IN THE SUPREME COURT OF IOWA

No. 23-0964

Des Moines County No. OWIN 028293

STATE OF IOWA

Plaintiff-Appellee,

vs.

HOPE JENNIFER CLARK

Defendant-Appellant

APPEAL FROM THE DES MOINES COUNTY DISTRICT COURT

THE HONORABLE EMILY DEAN

APPELLANT'S REPLY BRIEF

Kent A. Simmons
P.O. Box 594
Bettendorf, Iowa 52722
(563) 322-7784
ttswlaw@gmail.com

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

- this brief contains **5,437** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903.

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because:

- this brief has been prepared in a proportionally spaced typeface based on Word 14 in Times New Roman font.

/s/ Kent A. Simmons

KENT A. SIMMONS

CONTENTS

TABLE OF AUTHORITIES

Code of Iowa

Statement of the Facts

The State's Statement of the Facts relies completely on the trial testimony of the police officers. Even though all interactions and conversation the police had with Ms Clark were submitted on video exhibits, with sound, to the jury as evidence, there is no reference made to those recordings. There is no reference to the fact that: Ms. Clark is severely hearing-impaired; is trying to hear the officers questions and instruction out in the very middle of a noisy four-lane roadway; and is not likely to understand what they are saying unless they are looking directly at her, while speaking slowly and loudly. As a result of her impairment, the tests the officers attempted to administer were clearly performed without instruction. The Court must view and listen to the entirety of the video of the attempted field tests to see that there is no evidence of alcohol impairment on Ms. Clark's part, but only an impairment on the officers' part when it comes to field testing of a severely hearing-impaired person.

The State did make some plainly false and misleading assertions in its Statement of the Facts. Ms. Clark will point out a few examples here:

1) After noticing several signs of intoxication and Clark at first admitting to drinking, the Deputies asked Clark to exit her car. Trial Tr. 37:22–38:2, 75:10–13. Clark complied but "stumbled" and relied on "her car for balance" while exiting. Trial Tr. 40:12–16, 51:3–7, 78:4–7.

This illustrates how an officer's recollection of an incident is affected by the embellishment of confirmation bias. A jury, and the Court, must focus on the clearly recorded actual event in the video as the real evidence. When Officer Phillips first asked Ms. Clark if she had been drinking, she had not yet told him she is hearing-impaired, and she was not looking at him when he asked if she had been drinking. Phillips was also talking at a fairly quick rate in those first questions as Hope still sat in her car. She was not looking at the officer when he asked the question. There is no reason to believe she correctly heard the question. (D0059-60, Videos, 22:59:40 - 23:00:02) When Officer Cheesman asked Hope if she had been drinking, it is clear from his body cam that she was looking directly at him. He spoke clearly. She answered, "No." (D0059-60, Videos, 23:01:14 - 23:01:19)

Hope did not "stumble" as she got out of her car. She had her hand on her car door as anyone would, under any circumstance, as she got out of the car and stood up. She was not touching her car with her left hand for the purpose of maintaining balance as she walked back toward the squad car. Lightly touching an object when walking by is a natural physical reaction. (D0059-60, 23:01:30 - 23:02:02)

> **2) Before commencing any tests, Clark disclosed to the Deputies that "she was hearing impaired." Id. at 41:6–12, 78:15–79:8. After learning this, Deputy Phillips "instructed Deputy Cheesman to enunciate everything he said," "speak loudly," and confirm Clark understood the directions "as he was giving them." Id. at 41:13–18. They maintained eye contact with Clark so "she could read [their] lips" and repeated any instructions until she confirmed comprehension.** (State's Br. p. 10)

This trial testimony from the police officers will illustrate the need for the Court to watch the video of all the testing out on the street. The officers cannot maintain the eye contact when they are talking to Hope. They also cannot maintain a consistent slowly-paced and loud voice when speaking with her. Much of the time the traffic out in the middle of that four-lane roadway is extremely loud, and

no precautions on communication would have helped. In general, this was no place to be conducting field tests with a person known to be hearing impaired.

