IN THE SUPREME COURT OF IOWA
Supreme Court No. 17-0637

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROBERT A. DAVIS,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR MUSCATINE COUNTY
THE HONORABLE GARY P. STRAUSSER, JUDGE

# APPELLEE'S BRIEF

THOMAS J. MILLER
Attorney General of Iowa

**TIMOTHY M. HAU**
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
(515) 281-4902 (fax)
tim.hau@ag.iowa.gov

ALAN OSTERGREN
Muscatine County Attorney

OUBONH WHITE
Assistant County Attorney

ATTORNEYS FOR PLAINTIFF-APPELLEE

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Authorities

*Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016)
*Bromeland v. Iowa Dep't of Transp.*, 562 N.W.2d 624 (Iowa 1997)
*Ferguson v. Iowa Dep't of Transp.*, 424 N.W.2d 464 (Iowa 1988)
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## ROUTING STATEMENT

The State agrees this case can be decided based on existing legal principles. Appellant's Br. 5. Several recent unpublished decisions of the Iowa Court of Appeals—although not controlling—provide persuasive authority for this case's resolution. *See State v. Smith*, No. 16-0749, 2017 WL 510957, at *2 (Iowa Ct. App. Feb. 8, 2017); *State v. Serrine*, No. 15-1496, 2017 WL 108290, at *6–7 (Iowa Ct. App. Jan. 11, 2017); *State v. Delzer*, No. 15-1737, 2016 WL 3276944, at *3-4 (Iowa Ct. App. June 15, 2016); *State v. Perry*, No. 11–1051, 2012 WL 1864568, at *1-2 (Iowa Ct. App. May 23, 2012). Accordingly, transfer to the Iowa Court of Appeals is appropriate. Iowa R. App. P. 6.1101(3).

## STATEMENT OF THE CASE

### Nature of the Case

Robert Davis appeals following his conviction for operating while intoxicated—second offense. He alleges that the district court erred in ruling on his suppression claims alleging a violation of Iowa Code section 804.20. The district court excluded "[a]ny evidence of the field sobriety tests performed at the Muscatine County Jail," but did not suppress Davis's chemical test sample, which was obtained after he was able to confer in person with counsel. 8/1/2016 Order;

App. 16–19. The Honorable Gary P. Strausser presided over the suppression and bench trial.

**Facts and Course of Proceedings**

On February 25, 2015, Davis and his wife were driving home from dinner and were involved in a traffic accident on a snow-covered road. Supp. Tr. p.69 ln.5–14. Davis did not appear to be at fault in the accident. Muscatine County Sheriff's Deputy Cardenas arrived at the scene. Supp. Tr. p.4 ln.25–p.5 ln.7. After making contact with Davis, Davis admitted to driving and further acknowledged he had ingested alcohol earlier in the evening with dinner. Supp. Tr. p.6 ln.4–17; p.7 ln.8p . At that time, Cardenas noted that Davis smelled somewhat of alcohol, and had red, watery eyes. Supp. Tr. p.7 ln.8–p.8 ln.1; p.9 ln.14–19. Cardenas then conducted horizontal gaze nystagmus ("HGN") testing with Davis. Supp. Tr. p.10 ln.1–p.11 ln.2. The test results were consistent with Davis being affected by alcohol. Supp. Tr. p.11 ln.9–23. At the suppression hearing Davis testified he attempted to contact his attorney by cell phone, which Cardenas stopped. Supp. Tr. p.73 ln.1–p.74 ln.5. Because of the cold, snowy nature of the scene, Cardenas intended to take Davis back to the Muscatine County Jail to conduct additional field sobriety testing in a controlled environment.

Supp. Tr. p.11 ln.24–p.12 ln. Cardenas indicated that if Davis passed these tests, he would be taken directly home. Exh. 1 23:02:40–23:03:15.

At the suppression hearing, Cardenas indicated that at the time he placed Davis inside the police vehicle he was "really not free to leave until the investigation was done." Supp. Tr. p.20 ln.17–20. Davis was not handcuffed, but was given *Miranda* warnings. Supp. Tr. p.20 ln.15–p.21 ln.5; p.73 ln.20–p.74 ln.1. Cardenas obtained Davis's cell phone from his wife, but did not give it to him prior to arriving at the jail. Supp. Tr. p.74 ln.2–11; Exh. 2 23:12:10–23:12:35. Prior to leaving the scene, Davis requested—and Cardenas denied him—an opportunity to speak with his wife, but Cardenas indicated could calls could occur "once we are all done." Supp. Tr. p.18 ln.13–17; Exh. 1 22:57:00–22:57:45.

