IN THE SUPREME COURT OF IOWA
Supreme Court No. 19-0725

STATE OF IOWA,
Plaintiff-Appellant,

vs.

MICHAEL HILLERY,
Defendant-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR DUBUQUE COUNTY
THE HONORABLE MONICA ZRINYI WITTIG, JUDGE

APPELLANT'S BRIEF

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I. Did the district court err in concluding that both the statements and physical evidence obtained by officers after Hillery agreed to cooperate should be suppressed as the products of an improper promise of leniency?

Authorities

Arizona v. Fulminante, 499 U.S. 279 (1991)
Brady v. U.S., 397 US 742, 90 S. Ct. 1463 (1970)
Bram v. United States, 168 U.S. 532 (1897)
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United States v. Perdoma, 621 F.3d 745 (8th Cir. 2010)
United States v. Romano, 630 Fed. App'x 56 (2d Cir. 2015)
United States v. Shears, 762 F.2d 397 (4th Cir. 1985)
Wong Sun v. United States, 371 U.S. 471 (1963)
Doornick v. State, No. 18-0429, 2019 WL 1933991 (Iowa Ct. App. May 1, 2019)
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State v. Gaskins, 866 N.W.2d 1 (Iowa 2015)
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State v. Smith, No. 13-0993, 2014 WL 3511811 (Iowa Ct. App. July 16, 2014)
State v. Tyler, 867 N.W.2d 136 (Iowa 2015)
State v. Watts, 801 N.W.2d 845 (Iowa 2011)
State v. Whitsel, 339 N.W.2d 149 (Iowa 1983)
State v. Wondergem, No. 98-0721-CR, 2000 WL 665692 (Wis. Ct. App. May 23, 2000)
State v. Zarate, No. 11-0530, 2012 WL 652449 (Iowa Ct. App. Feb. 29, 2012)
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Mark E. Cammack, *The Rise and Fall of the Constitutional Exclusionary Rule in the United States*, 58 Am. J. Comp. L. 631 (2010)

ROUTING STATEMENT

Transfer to the Court of Appeals is appropriate because the issue raised involves the application of existing legal principles. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

This is an interlocutory appeal of the district court's order granting Defendant Michael Hillery's motion to suppress. The Iowa Supreme Court granted the State's application for discretionary review and motion to stay on May 13, 2019.

The district court erred in suppressing both Hillery's statements and physical evidence as a result of what the court improperly concluded was a promise of leniency. Not only does the common law evidentiary rule not apply to physical evidence, officers would have obtained that evidence through other lawful means. Nor is an agreement with a defendant to cooperate, where the defendant is informed that the agreement is conditional, an improper promise of leniency. This Court should reverse the district court's suppression order in its entirety.

Facts and Course of Proceedings

Background

In October and November 2018, officers on the Dubuque Drug Task Force were investigating the sale of drugs out of a house at 1910 ½ Ellis Street in Dubuque, Iowa. Order, Apr. 3, 2019 at 1; App. 13; Suppression Hearing Transcript, March 29, 2019 ("Supp. Hr'g Tr.") 7:8-8:9; 21:5-19. Officers had discovered that Carl Watkins—who goes by the street name "Country"—lived in the house, and several confidential informants working with officers had purchased drugs from Watkins at his home. Supp. Hr'g Tr. 7:20-8:11-16.

Around 3:37 p.m. on November 14, 2018, Officer Chad Leitzen was driving by 1910 ½ Ellis Street when he saw Hillery bike up to the house. Order, Apr. 3, 2019 at 1; App. 13; Supp. Hr'g Tr. 21:20-22:14; 23:11-19. Officer Leitzen knew of the ongoing investigation into Watkins, and he recognized Hillery as a person with a history of drug convictions. Supp. Hr'g Tr. 21:5-19; 23:6-10; 24:1-8. Not more than three minutes later, Officer Leitzen circled back to 1910 ½ Ellis Street and saw Hillery walk away from Watkins—who had been standing next to Hillery outside the house. Order, Apr. 3, 2019 at 1; App. 13; Supp. Hr'g Tr. 22:22-23:4; 23:20-25. Officer Leitzen then saw Hillery

get back on his bike and ride away. Order, Apr. 3, 2019 at 1; App. 13; Supp. Hr'g Tr. 22:18-22.