> **3) During the horizontal gaze nystagmus (HGN) test, Clark repeatedly moved her whole head despite being instructed to follow with only her eyes. Id. at 80:19–81:22, 89:10–18. She acknowledged understanding the test's requirements, yet she still had to be reminded five times not to move her head. Id. at 82:1–3, 116:19–21.** (State's Br. pp. 10-11)

The Court must review the video and audio at 23:03:47 to 23:07:02. Before giving instructions for the test, the officer is looking right at Ms. Clark and asks her to put her feet together and keep them that way throughout the entire test. She complies. During the instruction phase of the HGN test, the officer had his finger up in the air when he said to follow "with your eyes only and not your head", repeatedly. Ms. Clark is focusing on his finger in the air the entire time. The officer is speaking very quickly. He asked her a couple times if she understood those instructions, and she did not say that she did. She only said, "Follow your finger?" During the test, the officer does indeed say five times that she should follow with her eyes only, and not her head. Every time, Ms Clark has her eyes focused on the finger up in the air and not the officer's lips mouth for the

purpose of lip reading. If the test is not performed correctly, the results are invalid. The video discloses no nystagmus in her eyes, and in fact the camera is closer to her eyes than the officer's eyes are. Of note, Ms. Clark did not lose her balance or shift her feet the entire time she was looking up with her feet together and following the finger with a light shining in her eyes.

ARGUMENT

I.

THE STATE FAILED TO PROVIDE SUFFICIENT EVIDENCE IN THE TRIAL RECORD THAT WOULD REACH THE LEVEL OF SUBSTANTIAL EVIDENCE TO PROVE THAT THE DEFENDANT WAS OPERATING HER MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL

STANDARD OF REVIEW: The State did acknowledge the requirement of *State v. West Vangen* that the Court's review must consider all the evidence that was before the jury, not just the evidence that supports the verdict. At the same time, the State does nothing to address the evidence that does not support the verdict as

Ms. Clark explained it in her opening brief. Importantly, the State's explanation of the standard of review does not include the key factor stating that "[e]vidence which merely raises suspicion, speculation, or conjecture is insufficient." *State v. West Vangen,* 975 N.W.2d 344, 349 (Iowa 2022) (State's Brief, p. 13)

The Merits

The State approaches this argument by completely relying on testimony from the two police officers who effected the arrest of Ms. Clark. While police officer testimony has traditionally been given great weight in this Court's review for sufficiency of the evidence, the standard of review requires that the Court weigh that evidence in light of what evidence of audio and video recordings show in regard to the same events in question. Thirty years ago, police testimony was generally the only evidence juries considered in judging the facts surrounding the question of whether a defendant was under the influence. These days, the courts must carefully consider the evidence that real time records disclose as to what actually happened.

Under Section 804.31, the Code, several provisions relating to the arrest, detention, questioning and statements made by persons who are deaf or hard of

hearing are required procedures for police in their interactions. Section 804.31(1) requires an officer to procure a certified interpreter for questioning a person the officer determines is deaf or hard of hearing. The requirement applies to questioning after arrest or while the person is being detained for questioning. On the other hand, under subsection 31(2), an officer can administer an Implied Consent advisory and request before an interpreter arrives, but an interpreter must then explain the advisory and request to the hearing impaired person after arrival. Additionally, under 804.31(4), "[a]n answer, statement, or admission, oral or written, made by a deaf or hard-of-hearing person" in response to questioning when an interpreter is not present is inadmissible. It is not clear whether that provision only applies to in custody questioning or all communications with a police officer. Ms Clark's attorney did not raise any issues for suppression or exclusion of evidence based upon a violation of 804.31, and therefore no such legal issues can be raised in the instant appeal. The Court can take note of the statute, however, for the proposition that the law recognizes questions, answers and statements in police interactions with a hearing impaired person are considered unreliable when a certified interpreter is not present.

