LAW UPDATE
HIGHWAY SAFETY

February 5, 2019 Office of the Prosecuting Attorneys Training Coordinator Oct/Nov/Dec, 2018

County Spotlight – Adams County

The second county spotlight is on Adams County. Corning is the biggest town in Adams County and sits off the intersection of Highways 34 and 148. Corning is the birthplace of the "King of Late Night Television" Johnny Carson and where TSRP Jeremy Peterson grew up and graduated high school. Assistant Kossuth County Attorney Stephanie Miller also graduated from Corning High School. According to the 2010 census, Adams County has a population of 4,029.[1]

Andy Knuth is the Adams County Attorney. Mr. Knuth is a part-time county attorney and there are no assistant county attorneys in the office. Mr. Knuth has been the Adams County Attorney for approximately two years. Prior to becoming the Adams County Attorney, Mr. Knuth was a defense attorney for approximately twenty-two years and the Adams County Magistrate for five years. Mr. Knuth's experience as a defense attorney and magistrate has given him a unique understanding on how a defense attorney approaches/analyzes a criminal case. Mr. Knuth graduated from the University of Northern Iowa in Spanish Education and then attended Drake Law School.

Alan Johannes is the Adams County Sheriff. Sheriff Johannes has been with the Adams County Sheriff's Office for a total of fifteen years, the last nine years as the sheriff. The Adams County Sheriff's Office consists of six sheriff deputies and six dispatchers. The Adams County Sheriff's Office also utilizes two drug dogs and starting in July 2019, they will employee a seventh deputy as a school resource officer. The Adams County Sheriff's Office is the only local law enforcement agency based in the county and prides itself on having an open door policy. As the sole local law enforcement agency in the county, the Sheriff's Office not only handles all traffic offenses and other crimes in the county's biggest metropolitan area (Corning), but also the rest of the county. In 2017, there were 779 traffic convictions[2] and 24 OWI convictions in Adams County according to Division of Criminal & Juvenile Justice Planning[3].

[1] https://www.census.gov/quickfacts/fact/table/adamscountyiowa,ia/PST045217

[2] "Convictions include all charges resulting in a conviction, including deferred judgments. Cases involving multiple charges may also involve multiple convictions, and each of those individual convictions are included in the results. Local ordinances are not included." (https://disposedcharges.iowa.gov/asp/glossary.asp

[3] https://disposedcharges.iowa.gov/

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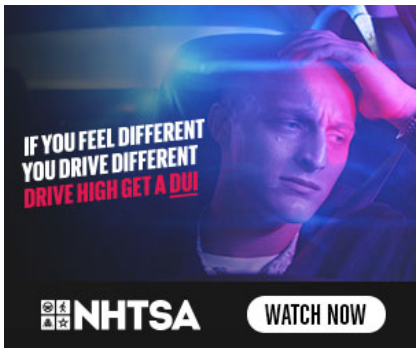

.05 BAC is the New Limit in Utah

.08 was the BAC limit for all 50 states; however, on March 23, 2017, Utah Governor Gary Herbert signed H.B. 155, that lowered the maximum BAC level in Utah to .05 effective December 30, 2018.[4] Utah is the first state to lower its BAC to .05; although Hawaii and Washington have also considered similar legislation.[5]

In January 2018, the National Academies of Sciences, Engineering, and Medicine released a report recommending a .05 BAC limit.[6] "[T]he the committee found that an individual's ability to operate a motor vehicle (including a motorcycle) begins to deteriorate at low levels of BAC, increasing a driver's risk of being in a crash."[7] Other countries, including Japan, Austria, and Denmark, have found lowering their BAC limit to .05 to be an effective policy.[8] According to the Centers for Disease Control and Prevention, it is predictable for a person to experience a decline the ability to perform divided attention tasks (two things at the same time) even at a .02 BAC.[9] After approximately three 12-ounce beers in an hour, a 160-pound male would have at least a .05 BAC.[10] It takes approximately four 12-ounce beers in an hour for the same male to have a .08 BAC.[11]

In 2016 and 2017, 19% of the traffic fatalities in Utah involved alcohol impaired driving.[12] Although, the number of alcohol impaired driving fatalities fell by 20 during the same time period in Iowa, the percentage of traffic fatalities that involved alcohol impaired driving remained constant at 27%.[13] Despite the potential benefits, Utah's new legislation has not been without its detractors. Since March 23, 2017, the ".05" law has faced efforts to delay its enforcement, but it is still went into effect on December 30, 2018.[14]

Recreational Marijuana and Police Reported Crashes

In January 2014, Colorado legalized recreational marijuana sales. Colorado was followed by Washington in July of 2014 and Oregon in October of 2015. The Insurance Institute for Highway Safety released a report, *Effect of recreational marijuana sales on police-reported crashes in Colorado, Oregon, and Washington*, in October 2018.[15] The study focused on crashes (regardless of the severity) reported by law enforcement each month from January 2012 through December 2016. The study included crashes from Colorado, Oregon, and Washington, along with their neighboring states. The study found a 5.2% higher rate of law enforcement reported crashes after the legalization of marijuana sales in the three states in comparison to their neighboring states.[16] The report concluded that "[a]lthough the causal link between marijuana use and crash risk remains unproven, the consistent pattern of findings in the current study and in the 2018 HLDI