After arriving at the jail, Cardenas conducted two additional field sobriety tests, which Davis failed. Supp. Tr. p.19 ln.1–p.20 ln.4. Davis declined to provide a preliminary breath test sample. Exh. 3 00:04:40–00:04:55. At this point, Cardenas advised Davis he was under arrest for operating while intoxicated, and took him into another room. Supp. Tr. p.21 ln.6–12. Cardenas advised Davis that he

could contact "anyone" he wished to, and gave Davis his phone. Davis contacted his wife twice. Exh. 3 00:01:18–00:06:15. During these conversations, Davis's speech was slurred as he urged his wife to contact Greg Johnson or Ardeth, and he began reshaping the narrative—placing his wife as the driver of the vehicle, in contradiction to both parties' statements at the scene at their later testimony at the suppression hearing. Exh. 3 00:01:40–00: 03:36; Supp. Tr. p. 69 ln.2–3; p.73 ln.1–3. Davis unsuccessfully attempted to reach Johnson. Exh. 3 00:07:30–00:08:23. Johnson then called Davis back and advised him not to say anything or sign anything until he arrived at the Muscatine County Jail. Exh. 3 00:08:30–00:11:20.

At 11:40 p.m., Cardenas read Davis the implied consent advisory and officially requested a chemical test sample. Exh. 3 00:11:20–00:16:35. Though the two engaged in some conversation, Davis did not respond to Cardenas's requests for a sample—likely complying with Johnson's advice. Exh. 3 00:16:35–00:30:08. After Johnson arrived, he and Davis were permitted to speak outside Cardenas's earshot, but within his view. Exh. 3 00:31:15–00:40:28. Once their consultation was complete, Davis agreed to provide a breath sample. Exh. 3 00:41:20–00:42:40. The blood alcohol sample

registered .128. Exh. 3 00:48:10–00:52:45. Davis was then booked at released to Johnson's custody. Exh. 3 00:56:40–01:00:30. The total time between Davis's arrival at the Muscatine County Jail and his being allowed to make phone calls was approximately twelve to thirteen minutes. *Compare* Exh. 2 11:13:55–11:14:00 (video timecode depicts the time) *with* Exh. 3 00:01:17 (Cardenas indicates the present time 11:25).

On March 30, 2015, the State charged Davis with operating while intoxicated—second offense in violation of section 321J.2(1) (2015). 3/30/2015 Trial Inf.; App. 3. Davis filed an initial motion to suppress, and later filed an amended motion. 1/4/2016 Motion to Suppress; 3/15/2016 Amended and Substituted Motion; App. 6–12. A suppression hearing occurred on April 1, 2016. The district court entered its ruling on August 1, granting the suppression motion in part and denying it in part.

The court found that Davis was "in custody" when he requested to speak with his wife, that the Muscatine County Jail was "a place of detention" as anticipated by section 804.20, and concluded that when Cardenas conducted field sobriety testing prior to allowing Davis an opportunity to speak with his wife "this is a clear violation of Iowa

Code Section 804.20 and the State is precluded from using as evidence the 'field' sobriety tests performed in the sally port/garage at the Muscatine County Jail." 8/1/2016 Order p.4–5; App. 16–17. However, the district court also found that following field sobriety testing

> Attorney Johnson had an opportunity to meet with his client in private. . . . The evidence establishes that Deputy Cardenas did not interrupt the defendant when he consulted with his attorney. They had a full and complete opportunity to discuss the situation. The State's misconduct by violating Iowa Code section 8004.20 ended when the defendant was allowed to consult with his wife by phone and attorney in person. From that point forward there was no violation of Iowa Code Section 804.20 and evidence collected after that point was admissible.

8/1/2016 Order p.7; App. 19.

Following the suppression hearing, the matter was tried to the bench based upon stipulation and submitted exhibits. 3/1/2017 Order p.1; App. 28. The district court again excluded all statements Davis made after being placed in Cardenas's service vehicle and his results on field sobriety testing prior to being allowed to contact his wife and attorney. 3/1/2017 Order p.3; App. 30. The Court found Davis guilty beyond a reasonable doubt of operating while intoxicated based upon

Davis and his wife's statements that he was driving on the night in question, his admission to having three drinks, and Cardenas's observation of Davis and his HGN test failure, in addition to his chemical test revealing a .128 blood alcohol content. 3/1/2017 Order p.1–3; App. 28–30. A sentencing order was issued on March 23, and Davis filed a timely notice of appeal on April 14, 2017. 3/23/2017 Disposition; 4/14/2017 Notice of Appeal; App. 32–36.

