IN THE SUPREME COURT OF IOWA

No. 17-0637

STATE of IOWA

Plaintiff-Appellee,

vs.

ROBERT A. DAVIS

Defendant-Appellant

APPEAL FROM THE MUSCATINE COUNTY DISTRICT COURT

THE HONORABLE GARY P. STRAUSSER

APPELLANT'S REPLY BRIEF

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

ATTORNEY FOR DEFENDANT - APPELLANT

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/s/ Kent A. Simmons

KENT A. SIMMONS

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ROUTING STATEMENT

Mr. Davis had originally determined this action was appropriate for the Court of Appeals. At this point, the State has now relied on a mixture of reported and unreported cases to assert a police officer has a right to continue and complete his investigation before honoring a timely assertion of the right to speak with a family member or attorney, as guaranteed by Section 804.20. The Appellant now recommends the Supreme Court retain this case to resolve this very important question affecting the proper administration of justice.

Statement of the Facts

The State does not challenge or even mention the testimony of Attorney Greg Johnston. As will be discussed below, Judge Strausser did not dismiss any of the facts in Johnston's testimony, either. The judge simply concluded Johnston should have reached a different legal conclusion. The State predictably focuses on the fact that Mr. Davis was allowed to talk to his wife and Attorney Johnston after he completed the field tests for Deputy Cardenas at the jail. In the course of its statement, the State pointed out that completing the field tests after arriving at the jail took only "approximately twelve to thirteen minutes." (St. Br. 10-12) The undisputed facts show the officer was aware Mr. Davis wanted to talk to his wife and his attorney before deciding to whether to submit to the field tests at the jail. (Trial Ex. "B", DOT Hrg. Trans. 18-19; App 22-23) The

undisputed facts developed in argument below will show there was no circumstance that prevented the deputy from providing that communication before the field tests. That communication is guaranteed by the Code. In fact, Judge Strausser's conclusion that the deputy violated Mr. Davis's statutory right upon arrival at the jail is the factual and legal linchpin to the question on the breath test.

ARGUMENT

The juxtaposition of the State's argument with the district court's ruling eventually exposes the legal errors in both lines of reasoning. The State rejects Judge Strausser's conclusion that Deputy Cardenas violated the statutory right upon arrival at the jail. This paragraph sums up the totality of the State's argument:

> 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. (St. Br. 18)

A. The Statutory Right was Triggered When Mr. Davis was Placed in Custody at the Scene and then Immediately Asked to Speak with His Wife. (St. Br. pp.18-27)

The State believes Judge Strausser erred in concluding there was an initial violation of the right that required suppression of the field tests of balance. (St. Br. 25-27) The case law the State relies upon to reach that conclusion is generally focused upon situations where the officer is still out on the street in the process of conducting field tests before there is any imposition of custody. The line of analysis follows a mixture of cases from this Court, as well as reported and unreported cases from the Court of Appeals. The State's keenest focus centers on the unreported case of *State v. Serrine,* No. 15-1496, 2017 WL 108290 (Ia. App., 1/11/17). The State's analysis misses the key conclusion in *Serrine* that actually supports Judge Strausser's ruling on the field tests in the instant case. The *Serrine* court decided:

As the court noted in *State v. Moorehead,* the statute's language applies to those "arrested or restrained of the person's liberty for any reason whatever," and the *Moorehead* court had no problem finding section 804.20 applicable under the facts of that case, even though the request was made at the scene and the accused had not been formally arrested. See 699 N.W.2d 667, 672 (Iowa 2005) (emphasis added). This makes sense, given that formal words announcing an arrest are not required for a suspect to be arrested. See *State v. Wing,* 791 N.W.2d 243, 248 (Iowa 2010). Rather, under the statutory definition of "arrest," an arrest occurs when a person is taken into custody "in the manner authorized by law, including restraint of the person or the person's submission to custody," Iowa Code Section 804.5. A suspect is in custody when the "suspect's freedom of action is curtailed to a 'degree associated with formal arrest.'" *State v. Bogan,* 774 N.W.2d 676.680 (Iowa 2009) (citations omitted). We agree with the district court's conclusion that Serrine was in custody when she was ordered out of her car and into the squad car, thus restraining her liberty. Serrine's section 804.20 rights were implicated at that time. *Serrine,* at 7.

