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State v. Hartman Appellant's Brief Dckt. 47312

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Idaho Supreme Court
Karel Lehrman, Clerk of the Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 47312-2019**
Plaintiff-Respondent,	)	
	)	**ADA COUNTY NO. CR01-18-20964**
v.	)	
	)	
CARY W. HARTMAN,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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District Judge

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STATEMENT OF THE CASE

Nature of the Case

The State charged Cary W. Hartman with driving under the influence of drugs or intoxicating substances after he got into a car accident on the interstate. Before trial, the district court granted State's motion for the State's forensic scientist to testify via video teleconference. The forensic scientist testified, by video teleconference, that Mr. Hartman had Ambien, methamphetamine, and amphetamine in his blood sample obtained shortly after the accident. The jury found Mr. Hartman guilty. Mr. Hartman appeals, and he argues the district court abused its discretion by allowing the forensic scientist to testify by video teleconference. Due to this error, Mr. Hartman respectfully requests this Court vacate his judgment of conviction and remand his case for a new trial.

Statement of Facts and Course of Proceedings

The State charged Mr. Hartman with driving under the influence of drugs or an intoxicating substance ("DUI"), a felony due to two prior DUI convictions. (R., pp.24–25.) Mr. Hartman pled not guilty, and the district court set the case for a jury trial. (R., p.27.)

Before trial, the State filed a motion to allow video teleconference testimony of Sarah Pickle, a forensic scientist at the Idaho State Forensic Laboratory in Pocatello.[1] (R., p.49.) The State made the motion pursuant to Idaho Criminal Rule ("I.C.R.") 43.2. (R., p.49.) Mr. Hartman objected because Ms. Pickle was "a crucial witness" to proving Mr. Hartman "had drugs in his system," and Mr. Hartman "need[ed] her to be present in person before the jury in order to get the full benefit of cross-examination." (Aug. R., p.1)

[1] The State had filed two prior motions to allow remote video testimony, but the district court denied both those motions as "moot without prejudice to renewal" after trial continuances. (R., pp.31, 34, 38, 46.)

The district court held a hearing on the State's motion. (R., p.53.) At the hearing, the State argued Ms. Pickle's testimony "is going to be pretty dry," and the State did not believe it was necessary for her to drive from Pocatello to Boise to testify in person. (Tr. Vol. I,[2] p.5, L.20–p.6, L.1.) Mr. Hartman argued, unlike an alcohol-related DUI, Ms. Pickle was the "crucial witness" to prove Mr. Hartman had the alleged substances in his blood while driving. (Tr. Vol. I, p.6, L.20–p.7, L.13.) Mr. Hartman highlighted there were no field sobriety tests or "other things that we normally have associated with DUIs to indicate that someone's under the influence." (Tr. Vol. I, p.6, Ls.18–20, p.7, Ls.1–13.) Mr. Hartman asserted it was "important" for the jurors to see her in person and judge her credibility and the weight to be given to her testimony. (Tr. Vol. I, p.7, L.14–p.8, L.1.) Mr. Hartman concluded I.C.R. 43.2 was a discretionary rule, "so it would be our preference, I think, to get the fairest trial, to have her here in person." (Tr. Vol. I, p.8, Ls.2–5.)

The district court then asked Mr. Hartman, "What do you believe is the test I'm supposed to exercise here, [defense counsel]? Use of discretion, whether it's reasonable? What's the test?" (Tr. Vol. I, p.8, Ls.16–18.) Mr. Hartman answered the "predominant factor" to weigh was the constitutional right to cross-examine and confront witnesses at trial. (Tr. Vol. I, p.8, Ls.19–25.) Mr. Hartman continued, "[W]hether it's a . . . more reasonable request than not, or

[2] The transcripts on appeal are contained in two separate documents. The first document, titled "Trans.-Hartman.pdf," contains transcripts of the sentencing hearing, held on July 16, 2019, and the two-day jury trial, held on February 7 and 8, 2019. The second document, titled "Supplemental Transcript.pdf," contains a hearing on the State's motion to allow video teleconference testimony, held on February 5, 2019. For citation purposes here, citations to "Tr. Vol. I" refer to the transcript of the hearing on the State's motion from "Supplemental Transcript.pdf." Citations to "Tr. Vol. II" refer to the two-day jury trial, which begins on page sixteen of "Trans.-Hartman.pdf." Citations to "Tr. Vol. III" refer to the sentencing hearing, which begins on page one of "Trans.-Hartman.pdf.".

