ELECTRONICALLY FILED JUN 30, 2022 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellant, v. FETHE BARAKI, Defendant-Appellee.	)))))))))	S.CT. NO. 21-1115

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR WOODBURY COUNTY
HONORABLE JOHN NELSON, JUDGE

APPELLEE'S BRIEF AND ARGUMENT AND CONDITIONAL REQUEST FOR ORAL ARGUMENT

MARTHA J. LUCEY
State Appellate Defender

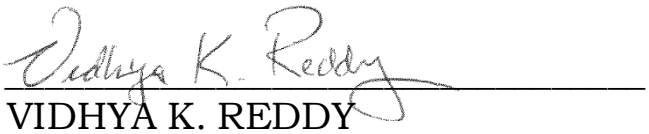
VIDHYA K. REDDY
Assistant Appellate Defender
vreddy@spd.state.ia.us
appellatedefender@spd.state.ia.us

STATE APPELLATE DEFENDER'S OFFICE
Fourth Floor Lucas Building
Des Moines, Iowa 50319
(515) 281-8841 / (515) 281-7281 FAX
ATTORNEYS FOR DEFENDANT-APPELLEE FINAL

CERTIFICATE OF SERVICE

On June 30, 2022, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellee by placing one copy thereof in the United States mail, proper postage attached, addressed to Fethe Baraki, 1211 Nebraska St. Apt. 7, Sioux City, IA 51105.[1]

STATE APPELLATE DEFENDER



VIDHYA K. REDDY
Assistant Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
vreddy@spd.state.ia.us
appellatedefender@spd.state.ia.us

VKR/vkr/04/22

[1] Defendant-Appellee has been served with the brief in English. Defendant does not read, speak, or understand the English language. Defendant is from the country of Eritria, and he speaks and reads the language of Tigrinya. The undersigned counsel has, through an interpreter, orally explained the issues being addressed on appeal.

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ROUTING STATEMENT

This case may be appropriate for retention by the Iowa Supreme Court for purposes of clarification and further application of the standard set forth in State v. Garcia, 756 N.W.2d 216 (Iowa 2008) concerning the administration of the implied consent advisory to non-English speaking drivers. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(c).

Alternatively, this case may be appropriately transferred to the Court of Appeals, as it is governed by existing legal principles. Iowa R. App. P. 6.903(2)(d) and 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case: The State, by discretionary review, challenges the district court's suppression of a DataMaster breath result for lack of voluntary consent to the submission of a breath sample.

Course of Proceedings: The State charged Defendant-Appellee Fethe Baraki with Second Offense Operating While Under the Influence, an Aggravated Misdemeanor in violation of Iowa Code § 321J.2(2)(B). The offense was alleged to have

been committed on May 16, 2021 in Woodbury County Iowa. (5/17/21 Complaint; 5/20/21 TI) (Conf.App.5-6, App.4-5).

Baraki filed a June 6, 2021 Motion to Suppress seeking exclusion of the DataMaster breath test result obtained from Baraki, on grounds that he (a non-English speaker) did not provide informed and voluntary consent to submission of the breath sample after the implied consent advisory was read to him only in English. (6/8/21 Motion to Suppress) (App.6-10). A reported hearing on the motion was held on July 12, 2021. (6/14/21 Order Setting Hearing) (App.11-12); (7/12/21 Suppr.Tr.1:1-25). During the hearing, testimony was presented from Sioux City Police Officer Colin Scherle, who administered the implied consent advisory and collected Baraki's breath sample. A copy of Officer Scherle's body cam recording, capturing the administration of the test, was placed into evidence as State's Exhibit 1. (7/12/21 Suppr.Tr.9:22-10:17). At the conclusion of the hearing, the court took the matter under advisement.