[4] https://le.utah.gov/~2017/bills/static/HB0155.html
[5] http://www.ncsl.org/Portals/1/Documents/transportation/Traffic_Safety_Trends_2018_32414.pdf
[6] http://www.nationalacademies.org/hmd/reports/2018/getting-to-zero-alcohol-impaired-driving-fatalities.aspx
[7] http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=24951&_ga=2.168484961.1523257448.1516381904-533022816.1516381904
[8] http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=24951&_ga=2.168484961.1523257448.1516381904-533022816.1516381904
[9] https://www.cdc.gov/motorvehiclesafety/impaired_driving/impaired-drv_factsheet.html (Adapted from The ABCs of BAC, National Highway Traffic Safety Administration, 2005, and How to Control Your Drinking, WR Miller and RF Munoz, University of New Mexico, 1982)
[10] https://www.cdc.gov/motorvehiclesafety/impaired_driving/impaired-drv_factsheet.html (Adapted from The ABCs of BAC, National Highway Traffic Safety Administration, 2005, and How to Control Your Drinking, WR Miller and RF Munoz, University of New Mexico, 1982)
[11] https://www.cdc.gov/motorvehiclesafety/impaired_driving/impaired-drv_factsheet.html (Adapted from The ABCs of BAC, National Highway Traffic Safety Administration, 2005, and How to Control Your Drinking, WR Miller and RF Munoz, University of New Mexico, 1982)
[12] https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812603
[13] https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812603
[14] https://www.deseretnews.com/article/900011697/utah-house-committee-rejects-bill-to-delay-05-dui-law.html
[15] https://www.iihs.org/frontend/iihs/documents/masterfiledocs.ashx?id=2173
[16] https://www.iihs.org/frontend/iihs/documents/masterfiledocs.ashx?id=2173

[Highway Loss Data Institute] study suggest with reasonable certainty that crash rates in Colorado, Washington, and Oregon did indeed increase after recreational marijuana was legalized there."[17] You can read the full report by clicking on the link here.

A Pilot Program to Combat Drunk Driving

What if there was a device that could be installed or was standard equipment in vehicles that prevented a car from moving if the driver's BAC was over .08? What if that device did not require the person to breath directly into a machine, but was able to measure the driver's BAC from just their normal breathing? What if the device could determine your BAC just by touching a vehicle control, like the vehicle's start button? The Driver Alcohol Detection System for Safety (DADSS) Program is researching technology to combat drunk driving through both a breath-based device and a touch-based device.[18] The devices are intended to determine if a driver's BAC is over the legal limit in less than a second.[19] If a device determines the driver's BAC is over the legal limit, it will allow the vehicle to start (enabling the driver to charge a phone to call a cab), but the driver will not be able to move the vehicle.[20] The devices are being designed so parents can set a zero tolerance level, therefore, precluding a driver under the age of 21 from operating the vehicle with a BAC over .00.[21] In September 2018, the State of Virginia partnered with DADSS and as part of the partnership, James River Transportation in Richmond has installed prototype sensors in some of their vehicles to conduct on-road testing.[22] For more information, visit the DADSS website (https://www.dadss.org/).

December – National Impaired Driving Prevention Month

December was declared National Impaired Driving Month.[23] Last December, 885 people were killed as a result of crashes involving drunk drivers.[24] 4,110 lost their lives in December from 2013 to 2017 in crashes where a driver was over the legal limit.[25] In response, December was made National Impaired Driving Prevention Month.[26]

[17] https://www.iihs.org/frontend/iihs/documents/masterfiledocs.ashx?id=2173
[18] https://www.dadss.org/
[19] https://www.dadss.org/
[20] https://www.dadss.org/faq/
[21] https://www.dadss.org/faq/
[22] https://www.dadss.org/wp-content/uploads/2018/09/Driven-to-Protect-Governor-Northam-Launches-First-Real-World-Testing-of-Innovative-In-Car-Alcohol-Detection-Technology.pdf
[23] https://www.whitehouse.gov/presidential-actions/presidential-proclamation-national-impaired-driving-prevention-month-2018/
[24] "Fact Sheet Buzzed Driving is Drunk Driving - Holiday Season 2018" (https://www.trafficsafetymarketing.gov/get-materials/drunk-driving/buzzed-driving-drunk-driving/holiday-season)
[25] "Fact Sheet Buzzed Driving is Drunk Driving - Holiday Season 2018" (https://www.trafficsafetymarketing.gov/get-materials/drunk-driving/buzzed-driving-drunk-driving/holiday-season)
[26] https://www.whitehouse.gov/presidential-actions/presidential-proclamation-national-impaired-driving-prevention-month-2018/