The *Serrine* conclusion was that the attorney, who just happened to be Ms. Serrine's passenger when she was stopped, did not have a right to be present in a nearby parking lot where the officer had found level ground for field tests. Additionally, Ms. Serrine did not have a right to consult with counsel out at the scene. She did have that right the moment she arrived at the jail, however. The factual difference from the instant case, is that Ms. Serrine had completed the field tests and submitted to a PBT out at the scene, b*efore* she was taken into full custody by placement in the squad car. The officer had completed all of his investigation that led to her custody and later invocation of the Implied Consent request. At the jail, Ms. Serrine was allowed to make two legal phone calls before submitting a breath sample. No rights were violated.

In the instant case, Judge Strausser emphasized that the deputy knew when he began the transport to the jail that Mr. Davis wanted to speak with his wife. The judge concluded Deputy Cardenas did not have the authority to delay that opportunity until after he had completed the field tests in the sally port of the jail:

> Iowa code section 804.20 provides an opportunity to call a spouse upon arrival at the place of detention. Detention as used in the statute does not require arrest. If the legislature intended after arrival *after arrest* they would have stated. The defendant was clearly being detained

> for the purpose of sobriety testing
> and was denied an opportunity to
> call his wife. Iowa Code Section
> 804.20 was violated and the "field"
> sobriety tests are suppressed.
> (Ruling, p.5; App. 17) (emphasis added)

Of course, Judge Strausser was on firm legal footing at that point. Statutory interpretation requires giving the statute the meaning of the words the legislature actually used. The Court cannot ignore clear language to speculate as to what the legislature might have meant to say. *State v. Hearn,* 797 NW 2d 577, 583 (Iowa 2011). By the same token, the statute does not say the officer can delay the communication until he is done conducting his investigation.

On the question of the field test suppression, the part of the statute the State relies upon is the phrase "without unnecessary delay after arrival at the place of detention…" The State reads the case law to mean the completion of the balance field tests was a *necessary* delay. Counsel for the State makes the same mistakes he made in *Serrine,* misinterpreting *Krebs* and ignoring *Moorehead.*

In finding the defendant in *Serrine* was in the custody that triggers 804.20 when placed in the squad car out at the scene, the panel first explained the State's defective analysis of *State v. Krebs,* 562 N.W.2d 423 (Iowa 1997). The *Serrine* court first pointed out for the State that *Krebs* does *not* stand for the proposition that the rights under 804.20 do not attach until after a formal arrest is made. It was simply the factual situation in

Krebs that the officer completed all field tests before he placed the defendant in custody in the squad car. The *Serrine* court explained that the officer's order to Ms. Serrine in placing her in the squad car triggered the rights as a restraint on her liberty "for any reason whatever." *Serrine,* at p. 7.

On that point of custody at the scene, the *Serrine* court had directed the State specifically to *State v. Moorehead,* 699 N.W.2d 667, 672 (Iowa 2005) That reference is set out in the lengthy quote from *Serrine,* above. The *Moorehead* case was another one where the defendant was placed in a squad car after failing field tests on the street. While sitting in the back of the squad, Mr. Moorehead asked to speak with his mother:

> He was restrained of his liberty, and therefore his request fell within the timeframe of the statute. Like the Court of Appeals, we can find nothing in the plain language of Iowa Code 804.20 that requires the defendant to make his request for counsel or a family member at the ultimate place of detention. The district court erred when it ruled otherwise. *Moorehead,* 699 N.W.2d at 671-672.

Similarly, there is nothing in the statute that allowed Deputy Cardenas to continue field tests at the jail *before* allowing Mr. Davis to speak with his wife or his attorney at the jail. The imposition of field tests was not a necessary delay contemplated by 804.20. In fact, it was perfectly clear that consultation with his wife or his attorney was specifically requested to assist Mr. Davis in deciding whether he should agree to participate in field

tests. The deputy admitted he had that knowledge in sworn testimony in the DOT hearing. (App 22-23)

B. Delaying Defendant's Opportunity to Speak with his Wife or Attorney until after Completion of Field Tests at the Jail was not "Necessary", and it was a Violation of Section 804.20. (St. Br. pp. 26-31)

In arguing Mr. Davis did not have the right to make a phone call before the field tests were completed, the State focused on the wrong part of the process. The statute says nothing about field tests or an officer's investigation in general. The operative event is the restraint of the subject's liberty. In arguing that completion of field tests is a "necessary delay" contemplated by the statute, the State incorrectly focuses on the passage of time in minutes and seconds, rather that the situational facts that control the timing of the phone call.