In its brief on this argument, the State makes almost no reference to the evidence disclosed by the audio and video recordings. Its sole reference to the recordings appears on page 15: "When Deputy Phillips first asked if she had been drinking that night, Clark said, "yes." (D0059-60, Videos, 10:59:56–11:00:03 p.m.) That is a total of seven seconds. A close audit of the video in those seven seconds shows Hope was not looking at the officer when he asked that question. As stated above, there is no reason to believe Hope heard that question correctly. That evidence of an admission to drinking that night, of course, was considered by the officers as evidence of being under the influence. When the Court considers *all* the evidence in the record, however, the evidence cannot be considered substantial evidence of the alcohol impairment. "Sufficient or substantial evidence is such evidence as could convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt." *State v. West Vangen,* 975 N.W.2d 344, 349 (Iowa 2022)

This comparison of testimony to video is exactly the point Ms. Clark is making. The State attempts to evade the truth of the video evidence with this statement: "While the State acknowledges that Clark is hearing impaired, her testimony about the effects of her hearing impairment and other alleged conditions

during the stop ultimately goes to her credibility." (St. Br. 20-21) In a similar assertion, the State warns the Court against making credibility judgments: "Because the jury was free to dismiss Clark's explanations, the Court cannot reassess those determinations now." (St. Br. 21) The point is that credibility does not play a significant role in judging the value of the testimony in the trial. The truth is in the video. In dismissing trial testimony from the police witnesses, the Court will not be making credibility judgments. The Court will be weighing the sufficiency of the evidence on the basis of consideration of *all* the evidence.

II.

THE JUDGE BASED THE DECISION ON ERRORS OF LAW IN RULING ON THE MOTION TO SUPPRESS EVIDENCE FOR VIOLATION OF THE RIGHT TO CONSULT WITH AN ATTORNEY AS IT IS PROTECTED UNDER SECTION 804.20, THE CODE OF IOWA, AND THE FIFTH AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION.

Not surprisingly, the State only mentions *State v. Moorehead,* 699 N.W.2d 667 (Iowa 2005) parenthetically, with no substantive reference. Instead, the State relies on several unreported decisions that do not squarely address the issue. (Def. Opening Br. 37-41) (St. Br. 22-29)

Additionally, the State offers no substantive direct resistance to Ms. Clark's argument that the officers did not provide Hope with a "Reasonable Opportunity" to make a phone call after reading the Implied Consent statute to her. (Def. Opening Br. pp. 44-41) Accordingly, the State does not analyze or even mention *State v. Hicks,* 791 N.W.2d 89 (Iowa 2010). That is the case that definitively demonstrates that Ms. Clark was not afforded that reasonable opportunity. The State merely points to the district court's ruling that simply and summarily states: "Clark was allowed to use her cell phone while at the jail. It was in fact retrieved for her by the arresting deputies." (D0033, Ruling on Motion to Suppress, 2/22/23, p. 8) (St. Br. p. 29)

Custody and Detention

In *Moorehead,* the defendant was placed in custody and placed in a squad car after the police officers determined the field testing was completed out on the

street. In that case, the police invoked the implied consent request for breath testing by reading the statute to the defendant and gaining his agreement to provide a breath sample that measured well over the legal limit. The *Moorehead* court held that the defendant's request to speak with his mother while he was in the squad car out at the scene of his arrest triggered his statutory right under 804.20. At the station, the police never did give Mr. Moorehead the opportunity to call his mother, and the Court held the chemical breath test result they obtained after invoking the Implied Consent should have been suppressed. The error was considered prejudicial. *Moorehead,* 699 N.W. 2d at 671-673.