## ARGUMENT

### I. The District Court Correctly Found Davis's Statutory Rights Under Iowa Code Section 804.20 were Satisfied Prior to Chemical Testing.

#### Preservation of Error

The State agrees Davis challenged the delay before he was allowed to contact his wife and attorney as a violation of Iowa Code section 804.20. 3/15/2016 Amended Suppression Motion p.2–3; App. 9–10. The matter was litigated during the April 1, 2016 hearing, and the district entered a ruling granting Davis's claim in part and denying it in part on August 1, 2016. 8/1/2016 Order p.4–7; App. 16–19. After Davis's trial brief urged the court to reconsider the matter, the court reaffirmed its views in its bench trial ruling. 3/1/2017 Order p.2–3; App. 29–30. Error was preserved.

**Standard of Review**

When an Iowa appellate court reviews a claim that an officer failed to comply with Iowa Code section 804.20, "review is on error because no constitutional issues are involved." *State v. Frake*, 450 N.W.2d 817, 818 (Iowa 1990) (citing *State v. Cullison*, 227 N.W.2d 121, 126-27 (Iowa 1975)). If the district court properly applied the law and its findings of fact were supported by substantial evidence within the record, the appellate court will uphold the lower court's ruling on the motion to suppress. *See State v. Moorehead*, 699 N.W.2d 667, 671 (Iowa 2005); *see also State v. Walker*, 804 N.W.2d 284, 289 (Iowa 2011).

**Merits**

A person arrested for operating while intoxicated has a limited statutory right to consult with an attorney or family member prior to deciding whether to submit to a chemical test. *State v. Vietor*, 261 N.W.2d 828, 832 (Iowa 1978). This right is based within Iowa Code section 804.20:

> Any peace officer of other person having custody of any person arrested or restrained of the person's liberty for any reason whatever, shall permit that person, without unnecessary delay after arrival at the place of detention, to call, consult, and see a member of the person's

> family or an attorney of the person's choice, or both. Such person shall be permitted to make a reasonable number of telephone calls as may be required to secure an attorney. If a call is made, it shall be made in the presence of the person having custody of the one arrested or restrained. If such person is intoxicated, or a person under eighteen years of age, the call may be made by the person having custody. An attorney shall be permitted to see and consult confidentially with such person alone and in private at the jail or other place of custody without unreasonable delay. A violation of this section shall constitute a simple misdemeanor.

The statute does not provide an absolute right to counsel. It does "require[] a peace officer to provide the arrestee with a reasonable opportunity to contact an attorney." *Bromeland v. Iowa Dep't of Transp.*, 562 N.W.2d 624, 626 (Iowa 1997). The right is satisfied when the arrestee is permitted to make a phone call. *Ferguson v. Iowa Dep't of Transp.*, 424 N.W.2d 464, 466 (Iowa 1988), *abrogated on other grounds by State v. Hicks*, 791 N.W.2d 89, 95-96 (Iowa 2010); *Haun v. Crystal*, 462 N.W.2d 304, 306 (Iowa Ct. App. 1990); *State v. Rooks*, No. 04-1007, 2005 WL 1963032, at *3 (Iowa Ct. App. Aug. 17, 2005) (right to contact family member satisfied where individual had opportunity to call family member). Where the right is

denied "evidence of his refusal to take chemical test shall be inadmissible at a later criminal trial." *Vietor*, 261 N.W.2d at 832.

Iowa courts read section 804.20 in tandem with the provisions of Iowa Code chapter 321J and Iowa's implied consent procedures: "'[W]e have continuously affirmed that the primary objective of the implied consent statute is the removal of dangerous and intoxicated drivers from Iowa's roadways in order to safeguard the traveling public.'" *Id.* (quoting *Welch v. Iowa Dep't of Transp.*, 801 N.W.2d 590, 594 (Iowa 2011)); *State v. Garcia*, 756 N.W.2d 216, 220 (Iowa 2008) (observing Iowa's implied-consent statute was enacted to "reduce the appalling number of highway deaths resulting in part at least from intoxicated drivers"); *see generally Birchfield v. North Dakota*, 136 S.Ct. 2160, 2166 (2016) ("Drunk drivers take a grisly toll on the Nation's roads, claiming thousands of lives, injuring many more victims, and inflicting billions of dollars in property damage every year."). This means that in the context of an OWI investigation, the contours of this statutory right are read pragmatically; the reviewing court must balance the individual's statutory right with the goals of Iowa's chemical-testing statutes. *See Walker*, 804 N.W.2d at

291. That is to say, the individual's right to contact another does prevail over the State's need to conduct an investigation.