Having seen someone he knew had prior drug convictions engage in a three-minute exchange with a man suspected of selling drugs out of his home, Officer Leitzen believed that an illegal drug transaction had taken place. *See* Supp. Hr'g Tr. 24:9-25:4; 39:2-23. Officer Leitzen waited until he and Hillery were out of Watkins's sight, parked, and then called Hillery by name, asking him to stop and talk. Supp. Hr'g Tr. 25:5-25; 36:12-17; Order, Apr. 3, 2019 at 1; App. 13. At this point, Hillery had gotten off his bike and was on the sidewalk, pushing it up a hill. Supp. Hr'g Tr. 25:13-21.

Hillery ignored Officer Leitzen and continued walking. Supp. Hr'g Tr. 25:25-26:3; 36:18-19. The officer got out of his car and began following Hillery, again calling his name and telling him to stop. Supp. Hr'g Tr. 26:3-8; 36:20-24. At this point, Officer Leitzen could "smell a very strong odor of marijuana clearly emanating from" Hillery. Supp. Hr'g Tr. 26:3-7; 26:18-27:4; 37:3-12. Again, Hillery ignored Officer Leitzen and kept walking. Supp. Hr'g Tr. 26:8-9; 36:25-37:2.

Officer Leitzen then walked up beside Hillery, showed Hillery his badge, and identified himself as an investigator with the drug task force. Supp. Hr'g Tr. 26:10-14. Hillery continued to walk, but this time he told the officer that he had "done nothing wrong." Supp. Hr'g Tr. 26:14-15. Officer Leitzen stepped in front of Hillery's bicycle and prevented him from walking any further. Supp. Hr'g Tr. 26:15-17; 37:13-15.

Officer Leitzen told Hillery that Hillery "needed to give [the officer] what he had just bought . . . ." Supp. Hr'g Tr. 27:11-12. Hillery denied buying anything; he stated that he had been to the house to repay his coworker, who lived with Watkins at 1910 ½ Ellis Street. Supp. Hr'g Tr. 27:11-14; 16:7-17. Officer Leitzen said that he was certain Hillery had bought something and that Hillery needed to give it to him. Supp. Hr'g Tr. 27:14-16. The officer also told Hillery that he "was not looking to take [Hillery] to jail that day." Supp. Hr'g Tr. 27:16-17; 37:16-22. Officer Leitzen stated that he was looking instead for Hillery's cooperation; officers wanted Hillery's "help to get into" Watkins's house. Supp. Hr'g Tr. 27:17-22. Officer Leitzen did, however, make clear that Hillery could someday be jailed for what he

had just done. Supp. Hr'g Tr. 27:19-22; 29:24; 38:11-18; Order, Apr. 3, 2019 at 1; App. 13.

At that point, Hillery reached into his pocket and held something in a balled-up fist. Supp. Hr'g Tr. 27:23-25. Hillery again told the officer that he had not bought anything and had not done anything wrong. Supp. Hr'g Tr. 28:1-3. Officer Leitzen told Hillery to drop what he had in his hand, and Hillery dropped a baggie of crack cocaine weighing 0.3 grams, shoved his bicycle into the officer, and took off running. Supp. Hr'g Tr. 28:4-12; Minutes of Testimony.

