from defendant.** Trial court properly found that victim's mental health records contained no exculpatory information and that the victim's privacy interests outweighed the defendant's need for disclosure; Court of Appeals examined the same records and concurred in the district court's finding. See Iowa Code section 622.10 and State v. Thompson, 836 N.W.2d 470 (Iowa, 8/23/13).

Scott County State v. Kashia Nicole Myrick, No. 3-1226 / 13-1054 (Iowa Court of Appeals, filed March 12, 2014.) **Sentencing form criticized.** Concurring opinion criticized use of sentencing form which provided, as justification for a sentence, the following language: "The reasons for this sentence are the defendant's prior criminal history, or lack thereof; age and circumstances; to maximize rehabilitation of the defendant and deter future misconduct. Other reasons: [This area was left blank]. " The concurring opinion noted "A court that relies solely upon this form's boilerplate for explanation of the sentence it imposes, without more, skates on thin ice."

Washington County Joseph Schrock v. State, No. 3-1087 / 12-1718 (Iowa Court of Appeals, filed January 9, 2014.) **Trial attorney not ineffective in handling intoxication issue.** Trial attorney in child endangerment case attempted to suppress all opinion evidence on defendant's intoxication (defendant had been driving an ATV which crashed; his child passenger received severe injuries); when the suppression attempt was rejected by the trial court, the attorney changed strategy and the defendant testified he was not impaired by his drinking; "(t)he post-conviction court rightly did not second-guess this reasonable strategic decision."

Washington County Joseph Schrock v. State, No. 3-1087 / 12-1718 (Iowa Court of Appeals, filed January 9, 2014.) **Trial attorney not ineffective in handling ATV design and passenger issue.** Trial attorney not ineffective for failing to secure an expert witness on ATV design and passenger capacity; the trial attorney elicited testimony from the ATV owner that covered both issues, and "the attorney made a reasonable tactical decision in declining to call an expert on these subjects and the decision did not amount to the breach an essential duty."

Webster County State v. Jackie Dean Knight, 3-1210 / 13-0230 (Iowa Court of Appeals, filed February 5, 2014.) **"Mistake of fact" stop valid; convictions upheld.** Officer's stop of a car with no front or rear license plate was valid although, after the stop, the officer noticed a "white piece of paper behind the darkly tinted rear window"; defendant's conviction for OWI and five other charges affirmed (Court distinguishes State v. Tyler, 830 N.W.2d 288 (Iowa, 4/26/13) as a "mistake of law" case and looks to State v. Lloyd, 701 N.W.2d 678 (Iowa, 8/5/05), a "mistake of fact" case, as

Continued on page 8
Back to Page 1

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controlling the decision.)

Woodbury County State v. James Alan Rose, No. 3-1157 / 13-0452 (Iowa Court of Appeals, filed January 23, 2014.) **Prison sentence supported by adequate reasons.** Sentencing court adequately considered its sentencing alternatives and explained the 15 year sentence imposed on the defendant, an OWI 3rd habitual offender.

Citation from previous issue of the Highway Safety Law Update

State v. Driscoll, 839 N.W.2d 188 (Iowa, 11/1/13)

Prepared by the
Prosecuting Attorneys Training Coordinator (PATC)

Under a project approved by the Governor's Traffic Safety Bureau (GTSB), in cooperation with the National Highway Traffic Safety Administration (NHTSA). The opinions, findings, and conclusions expressed in this publication are those of the author and not necessarily those of the PATC, GTSB, NHTSA, or the Iowa Department of Justice. At age 60 years and 364 days, after 46 years and 364 days of driving in Iowa, I finally hit a deer. Although my car is totaled, I hold my head up high. A person can't claim to be a true Iowan unless and until he or she has visited the State Fair, ridden in RAGBRAI, and hit a deer. My parents would be so proud!

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Back to Page 1