Davis contends that the suppression court erred in admitting his chemical test result. In his view, after concluding that Cardenas initially violated section 804.20, the court "laid down an artificial line of demarcation, rather than applying the law of the exclusionary rule." Appellant's Br. 25. The State respectfully disagrees. Davis's chemical test was admissible because his right to contact another person pursuant to section 804.20 did not come into effect until completion of the officer's OWI investigation, because any delay after his arrival at the station was not "unreasonable," and because his right under the statute was given full effect prior to requiring him to make a decision whether to take a chemical test.

### A. Davis's Request to Contact Others was Premature Until the Completion of the OWI Investigation and Invocation of Implied Consent Procedures had Begun.

Despite his early invocation of section 804.20's opportunity to make contact with counsel or family, Davis had no right to consult another person prior to his arrival at the place of detention—the Muscatine County Jail's OWI room. His prior invocation could not bring the officer's lawful investigation to a halt, nor does it render the

delay in allowing Davis access to contact others a statutory violation. Cardenas was not required to give effect to Davis's right under section 804.20 until the conclusion of his field sobriety testing. Deferring the opportunity to place a phone call until after Cardenas invoked Iowa's implied consent procedures was consistent with the legislature's intent. The district court's error, if any, was in suppressing Davis's earlier performance on field sobriety tests at the jail port.

While field sobriety tests undoubtedly are an inconvenience for the suspected driver, Iowa courts have already concluded temporary detention for field sobriety testing is not necessarily an arrest. *See State v. Krebs*, 562 N.W.2d 423, 426 (Iowa 1997) ("These tests are part of an officer's investigation to determine if a criminal offense has occurred."). In a similar vein, transport to a law enforcement office to conduct field sobriety testing does not automatically render the encounter an arrest. *See State v. Dennison*, 571 N.W.2d 492, 497 (Iowa 1997) ("The limited detention necessary to transport Dennison to the ASAP office and to conduct the tests to determine whether he was under the influence of drugs was incidental to the investigation, and did not constitute an arrest."); *State v. Delzer*, No. 15-1737, 2016 WL 3276944, at *3-4 (Iowa Ct. App. June 15, 2016) (transport to jail

for field sobriety tests during inclement weather not arrest). Iowa courts have also already held that the "restrained of the person's liberty" language within section 804.20 means something beyond this type of temporary investigative detention. *See id.* at 426 ("Although section 804.20 may be implicated in a situation short of a formal arrest, we do not believe the language 'restrained of the person's liberty for any reason whatever' extends to the investigatory portion of a traffic stop."). *But see State v. Serrine*, No. 15-1496, 2017 WL 108290, at *6–7 (Iowa Ct. App. Jan. 11, 2017) (finding that Serrine's 804.20 rights were "implicated" when officer ordered her out of her vehicle and placed her within officer's police vehicle for transport to perform additional field sobriety testing).

The Iowa Supreme Court has already foreclosed the argument that Iowa Code section 804.20 authorizes a right to contact counsel during this pre-arrest field sobriety testing phase of an OWI investigation. *Krebs*, 562 N.W.2d at 426 ("To interpret the statute otherwise would thwart all investigations upon a person's request to contact a family member or an attorney. We do not believe the legislature intended such an impediment in enacting the protections of the statute."); *see also Delzer*, 2016 WL 3276944, at *2–3 (finding

that like *Krebs*, an officer's decision to conduct field sobriety testing in the jail was an ongoing portion of the OWI investigation, and Delzer's request to contact her attorney was premature). Sensibly, when an individual invokes his or her rights under Iowa Code section 804.20 law enforcement is not required to immediately cease all otherwise valid activity until the individual has made contact with their attorney. *See Krebs*, 562 N.W.2d at 426; *Vietor*, 261 N.W.2d at 831–32 (quoting *People v. Gursey*, 239 N.E.2d 351, 352 (N.Y. 1968)) ("[T]here can be no recognition of an absolute right to refuse the test until a lawyer reaches the scene."). Such a requirement would undoubtedly create a trap for the State. *See State v. Hellstern*, 856 N.W.2d 355, 365 (Iowa 2014) (Cady, C.J. concurring specially) (stating section 804.20 is not intended to be used as "a trap for the state"). Rather, balancing the rights of the individual with the Iowa's OWI statutory framework, Iowa Courts have concluded that the right 804.20 provides comes into effect after the completion of field sobriety testing and the invocation of implied consent procedures, but prior to the individual being required to elect whether or not to provide a chemical test sample. Several recent court of appeals

decisions, although not controlling authority, persuasively illustrate the point.