Opinions of the Iowa Supreme Court

Clarke County State v. Cody Tyler Smith, 919 N.W.2d 1 (Iowa filed 10/12/2018) No. 17-0317. **The traffic stop of the van was not justified under "community caretaking" exception to the warrant requirement under the Iowa Constitution (article I, section 8).** Early in the morning, officers were dispatched to a vehicle in a ditch. The caller stated that the possible driver was walking down the road away from the vehicle. Officers looked in the area for the driver, but they were unable to locate the driver. Officers did find the defendant's driver's license in the vehicle. Officers also discovered the vehicle was registered to a male with the same last name as the defendant and the registered owner lived approximately four miles away. The officers then observed a van drive by the scene, pull into a driveway, exit the driveway, and drive away. The officers checked the van's registration and discovered it was registered to a female that with the same last name as the owner of the vehicle that was in the ditch and they both resided at the same residence. An officer decided to stop the van to check on the people in the van and determine if they were looking for the driver or if the driver was in the van. After stopping the van, the officer found the defendant inside the vehicle. The officer observed that the defendant only had one boot on, was muddy and wet, showed signs of intoxication, and he admitted to driving the vehicle that was in the ditch. The defendant was charged with OWI 1st. The defendant appealed the denial of his a motion to suppress, arguing the stop violated the United States Constitution (Fourth Amendment) and the Iowa Constitution (article I, section 8). Held, the traffic stop was not justified under the "community caretaking" exception to the warrant requirement under the Iowa Constitution (article I, section 8). The Iowa Supreme Court stated "under article I, section 8 of the Iowa Constitution, 'it is incumbent on the state to prove both that the objective facts satisfy the standards for community caretaking and that the officer subjectively intended to engage in community caretaking.'" State v. Cody Tyler Smith, ___N.W.2d ___ (Iowa filed 10/12/2018) (*quoting* State v. Coffman, 914 N.W.2d 240, 257 (Iowa 2018)). The Court determined the officers' actions were not a bona fide community caretaking activity. The Court found the stop of the van was for investigatory purposes (why the vehicle was in the ditch), not community caretaking. The Court further stated that the officers had other options (e.g., they could have driven to the vehicle's registered owner's house). The Court distinguished this case from Coffman, because in Coffman the vehicle was already on the side of the road, whereas here, the officer had to stop the van.

Muscatine County Richard Eugene Noll v. Iowa District Court for Muscatine County, 919 N.W.2d 232 (Iowa filed 10/19/2018) No. 17-0783. **Cannot apply habitual offender enhancement to OWI 3rd and subsequent offenses.** The defendant was charged and convicted of OWI 3rd with the habitual offender enhancement. The defendant was sentenced to fifteen years in prison with a mandatory minimum of three years. The defendant appealed arguing that Iowa Code section 321J.2(5) authorizes the maximum sentence for OWI 3rd offenses (five years) and thus he cannot also be sentenced as a habitual offender. Held, "the plain and ordinary meaning of the words used in sections 321J.2(5), 902.8, and 902.9 articulate a legislative intent that the court should not have sentenced Noll as a habitual offender." Under Iowa Code section 321J.2(5), the legislature prescribed the maximum and minimum sentences; therefore, removing the option of applying habitual offender enhancement to OWI 3rd and subsequent offenses. The sentence was vacated and the case was remanded for resentencing. The Court also held its decision applied retroactively.

Polk County Rickie Rilea and Timothy Riley v. Iowa Department of Transportation, 919 N.W.2d 380 (Iowa filed 10/19/2018) No. 17-1803. **Prior to May 11, 2017, Iowa DOT Motor Vehicle Enforcement (MVE) officers lacked authority "to stop vehicles and issue speeding tickets or other traffic citations that did not relate to operating authority, registration, size, weight, and load."** In September 2016, MVE officers issued Mr. Rilea and Mr. Riley each a speeding ticket in violation of 321.285. Mr. Rilea and Mr. Riley sought declaratory orders arguing the Iowa DOT lacked authority to issue traffic citations not related to "operating authority, registration, size, weight, and load." Held, prior to May 17, 2017, the Iowa DOT MVE officers lacked authority to issue Mr. Rilea and Mr. Riley speeding tickets. Prior to May 17, 2017, Iowa DOT MVE officers "were conferred only limited authority by chapter 321 to enforce violations relating to operating authority, registration, size, weight, and load of motor vehicles and trailers." NOTE: Iowa Code section 321.477 was amended effective May 17, 2017 giving MVE officers authority to enforce Chapter 321 violations.

Polk County Rickie Rilea and Timothy Riley v. Iowa Department of Transportation, 919 N.W.2d 380 (Iowa filed 10/19/2018) No. 17-1803. **While on duty, the citizen's arrest does not grant Iowa DOT MVE officers authority to issue traffic citations.** In September 2016, a MVE officer issued Mr. Rilea and Mr. Riley each a speeding ticket in violation of 321.285. Mr. Rilea and Mr. Riley sought a declaratory orders arguing the Iowa DOT lacked authority to issue traffic citations not related to "operating authority, registration, size, weight, and load." Held, "IDOT MVE officers, when engaged in their official duties, cannot use citizen's arrest authority to issue traffic citations." NOTE: Iowa Code section 321.477 was amended effective May 17, 2017 giving MVE officers authority to enforce Chapter 321 violations.

Iowa County State v. Jeremy M. Werner, 919 N.W.2d 375 (Iowa filed 10/19/2018) No. 17-1232. **In August 2016, MVE officers lacked authority "to engage in general traffic enforcement under Iowa Code chapter 321."** In August 2016, an Iowa DOT Motor Vehicle Enforcement (MVE) officer issued the defendant a citation for speeding and arrested him for driving while revoked. The defendant appealed his conviction for driving while revoked and argued the MVE officer lacked authority to stop his vehicle. In its analysis, the Court incorporated Rilea v. Iowa Department of Transportation, 919 N.W.2d 380 (Iowa filed 10/19/2018) No. 17-1803, into its decision. Held, the MVE officer did not have the authority to stop the defendant for speeding. The case was reversed and remanded. The Court also found the MVE officer did not have the authority to make a citizen arrest of the defendant. The Court noted there was no evidence that the MVE officer knew the defendant's driver's license was revoked under 321J.21, thus the MVE officer did not have reasonable suspicion to stop the defendant for driving while revoked. The Court did state that MVE officers may be allowed to make traffic stops under the community caretaking doctrine under certain circumstances and all peace officers have a duty to enforce the school bus safety requirements.