The court subsequently issued a July 16, 2021 written order granting the defendant's motion to suppress the DataMaster breath test result, concluding that the State failed to meet its burden of showing, by a preponderance of the evidence, that Baraki provided informed and voluntary consent to collection of the breath sample for chemical testing. (7/16/21 Order Granting Mot. Suppress) (App. 19-21). The court noted that "The Defendant is from Eritria", "[h]is first language is Tigrinian", and he "speaks little English." (7/16/21 Order Granting Mot. Suppress p.1) (App. 19). The court further noted that Officer Scherle "read the advisory to the Defendant in English", that Officer Scherle testified "he did not believe that the Defendant understood the Implied Consent Advisory", and that "[t]he video and audio evidence presented by the State support that conclusion." (7/16/21 Order Granting Mot. Suppress p.2) (App.20). The court concluded: "The State has failed its burden. The Defendant did not understand the Implied Consent Advisory and thus could not give valid consent. Valid consent can only be given

if it is done so knowingly and in this instance it was not." (7/16/21 Order Granting Mot. Suppress, p.2) (App.20).

The State sought and was granted discretionary review of the district court's July 16, 2021 order granting Baraki's motion to suppress the DataMaster breath test result. (8/16/21 State Applic. for Discretionary Review; 9/21/21 S.Ct. Order Granting Discretionary Review) (App.22-46). The district court proceedings were stayed pending resolution of the instant discretionary State's appeal. (9/21/21 S.Ct. Order Granting Discretionary Review) (App.44-46).

Facts: At the hearing on the motion to suppress, the State presented testimony from Sioux City Police Officer Colin Scherle, and placed into evidence Officer Scherle's body camera recording capturing his interaction with Defendant-Appellee Baraki herein. (7/12/21 Suppr.Tr. 2:21-3:21, 9:22-10:17); (Exhibit 1).

On May 16, 2021, Officer Scherle was called to the scene of a traffic stop performed by Sioux City Police Officer Sitzman. Officer Sitzman requested Officer Scherle's presence, owing to

his suspicion that the driver (Defendant-Appellee Baraki) was exhibiting signs of potential impairment. (7/12/21 Suppr.Tr.4:15-5:8). Officer Sitzman was part of a special unit which works specifically with OWI investigations. (7/12/21 Suppr.Tr.4:7-14).

Officer Scherle arrived at the scene of the traffic stop. After speaking with Officer Sitzman, he made contact with the driver Baraki and began his OWI investigation. (7/12/21 Suppr.Tr.5:9-15). See also (Exhibit 1, at 23:52:34-00:04:16). Officer Scherle immediately noticed that Baraki "had a pretty distinct language barrier." Baraki was from the county of Eritrea, and his native language was Tigrinya. (7/12/21 Suppr.Tr.5:20-22, 12:24-13:2). The "language barrier was prominent." (7/12/21 Suppr.Tr.12:11). Officer Scherle tried to communicate with Baraki using words (in English) together with "hand gestures and things of that nature." (7/12/21 Suppr.Tr.5:23-6:5). After performing field testing (via the horizontal gaze nystagmus or HGN test), Officer Scherle requested a preliminary breath sample. He then transported

Baraki to the Woodbury County Law Enforcement Center. (7/12/21 Suppr.Tr.6:1-17).

After allowing Baraki to use the restroom at the Law Enforcement Center, Officer Scherle "made attempts in order to get the Implied Consent Advisory read to him." In light of Baraki's language barrier, Officer Scherle got on the phone with the Language Line, but "[a]fter several minutes of being on hold with them, [he] was made aware that they did not have any translators for [Baraki's] country of origin." Officer Scherle "asked when would one become available", but "[t]hey could not tell [him]." (7/12/21 Suppr.Tr.6:18-7:9, 11:7-13).

After getting off the phone with the language line, Officer Scherle "made contact with Sergeant Wagner and former ASAP Officer Talbot", explaining "This was a unique circumstance that I was never aware of or never been a part of I should say." (7/12/21 Suppr.Tr.7:14-25). Officer Scherle reported to the other officers that Baraki "speaks little to no English", and requested guidance on how to proceed. (Exhibit 1, at 31:32-00:31:36, 00:37:21-00:37:28). Officer Scherle was advised

that he'd "made reasonable enough effort in order to read him the Implied Consent Advisory in his language and to proceed as I would with any other OWI investigation", by reading the advisory to him in English. (7/12/21 Suppr.Tr.7:14-25).