For example, the Iowa Court of Appeals in *State v. Perry* rejected the argument that not providing immediate access to counsel violates section 804.20. In the case, the State flatly denied Perry the right to make a telephone call to counsel upon arrival at the police station until after the implied consent advisory had been read to him. *State v. Perry*, No. 11–1051, 2012 WL 1864568, at *1-2 (Iowa Ct. App. May 23, 2012). In fact, the officer physically took Perry's cell phone so that he could complete reading the advisory. *Id.* After completing the advisory, he returned the phone to Perry and permitted him to make calls prior to conducting chemical testing. *Id.* While Perry refused to make calls, the court of appeals did not find that the officer's deferred telephone access violated section 804.20: "we agree with the district court's finding that Perry was provided multiple opportunities to contact an attorney without unnecessary delay by Jorgensen." *Id.* at *3; *see also State v. Shaffer*, 774 N.W.2d 854, 855-57 (Iowa Ct. App. 2009) (finding no denial of right of 804.20 where defendant was given multiple opportunities to contact counsel); *State v. McKibbin*, No. 07-2146, 2008 WL 4531459, at *3 (Iowa Ct. App. Oct. 1, 2008)

(concluding that police affording defendant a reasonable opportunity to call a family member or attorney satisfied section 804.20; refusing to assist defendant in calling person not authorized by statute did not violate the statute).

Similarly in *Serrine*, police pulled over Serrine's vehicle after observing her driving the opposite direction on a one-way street. *Serrine*, 2017 WL 108290, at *1. The car was parked in a parking lot next to an apartment complex. Serrine's passenger was an attorney. *Id.* After she failed HGN testing and admitted she had been drinking, the officer believed Serrine was driving while intoxicated. *Id.* at *2. The officer wished to conduct additional field sobriety testing in a different, flatter parking lot. Prior to this second phase of field sobriety tests, Serrine insisted on her passenger coming along, which the officer refused. *Id.* at *2–3. Although the passenger was not allowed to accompany her to the other parking lot, Serrine was allowed to speak with him prior to the tests, and a second officer arrived and was present for the testing. Serrine failed the additional tests and registered a "high" preliminary breath test over .08. *Id.* at *4. Serrine was arrested, but was not given *Miranda* warnings.

After arriving at the "sally port" of the county jail, Serrine asked to contact her attorney, and again asked when she entered the datamaster room. *Id.* Both times officers deferred her request, suggesting she could make the calls after the implied consent advisory was read. *Id.* The officer eventually permitted her to make calls before reading the advisory. *Id.* She did so, and then provided a chemical test sample that was above the .08 threshold. *Id.* Serrine filed a motion to suppress, and was partially successful—the district court suppressed her un-*Mirandized* statements made to the officer after being placed in his service vehicle. *Id.* at *5. Her chemical test result was not suppressed; Serrine had time to talk with her passenger at the scene and was afforded the opportunity to contact others once she arrived at the county jail. *Id.* After a trial to the bench, the district court convicted Serrine.

On appeal, Serrine again urged that her rights under 804.20 were violated. The Iowa Court of Appeals disagreed. Although it found that her rights were "implicated" after she was placed within the officer's service vehicle and moved to the second lot for further testing, her invocation of the right was premature:

> Although one may invoke section 804.20 rights before arriving at the ultimate place of

> detention, a call or consult need not take place until after arrival at the ultimate place of detention. Serrine was not entitled to a call or consult at roadside, in the parking lot, or in the squad car, i.e., during the investigatory pre-arrest period of time. She was entitled to a call or consult only at her final place of detention—the jail. . . . She had no statutory right to have Spurgeon accompany her during the field sobriety tests or to consult with him at the scene.

*Serrine*, 2017 WL 108290 at *6–8. Because she was afforded an opportunity to contact her attorney after her arrival at the jail, no violation of section 804.20 occurred.

Applying these analyses to the facts of the present case, any claim Davis's field sobriety testing should have been suppressed is without merit. Officers arriving to the scene of an automobile accident on a cold and snowy night noted that Davis smelled of alcohol and had red, watery eyes. Supp. Tr. p.7 ln.8–p.8 ln.1; p.9 ln.14–19. After failing a horizontal gaze nystagmus test, Cardenas wished to conduct additional field sobriety testing to determine if Davis was impaired. Supp. Tr. p.11 ln.24–p.12 ln. Because of weather conditions, the results obtained from any testing on the scene would have been suspect. The outcome of the testing was not preordained, Cardenas indicated that if Davis passed, he would be returned home.