preponderance, honestly, frankly, I couldn't answer that. When [Rule 43.2] says 'may,' . . . I'm inclined to think it's in your discretion . . . ." (Tr. Vol. I, p.9, Ls.1–5.) Mr. Hartman reiterated:

> If this were a possession case, she's going to testify it's meth and our argument was someone else had used the car or . . . "I didn't possess it," that sort of thing, then I think it would be of less consequence. But in this case, she's going to testify to something that, in the context of this case, is inflammatory in the sense that, in the blood system, there are these two substances, and then be subject to cross and exactly how far can you go with that, what does that mean? In other words, we're not testing for – we don't have level for methamphetamine or these other drugs that equate to .08 for DUIs and those sorts of things. So I just think that she's a more crucial witness in this type of case, and that's why I'm asking that she be present.

(Tr. Vol. I, p.9, L.12–p.10, L.1.) The district court asked the State if it had to make a finding of necessity or was there "some other reason" why it did not have to make a necessity finding. (Tr. Vol. I, p.10, Ls.13–16.) The State responded, "There's no necessity either way. I agree with [defense counsel]. This is a matter of your discretion." (Tr. Vol. I, p.10, Ls.17–19.) The district court asked defense counsel the same question, "[I]t's not a question of whether the State's necessary [sic], it's a question of my discretion?" (Tr. Vol. I, p.10, Ls.20–22.) Mr. Hartman answered: "Yeah, I don't think in this case it is. I think there could be a case and circumstances where it was of necessity, but I don't believe in this case it is." (Tr. Vol. I, p.10, L.23–p.11, L.1.) The district court followed up: "And the State doesn't have to show necessity, just a matter of discretion?" (Tr. Vol. I, p.11, Ls.2–3.) Mr. Hartman responded, "I don't think they have to show necessity." (Tr. Vol. I, p.11, Ls.4–5.) After his response, the State interjected, "And certainly as to that, Your Honor, there is no necessity. She's around. She's available. She can drive over. It's a matter of convenience." (Tr. Vol. I, p.11, Ls.6–7.)

The district court then ruled:

> All right. So here's where this is going to land. There's, of course, the preeminent case on the use of video testimony during trial, is *Maryland v. Craig*, [497 U.S. 836 (1990),] a Supreme Court case. It was a case involving a child

testifying against a sexual abuser, and they did it one-way. The U.S. Supreme Court allowed it in that case. Here we're proposing two-way testimony, which is the standard set out in Rule 43.2, and there are specific safeguards in 43.2 that include, for instance, that the witness has to be able to see the defendant and the defendant has to be able to see the witness.

In that case, *Maryland v. Craig*, it was a two-part test. The State did have to show the video was necessary to further important public policy. The second part was the reliability of the testimony is otherwise assured.

There's a case on appeal on this question out of Canyon County. This is the case of *State v. Woods*.[3] This is Idaho Supreme Court No. 45094, and the question presented in that case that's pending right now is whether 43.2 is permissible in light of that Supreme Court case, particularly that first prong under *Craig*, whether the State is necessary -- has shown necessity for it. Neither party is arguing that. Both parties are arguing the question of the second test, the reliability of the testimony is otherwise assured. And in a case called [*United States*] *v. Gigante*, 166 F.3d 75 [(2d Cir. 1999)], from the Second Circuit, it says the salutary effects of face-to-face confrontation include: 1, giving of testimony under oath, which would be here; 2, the opportunity for cross-examination, which would be present here; 3, the opportunity of the fact finder to observe the demeanor evidence or the jury to see the witness. That would also be here. And 4, reduce risk the witness will wrongfully implicate against the defendant when testifying in his presence, which is met when the witness can see the defendant. All four parts of that test are met.

In that [*Maryland*] *v. Craig*, the U.S. Supreme Court held that there's no absolute right to a face-to-face meeting of witnesses during trial. Instead, there is a different standard. The question then goes to – this is what I call the evidence as to that, forensic testimony within the scope of 43.2 would be sufficient for the jury to make its determination of the credibility of the witness. They may or may not believe the witness in this case, but it could be adequately done by the video conference, and I'll be the guardian to make sure it's an adequate feed, both audio and video, to make sure that's the case. So the parties are arguing prong two of *Craig*. That's the dispute. On that basis, I will find for the prosecution, and we will proceed to trial under 43.2.