The State relies on unreported cases on this part of the argument. Its position is summarized in these two sentences:

> 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.
> (St. Br. 26-27)

The instant case is *not* like *Perry* and *Serine* on this point. The requests in those cases were premature not because the officer had additional field tests to conduct. The first request in *Serrine* was premature because the defendant had not yet been placed in custody. In the instant case, Mr. Davis had been placed in the back of the squad, and Cardenas was heading for the jail when the request for the communication was made. (Ruling on Suppression, p.4; App. 16) In *State v. Perry* 2012 WL 1864568 (Ia. App.) , the slight delay in allowing the phone call was due to the fact the defendant made his request by interrupting the deputy in the middle of his reading of the Implied Consent advisory at the jail. The deputy's persistence in completing his reading before allowing the call was viewed by the Court *not* to be an "unnecessary delay." The request Mr. Davis made in the squad car was not premature. The question boils down to whether Cardenas violated the statute when he subjected Mr. Davis to the balance tests at the jail before honoring his right to speak with his wife and his attorney. The deputy knew Bob wanted to talk to his attorney before deciding whether to do field tests. Was the imposition of the field tests in the sally port an "unnecessary" delay? (App. 22-23)

The State relies on *State v. Smith* 2017 WL 510957 to equate the *length* of the delay with the *necessity* of the delay. The statutory language is not "lengthy delay" or even

"unreasonable delay." The statutory question is whether Cardenas caused an "unnecessary delay" by going forward with tests before allowing the phone call. The defendant in *Smith* made the wrong argument in complaining that the officer took "too long" to give him his phone call at the jail. That court equated "unnecessary delay" with the lapse of time and decided "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." Id. at 2. The question Smith should have been arguing was not whether the process took too long, but whether the officer could conduct field tests before allowing the calls. Smith refused some tests but submitted to a Preliminary Breath Test (PBT) before he was allowed to use the phone. *Id*. at 1.

The question of whether custodial field tests constitute necessary delay can be found by following the rules set down in *State v. Moorehead,* 699 N.W.2d 667 (Iowa 2005). In one short sentence, the *Moorhead* decision verifies that the request after placement in the squad car properly invoked the statutory protection: "We conclude Moorehead's request was properly timed. Moorehead was restrained of his liberty as he sat in the back of the patrol car." 699 N.W. 2d at 671. The Court then explained that police response to the defendant's invocation of his right must be judged in light of the "surrounding circumstances" and the "context" of the conversation defendant is seeking with a family member. *Id*. at 672.

In the instant case, Cardenas was well aware that Bob Davis wanted to speak with his wife because she was in turn communicating with his attorney. In the suppression hearing, Deputy Cardenas first made this admission on direct examination:

> Q. Okay. After explaining him -- explaining that to him, sorry, what did you do?
>
> A. I escorted him out to my squad car, placed him in the back seat of my squad car. I believe at that point I started my camera up and advised him I would let his wife know where he would be going.
>
> Q. Okay. While you were sitting in the ambulance with Mr. Davis, did he at anytime ask you to call anybody for him?
>
> A. Not myself, no.
>
> Q. Okay. Can you explain that?
>
> A. He never mentioned anything about wanting me to call. I believe he might have mentioned or said something to his wife about calling -- her calling his attorney.
>
> Q. Okay. So you heard him telling his wife to call his attorney?
>
> A. I believe so, yes. (Supp. Tr. 12,L.4-20)

As stated, in the DOT hearing, the deputy was quite clear that Barb Davis told him at the scene that she was calling Bob's attorney, and Bob wanted to talk to him before doing "any further testing". (App 22-23)

In her testimony, Barb testified that when Bob handed her his phone while they were sitting in the ambulance with the deputy, Bob had already dialed his attorney, Greg Johnston. While the officer took Bob out of the ambulance and placed him in custody in the squad car, Barb talked to Attorney Johnston. The officer then returned to the ambulance and took Bob's phone away from Barb while announcing he was taking Bob to jail. (Supp. Tr. 70-71, L. 2-19) The officer's intent in seizing the phone was clearly shown when he was caught in false testimony as a result of the audio recording picked up on his squad car system.