Exh. 1 23:02:40–23:03:15. A short detention and transport for field sobriety testing was appropriate in this circumstance. *See Delzer*, 2016 WL 3276944, at *3–4. Although Davis attempted to contact his attorney and confer with his wife within the ambulance, at this time, no rights under section 804.20 had attached. *Id.* ("We find no error in the district court's conclusion Delzer had been detained, but had not been restrained of her liberty, so section 804.20 was not implicated.").

As the district court observed, Davis was placed in Cardenas's police vehicle un-handcuffed but *Mirandized*. 8/1/2016 Order p.2; App. 14. Cardenas agreed at the suppression hearing that Davis was not free to leave. Supp. Tr. p.20 ln.15–24; p.40 ln.24–p.41 ln.14. Even so, at this point Davis possessed no right to consult his wife or counsel. *Serrine*, 2017 WL 108290, at *6–8; *Krebs*, 562 N.W.2d at 426. After arriving at the "sally port" of the Muscatine County Jail, Cardenas then conducted the remaining field sobriety tests. Exhibit 2 23:14:00–23:20:40. Now possessing reasonable belief that Davis was under the influence of alcohol, Cardenas invoked Iowa's implied consent procedures. *See* Iowa Code § 321J.6; Exhibit 3 00:00:00–00:01:50. Because implied consent was invoked and Davis was now

going to be indefinitely detained, Davis's right to contact counsel or a family member prior to undergoing chemical testing came into full effect. Like the suspects in *Perry* and *Serrine*, Davis's prior invocations were premature and Cardenas's failure to immediately stop his lawful investigation and honor those requests did not violate 804.20. *See Serrine*, 2017 WL 108290, at *7–8; *Perry*, 2012 WL 1864568, at *3; *see also Delzer*, 2016 WL 3276944, at *3 (distinguishing *Moorehead*, investigatory state of stop was still ongoing and 804.20 rights were not violated). Davis is wrong that Cardenas was required to immediately comply with his request to call his wife or counsel. Respectfully, the district court erred in suppressing Davis's performance on his field sobriety tests within the jail.

Even if this Court were to disagree, reversal is not warranted. Assuming Davis's right to consult with counsel came into full effect the moment he and Cardenas arrived at the Muscatine County Jail—but prior to the completion of Cardenas's investigation—any delay in allowing Davis to make a phone call was not "unnecessary."

### B. Delaying Davis from Contacting his Wife or Attorney until the Completion of the OWI Investigation and the Invocation of Implied Consent Proceedings was Necessary.

After a person arrested or restrained of their liberty arrives at the place of detention, the officer shall permit the person to call, consult, and see a member of the person's family or attorney without "unnecessary delay." Iowa Code § 804.20. So long as the delay is "necessary," no violation of section 804.20 occurs. *See State v. Smith*, No. 16-0749, 2017 WL 510957, at *2 (Iowa Ct. App. Feb. 8, 2017); *State v. Campbell-Scott*, No. 16-0472, 2017 WL 512590, at *3–4 (Iowa Ct. App. Feb. 8, 2017). Two recent Iowa appellate cases helpfully illustrate the contours of a "necessary" delay.

First, in *Smith* a defendant alleged that an eleven-minute delay between his arrival at the police station and the ability to make a phone call violated his rights under section 804.20. *Smith*, 2017 WL 510957, at *1. Smith had been brought to the scene for field sobriety testing after he had crashed into a police barricade. *Id.* Although officers noted he smelled heavily of alcohol, had blood-shot eyes and slurred speech, additional field sobriety testing could not have been performed at the scene due to safety concerns. *Id.* En route, Smith requested to make a phone call. *Id.*

Upon arrival at the police station, the officer conducted a pat down search, then placed Smith in a holding cell for five minutes while he explained to another officer the state of the investigation. The officer then informed Smith he was not under arrest but requested him to engage in field sobriety testing. *Id.* Smith declined field sobriety testing but did submit to a preliminary breath test which indicated his blood alcohol content was above .08. *Id.* He was then read an implied consent advisory, given his rights under section 804.20, and permitted to make phone calls.

On appeal, he urged that the delay was too long, that he should have been immediately permitted to contact others upon arrival at the jail. *Id.* at *2. The Iowa Court of Appeals disagreed:

> 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

*Id.* Like *Perry*, The court of appeals implicitly rejected the argument that not providing this type of immediate opportunity to contact

others violates section 804.20. *Perry*, 2012 WL: 1864568, at *3; *see also Shaffer*, 774 N.W.2d at 855–57 (finding no denial of right of 804.20 where defendant was required to wait until advisory was read, and was given multiple opportunities to contact individuals). The logic of *Smith* and *Perry* is apposite in resolving the present case.