(Tr. Vol. I, p.11, L.9–p.13, L.11.) The district court issued an order allowing the video teleconference testimony of Ms. Pickle. (R., p.51.)

[3] In *State v. Woods*, the Court of Appeals did not consider whether I.C.R. 43.2 was permissible in light of *Craig* or examine necessity prong. 165 Idaho 329, 444 P.3d 901, 904 (Ct. App. 2019). The Court of Appeals assumed, without deciding, there was error, but any error was harmless. *Id.* at 904–06.

Mr. Hartman proceeded to trial. The State's evidence showed that, around 5:00 a.m., an eyewitness saw a car speed down an on-ramp onto I-84, hit the far left concrete guardrail, turn back around, and hit the far right guardrail. (*See* Tr. Vol. II, p.122, L.18–p.125, L.19.) This eyewitness testified that she saw no other cars on the road at that time. (Tr. Vol. II, p.126, Ls.13–22.) The State's evidence also showed that the paramedics and the police arrived to the scene of the crash. (*See* Tr. Vol. II, p.158, L.12–p.159, L.13.) Mr. Hartman was the driver and the only person in the car. (Tr. Vol. II, p.161, Ls.5–23.) A police officer at the scene testified that he was unable to conduct any field sobriety tests because Mr. Hartman was taken to the hospital with life-threatening injuries, including eight broken ribs and internal bleeding from his spleen. (Tr. Vol. II, p.147, L.24–p.148, L.15, p.161, Ls.16–18, p.169, Ls.2–7, p.174, Ls.13–18.) The officer also testified that, based on his review of the scene and tire tracks, the speeding car actually came from the interstate, not the on-ramp, before the car zigzagged between the guardrails. (Tr. Vol. II, p.188, L.5–p.189, L.14.) At the hospital, the officer had a nurse take a blood sample. (Tr. Vol. II, p.137, Ls.1–16, p.170, Ls.18–25.) The nurse testified that he had not given Mr. Hartman Zolpidem (Ambien) or methamphetamine before the blood draw. (Tr. Vol. II, p.138, L.19–p.139, L.16.) Ms. Pickle was the last witness in the State's case-in-chief, and she testified via video teleconference. (*See* Tr. Vol. II, p.214, L.15–p.246, L.23.) She testified that Mr. Hartman had Zolpidem, methamphetamine, and amphetamine in his blood. (Tr. Vol. II, p.228, L.25–p.229, L.4.)

Mr. Hartman testified in his defense. He testified that he swerved to avoid a car speeding down the on-ramp, and he did not remember much else. (Tr. Vol. II, p.279, L.1–p.280, L.23.) He said that he had taken Ambien the night before the accident around 9:00 p.m. (Tr. Vol. II, p.277, Ls.3–7.) He testified that he had taken it every night for eight to ten years, and he did not feel the

effects in the morning. (Tr. Vol. II, p.274, Ls.1–10, p.275, Ls.11–21.) He also testified that he had been taking an old inhaler, over-the-counter cold medicine pills, and Vick's vapor rub for a cold. (Tr. Vol. II, p.278, Ls.11–25.) On rebuttal, the State called a pharmacist that testified that an inhaler, over-the-counter cold medicine pills, and Vick's vapor rub did not contain methamphetamine. (Tr. Vol. II, p.292, L.18–p.292, L.7.) The jury found Mr. Hartman guilty. (Tr. Vol. II, p.338, L.17–p.339, L.3; R., p.67.) Mr. Hartman admitted to two prior DUI convictions. (Tr. Vol. II, p.347, Ls.4–11.)

The district court sentenced Mr. Hartman to ten years, with two years fixed. (Tr. Vol. III, p.33, Ls.7–14.) Mr. Hartman timely appealed from the district court's judgment of conviction. (R., pp.106–08, 110–12.)

ISSUE

Did the district court abuse its discretion when it allowed the State's forensic scientist to testify via video teleconference?