Officer Leitzen caught Hillery and reassured him that he could still avoid going to jail that day if he agreed to cooperate. Supp. Hr'g Tr. 28:13-25. Hillery accepted the offer, handed Officer Leitzen a bag of marijuana weighing 4.5 grams, and told officers that he bought the crack and marijuana for a total of $70.00 at the house at 1910 ½ Ellis Street from a man he knew as Country. Supp. Hr'g Tr. 30:5-31:4; 38:19-39:1; Minutes of Testimony. After exchanging numbers and after Hillery agreed to participate in controlled buys with Watkins, officers allowed Hillery to leave on his bicycle. Supp. Hr'g Tr. 13:16-23; 31:5-25. Hillery was not arrested or charged that day. Order, Apr. 3, 2019 at 1; App. 13; Supp. Hr'g Tr. 16:18-17:18.

Charges and Motion to Suppress

On February 28, 2019, however, after deeming Hillery's cooperation inadequate and after he had been charged in a separate drug case, the State charged Hillery for his actions in November with possession of crack, third or subsequent offense; and possession of marijuana, third or subsequent offense, both in violation of Iowa Code section 124.401(5). Trial Information; App. 4; Supplemental Trial Information; App. 7; Order, Apr. 3, 2019 at 1; App. 13; Supp. Hr'g Tr. 15:7-16:2; 32:1-35:3.

Hillery moved to suppress the drugs and his statements, arguing that the officers (1) stopped and detained him in violation of his rights under the United States and Iowa constitutions, and (2) questioned him without the benefit of counsel in violation of his rights under the United States and Iowa constitutions. Motion to Suppress Evidence; App. 9. Two days before the hearing, Hillery filed an addendum to his motion, in which he asked for suppression of "evidence and any confession or statements" he made because they were obtained "after a promise of leniency, in violation of the 5th Amendment to the United States Constitution, and Article I Sections 1

and 8 of the Iowa Constitution." Addendum to Motion to Suppress; App. 11.

Officer Leitzen and the officer leading the investigation into 1910 ½ Ellis Street, Adam Williams, both testified at the suppression hearing. Supp. Hr'g Tr. 4:22-40:5. Hillery did not testify. Supp. Hr'g Tr. 40:6-8. The State argued that, pursuant to *State v. Kreps*, 650 N.W.2d 636 (Iowa 2002), Officer Leitzen had reasonable suspicion to believe that a crime had just occurred; thus, the stop was constitutional. *See* Supp. Hr'g Tr. 40:13-42:11. As for the alleged promise of leniency, the State argued that the officer's conditional cooperation offer did not amount to a promise that prompted Hillery's confession. *See* Supp. Hr'g Tr. 42:15-21.

Hillery argued that the stop was not warranted under the circumstances and that it was based on assumptions, not reasonable suspicion. *See* Supp. Hr'g Tr. 42:23-43:18. Hillery then argued that him handing over the crack and marijuana he had just bought was a "de facto confession" and that the fact that Officer Leitzen told Hillery "that he would remain at liberty if he cooperated" rendered that "confession" involuntary. *See* Supp. Hr'g Tr. 43:19-45:5. For both of those reasons, Hillery argued, the court should suppress "all of the

evidence and any statements" he had made. Supp. Hr'g Tr. 45:3-5. Neither Hillery nor the State mentioned the common law evidentiary test or any potential *Miranda* violation. *See* Supp. Hr'g Tr. 40:10-45:25.

The district court granted Hillery's motion in a written order. Order, Apr. 3, 2019; App. 13. In relevant part, the court stated:

> The Defendant challenges the arrest based on a violation of his constitutional rights. The specific assertion is that the officer made a promise of leniency that prompted the Defendant to act. His statements were not voluntary.
>
> The Iowa and United States Supreme Courts have held on numerous occasions that an officer's promise of leniency is improper to obtain cooperation or confessions from Defendants. *See State v. Polk*, 812 N.W.2d 670 (Iowa 2012); *Brady v. U.S.*, 397 US 742, 90 S. Ct. 1463 (1970) (... even a mild promise of leniency was deemed sufficient to bar the confession, not because the promise was an illegal act as such, but because defendants at such times are too sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess.).

Order, Apr. 3, 2019 at 2; App. 14.