Any delay in allowing Davis to confer with his attorney was necessary. At the time Cardenas and Davis arrived at the Muscatine County Jail, the OWI investigation was incomplete. Other field sobriety tests had not been administered and Davis had not yet been offered a preliminary breath test. Davis would need to be read the implied consent advisory prior to contacting his attorney. *See* Iowa Code §§ 321J.8, 9. Cardenas testified at the suppression hearing that a fifteen-minute deprivation period was still required. Supp. Tr. p.26 ln.15–p.27 ln.16; Iowa Admin Code r. 661–157.2(4) (requiring operator of breath testing device to follow checklist furnished by the Iowa department of public safety's criminalistics laboratory providing that arrestee be observed for a fifteen-minute "deprivation" period). In order to comply with section 321J.6(1), a brief delay was necessary. The roughly twelve-minute delay from Cardenas and Davis's arrival at the Muscatine County Jail did not violate Davis's rights. Exh. 2

22:13:55–22:23:40; Exh. 3 00:00:00–00:01:17. The district court's decision not to suppress Davis's chemical test was correct.

### C. Because Davis's 804.20 Rights to Confer with an Attorney Prior to Chemical Testing were Vindicated, Davis's Chemical Test was Properly Admitted.

Accepting as true for argument's sake that a violation of section 804.20 occurred because Davis's rights under the statute attached and should have been immediately given effect upon his arrival at the Muscatine County Jail, there still remains no reason to apply 804.20's exclusionary rule. Appellant's Br. 23–25. As the district court concluded, Cardenas afforded Davis a full opportunity to meet and confer with his attorney prior to chemical testing. His rights under section 804.20 were given full effect, and accordingly suppression of the chemical test was inappropriate. The State addresses this issue in two respects. First, because the exclusionary rule applied to violations of the Fourth and Fifth amendments is distinct from the rule of exclusion the *Vietor* court created, the relevant doctrine does not warrant suppression here. Second, so long as section 804.20's rights are enforced prior to chemical testing, any prior violation is cured.

### D. Because the Rule of Exclusion for Constitutional Violations is Distinct from the Rule of Exclusion for Statutory Violations, the District Court Applied the Proper Standard.

Davis suggests the district court erred when it did not suppress his chemical test after finding an earlier 804.20 violation because "there is no reason the exclusionary rule would be applied differently in enforcing the statutory right, as compared to constitutional rights." Appellant's Br. 24. He is mistaken. The rules–although similar–have different foundations and applications. They are not parallel.

First these exclusionary rules have different foundations, and the Iowa Supreme Court has long recognized the rules are distinct. *See State v. McAteer*, 290 N.W.2d 924, 925 (Iowa 1980) (noting the *Vietor* court's adoption of an exclusionary rule for violations of section 804.20, "Before doing so we were careful to reject a contention that the evidence should be suppressed on constitutional grounds. Our holding in *Vietor* rested squarely and exclusively on the statute. . . . Constitutional requirements may be set aside because [804.20's] exclusionary rule was in no way derived from constitutional rights."). Accordingly, when a violation of Iowa Code section 804.20 occurs, it produces "a nonconstitutional error." *State v. Garrity*, 765 N.W.2d 592, 597 (Iowa 2009); *Moorehead*, 699

N.W.2d at 672. Such error only justifies vacating the OWI conviction if "the rights of the complaining party have been injuriously affected by the error or that he has suffered a miscarriage of justice[.]" *See Garrity*, 765 N.W.2d at 597 (quoting *State v. Sullivan*, 679 N.W.2d 19, 29 (Iowa 2004)).

Additionally, the standards differ in application. Although exceptions exist to the constitutional exclusionary rule, Iowa courts historically have not engaged in a harmless error analysis to absolve such constitutional violations. *Compare State v. Naujoks*, 637 N.W.2d 101, 111 (2001) (describing the attenuation, inevitable discovery, and independent source exceptions to the exclusionary rule) *with State v. Fremont*, 749 N.W.2d 234, 243–44 (Iowa 2008) (refusing to apply harmless error rule to Fourth Amendment violation where ample probable cause supported warrant but magistrate was not neutral and detached). The same cannot be said of the rule of exclusion applied to section 804.20 violations. *See Garrity*, 765 N.W.2d at 597. Iowa Courts have affirmed convictions based in part upon evidence obtained in violation of section 804.20 where the admission amounted to harmless error. *See Garrity*, 765 N.W.2d at 597; *State v. Solomon*, No. 12-1919, 2013 WL 6700295, at *3 (Iowa