ARGUMENT

The District Court Abused Its Discretion When It Allowed The State's Forensic Scientist To Testify Via Video Teleconference

A. Introduction

Mr. Hartman asserts the district court abused its discretion in two ways when it allowed the State to offer testimony from forensic scientist Ms. Pickle via video teleconference. First, he argues the district court did not perceive its decision as discretionary. Second, he argues the district court did not apply the correct legal standards. Both of these discretionary errors stem from the district court incorrectly identifying and applying the rigid constitutional standard from *Maryland v. Craig* rather than a purely discretionary test to allow this testimony. Due to this discretionary error, Mr. Hartman respectfully requests this Court vacate his judgment of conviction and remand his case for a new, error-free decision.

B. Standard Of Review

> When determining whether the trial court abused its discretion, this Court considers "[w]hether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason."

State v. Weigle, 165 Idaho 482, 447 P.3d 930, 937 (2019) (alteration in original) (quoting *Lunneborg v. My Fun Life*, 163 Idaho 856, 863 (2018)).

C. The District Court Did Not Perceive The Issue As Discretionary Or Apply The Correct Legal Standards By Allowing The State's Forensic Scientist To Testify Via Video Teleconference

Mr. Hartman maintains the district court did not perceive its ruling as discretionary or apply the correct legal standards because the district court employed a constitutional two-part test instead of exercising its discretion under the totality of the circumstances. He further asserts,

had the district court considered all the factors and not been bound by the constitutional standard, it would not have granted the State's motion to allow Ms. Pickle to testify via video conference.

I.C.R. 43.2 governs the process for the admission of testimony by video teleconference. It states in full:

> Forensic testimony may be offered by video teleconference. For testimony by video teleconference to be admissible:
>
> (a) Witness Visible to Participants. The forensic scientist must be visible to the court, defendant, counsel, jury, and others physically present in the courtroom.
>
> > (1) The court and the forensic scientist must be able to see and hear each other simultaneously and communicate with each other during the proceeding.
> >
> > (2) The defendant, counsel from both sides, and the forensic scientist must be able to see and hear each other simultaneously and communicate with each other during the proceeding.
> >
> > (3) A defendant who is represented by counsel must be able to consult privately with defense counsel during the proceeding.
>
> (b) Written Notice Required. The party intending to submit testimony by video teleconference must give written notice to the court and opposing party 28 days before the proceeding date.
>
> (c) Written Notice of Objection or Affirmative Consent. A party opposing the giving of testimony by video teleconference must give the court and opposing party written notification of objection or affirmative consent at least 14 days before the proceeding date.
>
> (d) Party Responsible for Coordinating. The party seeking to introduce testimony by video teleconference is responsible for coordinating the audiovisual feed into the courtroom. Nothing in this rule requires court personnel to assist in the preparation or presentation of the testimony provided by the provisions of this rule.
>
> The testimony must be recorded in the same manner as any other testimony in the proceeding.

I.C.R. 43.2. This rule is procedural in nature. It regulates the "mechanical operations" for the parties to provide notice of, coordinate, and present this testimony and for the trial court to

facilitate and record this testimony. *See Weigle*, 447 P.3d at 935 (discussing the test for procedural versus substantive law).[4] This rule does not create, define, or regulate primary rights. *Id.* It is "an operation by which the applicable process"—forensic testimony by video teleconference—"is implemented." *Id.*

Moreover, I.C.R. 43.2 vests the trial courts with discretion to allow the parties to offer forensic testimony by video teleconference. Idaho appellate courts have recognized that the use of "may" in an Idaho Criminal Rule denotes a discretionary decision by the district court. *See State v. Joy*, 155 Idaho 1, 12 (2013) ("may" in I.C.R. 17(b) on quashing or modifying subpoenas "suggests" a discretionary decision that the Court reviews for an abuse of discretion); *State v. Harbaugh*, 123 Idaho 835, 837 (1993) (the use of "may" in I.C.R. 33(c) for withdrawal of guilty pleas makes "clear" that the trial court's decision "lies within its discretion"); *State v. Jacobson*, 150 Idaho 131, 138 (Ct. App. 2010) ("may dismiss" in I.C.R. 48(a) is a permissive term that the Court reviews for an abuse of discretion); *see also State v. Dudley*, 104 Idaho 849, 851 (Ct. App. 1983) ("[I.C.R.] 48 did not mandate a dismissal; rather, it employed the term "may" and vested in the district court a discretionary power to dismiss."). I.C.R. 43.2 also uses "may": "Forensic testimony *may* be offered by video teleconference." I.C.R. 43.2 (emphasis added). As such, the district court's decision to allow this forensic testimony lies within its discretion.