In an extended explanation on direct exam, the prosecutor had Cardenas testify that he took Bob's phone from Barb, and that he then gave the phone to Bob before he began the transport to the jail. The prosecutor then had Cardenas testify that Mr. Davis was free to use his phone and could have called anyone he wanted during the transport to the jail. (Supp. Tr. 15-18; L. 10-12) Of course, if that testimony were true, Mr. Davis would have had the opportunity to call his attorney or his wife immediately after being placed in custody. The requirement of 804.20 would have been satisfied.

The officer's testimony on direct that immediately followed first indicated he had not given Mr. Davis his phone:

Q. Once you were in the squad car, did Mr. Davis, to the best of your recollection -- and this is all recorded on your transport -- but do you remember whether or not he was calling anyone or having any conversations with anyone on his cell phone while he was in the squad car?

A. No. He just -- he had a conversation with me -- with me.

Q. He wasn't handcuffed, so it's possible he could have called somebody if he wanted to, is that correct?

A. Correct.

Q. Okay. Did he ask you at anytime if he could call anyone or anything in that regard?

A. I believe he might have early on, and I advised him he would be able -- able to call once we were done with the field sobriety testing.

Q. So he was in the squad car with his phone, but did not make any calls that you are aware of?

A. I didn't look back, so I don't believe he did, correct.
(Supp. Tr. 18, L. 3-21)

Because of the false nature of the testimony, the deputy first presented his own internal inconsistency. It can be paraphrased in this way: "He could have called anybody

he wanted after I gave him his phone in the patrol car, but I told him he could not call until after we got done with the field testing at the jail." The testimony and audio recording eventually showed the officer did not give Bob his phone. The officer did not want Bob to talk to his attorney before he completed the balance tests at the jail. The judge eventually found that the deputy did *not* give Bob the phone "during his transport to the jail.". (Ruling, p. 2; App. 14)

On cross-exam, the deputy testified there would have been no conversation on the squad audio recording because he simply handed Bob his phone before driving to the jail. The officer claimed he did not say anything about the phone. (Supp. Tr. 36-37, L. 4-7) The officer was wrong. The defense presented the partial transcript of the squad recording. The smoking gun shows Cardenas talking about Bob's phone as he actually enters the jail's sallyport:

> Deputy Cardenas: Not very fun to drive in, that's for sure, especially when you have a (inaudible) vehicle like this when it's -- (phone rings)
>
> Deputy Cardenas: If that's your phone ringing, I'll give it here in a second when we get into this facility.
>
> The Defendant: Sounds like one of my ring tones.
>
> Deputy Cardenas: Muscomm 24. 10-23. 1-1.8.

Jail Clerk: May I help you?

Deputy Cardenas: 24 and 1.
All right. We're going to use
this sallyport as our area to
finish these tests up in, because
It's nice and out of the weather.
(Hrg. Ex. "C", p. 3, L. 6-21; App. 26).

The State does not mention this false testimony from Cardenas. The squad audio recording was critical. It corroborated Mr. Davis's testimony that the deputy did not give his phone back until after he completed the field tests at the jail. (Supp. Tr. 73-74, L. 8-17) The evidence shows the officer's intent was to prevent any phone contact until after he completed his investigation. Under the circumstances of the instant case, the deputy's intent was directly opposed to the legislative intent. Section 804.20 provides the right for a person in custody to have the counsel of family or an attorney before any substantive police action proceeds against him.