The district court concluded by stating that "[t]he evidence obtained after the promise of leniency was made is fruit of the

poisonous tree and therefore is not admissible against him." Order, Apr. 3, 2019 at 2; App. 14.[1]

On April 30, 2019, the State moved to reconsider, arguing that (1) the district court retains the ability to correct its erroneous ruling at any time before final judgment; (2) the district court erred in concluding that the drugs were "fruit of the poisonous tree" of any promise of leniency, both because an improper promise of leniency should only result in the suppression of the defendant's *confession*, not physical evidence, and because Officer Leitzen had probable cause and exigent circumstances to seize the crack and marijuana; and (3) the court erred in relying on the decision in *State v. Polk*, 812 N.W.2d 670 (Iowa 2012), which was based on the common law evidentiary test, when Hillery only argued that his confession was involuntary under the Iowa and federal constitutions. Motion to Reconsider; App. 16.

[1] Hillery agrees that the district court "did not rule on the stop and search issue raised in the original Motion to Suppress." Resistance to Application for Discretionary Review (Sup. Ct. No. 19-0725) at 2; App. 35. Nor did the court address any alleged 5th or 6th Amendment violations. *See* Motion to Suppress at 2; App. 10; Order, Apr. 3, 2019; App. 13.

Not wanting to lose the ability to seek an interlocutory appeal of the district court's suppression order, the State applied to this Court for discretionary review before the district court ruled on its motion to reconsider. Application for Discretionary Review and Motion for Stay (S. Ct. No. 19-0725); App. 19. The State did so because it filed its motion to reconsider outside the time provided for in Iowa Rule of Civil Procedure 1.904(3) and, although Hillery did not object to the timeliness of the State's motion and the State believes it would have retained the ability to appeal had it waited—it wanted to ensure there were no jurisdictional problems with challenging the order. In its application for review, the State argued that the district court erred by suppressing both Hillery's statements and the physical evidence following what was a cooperation agreement, not a promise of leniency. *See* Application for Discretionary Review and Motion for Stay (S. Ct. No. 19-0725), at 5; App. 23.

On May 13, 2019, the Court granted the State's application and stayed proceedings below pending resolution of the appeal. Order (S. Ct. No. 19-0725), May 13, 2019; App. 38. Accordingly, the State will not address the district court's order denying the State's motion to reconsider, which did not come until the day after this Court's stay.

See Order (S. Ct. No. 19-0725), May 13, 2019; App. 38; Order, May 14, 2019. For all the reasons set forth below, this Court should reverse the district court's order suppressing the physical evidence and Hillery's statements.

ARGUMENT

I. The district court erred in suppressing Hillery's statements and the physical evidence in this case because an agreement to cooperate with police officers is not a promise of leniency and because the physical evidence was not the product of any illegality.

Preservation of Error

The district court's ruling on Hillery's motion to suppress preserved this issue for review. *See State v. Naujoks*, 637 N.W.2d 101, 106 (Iowa 2001) ("An adverse ruling on a motion to suppress will preserve error for our review.").

Standard of Review

This Court reviews a district court's ruling on promises of leniency under Iowa's common law evidentiary test for correction of errors at law. *See State v. Polk*, 812 N.W.2d 670, 674 (Iowa 2012). The Court reviews de novo a defendant's constitutional challenge to his confession. *State v. Madsen*, 813 N.W.2d 714, 721 (Iowa 2012). The Court "give[s] deference to the district court's factual findings

because of its ability to assess the credibility of the witnesses, but [it is] not bound by those findings." *Id.*

Merits

A. The Iowa Supreme Court has identified two discrete ways for a defendant to challenge his confession on promissory leniency grounds.