Officer Scherle read the Implied Consent Advisory to Baraki in English. (7/12/21 Suppr.Tr.8:20-23). Baraki indicated during the reading of the advisory that he did not understand what was being read. Officer Scherle acknowledged "I understand. But I'm going to read this to you okay?". (Exhibit 1, at 00:38:08-00:38:29). The officer then finished reading the advisory to Baraki in English. No hand gestures or other means of communicating the information were utilized during the reading of the advisory. (Exhibit 1 at 00:38:08-00:40:20).

After finishing reading of the advisory in English, Officer Scherle testified he "made several attempts to try to" communicate to Baraki the question of "whether or not he would plan on taking the test", "just using very short phrases, yes or no, will you take this test along with hand gestures"

such as "thumb up and thumb down". (7/12/21 Suppr.Tr.9:5-23). Baraki again indicated several times that he did not understand, as he spoke Tigrinya. (Exhibit 1 at 00:43:02-00:47:45). During this portion of the interaction, it occurred to Officer Scherle to try to use Google translate, "however, that language does not appear to be recognized with Google translate". (7/12/21 Suppr.Tr.8:24-9:5). Officer Scherle then administered the DataMaster test, collecting a sample of Baraki's breath for chemical testing. (7/12/21 Suppr.Tr.9:22-24); (Exhibit 1 at 00:47:45-00:51:54).

Other relevant facts will be discussed below.

ARGUMENT

The district court correctly concluded the State failed to meet its burden of showing Baraki provided valid (knowing and informed) consent where: he was a non-English speaker, the implied consent advisory was read to him only in English, the officer testified "he did not believe that the Defendant understood the Implied Consent Advisory", and "[t]he video and audio evidence presented by the State support that conclusion."

A. <u>Preservation of Error</u>: Error was preserved by virtue of the district court's order suppressing the datamaster

result over the State's resistance. (7/16/21 Order Granting Mot. Suppress) (App.19-21).

B. Standard of Review: Statutory claims, including a claim that the implied consent advisory given violated the implied consent statute is reviewed for correction of errors at law. State v. Garcia, 756 N.W.2d 216, 220 (Iowa 2008); State v. Hutton, 796 N.W.2d 898, 901 (Iowa 2011).

Constitutional claims, including a claim that any consent given was invalid as unknowing or involuntary, is reviewed de novo. On such de novo review, the appellate court evaluates the totality of the circumstances to determine whether or not the decision to provide a sample for chemical testing was made voluntarily. Garcia, 756 N.W.2d at 220; Hutton, 796 N.W.2d at 902.

C. Discussion: Section 321J.8(1) of Iowa's implied consent statute provides that "A person who has been requested to submit to a chemical test shall be advised by a police officer of" certain listed rights and consequences of submitting to or refusing a test. Iowa Code § 321J.8(1)

(emphasis added). Subsection 2 of that statute provides for an exception to the "shall be advised" requirement in a single circumstance – where the person "is dead, unconscious, or otherwise in a condition rendering the person incapable of consent or refusal". Iowa Code § 321J.8(2). No statutory exception to the "shall be advised" requirement exists for non-English speakers.

"To be valid, the driver's decision to consent to testing must be voluntary, i.e., freely made, uncoerced, reasoned, and informed." State v. Garcia, 756 N.W. 2d 216, 220 (Iowa 2008). A "driver's consent to testing may be considered involuntary, and therefore invalid, if [1] it is coerced *or* [2] *if the driver is not reasonably informed of the consequences of refusal to submit to the test or failure of the test*." Id. (emphasis added). Here, as in State v. Garcia, "we are concerned only with whether [Defendant's] consent was reasoned and informed." Id. "The ultimate question is whether the decision to comply with a valid request under the implied-consent law is a reasoned and

informed decision". State v. Bernhard, 657 N.W.2d 469, 473 (Iowa 2003).

In State v. Garcia the Iowa Supreme Court "adopt[ed] a standard which requires an officer under the circumstances facing him or her at the time of the arrest to utilize methods which [1] are reasonable *and* [2] *would reasonably convey Iowa's implied consent warnings*", including to a non-English speaker. Garcia, 756 N.W.2d at 223 (emphasis added). The requirement under this standard is not merely reasonableness of the officer's methods, but also that the methods in fact be such as "would reasonably convey Iowa's implied consent warnings." Id. That is, contrary to the State's assertion in the instant appeal, it is not enough that an officer make "an objectively reasonable effort" (State's Br. p.7) – such effort must also objectively "reasonably convey Iowa's implied consent warnings." Id.