Ct. App. Dec. 18, 2013) (observing that even if violation of Iowa Code section 804.20, admission of such evidence was harmless error when taken in context with pre-violation evidence); *see also State v. Coder*, No. 15-0786, 2016 WL 1130616, at *2-3 (Iowa Ct. App. Mar. 23, 2016) (not reaching the merits of defendant's claim of violation of section 804.20 where overwhelming evidence of guilt aside from chemical testing established harmless error); *State v. Thornburg*, No. 04-0237, 2005 WL 974692, at *3-4 (Iowa Ct. App. Apr. 28, 2005) (same).

It is true that where an individual is completely or functionally denied the right to contact others pursuant to section 804.20, suppression of his or her chemical test is the remedy. *See Walker*, 804 N.W.2d at 296; *Vietor*, 261 N.W.2d at 832. But this case is distinct. Discussed below, Davis's rights were given full effect before he was required to submit to chemical testing and accordingly the 804.20 exclusionary rule was inapplicable.

### E. Violations of Section 804.20 can be Cured.

One of the distinct aspects of sect 804.20's exclusionary rule is that its violation can be cured. Section 804.20's requirements are satisfied "if the arrestee is permitted to make a phone call to his or her attorney" prior to refusing or consenting to a chemical test. *See*

*Moore v. Iowa Dep't of Transp.*, 473 N.W.2d 230, 231 (Iowa Ct. App. 1991) (citing *Haun*, 462 N.W.2d at 306). In *Vietor*, the Iowa Supreme Court laid out rules governing the application of exclusionary rule following violations of the statutory right to counsel in OWI investigations.

These rules required a person arrested for OWI be allowed to call his lawyer "before being required to elect whether he shall submit to a chemical test." *Vietor*, 261 N.W.2d at 832. "If he is *denied* that opportunity, evidence of his refusal to take chemical test shall be inadmissible at a later criminal trial." *Id.* (emphasis added). The only timing element within the exclusionary rule adopted in *Vietor* rule is the "before being required to elect" to undertake chemical testing component. This is consistent with this specific rule of exclusion's role in protecting a limited right to consult an attorney "before making the important decision to take or refuse a chemical test under implied consent procedures." *Id.* at 831; *see also Garrity*, 765 N.W.2d at 596 (noting that section 804.20 is intended to "allow the [OWI] arrestee to call an attorney before making the decision to submit to chemical testing."). As the court in *Vietor* specifically observed: "We have not overlooked the fact that Irvin was allowed to make several

telephone calls and ordinarily this would satisfy [§ 804.20]." *Vietor*, 261 N.W.2d at 831. This suggests that although an initial violation could occur, so long as the violation is ultimately cured prior to the suspect being required to submit to a chemical test, the rights under the statute are satisfied and suppression is unnecessary.

Here, Davis was permitted several minutes to contact others unfettered. Exh. 3 00:00:15–00:11:10. He was additionally permitted to wait approximately 15 minutes to decide whether or not to make his decision regarding chemical testing until his attorney arrived and a private consultation occurred. Exh. 3 00:14:30–00:30:52. Cardenas gave full effect to Davis's rights under section 804.20. As the district court correctly concluded, any prior violation did not injuriously affect Davis's rights and the 804.20 exclusionary rule need not apply. The district court correctly declined to suppress Davis's chemical test result and respectfully, this Court should affirm.

## CONCLUSION

Although the district court erred in concluding that an 804.20 violation occurred when Davis was not allowed to contact his wife or attorney prior to field sobriety testing, it correctly determined that Davis's chemical test result need not be suppressed. Davis is mistaken that a lawful OWI investigation must come to a complete halt upon a premature invocation of one's section 804.20 rights. Any delay that occurred prior to Davis's contact with his counsel was necessary. Even assuming arguendo that a violation occurred, any violation was cured by fully honoring Davis's right prior to requiring him to decide whether or not to provide a chemical test sample. Respectfully, this Court should affirm Davis's conviction for operating while intoxicated—second offense.

## REQUEST FOR NONORAL SUBMISSION

The State does not request oral submission. Davis's presented questions regarding the application of section 804.20 and its rule of exclusion can be resolved on existing case law. In the event that oral argument is ordered, the State requests to be heard.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

**TIMOTHY M. HAU**
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
tim.hau@ag.iowa.gov

## CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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Dated: February 26, 2018

**TIMOTHY M. HAU**
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
tim.hau@ag.iowa.gov