C. The Statutory Right was not Vindicated before Mr. Davis Submitted to the Chemical Test. (St. Br. 31-37)

The last three sections of the State's argument assert that any violation of 804.20 did not require suppression of the result of the breath test. Again, the State fails to mention indisputable key testimony. This time the testimony came from Attorney Greg Johnston. The attorney testified that he immediately called the jail after talking to Bob's wife. He

told them he was en route to the jail, and he requested to talk to Deputy Cardenas on the phone. The deputy refused to talk to Mr. Johnston. The attorney made it clear to the jail staff person that he was on his way to assist Mr. Davis, and it was important that he talk to his client on the phone. The attorney made it clear he did not want Bob talking to anybody or doing anything before legal consultation. The staff person said those points were relayed to Cardenas, and the deputy refused communication with the attorney. By the time Attorney Johnston got to the jail, the deputy had already begun to put Mr. Davis through the balance field tests. The attorney testified that if he could have talked to Bob before he did the balance tests he would have recommended he refuse to participate in the field tests and that he refuse to submit to the breath test. After the deputy refused the spouse and attorney communications, the damage was then done when the field tests were imposed. At that point, the attorney decided the "die was cast" with the evidence against Mr. Davis. Without the field tests, the attorney would have recommended refusal of the breath test. After the field tests, the attorney determined Bob had nothing left to lose, and told him to go ahead and submit to the breath test. The violation of the statute indisputably affected the attorney/client consultation and gained the State a breath result that otherwise would have been denied. (Supp. Tr. 50-55, L. 23-12, pp. 58-61, L. 8-2)

D. The Rule of Exclusion on the Statutory Violation is Analyzed in this Court with a Presumption of Prejudice, and the State has not Argued the Chemical Result was not Prejudicial. (St. Br. 32-34)

In *State v. Moorehead,* 699 N.W. 2d 667, 672-673 (Iowa 2005), the Court noted, "We presume prejudice unless the record affirmatively establishes otherwise. (Cites). A breath test result is important in prosecutions for drunk driving. This is especially true when the breath test is high -- in this case nearly twice the legal limit." It is not clear what "nearly twice the legal limit" might mean in the instant case where the breath result was .128. That result is more than 50 percent above the statutory level of guilt at .08. The focus should not be on an exponential level above the legal limit. The statute necessarily creates a strict liability when a driver alcohol level is shown in any amount over .08. The charge under Section 321J.2 in the instant case correctly sets out the liability as operating and "having a blood alcohol concentration of 0.08% or greater." (Tr. Info., p. 1; App. 3). The measured amount of 0.048 above the limit leaves little room for doubt that the limit was exceeded. Further, the evidence on the "under the influence" alternative in the statute was far more overwhelming against Moorehead than it was in the instant case. "Moorehead was speeding, did not immediately stop for the deputy, swerved over the center line twice, had an odor of alcohol, slurred speech, and glazed eyes, failed all field sobriety tests, and admitted he was drunk as hell at the station," Still, the *Moorehead* court concluded the breath result "clearly prejudiced Moorehead." *Id.* In the instant case, the

only indicators of impairment that Judge Strausser cited in his verdict were the HGN test and the breath test result. (App 29) The judge would not even have to consider the strength of the HGN testimony because the breath test evidence was so clearly determinative of guilt on the alcohol level alternative of the charge.

E. The Deputy's Violation of the Statutory Right to a Private Communication Directly and Prejudicially Affected the Attorney-Client Consultation, and there is no Authority or Factual Basis for the Argument that the Violation was Cured. (St. Br. 34-36)

Justice Waterman emphasized the importance of the suppression of the chemical breath test in *State v. Walker,* 804 N.W. 2d 284, 296 (Iowa 2011):

> We now turn to the remedy for the violation of Walker's section 804.20 rights. The district court applied the remedy mandated by more than a generation of our precedent -- suppression of the breath test results. (Citing *Moorehead*) . . . We see no reason to retreat from our precedent today. Our prior cases applied the exclusionary rule for violations of a defendant's Section 804.20 right to telephone a family member or counsel; as noted above, this statute provides greater protection for confidential, in-person attorney

> consultations. It would make no sense to provide a lesser remedy.

In *Walker,* and in *State v. Hellstern,* 856 N.W. 2d 355, 364-365 (Iowa 2014), the Court suppressed breath test results where the defendants had actually gotten the opportunity to speak with their attorneys, but the jail staff had failed to provide privacy for confidential attorney-client communication. In both cases, the Court determined police interference with the privacy of the attorney-client communication required suppression of the chemical test result that was taken after consultation with counsel. In *Walker,* the Court specifically rejected the State's argument that the defense should have to show the attorney's advice was affected by the privacy infringement. "The remedy for this violation is suppression of the breath-test results, regardless of prejudice or the lack thereof." 804 N.W. 2d at 296. The prejudice is presumed.