In the instant case, the State did rely on *State v. Davis*, 922 N.W.2d 326 (Iowa 2019), but did not explain its important link to the *Moorehead* case. (St. Br. pp. 22-24, 27-28) The *Davis* decision addressed a situation where the defendant made a request to talk to his wife while in custody in the squad car during an OWI investigation. The defendant had failed the HGN out at the scene. Because of inclement weather, the investigating deputy sheriff decided to transport Mr. Davis to the sallyport of the county jail to complete the field balance tests indoors. After completing those field tests in the sallyport, the deputy then made the arrest for the

OWI. At the beginning of the decision, the Court capsulized the sequence of events;

> The driver requested the opportunity to talk to his wife before leaving the scene, but the deputy denied the request and informed the driver he could talk to her after the field sobriety testing. The driver later failed two field sobriety tests at the sally port. He was arrested, moved to the jail's intake room, and given the opportunity to call his wife and attorney. After speaking with his attorney, the driver submitted to a chemical breath test which revealed a blood alcohol concentration of .128. *Davis,* 922 N.W. 2d at 328

The *Davis* court then relied on *Moorehead* to determine the Section 804.20 right to make phone calls was triggered when Mr. Davis asked to speak to his wife before he was transported to the jail to complete further field testing. The Court noted the statute had allowed the officer in *Moorehead* to delay the defendant's phone call until the defendant was under arrest and in jail.

> It is worth reading *Moorehead* with care. We emphasized that when the defendant was being put in the patrol car, "[t]he investigatory stage of the stop had ended." *Id*. The defendant had failed the field tests and, as we have already noted, in the view of the deputy, he was " 'technically' under arrest." *Id*. We continued, "As a consequence, the police were obligated to honor Moorehead's request 'without unnecessary delay after arrival at the place of detention,' in this case the police station. Because the police

> did not do so, they violated Moorehead's statutory right to contact a family member." *Davis,* 922 N.W. 2d at 332.

The *Davis* decision is critical in controlling the Court's decision in the instant case for two reasons. First, it plainly shows Ms. Clark's request to speak to her attorney just before the deputy formally arrested her, placed her in handcuffs, and placed her in the squad car out at the scene of the stop was a proper trigger for protecting her statutory right to a phone call. There is no reason to determine whether or not the investigatory phase had been completed and Hope was "technically under arrest" when she asked to speak to her attorney. The *Davis* court determined the request for a phone call that is made before field tests are completed must be honored "without unreasonable delay" after the defendant is later arrested and then put in jail.

The second important point in *Davis* that the State failed to mention in the instant case was the sequence of events after arrest and jailing. The *Davis* decision explains that sequence in detail:

> At approximately 11:14 p.m., Deputy Cardenas and Davis arrived at the sally port. Davis performed two field sobriety tests for

> Deputy Cardenas. Based on the results of these tests, at approximately 11:23 p.m., Deputy Cardenas placed Davis under arrest for operating while intoxicated and took Davis to the jail's intake room. At 11:25 p.m., Deputy Cardenas advised Davis he was allowed to place a phone call to anyone he wished.
>
> Davis first called his wife and asked her to call his attorney. Deputy Cardenas inquired of Davis if he wished to place any further calls. Davis then contacted his attorney, Greg Johnston, at approximately 11:32 p.m. After speaking to Johnston, Davis declined to answer any further questions or sign any documents until Johnston had appeared.
>
> At this point, Deputy Cardenas read Davis the implied-consent advisory and formally requested Davis to provide a breath sample for chemical testing. Deputy Cardenas, however, allowed Davis to wait to make a decision on whether or not to refuse chemical testing until he had a chance to speak personally with Johnston. Upon arrival, Johnston engaged in discussion with Davis, within view but out of earshot of Cardenas. After consulting with his attorney, Davis submitted to a chemical breath test, which indicated a blood alcohol concentration of .128.
>
> *Davis,* 922 N.W. 2d at 329

In *Davis,* the deputy allowed the defendant the phone calls he had requested out at the scene of the traffic stop. The deputy allowed the calls to be made immediately upon placing Mr. Davis in the jail. The deputy did not read the Implied Consent advisory until after Mr. Davis had phone calls with his wife and his attorney. There was *no unreasonable delay* on allowing the calls after escorting Mr. Davis into the jail.