The objectivity of the standard focuses on whether the methods used "would reasonably convey the implied consent warnings". Garcia, 756 N.W.2d at 221-222. If the methods

used "would reasonably convey" the warnings, then a defendant's unreasonable "'subjective confusion'" is not a defense. Id. (quoting State v. Piddington, 623 N.W.2d 528, 539 (Iowa 2001)). Just as "[i]n determining whether a defendant's waiver is voluntary, knowing, and intelligent, we have employed an objective test", so too "the test of whether the implied consent warnings were sufficiently administered" is also "an objective test." Garcia, 756 N.W.2d at 223 (citing to State v. Hajtic, 724 N.W.2d 449, 453 (Iowa 2006)). "Obviously, a defendant's alienage and unfamiliarity with the American legal system should be included among these objective factors [bearing on voluntariness], given that the ultimate determination of whether a waiver is knowing, intelligent, and voluntary must rest on the totality of the circumstances." Hajtic, 724 N.W.2d at 454. Just as clearly, "the defendant's *ability to understand* the questions" is among the objective factors bearing on voluntariness. Id. (emphasis added).

Application of the objective standard in Garcia turned on "the question of whether, under the circumstances presented

to [the officer], she used those methods which *would reasonably convey* the implied consent warnings to Garcia." Garcia, 756 N.W.2d at 223 (emphasis added). In finding this standard was satisfied, the Iowa Supreme Court in Garcia stated as follows:

> *Officer Strunk testified that she could understand Garcia and he seemed to understand her.* There were numerous conversations between Strunk and Garcia with little apparent difficulty in communicating. *Garcia signed the implied consent form, and he did not indicate that he did not understand. It was not until the motion to suppress that his lack of understanding was raised.* Applying the "reasonable efforts" standard to the facts and circumstances of this case, we hold that Officer Strunk, under the circumstances facing her at the time of the arrest, utilized reasonable methods *to reasonably convey* the implied consent warnings to Garcia.

Id. (emphasis added).

Importantly, the defendant in State v. Garcia was a Spanish speaker *who also spoke and understood English*. The defendant there had "challenged the adequacy of the implied consent advisory given to him, asserting that he did not comprehend the advisory when he signed it." Garcia, 756

N.W.2d at 219. But the trial court had denied the motion to suppress, because "[t]he court found Officer Strunk's testimony that Garcia was able to answer her questions in English to be credible and *concluded that Garcia 'has some understanding of English*.'" Id. (emphasis added). The methods used by the officer there were both objectively reasonable *and reasonably conveyed the implied consent warnings* to the defendant.

The same is not true in the instant case. Unlike the defendant in Garcia, Mr. Baraki does not have dual fluency in English (in addition to his first language of Tigrinya). Mr. Baraki does not speak English, and any conveyance of information by the officer was primarily through the use of hand gestures or physical demonstration. Unlike the defendant in Garcia, Mr. Baraki did not respond in English, did not indicate he generally understood, and it was clear to all involved that there was a significant language barrier preventing the conveyance of information back and forth. Mr. Baraki indicated several times during the interaction that he

did not understand what the officer was saying. Under these circumstances, the methods utilized by the officer were not such as would "reasonably convey the implied consent warnings" to Baraki who lacked the ability to speak or understand the English language.

This was precisely the determination reached by the district court herein, when ordering suppression of the datamaster result. The district court noted that "[t]he Defendant is from Eritria", "[h]is first language is Tigrinian", and he "speaks little English." (7/16/21 Order Granting Mot. Suppress p.1) (App.19). The court further noted that Officer Scherle "read the advisory to the Defendant in English", that Officer Scherle testified "he did not believe that the Defendant understood the Implied Consent Advisory", and that "[t]he video and audio evidence presented by the State support that conclusion." (7/16/21 Order Granting Mot. Suppress p.2) (App.20). Based on these considerations, the court concluded (correctly) that the State failed to meet its burden of showing, by a preponderance of the evidence, that Baraki provided

informed and voluntary consent to collection of the breath sample for chemical testing. (7/16/21 Order Granting Mot. Suppress) (App. 19-21).