Scott County State v. Darryl B. Shears Jr., 920 N.W.2d 527 (Iowa 11/30/2018) No. 16-1665. **Restitution proper where patrol car was damaged in course of pursuit.** Defendant was convicted of eluding and criminal mischief. The City filed a restitution claim for damages to a patrol car that used a PIT maneuver to end the pursuit. The Iowa Supreme Court affirmed the district court's decision to award restitution to the city. The Court found: (1) the City may be a victim according to the Iowa criminal restitution statute; (2) "that damage to a police vehicle is generally recoverable under either the Restatement (Third) of Torts . . . or prior tort law[;]" (3) it did not need to decide whether the liability standard of tort law as it relates to restitution claims is analyzed under the law as it existed when the statute was enacted or does the analysis change as the tort law changes; (4) "a reasonable fact finder could conclude under the circumstances of this case that it was foreseeable that police would engage in an effort to apprehend the speeding Shears and that police vehicles could be damaged in the effort to bring Shears's vehicle to a halt[;]" (5) the officers' actions (PIT maneuver) would not relieve the defendant of liability as an intervening or superseding cause under both, the laws that existed when the statute was written and the Restatement 3rd of Torts; (6) "the defendant's misconduct during the vehicle pursuit—driving at a high rate of speed, running stop signs, avoiding spike

strips—were acts that take this case outside the scope of the firefighter's rule [(police officers and firefighters generally are cannot recover damages for injuries that happened during the normal course of their job duties);]" and (7) Iowa Code section 910.1(4) does not prevent restitution to the City.

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

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(Recent Unpublished Decisions Arranged by County)

Black Hawk County State v. Justin Andre Baker, No. 17-0622 (Iowa Court of Appeals, filed October 10, 2018). **Sufficient evidence to support reasonable suspicion to stop the defendant's vehicle.** A law enforcement investigator: was aware the defendant had been previously arrested seven months earlier in Nevada with large amounts of marijuana in the same vehicle; received an anonymous tip that the defendant had a large amount of marijuana at his residence; observed the defendant leave the residence and drive into an alley; and saw a person reach into the passenger side window then quickly withdraw his hand and placed something in his pocket. The investigator then had a police sergeant initiate a traffic stop. When the sergeant activated his emergency lights, the sergeant observed the defendant throw something out the window, which was later discovered to be a bag of marijuana. The defendant argued the stop was not supported by reasonable suspicion. Held, an officer can only base the reason for the stop on the information he was aware of when he made the decision to stop the vehicle (i.e. activated his emergency lights), thus the defendant's actions of throwing the marijuana out the window after the lights were activated could not be used support the reasons for the stop. The Court of Appeals found that even after excluding the evidence of the defendant throwing marijuana from the vehicle, there was still sufficient evidence to support reasonable suspicion to stop the defendant's vehicle.

Black Hawk County State v. Daniss Tamar Jenkins, No. 17-1898 (Iowa Court of Appeals, filed October 24, 2018). **The State presented sufficient evidence to support the conviction for eluding.** While chasing the defendant, an officer estimated that the defendant was driving 50 to 55 miles per hour in a 25 mile per hour zone. After a trial, the defendant was convicted of eluding. The defendant appealed arguing the State failed to prove he was driving at least 25 miles per hour over the speed limit. Held, the State presented sufficient evidence the defendant was driving at least twenty-five miles per hour over the speed limit to support the conviction for eluding.

Boone County State v. Clay Thomas Paulson, No. 17-2097 (Iowa Court of Appeals, filed December 19, 2018). **Sufficient evidence to establish the defendant's constructive possession of the backpack.** After stopping a vehicle that officers suspected as being stolen, the driver fled and the officers discovered the defendant in the passenger seat and another male in the backseat. The officers seized a backpack from the floorboard where the defendant had been seated. The officers then found drugs in the backpack. A woman that had been a passenger in the vehicle the night before identified the backpack as the defendant's. Held, a reasonable juror could have found the location of the backpack at the defendant's feet and the woman's testimony sufficient to establish the defendant's constructive possession of the backpack.

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Buchanan County State v. Brian McConnelee, No. 17-1696 (Iowa Court of Appeals, filed October 10, 2018). **The defendant's counsel was ineffective for failing to object at sentencing when the State asked for a sentence outside the plea agreement.** The defendant pled guilty to multiple offenses in three difference cases, including two counts of OWI 1st, pursuant to a plea agreement. During the plea hearing, the State stated on the record it would recommend a sentence of at least five years, but if the PSI recommended something higher, the State will follow that recommendation. Later, the PSI recommended that the sentences in each *case* be run consecutively. At sentencing, the State recommended at sentencing that *all the charges* in *all of the cases* be run consecutively. The defendant's attorney did not object to the State's recommendation prior to sentencing being pronounced. The defendant appealed arguing that the State breached the plea agreement. Held, the defendant's attorney was ineffective for failing to object to the State breach of the plea agreement (the PSI only recommended the cases run consecutively, not all the charges) and the defendant was prejudiced by this failure. The case was remanded for resentencing.