In the instant case, the State uses several unreported, unpublished cases to conclude delay was reasonable in the deputies' interviewing Hope, reading Section 804.20 to her, reading Miranda warnings to Hope, reading the Implied Consent statute to her, and then asking her if she would offer a breath sample, before saying she could call anybody she wanted. The State focused on the amount of time all of those steps took rather than on whether those steps were "unnecessary" *before* opening up the possibility of making a phone call. The State posits: "At most, 11-minutes-and-22-seconds passed between entering the jail and Clark having the chance to make calls." From that, the State concludes there was no "unnecessary delay", and cites two unreported decisions in support of that conclusion. The decisions cited were *State v. Caldwell*, 2021 WL 592747, at *6 and *State v. Smith,* 2017 WL 510957. (St. Br. 26) The Court must examine those and other unreported opinions the State relies upon.

The *Caldwell* and *Smith* cases considered the amount of time that had lapsed while officers were engaging in other pursuits before offering an opportunity to make a phone call that had been previously requested. In *Caldwell,* a Court of Appeals panel did indeed find an 11-minute delay to be not unreasonable. While initially relying on the published *Davis* case for application of Section 804.11, the

panel did not mention that the deputy in *Davis* did afford requested phone calls before reading the Implied Consent to the defendant. The deputy then waited for Mr. Davis's attorney to arrive at the jail and complete consultation before asking for an answer on his Implied Consent request. *Davis,* 922 N.W. 2d at 329.

The *Caldwell* panel cited several unreported cases that the State has now cited in the instant case. Those cases are discussed here. In *State v. Smith,* 2017 WL 510957, p. 1, the facts were similar to *Davis* in that police elected to take a suspected drunk driver to the police station to complete field testing "because field conditions presented safety concerns". The defendant was not under arrest as the field sobriety investigation was continuing. On the way to the station, the defendant asked to make a phone call. At the station, a patdown was conducted and another officer was consulted about the investigation. The defendant then refused the balance tests, but did submit to a preliminary breath test (PBT) that was well over the limit. Mr. Smith was then placed under arrest, and an officer then read the Implied Consent advisory and defendant was informed of his Section 804.20 rights. He was then afforded telephone access. After attempting and failing to contact an attorney by phone, Smith decided to submit to the DataMaster test and again the result was well over the limit.

In approving of the reading of the Implied Consent and the Section 804.20 rights before the phone request was granted the *Smith* panel offered this rationale:

> Without deciding whether Smith's time of arrest is the defining line for determining whether there was unnecessary delay in this case, we conclude the some eleven minutes between the time Smith arrived at the police station and the time he was allowed to make phone calls did not constitute unnecessary delay. As a pragmatic matter, it is unrealistic to expect law enforcement to hand an accused a phone the minute he or she steps foot into the detention center. Necessary security measures and administrative tasks first must be performed. *State v. Smith,* 2017 WL 510957, p. 2

The *Smith* decision predated the Supreme Court's decision in *Davis,* and in *Davis,* the officer did hand the defendant the phone immediately after he arrested him at the jail. The *Smith* case and other unreported cases the State cites in its brief predate the *Davis* decision.

Importantly, the *Caldwell* panel cited an unreported decision that was filed almost ten months after the *Davis* decision. In *State v. Colocho,* 2019 WL 5791011, a panel faced yet another case where the defendant was transported to the station before attempting to conduct field tests. That was done to accommodate the defendant's request to urinate before doing any testing. As the field testing request

proceeded, the defendant asked for a lawyer. When Mr. Colocho then decided not to participate in any field testing, the officer placed him under arrest, and as in *Davis*, the officer was able to immediately hand the defendant his phone and even a phone book immediately after he was arrested. There was no need to conduct "security measures" or "administrative tasks". After Mr. Colocho decided not to make a call, the officer then invoked the Implied Consent procedure. *State v. Colocho,* 2019 WL 5791011, pp. 1-2