Note that in Garcia, our Court did not concur with the harder line taken by some States against non-English Speaking drivers. "In those states where the primary purpose of the implied consent law is to aid the state in making its highways safe by encouraging suspected persons to take the test, courts have determined the statute requires only the warning be given, not that the driver understand the consequences of refusal." Garcia, 756 N.W.2d at 221 (citing cases from Georgia and Illinois). "Other states have determined that the driver need only understand that he or she has been asked to take a test", but that "[t]here is no requirement that the driver understand the consequences of refusal or be able to make a reasoned judgment." Id. (citing cases from Minnesota and Nebraska). Our Court instead adopted Garcia's request to employ the reasonableness standard adopted by the Wisconsin Supreme Court in State v.

Piddington, 623 N.W.2d 528 (Wis. 2001). Garcia, 756 N.W.2d at 221.

The Wisconsin Supreme Court had recognized that [1] "[t]he purpose behind [Wisconsin's] implied consent law is to combat drunk driving by 'facilit[ating] the gathering of evidence against drunk drivers" but that [2] "[t]he specific objective of the [advisory requirement] within the implied consent statutory scheme is to 'advise the accused about the nature of the driver's implied consent.'" Garcia, 756 N.W.2d at 221 (quoting Piddington, 241 N.W.2d at 538). The Iowa Supreme Court in Garcia recognized that "Like Wisconsin's implied consent law, [1] the purpose of Iowa's implied consent statutory scheme is to combat drunk driving, *but* [2] *the purpose of Iowa Code section 321J.8 within the statutory scheme is to advise accused drivers of the consequences of submitting to or failing the chemical test*." Garcia, 756 N.W.2d at 222 (emphasis added). "The purpose of providing the accused driver a basis for evaluation and decision-making 'is fulfilled, rather than undermined, if the law enforcement

officer must use reasonable methods that reasonably convey the implied consent warnings, in consideration of circumstances facing him or her.'" Id. (quoting Piddington, 623 N.W.2d at 540)) (emphasis added). "This interpretation allows a person asked to submit to chemical testing to be 'properly advised under the implied consent law, without raising the specter of subjective confusion.'" Id. (quoting Piddington, 623 N.W.2d at 540). State v. Garcia thus held "Because the purpose of Iowa Code section 321J.8 within the statutory scheme is to advise accused drivers of the consequences of submitting to or failing the chemical test, we adopt the Wisconsin standard which requires the officer 'under the circumstances facing him or her at the time of the arrest to utilize those methods which [1] are reasonable, *and [2] would reasonably convey* the implied consent warnings.'" Garcia, 756 N.W.2d at 222 (emphasis added).

The Court in Garcia did *not* adopt the adopt the approach taken by states like Minnesota, which have "determined that the driver need only understand that he or she has been asked

to take a test" with "no requirement that the driver understand the consequences of a refusal or be able to make a reasoned judgment." Garcia, 756 N.W.2d at 221 (citing, inter alia, Yokoyama v. Comm'r of Pub. Safety, 356 N.W.2d 830, 831 (Minn. Ct. App. 1984)). It is true that Iowa's Garcia decision did at one point quote from Minnesota's Yokoyama case that "Although making an interpreter available when possible is desirable, finding an interpreter is not absolutely necessary and should not 'interfere with the evidence-gathering purposes of the implied consent statute.'" Id. (quoting Yokoyama, 356 N.W.2d at 831) (citations omitted in Garcia). Similarly, language is quoted in Garcia from Wisconsin's Piddington case that "The State cannot be expected to wait indefinitely to obtain an interpreter and risk losing evidence of intoxication." Id. at 222 (quoting Piddington, 623 N.W.2d at 542). But application of this language must be done in the context of Iowa's objective reasonableness standard – which requires not only that an officer make "an objectively reasonable effort" (State's Br. p.7), but also that such effort in fact objectively

