IN THE SUPREME COURT OF IOWA

DONALD CLARK, Appellee, vs. **STATE OF IOWA**, Appellant.	Case No. 19–1558 **STATE'S RESISTANCE TO CLARK'S MOTION FOR SUPPLEMENTAL BRIEFING**

In accordance with Iowa Rule of Appellate Procedure 6.1002(2), Appellant State of Iowa resists Appellee Donald Clark's motion for supplemental briefing.

1. Although framed as requesting supplemental briefing, Clark seeks nothing more than permission to file a sur-reply.

2. Before the modern rules of civil and appellate procedure, this Court struck an appellee's attempted sur-reply on at least two occasions. *See In re Rinard's Estate*, 275 N.W. 485, 486 (Iowa 1937) ("Appellee filed a brief and argument in reply to appellant's reply brief and argument. There being no authority for such a pleading, appellant's motion to strike appellee's reply brief and argument is sustained."); *Anundsen v. Standard Printing Co.*, 105 N.W. 424, 428 (Iowa 1905) ("Appellees filed an argument which they called 'an

answer to appellant's reply.' There is no authority for such a document, and appellant's motion to strike it, and to tax the costs thereof to appellees, is sustained."). Similar logic should prevail in this case decades later.

3. Rule 6.901(4) is not meant for mere sur-replies. Rather, supplemental briefing usually involves newly enacted legislation, a new decision from the United States Supreme Court, or an issue the Court *itself* identifies (and that the parties have not briefed). *See, e.g.*, *State v. Macke*, 933 N.W.2d 226, 228 (Iowa 2019) (legislation enacted while appeal was pending); *State v. Pettijohn*, 899 N.W.2d 1, 11 (Iowa 2017) (new decision from the United States Supreme Court); *Bierman v. Weier*, 826 N.W.2d 436, 443 (Iowa 2013) (mentioning supplemental briefing ordered after the Court held the case over "for reargument and further consideration"); *Grimm v. Iowa Dep't of Revenue*, 331 N.W.2d 137, 139 (Iowa 1983) (mentioning supplemental briefs ordered by the court after it identified a potential jurisdictional issue sua sponte). Clark does not contend any of those three factors exist here.

4. Further, by using the plural words "briefs," "parties," and "them" (referring to the supplemental briefs themselves), rule 6.901(4) does not appear to contemplate receiving supplemental briefs from

just one party. It is unclear from Clark's motion whether he seeks an order authorizing supplemental briefs from both parties, or just from him. *Compare* Clark Motion at pmbl. (quoting the plural words of the relevant rule), *with* Clark Motion ¶¶ 4-5 (suggesting Clark alone should have the opportunity to rebut authority cited and arguments made in the State's reply brief), *and* Clark Motion ¶¶ 8-9 (suggesting page and time limits for Clark alone). However, if the Court grants Clark's motion, the State should also have an opportunity for further briefing. *Cf. Feld v. Borkowski*, 790 N.W.2d 72, 85 (Iowa 2010) (Appel, J., concurring in part and dissenting in part) (asserting that supplemental briefing from *both* parties would "ensure that this court 'gets it right' now rather than wait").

5. Indeed, the plural text of rule 6.901(4) further supports the notion that the rule exists to provide the Court a mechanism to have an additional issue briefed, not to permit an appellee to file a sur-reply.

6. Finally, to the extent Clark contends briefing in this case has proceeded abnormally, his contention lacks merit.

7. Clark has already argued that the State did not preserve error. The State's brief asserted why reversal is required; Clark asserted in his brief that one issue was not preserved; and the State's

reply brief explains both why it was preserved and why the Court should reach it regardless of preservation. That is the normal progression of appellate briefing. No irregularity appears.

WHEREFORE, the State respectfully requests that the Court deny Clark's motion for supplemental briefing. If the Court grants Clark's motion, the State requests an equivalent opportunity to file a supplemental brief.

Respectfully submitted,

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