Buchanan County State v. Lowell Allan Ewalt, No. 17-1189 (Iowa Court of Appeals, filed October 24, 2018). **The officer did not unlawfully expand the traffic stop.** A trooper stopped the defendant for speeding. When the trooper made contact with the defendant he observed: bloodshot and watery eyes; the defendant's hand was shaking; the vehicle was registered in Iowa, but not in the defendant's name; the defendant had a Missouri license; the defendant avoided eye contact; and the defendant had just lit a cigarette (in the trooper's experience, the defendant may have been trying to mask the smell of marijuana or alcohol). Held, under the totality of the circumstances, the trooper had reasonable suspicion to extend the traffic stop.

Buchanan County State v. Lowell Allan Ewalt, No. 17-1189 (Iowa Court of Appeals, filed October 24, 2018). ***Miranda*** **not violated; no custody when the suspect voluntarily accompanied the officer to sit in patrol car.** A trooper stopped the defendant for speeding. When the trooper made contact with the defendant he observed signs of impairment. The trooper requested the defendant to come to his patrol car to sign something. The defendant then walked to the patrol car, sat in the passenger seat unrestrained, and the doors remained unlocked. While in the patrol car, the trooper asked the defendant about his criminal history and when he last smoked marijuana. The defendant argued he was in custody when he was asked whether he had smoked marijuana recently. Held, no reasonable person in the defendant's position would feel as if they were in custody. When the trooper asked the defendant to come to the patrol car there were good reasons (e.g., safety), the defendant agreed to sit in the patrol car voluntarily, and the doors remaining unlocked.

Delaware County Jamie Lee Cole v. State, No. 17-0387 (Iowa Court of Appeals, filed October 24, 2018). **The defendant failed to establish a legal reason to vacate his plea and sentence.** When the defendant pled guilty to OWI 3rd in the Delaware County case as part of a plea agreement, he was advised that the judge could not control what happened in a different county's case. The defendant filed an application for postconviction relief when he was

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denied entry into a 321J rehabilitation program, which was part of his plea agreement in the Delaware County case. Held, the defendant's actions caused his placement in prison as opposed to the 321J rehabilitation program and "[t]here [was] no legal reason to vacate his plea, conviction, or sentence in the Delaware County case."

Emmet County State v. Clarence D. Blanchard, No. 17-1619 (Iowa Court of Appeals, filed December 19, 2018). **The information supporting the reason for the stop was not stale despite an approximately twenty minute delay between the report and the stop.** At a gas station, an off-duty officer spoke to a passenger in a vehicle and smelled an odor of marijuana coming from a vehicle. The off-duty officer reported the incident to dispatch and a detective. Approximately twenty minutes later, the detective initiated a traffic stop on the vehicle based only on the off-duty officer's report. The defendant was subsequently convicted of OWI 1st. The defendant appealed his conviction and argued the detective did not have reasonable suspicion to stop the vehicle. Held, based on the totality of the circumstances (the off-duty officer's smell of marijuana coming from the vehicle) established "reasonable suspicion of criminal activity to stop the vehicle approximately twenty minutes later."

Lee (South) County State v. Ricky Leon Riddle, No. 17-1729 (Iowa Court of Appeals, filed October 10, 2018). **No abuse of discretion in allowing the recorded jail phone call to be played to the jury.** A jury found the defendant guilty of intimidation with a dangerous weapon with intent after he shot at his on-again off-again girlfriend's car that she was driving. During the trial, the State played a recorded jail phone call between the defendant and the victim over the defendant's objection. The defendant told the victim he would only win if people did not show up for trial and to avoid being subpoenaed. Held, there was no abuse of discretion by the district court in allowing the recording into evidence. The recording was evidence of the defendant's consciousness of guilt, relevant to the identity of the shooter, and was not more prejudicial that probative.

Monona County State v. Alan Lee Hergenrader, No. 17-1265 (Iowa Court of Appeals, filed December 5, 2018). **Trial judge did not abuse its discretion when it allowed the entire booking video to be played with no audio with the defendant's consent.** The defendant was convicted of OWI 1st. At trial, the State offered portions of the booking video. The defendant objected and requested the entire booking video be played. The State resisted playing the entire video with sound and the defendant's attorney consented to playing the entire video with no audio. Held, no abuse in discretion in allowing the booking video to play with no audio because the defendant had consented.

Monona County State v. Alan Lee Hergenrader, No. 17-1265 (Iowa Court of Appeals, filed December 5, 2018). **No abuse in discretion in allowing a video depicting the HGN test to be played as demonstrative evidence.** During the defendant's OWI 1st trial, the State played a video (*The Truth is in the Eyes*) that contained no audio and showed two different individuals performing the HGN test. The defendant argued there was a lack of foundation to play the video. Held, proper foundation was laid once the sergeant testified regarding

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how the HGN test is performed, what clues show signs of potential intoxication, and that the test on the video was accurate. The court also found the video was relevant and not unfairly prejudicial.