"reasonably convey Iowa's implied consent warnings." Garcia, 756 N.W.2d at 219 (emphasis added). Satisfaction of the obligation to undertake reasonable efforts and to reasonably convey the information will not always require an interpreter when a non-English speaker is involved – but only if the means used in fact reasonably convey the warnings to the non-English speaker. See e.g., State v. Piddington, 623 N.W.2d 528, 543 n.18 (Wis. 2001) (no interpreter needed "[w]here alternative methods of conveying the necessary information were available".) This could be the case for example: if the person speaks or understands enough English to reasonably understand the information conveyed in the oral advisory given in English without an interpreter; if the use of hand gestures or other mechanisms in addition to the oral advisory in English would have been adequate to reasonably convey the information to the driver; if the oral advisory given in English is accompanied by a written advisory given in the driver's native language which the driver is able to read; or, if a family member or friend can provide some interpretation

service to help the driver receive or understand the necessary information in the warnings. See e.g., Piddington, 623 N.W.2d at 542-43 (trooper used methods which would reasonably convey the implied consent warnings to hearing-impaired driver who could speech-read and read; by speaking to him, passing written notes back and forth, and obtaining assistance of officer who had limited sign language skills, the warnings were conveyed, it was evident that Piddington sufficiently understood what was communicated to him, and the defendant initialed each paragraph of the warning to show his understanding; "There was no need, as Piddington contends, for an ASL-certified interpreter in this instance."); State v. Hajtic, 724 N.W.2d 449, 452-53 (Iowa 2006) (Statutory requirement that parent must be informed was satisfied where "[a]n officer informed Hajtic's sister…, so she could translate the information to Hajtic's mother in their Bosnian language." "Despite Hajtic's argument that his sister was unable to accurately translate the fine points of a Miranda warning, it is clear that his mother was informed" of the matters required by

statute, given the mother's own testimony (through an interpreter) that the police department had informed her that Hajtic was in custody, the nature of the act charged, where Hajtic was being held, and the mother's right to confer with him.); State v. Garcia, 756 N.W.2d 216, 223 (Iowa 2008) (officer satisfied obligation to "use[] those methods which would reasonably convey the implied consent warnings to Garcia" where officer "could understand Garcia and he seemed to understand her", "[t]here were numerous conversations between [the officer] and Garcia with little apparent difficulty in communicating", "Garcia signed the implied consent form, and he did not indicate that he did not understand", and "[i]t was not until the motion to suppress that his lack of understanding was raised").

Piddington held that whether officers complied with the statutory requirement to give implied consent warnings "turns on whether they have used reasonable methods which would reasonably convey the warnings and rights in" the statute. State v. Piddington, 623 N.W.2d 528, 540 (Wis. 2001). "[T]he

State has the burden of proof of showing… that the methods used would reasonably convey the implied consent warnings." Id. The fact that the adopted standard is "not a subjective test" means that "it does not 'require assessing the *driver's perception* of the information delivered to him or her". Piddington, 623 N.W.2d at 539-40. But the information must in fact *have been delivered* to the person-- e.g., "reasonably conveyed" in a manner that gives the person the "same opportunity to understand the… warnings" as an English-speaker. Id. at 541 n.14. The requirement that "law enforcement must use reasonable methods that reasonably convey the… warnings", is an interpretation which "ensures that an accused driver is properly advised under the implied consent law, without raising the specter of subjective confusion." Id. at 540 (emphasis added).

Piddington quite explicitly adopts the understanding advanced by Defendant herein as to the distinction between 'subjective confusion' on the one hand, and the obligation to

'reasonably convey' the information on the other. In footnote 14, the Piddington court states as follows:

> Even though the legislature may have considered that the implied consent warning forms may not be easy for an intoxicated person to understand, there is no indication that the legislature intended that the mental processes of an intoxicated driver are to be taken into account in determining compliance with Wis. Stat. § 343.305(4). We agree with the court of appeals that "since the statute requires the information to be provided only to persons who are probably intoxicated, it is unlikely that the legislature intended a persons' understanding or comprehension of the information to be determinative of compliance with the statute." *State v. Piddington,* 2000 WI App 44, ¶ 15, 233 Wis.2d 257, 607 N.W.2d 303. However, **the issue at hand is whether an officer has to give deaf persons the same opportunity to understand the implied consent warnings as a hearing, English-speaking persons**, regardless of the extent to which their intoxication may interfere with their mental processes. **Reasonable methods which reasonably convey the implied consent warnings afford that opportunity.**