In *Walker,* the officer had refused the attorney's request to move to a room for a private, contact visit with his client. The officer restricted the consultation to a room where the attorney was separated from the defendant by a glass partition and the conversation was recorded on video and audio. The Court specifically held, "Those holding custody of arrested persons should honor attorney requests for a private barrier-free meeting room." 804 N.W. 2d at 296

Apparently, Deputy Cardenas was not aware of the foregoing 2011 directive in *Walker.* Attorney Johnston testified he told the deputy he needed some place to talk to him

alone and in private. Mr. Davis was still in or near the sally port, where he had completed the field tests. It was not clear whether the attorney elected to go into that area for the consultation or the deputy directed him into that area. It was agreed by both the attorney and the deputy that despite the officer's assurance to the contrary, the attorney-client conversation was fully recorded and perfectly clear. The deputy was standing 12 to 20 feet away, and made it clear he would be watching as the conversation proceeded. (Supp. Tr. 26-28, L. 3-24; pp. 38-39, L. 10-16; p. 42, L. 1-10)

When Mr. Johnston asked to have a private conversation with his client, the deputy then violated this part of Section 804.20: "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." In rejecting the use of a room with video surveillance, the *Walker* court pointed out the definition of "private" means "withdrawn from company or observation." 804 N.W. 2d at 294.

Cardenas first violated Mr. Davis rights by denying a phone call upon arrival at the jail. The deputy again violated the statute by failing to provide a private place for consultation. The second violation cannot cure the first violation.

Errors of Law -- The State's and the Trial Court's

The great irony in the overall position the State has taken is that it has fully exposed the glaring defect in the equally untenable legal reasoning Judge Strausser employed. By

rejecting the judge's conclusion that the field tests must be suppressed, the State has conceded that Attorney Johnson could quite reasonably have concluded the suppression of field tests was not a foregone conclusion. Judge Strausser mused in his verdict that neither party had asked Attorney Johnston whether he believed at the time he gave advice to Mr. Davis at the jail that the field tests would or would not be suppressed. From there, the judge created a rule saying the attorney should have concluded the field tests would be suppressed, and then he should have advised against submission to the breath test. As a result of that ineffective assistance of counsel, Mr. Davis's breath test result would not be suppressed. (Ruling, 6-7; App 18-19)

In his opening brief, Mr. Davis pointed out that the judge's conclusion was wholly untenable. After a brief conversation with Mr. Davis, an hour after the accident, Attorney Johnston could not possibly have a workable picture of all the facts Judge Strausser had before him in live testimony and DOT testimony in a hearing that had not yet taken place, and in audio recordings. The attorney had no adequate factual basis for reaching that kind of legal conclusion on the admissibility of the field tests that the judge reached after considering all the evidence. (Opening Br. pp. 21-24) That is why the attorneys did not attempt to question Mr. Johnston as to that kind of thought process in formulating his advice.

Now, the State's argument shows that even if Mr. Johnston had all the facts before him, he could have reasonably used caution on the prospect of how a judge would rule. A

judge might follow the type of somewhat supportable, though incorrect, reasoning set out in the State's brief. To be sure, Judge Strausser did not say his decision was based on an ineffective assistance analysis, but that is certainly the reality of his process. An attorney is not required to have a crystal ball and judgments made on few facts cannot be held to unreasonable standards of foresight. Simple errors in judgment or reasoning do not amount to ineffective assistance of counsel, and as previously argued, it was the deputy's violation of rights in the first place that would have put Mr. Johnston in the precarious position of trying to figure out what a judge would do. See generally: *Ledezma v. State,* 626 NW 2d 134, 142-143 (Iowa 2001).

The judge erred in failing to rule that the attorney's advice was a direct result of the initial violation of the statute, in failing to rule that the deputy failed to provide a private setting for legal consultation, and in imposing an untenable duty upon counsel to reach an ultimate conclusion upon facts that were not available to him. This Court must rule the result of the chemical test will be suppressed and remand the case for a new trial.

/s/ Kent A. Simmons
PO Box 594
Bettendorf, IA 52722
(563) 322-7784
ttswlaw@gmail.com