Polk County State v. Jack Raymond Carr, No. 17-1749 (Iowa Court of Appeals, filed September 26, 2018). **Ineffective assistance claim preserved; driving while barred and possession of methamphetamine convictions affirmed.** The defendant pled guilty to driving while barred and possession of methamphetamine. The defendant's claim that trial counsel had been ineffective by not conducting a proper investigation and discovery could not be resolved on the record provided on appeal; convictions affirmed and issues preserved for possible postconviction relief.

Polk County State v. Robert Alejandro Esparza, No. 17-1776 (Iowa Court of Appeals, filed October 10, 2018). **The defendant's conviction was upheld, but his claim of ineffective assistance was preserved for postconviction.** The defendant was convicted of driving while license revoked. Prior to trial, the defendant's attorney did not file a motion to suppress the defendant's admission he drove to the store; however, the defendant's attorney did file a motion in limine to keep the admission out of the trail. The court denied the defendant's motion in limine. The defendant appealed arguing his counsel was ineffective for failing to timely file a motion to suppress. Held, the Court affirmed the defendant's conviction, but preserved his ineffective assistance claim for any postconviction proceeding.

Polk County State v. Keysean Damour Chumley, No. 17-2036 (Iowa Court of Appeals, filed November 7, 2018). **Sufficient evidence to support a factual basis regarding the "visual signal" element for eluding.** As part of a plea agreement, the defendant pled guilty to felony eluding. During the plea colloquy, the defendant admitted the officer's lights and sirens were used. On appeal, the defendant argued his counsel was ineffective for allowing him to pled guilty when there was no factual basis in the record regarding the color of the officer's flashing lights; Iowa Code section 321.279(1) states in part "shall be by flashing red light, or by flashing red and blue lights, and siren." Held, there was sufficient evidence in the record to support a factual basis regarding the "visual signal" element for eluding ("Case law and statutes reflect the accepted understanding of emergency lights as red or red and blue.").

Polk County State v. Saul Gonzalez, No. 18-0137 (Iowa Court of Appeals, filed November 21, 2018). **No clear and convincing evidence to support the defendant's actual innocence claim.** The defendant pled guilty to driving while barred. Prior to sentencing, the defendant filed a motion in arrest of judgment arguing that he should not have been barred during the relevant time period because some the convictions on his driving record were for a different "Saul Gonzalez" and had been erroneously applied to his driving record. The defendant's motion in arrest of judgment was denied; the district court reviewed the certified driving record and exhibits showing the defendant received notice of his license being barred. The defendant then appealed, claiming he was actually innocent. Held, the defendant failed to establish by "clear and convincing evidence that no reasonable fact finder could convict him of the

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offense to which he pled guilty."

Polk County State v. Franklin Lee Harris, No. 17-2060 (Iowa Court of Appeals, filed December 5, 2018). **Jury verdict not inconsistent.** The defendant was charged with OWI and driving while revoked. Despite the defendant's attorney admission that the defendant was intoxicated, the jury acquitted him on the OWI charge. However, the jury found the defendant guilty of driving while revoked. The defendant argued that the jury must have acquitted him on the OWI charge because it did not believe he had been driving; therefore, his guilty verdict for driving while revoked was inconsistent with his acquittal. Held, there was no inconsistency with the verdicts; it is likely the jury found the defendant drove the vehicle to the bar while his license was revoked, but not from the bar after he became intoxicated.

Polk County State v. Todd Junior Landis, No. 17-1369 (Iowa Court of Appeals, filed December 19, 2018). **Motion to suppress was properly denied under the inevitable discovery doctrine.** After responding to a crash, law enforcement officers observed an odor of alcoholic beverage coming from the defendant and other signs of intoxication. Prior to requesting the defendant perform any SFSTs, the officers searched the defendant's front pocket and discovered marijuana and drug paraphernalia. Approximately thirty minutes later and after having refused SFSTs and a PBT, the defendant was placed under arrest. The court denied the defendant's motion to suppress the marijuana and he was convicted of OWI and possession of a controlled substance, 3rd offense. The defendant appealed. Held, the motion to suppress was properly denied under the inevitable discovery doctrine; the "officers would have inevitably discovered the contraband when booking him into the county jail on the OWI charge." The Court of Appeals declined to resolve the appeal under grounds of a search incident to arrest.

Polk County State v. Todd Junior Landis, No. 17-1369 (Iowa Court of Appeals, filed December 19, 2018). **The sentencing court gave sufficient reasons for its sentence.** The defendant was convicted of OWI and possession of a controlled substance, 3rd offense, which was enhanced by his habitual-offender status. The court sentenced the defendant to one year in prison on the OWI and fifteen years in prison on the possession of a controlled substance charge, to be served concurrently. The defendant appealed and argued the court failed to state sufficient reasons for the sentence. Held, the sentencing court gave sufficient reasons for its sentence that were more than "the dreaded boilerplate" language.

Polk County State v. Todd Junior Landis, No. 17-1369 (Iowa Court of Appeals, filed December 19, 2018). **Cannot assess costs to the defendant on a dismissed charged without the defendant's agreement.** The defendant was convicted of OWI and possession of a controlled substance, 3rd offense (habitual-offender). At sentencing, the court dismissed a related simple misdemeanor at the defendant's costs. Held, absent the defendant agreeing to pay costs pursuant to a plea agreement, the court cannot asses the costs of a dismissed charged to the defendant.