The key to adjudicating compliance with the statutory requirement to avoid "unnecessary delay" is not the number of minutes that elapse from the time the defendant gets to the jail and is under arrest until he is provided the opportunity to make a requested phone call. The legislature could have set a time limit, if that was what they intended. What was intended is in simple language. "Unnecessary" very simply means something that is not needed. The instant case is a perfect illustration of police officers unnecessarily engaging in readings and questioning they do not *need* to do before affording Ms. Clark a phone call she has rightfully requested before she arrived at the jail. The *Davis* and *Cochello* decisions perfectly illustrate that there is no *need* to read and invoke the Implied Consent

statute before a defendant is accommodated with the rightfully requested phone call. The following section shows the deputies never did accommodate that requested phone call.

Reasonable Opportunity to Make Call

At pages 42-43 of her opening brief, Ms. Clark explained how the instant case is exactly on point with *State v. Hicks,* 791 N.W.2d 89 (Iowa 2010). The State says nothing to contest Defendant's reliance on *Hicks,* and does not even mention the case. It is clear the State avoids discussing the *Hicks* decision because that decision plainly shows the officers failed to perform their statutory duty to take affirmative action to explain to Hope just how she would be permitted to place a phone call. As with every other aspect of the police work in the instant case the video clearly shows Hope was not hearing or understanding large portions of what the officers were saying. Under those circumstances, the game the officers were playing with hiding Hope's cell phone cancels any notion that their placement of the phone on the desk where she was sitting was the affirmative action that was required to provide a reasonable opportunity to use the phone:

> Section 804.20 states it only applies when a suspect is "restrained of [his] liberty." Hicks argues section 804.20, in order to provide detainees with a "reasonable opportunity" to contact family or counsel, requires peace officers to take some affirmative action to permit the communication. We agree that section 804.20 requires law enforcement to take affirmative action to ensure the request for a phone call is honored. Because of the disparity in power between detaining officers and detained suspects during the detention process, no lesser standard is adequate. Requiring a suspect with restrained liberty to affirmatively pick up a police department's telephone and contact family or counsel without invitation from the detaining officer transforms section 804.20 into an illusory statutory right. *Hicks,* 791 N.W.2d at 96-97

As part of its strategy to ignore *Hicks,* the State flatly denies the officers' duty to take affirmative action to accommodate the call, and misstates the law as it is set out above. The State maintains: "Iowa Code section 804.20 is not "self-enforcing: Something does not have to be provided just because the statute says it must be 'permitted.'" That statement is quoted from *State v. Markley*, 884 N.W.2d 218, 221 (Iowa Ct. App. 2016), The State misapplies the quote because that statement in *Markley* was not referring to the officer's duty to make a phone available and tell the Defendant she was free to use it. *Markley* was saying the officers were not required to find a particular lawyer for Mr. Markley and give the

defendant the lawyer's phone number. Access to the phone was not an issue in *Markley.* As the State halfway admits in its brief, the officer "gave Markley his cell phone, a landline phone, and a telephone book. [The officer] told Markley "you can use your cell phone" and "you can call anyone you want." *Id.* at 219

This is the passage Ms. Clark set out in her opening brief showing exactly what the *Hicks* court found as a failure on the duty to provide a reasonable opportunity to place a phone call. That duty requires affirmative action:

> The district court concluded "that the record indicates Hicks was permitted numerous opportunities to exercise his rights under section 804.20." We disagree. The district court noted that a telephone was located within reach of Hicks on the table where [the police officer] and Hicks were sitting, and that [the police officer] did nothing to deny Hicks the right to call his mother. First, from reviewing the tape of the processing room, no telephone is *visible* in the room. A small portion of the four-person table where [the police officer] and Hicks sat, the corner farthest diagonally from where Hicks was seated, was not shown on camera. If a telephone was located in that corner, it clearly was not within the reach or control of Hicks. Second, even if a phone was in reach, we do not think that alone suffices to provide a detainee a "reasonable opportunity" to contact family. (emphasis added)

State v. Hicks, 791 N.W.2d 89, 96 (Iowa 2010)