Piddington, 623 N.W.2d at 541 n.14 (emphasis added). The Piddington court encouraged law enforcement "to adopt methods that would assist officers in reasonably conveying the implied consent warnings in a variety of circumstances they are likely to face." Id. at 542 n.17. "Such reasonable methods

could include videos that show the warnings in sign language", or "translations, either by card for those fluent in the language to use or, again, videos, could be prepared in languages other than English that law enforcement officers encounter, such as Spanish and Hmong." Id.

In its appeal brief, the State makes three additional observations it suggests support its construction of the Garcia test. See (State's Br. pp.10-11). Defendant now addresses each in turn. First, the State reasons that Baraki impliedly consented to submit to a test merely by virtue of his decision to drive in Iowa. (State's Br. pp.10-11). But it is clear that implied consent statutes do not "do what their popular name might seem to suggest -- that is, create actual consent to all the searches they authorize." Mitchell v. Wisconsin, 139 S. Ct. 2525, 2533 (Iowa 2019). Only actual and voluntary (uncoerced, knowing, and informed) consent given at the time the bodily sample is requested will suffice as constitutionally valid consent. Second, the State suggests that excluding evidence when the officer 'did nothing wrong' is incongruous

with the exclusionary rule's principle. (State's Br. p.11). But the Iowa Supreme Court has recognized that error in the giving of the 321J.8 advisory that renders the resulting consent uninformed (and therefore involuntary) requires suppression of the chemical test results. State v. Hutton, 796 N.W.2d 898, 905-906 (Iowa 2011); State v. Bernhard, 657 N.W.2d 469, 473 (Iowa 2003). The Iowa Supreme Court has also rejected application of any 'good faith exception' to the exclusionary rule for search and seizure cases. State v. Cline, 617 N.W.2d 277, 288-93 (Iowa 2000) (en banc) (overruled on unrelated grounds by State v. Turner, 630 N.W.2d 601, 606 n.2 (Iowa 2001)). Third, the State suggests that "affirming the suppression order would make it almost impossible to conduct a DataMaster test on anyone who speak[s] an uncommon language and little English." (State's Br. p.11). But Defendant would note that Iowa's implied consent statute does not provide an exception to the obligation to provide the implied consent advisory in the case of non-English speakers (as the statute provides for unconscious drivers). Further, this feat is

not so infeasible as the State suggests. Even if a live or telephonic interpreter is not available, having pre-prepared written or video translations of the warnings available is not infeasible. See Piddington, 623 N.W.2d at 781 n.17. And interaction with someone speaking Tigrinya is not so uncommon as the State's argument on appeal may imply – indeed Officer Scherle references having interacted with another individual from Defendant's native country of Eritrea just the day before the interaction with Defendant. See (Exhibit 1 at 23:54:39-23:54:54).

Finally, and in the alternative, if this Court concludes the district court did in fact apply an incorrect legal standard, the proper remedy is remand to the district court for application of the correct legal standard. See State v. Robinson, 506 N.W.2d 769 (Iowa 1993) ("If we find an incorrect legal standard was applied [by the district court], we remand for new findings and application of the correct legal standard.").

D. Conclusion: Defendant-Appellee Fethe Baraki respectfully requests that the district court affirm the district

court's order suppressing the datamaster breath result for lack of voluntary (knowing and informed) consent.

Alternatively, if this Court concludes the district court did apply an incorrect legal standard, the proper remedy is remand for application of the correct legal standard

CONDITIONAL REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument, if argument may assist in the Court's resolution of this case.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $__0__, and that amount has been paid in full by the Office of the Appellate Defender.

VIDHYA K. REDDY
Assistant Appellate Defender

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Vidhya K. Reddy

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VIDHYA K. REDDY
Assistant Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
vreddy@spd.state.ia.us
appellatedefender@spd.state.ia.us