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Scott County State v. Nancy Kay Elizabeth Hoffman, No. 17-1528 (Iowa Court of Appeals, filed October 10, 2018). **There was a factual basis to support the defendant's plea of guilty.** The defendant pled guilty to OWI 2nd pursuant to a written guilty plea. In the defendant's written guilty plea, she "accept[ed] the minutes of testimony as substantially true". The defendant appealed arguing there was not a factual basis to support her plea of guilty. Held, a factual basis for OWI 2nd was established by the record.

Scott County State v. Nancy Kay Elizabeth Hoffman, No. 17-1528 (Iowa Court of Appeals, filed October 10, 2018). **Defendant failed to preserve error regarding her prior OWI conviction colloquy.** The defendant pled guilty to OWI 2nd pursuant to a written guilty plea. In the defendant's written guilty plea, she "accept[ed] the minutes of testimony as substantially true". The defendant appealed arguing her prior conviction colloquy was not sufficient. Held, the defendant had not preserved error on whether her prior conviction OWI colloquy was sufficient because she did not file a motion in arrest of judgment prior to sentencing. The Court further stated that even if the defendant had preserved error, she waived her presence to plead guilty in open court and the record does not establish that the court erred in accepting her plea.

Scott County State v. Trae D. Jackson, No. 17-1903 (Iowa Court of Appeals, filed October 10, 2018). **Insufficient evidence to establish the defendant as the driver.** The defendant's mother's car rear-ended a parked vehicle. No witnesses saw who was driving the vehicle; however, one witness saw two individuals outside of the vehicle, but those individuals fled the area. Later the defendant came to the scene, but the witness could not determine if the defendant was one of the two individuals he saw outside the vehicle. The defendant consistently denied driving the vehicle, but admitted he was a passenger. The defendant was convicted by a jury of OWI 3rd and DWB. The defendant appealed arguing there was insufficient evidence to establish he was operating the vehicle. Held, there was insufficient circumstantial evidence to establish beyond a reasonable doubt that the defendant was the driver. The defendant's convictions for OWI 3rd and DWB were reversed.

Scott County State v. Isai Sanchez-Casco, No. 17-1833 (Iowa Court of Appeals, filed November 21, 2018). **No abuse in discretion in allowing the DRE officer to testify as an expert on intoxication.** The defendant was convicted of OWI 3rd. At trial, the State presented evidence regarding the DRE officer's qualifications (number OWI investigations, SFST instructor, ARIDE certification, and her state and national DRE certification) that responded to the scene and observed the defendant. The DRE officer then testified as an expert witness on intoxication and opined that the defendant "was intoxicated by both alcohol and non-alcohol substances" despite the defendant refusing all SFSTs and the 12-step DRE examination. The defendant appealed, arguing the district court erred in allowing the DRE officer to testify as an expert witness on intoxication. The defendant further argued there was insufficient foundation to support her opinion without psychophysical testing. Held, there was no abuse in discretion in allowing the DRE officer to testify as an expert on intoxication; the DRE officer was "well-qualified to opine on intoxication from alcohol and other substances." The Court further found there was sufficient foundation

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presented to support the DRE officer's opinion that the defendant was intoxicated (alcohol, drugs, or both). The DRE officer testified about her training, including the psychophysical testing, and her observations of the suspect's appearance and behavior.

Scott County State v. Isai Sanchez-Casco, No. 17-1833 (Iowa Court of Appeals, filed November 21, 2018). **There was sufficient evidence to find the defendant guilty of OWI.** The defendant was convicted of OWI 3rd. The defendant appealed, arguing the district court erred denying his motion for judgment of acquittal (challenging the sufficiency of the evidence). Held, there was sufficient evidence to find the defendant guilty of OWI (three officers testified to their observations of the defendant; DRE officer's opinion the defendant was intoxicated; a store clerk testified about her observations of the defendant's erratic behavior; the defendant was found approximately 12 minutes after the store clerk called the police; the defendant was found alone and with the car keys; the store video; the patrol vehicles videos; and the defendant refused testing).

Scott County State v. Isai Sanchez-Casco, No. 17-1833 (Iowa Court of Appeals, filed November 21, 2018). **No abuse in discretion in finding the guilty verdict "was not contrary to the weight of the evidence."** The defendant was convicted of OWI 3rd. The defendant appealed, arguing the district court erred denying his motion for new trial (challenging the weight of the evidence). Held, there was no abuse in discretion in denying the motion for new trial. The guilty verdict "was not contrary to the weight of the evidence" (three officers testified to their observations of the defendant; DRE officer's opinion the defendant was intoxicated; a store clerk testified about her observations of the defendant's erratic behavior; the defendant was found approximately 12 minutes after the store clerk called the police; the defendant was found alone and with the car keys; the store video; the patrol vehicles videos; and the defendant refused testing).