In the instant case, the State does not discuss the foregoing facts from *Hicks* or that court's opinion because *Hicks* clearly shows Ms. Clark was not provided a reasonable opportunity to make a rightfully requested phone call to her attorney. The deputies' investigative processing and interview of Hope Clark in the jail after she was arrested was captured on Deputy Cheesman's body cam video that was recording as he sat across the computer desk from Hope in the intake room. The Court must closely watch the entire interview. (D0059-60, Videos, 23:30:08 - 23:37:08)

Deputy Cheesman admitted on cross-examination that the booking staff at the jail would have told her she could not use her cell phone in the jail. (D0072, Supp.Hrg. Tr., 6/23/23 p. 34, L. 2-24). When Cheesman placed the cell phone on the table in front of him and next to Hope, he did not tell her she could use it. He then immediately covered up the cell phone with the Implied Consent advisory sheet after first reading *Miranda* rights. (D0059-60, Videos, 23:31:14) He did not remove the sheet covering the cell phone when he told Hope she could make a phone call. He was not "gesturing toward her phone" when he said she could make

calls. (St. Br. 26) The deputy made a quick stab in the air with his finger toward Hope and the advisory sheet. (D0059-60, Videos, 23:35:20) The sheet was still covering the cell phone, and that phone remained covered throughout the entire questioning of Hope. (D0059-60, Videos, 23:31:14 - 23:37:13) Deputy Phillips was then on his feet and standing over Hope as she remained in a sitting in a corner, cowering with her arms folded up to cover her chest. That is when she refused the breath test. (D0059-60, Videos, 23:35:48 - 23:35:56) He was telling her she could make phone calls, but he did not tell her how she could go about doing that. He did not tell her she could use the landline phone that was clear at the other end of the computer desk from where Hope was sitting. That phone was plainly far out of Hope's reach. She did not know how she could make the call, and she wanted the process to end.

A police officer's affirmative duty to provide a reasonable opportunity for a phone call under Section 804:20 is not a game. It is not a situation where an officer is allowed to manipulate the interaction to discourage the phone call. The district court's ruling was a clear error of law as the law is determined in *Hicks.* The State has not argued Ms. Clark's refusal of the chemical test was not prejudicial. It cannot. As is demonstrated in the briefing, there was little to no

reliable evidence to prove Hope was under the influence of alcohol. The test refusal was clearly prejudicial. The conviction must be reversed and a new trial provided. This Court must order that all evidence of the OWI processing interview at the jail must be suppressed at the new trial.

III.

THE JUDGE ABUSED DISCRETION BY FAILING TO EXCLUDE DOUBLE HEARSAY ORIGINATING FROM AN UNKNOWN CALLER WHO ALLEGEDLY REPORTED SEEING MS. CLARK ENGAGED IN RECKLESS DRIVING

The Merits

First, the State wrongly asserts: "Clark does not claim the alleged hearsay statements are somehow untrustworthy." Why this appears in a footnote is unclear,

but the whole premise of excluding hearsay is that it is untrustworthy. Double hearsay is doubly untrustworthy. (St Br. p. 34, ftn. 1)

The State repeatedly suggests that the defense attorney "prompted discussion" about reckless driving and its legal definition. Somehow, the State concludes the defense attorney's attempt to deal with that improper State's evidence opened the door to the prejudice of the double hearsay. (St. Br. 34-36) The defense attorney clearly attempted to completely close the door on any testimony about reckless driving by raising the motion in limine. The defense did not introduce the reckless driver 911 call. The prosecution did. The prejudice was delivered with the unfounded and perfectly clear implication that Hope had been driving recklessly before the officers ever saw her vehicle. The evidence was completely unnecessary to any legitimate evidentiary purpose, and the State has not made an affirmative showing that the double hearsay was harmless.

/s/ Kent A. Simmons

Kent A. Simmons
PO Box 594

Bettendorf, IA 52722
(563) 322-7784
ttswlaw@gmail.com