In contrast with the procedural elements and grant of discretion in I.C.R. 43.2, a specific and substantive two-part test governs the constitutional standard to allow video testimony. In

[4] In *Weigle*, the Court considered whether demonstrative exhibits could be given to the jury during deliberations. 447 P.3d at 934–37. After recognizing that no rule provided guidance, and the statute most closely on point was a nullity, *id.* at 934–35, the Court held, "Trial judges are endowed with the discretion to determine whether demonstrative exhibits should be provided to the jury during its deliberations," *Id.* at 935. In reaching this holding, the Court reasoned, "Trial courts maintain broad discretion in admitting and excluding evidence. . . . [Idaho Rule of Evidence] 611 supports this broad discretion. It reads, 'The court should exercise reasonable control over the mode and order of . . . presenting evidence . . . .'" *Id.* (quoting I.R.E. 611(a)).

Craig, 497 U.S. 836, the U.S. Supreme Court considered whether the use of a one-way closed circuit television to present a child witness's testimony to the jury violated the defendant's Confrontation Clause right. *Id.* at 840. The U.S. Supreme Court first concluded, on review of its precedent, that the right to face-to-face confrontation is not an "absolute," but a "preference." *Id.* at 844–50. Nevertheless, this preference could not be "easily be dispensed with." *Id.* at 850. Accordingly, the U.S. Supreme Court outlined two factors for consideration before allowing the "denial of such confrontation": necessity and reliability. *Id.* at 851–60. The U.S. Supreme Court reasoned, if "denial of such confrontation is necessary to further an important public policy" and "the reliability of the testimony is otherwise assured," "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation." *Id.* at 850. The State, however, must make "an adequate showing of necessity." *Id.* at 855. The State must show the use of a procedure other than physical confrontation "is necessary to further an important state interest." *Id.* at 852. "The requisite finding of necessity" is "case-specific." *Id.* at 855. If a "proper finding of necessity has been made," and the alternative procedure "ensures the reliability of the evidence by subjecting it to rigorous adversarial testing," "the admission of such testimony would be consonant with the Confrontation Clause." *Id.* at 857. In light of this standard, the U.S. Supreme Court remanded *Craig* for "a case-specific finding of necessity."[5]

In sum, I.C.R. 43.2 and the Confrontation Clause impose separate requirements on the admission of testimony by video teleconference. I.C.R. 43.2 vests the district court with discretion to allow such testimony, which appropriately aligns with the discretion afforded to the district court on the admission and presentation of evidence in its courtroom. The rule also

[5] The Court acknowledged the procedure satisfied the reliability factor and the State's interest in protecting the child witness from trauma was "sufficiently important to justify a special procedure." *Craig*, 497 U.S. at 855.

imposes certain procedural requirements for admission, including notice, witness visibility, real-time communication, and recording. I.C.R. 43.2(a), (b). Conversely, the Confrontation Clause requires the district court make a "requisite finding of necessity" for a non-face-to-face procedure that furthers an important State interest. *Craig*, 497 U.S. at 855. The district court also must find that such procedure is still "reliable and subject to rigorous adversarial testing in a manner functionally equivalent" to physical confrontation. *Id.* at 851. If both factors are met, the procedure does not violate the Confrontation Clause. The *Craig* standard thus governs the constitutionality of such testimony, while I.C.R. 43.2 governs its procedure and grants discretion to the district court. As such, the proposed video teleconference could satisfy the constitutional standard, but still be excluded under I.C.R. 43.2. These are separate tests. I.C.R. 43.2 does not incorporate the constitutional standard from *Craig*.