Scott County State v. Chad L. Erwin, No. 18-0523 (Iowa Court of Appeals, filed December 19, 2018). **The defendant did not preserve the claim because he failed to request or object to the lack of reporting a discussion with a potential juror.** The defendant waived reporting of jury selection, but was advised by the court that he could have any issues that come up during jury selection recorded. During jury selection, a concern was raised regarding a potential juror. The court and the parties held a private conference with the potential juror in the judge's chambers, but it was not recorded. At the end of the conference the court granted the State's motion to strike the juror for cause. Later, the court explained what occurred on the recorded. The defendant was then convicted by a jury of operating a motor vehicle without the owner's consent. The defendant appealed and argued his right to a fair trial was violated because the conference with the potential juror was not recorded. Held, the defendant did not preserve the claim because he failed to request or object to the lack of reporting a discussion with a potential juror

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Union County State v. Colton Eugene Dunphy, No. 17-1693 (Iowa Court of Appeals, filed October 24, 2018). **The officer did not violate the defendant's 804.20 rights.** After being arrested for OWI, the officer read the defendant his 804.20 rights and gave him over 40 minutes to make phone calls. During the 40 minutes, the officer re-read the defendant his rights more than once, provided a phone book, and allowed him to meet with his mother in the law enforcement center. After the officer told the defendant he had to decide if he was going to submit to chemical testing, he spoke to an attorney by phone. During the defendant's phone call with the attorney, the officer denied a request for an attorney to come to the jail to speak with the defendant. The officer informed the attorney that he was invoking implied consent as soon as the phone call was finished. The officer then allowed the defendant to finish his phone call with the attorney. Held, the officer did not violate the defendant's 804.20 rights; the officer gave the defendant a reasonable amount of time to consult with an attorney.

Warren County State v. Vadim Igorevich Shultsev, No. 17-1766 (Iowa Court of Appeals, filed October 10, 2018). **The Defendant cannot file an actual-innocence claim on direct appeal when he failed to challenge his guilty plea.** The defendant waived counsel and pled guilty to two charges of driving while revoked. The defendant appealed arguing that the factual basis was not sufficient to support his guilty pleas; however, he did not preserve error because he had not timely filed a motion in arrest of judgment. On appeal, the defendant requested the Court expand Schmidt v. State, 909 N.W.2d 778 (Iowa 2018) and allow an actual-innocence claim on direct appeal. The Court declined to extend Schmidt and held "[b]ecause he did not timely challenge his guilty plea before the district court and a direct appeal from an uncontested guilty plea is not a viable vehicle to introduce a claim of actual innocence, we cannot reach the merits of Shultsev's factual-basis challenge."

Woodbury County State v. Alfred Joe Ray Gomez, No. 17-1851 (Iowa Court of Appeals, filed November 7, 2018). **It is an illegal sentence to apply habitual-offender enhancement to OWI 3rd or subsequent offenses.** The defendant entered an *Alford* plea to OWI 3rd, as a habitual offender. Held, under Noll v. Iowa Dist. Court, ___ N.W.2d ___, 2018 WL 5090781 (Iowa 2018), it is an illegal sentence to apply habitual-offender enhancements to an OWI 3rd. The Court vacated the defendant's sentence and remanded it for resentencing.

Woodbury County State v. Jerrell M. Wilson, No. 17-1636 (Iowa Court of Appeals, filed November 7, 2018). **Substantial evidence the defendant was driving reckless to support his conviction for vehicular homicide by reckless driving.** After a deputy tried to initiate a traffic stop, the defendant attempted to elude the deputy. As the defendant was trying to get away, he hit a dip in the road and crashed, killing his passenger. It was estimated that the defendant was traveling at eighty miles an hour on a residential street when he lost control. A jury convicted the defendant of OWI, felony eluding, and vehicular homicide by reckless driving or eluding. Held, there was substantial evidence to find that the defendant drove his vehicle in a reckless manner and counsel was not ineffective for failing to challenge the conviction on this ground.

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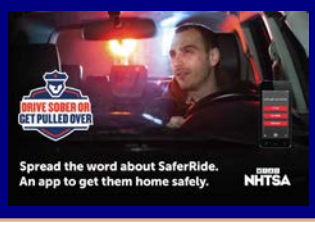

Woodbury County State v. Jerrell M. Wilson, No. 17-1636 (Iowa Court of Appeals, filed November 7, 2018). **Substantial evidence to find causation under both alternatives (reckless driving and eluding) of vehicular homicide.** After a deputy tried to initiate a traffic stop, the defendant attempted to elude the deputy. As the defendant was trying to get away, he hit a dip in the road and crashed, killing his passenger. It was estimated that the defendant was traveling at eighty miles an hour on a residential street when he lost control. A jury convicted the defendant of OWI, felony eluding, and vehicular homicide by reckless driving or eluding. Held, there was substantial evidence to find causation under both alternatives (reckless driving and eluding) of vehicular homicide.

Woodbury County State v. Jerrell M. Wilson, No. 17-1636 (Iowa Court of Appeals, filed November 7, 2018). **The district court did not error when it did not merge the convictions for OWI and felony eluding.** After a trial, the defendant was convicted of OWI, felony eluding, and vehicular homicide by reckless driving or eluding. The jury found the defendant guilty of felony eluding under two different alternatives (OWI or resulting bodily injury). The defendant appeal and argued the convictions for OWI and felony eluding should merge. Held, the district court did not error when it did not merge the convictions for OWI and felony eluding because the jury convicted the defendant under the OWI alternative and the bodily injury alternative of eluding. The Court also noted there was not a double jeopardy violation for a conviction of OWI and felony eluding citing State v. Eckrich, 670 N.W.2d 647, 650 (Iowa Ct. App. 2003).

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