Due to these separate requirements, the district court here did not perceive the issue as discretionary or act consistently with the legal standards because it superimposed the *Craig* standard onto I.C.R. 43.2. In the district court, Mr. Hartman argued the district court's decision was "totally in [its] discretion," (Tr. Vol. I, p.8, L.3), but the district court used the *Craig* standard instead. The district court determined neither party was arguing necessity, so it had to consider reliability only. (Tr. Vol. I, p.12, Ls.7–9.) Since the video teleconference method was "reliable" under the constitutional standard, the district court allowed Ms. Pickle's forensic testimony.[6] (Tr. Vol. I, p.12, L.9–p.13, L.11.) In employing the *Craig* test, the district court did

[6] Mr. Hartman's counsel did not make a separate Confrontation Clause objection to Ms. Pickle's video teleconference testimony. His counsel also conceded the State did not have to show necessity. (Tr. Vol. I, p.11, Ls.4–5.) However, if his counsel had objected on this constitutional basis, the State could not have made "an adequate showing of necessity." *Craig*, 497 U.S. at 855. In fact, the State admitted there was "no necessity" and its request was purely "a matter of convenience" (so Ms. Pickle did not have to drive from Pocatello). (Tr. Vol. I, p.11, Ls.6–8.) Moreover, the district court did not correctly apply the *Craig* standard because the district court

not recognize its decision was discretionary. The district court's oral ruling did not explicitly state its decision was discretionary, and the record does not reflect that the district court perceived the issue as discretionary. *See State v. Le Veque*, 164 Idaho 110, 114 (2018) ("A court is not required to explicitly make a finding regarding its discretion if the record clearly shows that the court correctly perceived the issue."). Rather, even though the district court asked the parties if its decision was discretionary and the parties agreed it was, the district court's ruling shows that it perceived the issue to be a strict "checklist" of necessity (which was not argued) and reliability. (*See* Tr. Vol. I, p.11, L.9–p.13, L.11.). Having essentially a waiver on necessity, the district court understood that it had to consider whether the method was reliable and, if it was, allow the testimony. (Tr. Vol. I, p.12, Ls.7–21, p.13, Ls.9–11.) This test, as perceived by the district court, contained no discretion.

Moreover, the district court did not act consistently with the correct legal standards. Again, the district court applied *Craig* when it should have weighed the totality of the circumstances. Under I.C.R. 43.2, the district court is not merely bound by necessity versus reliability. The district court can and should consider all relevant circumstances of the case, including the nature and importance of the forensic testimony, the preference for face-to-face confrontation, the proponent's reason for video teleconference testimony, any potential for prejudicial effect or confusion of the issues, and the reliability of the video teleconference. The district court did not weigh all the facts here; it viewed its decision through the narrow lens of necessity and reliability. This was inconsistent with the discretionary standard in I.C.R. 43.2.

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seemed to determine that, even if there was no necessity, the alternative procedure could be used if reliable. This is wholly inconsistent with *Craig*'s requirement of both necessity and reliability. Thus, it is highly unlikely that Ms. Pickle's video teleconference testimony would have been allowed had Mr. Hartman's counsel objected on constitutional grounds and the district court applied the correct standard. Moreover, although not argued below, Mr. Hartman notes, if I.C.R. 43.2 is intended to supplant *Craig* for forensic testimony, the rule is likely unconstitutional.

The district court, therefore, abused its discretion by allowing the State to present Ms. Pickle's testimony by video teleconference. "Ordinarily, when a discretionary ruling has been tainted by a legal or factual error, [the Court must] vacate the decision and remand the matter for a new, error-free discretionary determination by the trial court." *State v. Medrain*, 143 Idaho 329, 333 (Ct. App. 2006) (citing *State v. Upton*, 127 Idaho 274, 276 (Ct. App. 1995)). The State can avoid a remand, however, "where it is apparent from the record that the result would not change or that a different result would represent an abuse of discretion." *Id.* (citing *Upton*, 127 Idaho at 276). The State will be unable to meet this burden. The district court clearly articulated the incorrect standard, and it is not apparent from the record that the result would not change. The State's sole reason for the video teleconference request was to avoid having Ms. Pickle drive four hours. On the other hand, Ms. Pickle's testimony was important. It was the only evidence to prove Mr. Hartman was intoxicated when driving. Her testimony went to the very nature of this case: driving under the influence of drugs or intoxicating substances. Looking at the totality of the circumstances, a proper exercise of discretion would have required Ms. Pickle to testify in person. Due to this discretionary error, Mr. Hartman respectfully requests this Court vacate his judgment of conviction and remand this case for a new, error-free discretionary decision.

CONCLUSION

Mr. Hartman respectfully requests this Court vacate his judgment of conviction and remand his case for a new trial.

DATED this 7th day of February, 2020.

/s/ Jenny C. Swinford
JENNY C. SWINFORD
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of February, 2020, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
E-Service: ecf@ag.idaho.gov

/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

JCS/eas