There are two ways for a defendant in Iowa to challenge his confession following what he contends is a promise of leniency. The first is a matter of state evidentiary law, the theory being "[a] coerced confession should not be admitted in evidence because of its inherent lack of reliability." *State v. Quintero*, 480 N.W.2d 50, 52 (Iowa 1992). The common law evidentiary test, as it is known, "was developed, not as a constitutional principle, but because the law has no way of measuring the improper influence or determining its effect on the mind of the accused." *Id.*; *see also State v. McCoy*, 692 N.W.2d 6, 27-28 (Iowa 2005) (citing *State v. Mullin*, 85 N.W.2d 598, 602-03 (1957)). "The test 'is whether the language used amounts to an inducement which is likely to cause the subject to make a false confession.'" *State v. Howard*, 825 N.W.2d 32, 40 (Iowa 2012) (quoting *Mullin*, 85 N.W.2d at 602).

Unlike the constitutional test for voluntariness described below, the common law evidentiary rule provides for the per se exclusion of any statement a defendant makes following what the court deems to be a promise of leniency. *See Howard*, 825 N.W.2d at 40 (citing *Mullin*, 85 N.W.2d at 601). "[A] confession can never be received in evidence where the prisoner has been influenced by any threat or promise." *Madsen*, 813 N.W.2d at 724 (quotations omitted). According to the Court, a per se exclusionary rule "eliminates the need for the court to attempt to read the mind of defendant to determine if his confession, in fact, was induced by or made in reliance upon the promise of leniency." *Id.* at 726. The rule also "deters police from using a tactic that might induce the innocent to confess falsely." *Polk*, 812 N.W.2d at 674; *Howard*, 825 N.W.2d at 34.

In a string of cases beginning with *State v. McCoy*, the Iowa

Supreme Court reaffirmed the common law evidentiary test.[2] *See*, *e.g.*, 692 N.W.2d at 27-28; *Madsen*, 813 N.W.2d at 724-726; *Polk*, 812 N.W.2d at 674. Rather than adopt a test consistent with federal authorities, as the State urged, the Court concluded that the evidentiary rule had "the advantage of clarity and [wa]s a better deterrent against police misuse of threats and promises of leniency to obtain confessions." *Madsen*, 813 N.W.2d at 725-26.

A defendant may also challenge the voluntariness of his confession on due process grounds. *See McCoy*, 692 N.W.2d at 27. Under this totality-of-the-circumstances test, set forth in *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973), the court looks "at 'both the characteristics of the accused and the details of the interrogation'" to

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[2] Before *McCoy*, the Court appeared to conflate the two tests, asking whether the defendant's confession was voluntary, but applying an outdated per se exclusionary rule for a promise of leniency. *See*, *e.g.*, *State v. Kase*, 344 N.W.2d 223, 225 (Iowa 1984); *State v. Hrbek*, 336 N.W.2d 431 (Iowa 1983); *State v. Hodges*, 326 N.W.2d 345, 349 (Iowa 1982); *see also In re J.D.F.*, 553 N.W.2d 585, 589-90 (Iowa 1996). These cases relied on *Mullin*, but also on *Brady v. United States*, 397 U.S. 742 (1970), and *Bram v. United States*, 168 U.S. 532, 542-43 (1897), federal cases that had been disavowed in *Schneckloth v. Bustamonte*, 412 U.S. 218, 223-227 (1973). Indeed, in *Arizona v. Fulminante*, the United States Supreme Court made clear that the oft-cited passage in *Bram* was no longer the "standard for determining the voluntariness of a confession . . . ." 499 U.S. 279, 285-86 (1991).

determine whether the defendant's confession was voluntary. *McCoy*, 692 N.W.2d at 27 (quoting *Schneckloth*, 412 U.S. at 226).

As set forth in more detail below, a defendant's statements are voluntary if his "will is not overborne or his capacity for self-determination is not critically impaired." *Madsen*, 813 N.W.2d at 722 (citing *State v. Bowers*, 661 N.W.2d 536, 541 (Iowa 2003)). Courts look to a number of factors in making this determination, and no one factor—such as the fact that officers employed a promise of leniency—controls. *Schneckloth*, 412 U.S. at 223-227; *see also Arizona v. Fulminante*, 499 U.S. 279, 285-86 (1991).

If a defendant makes an argument under both tests, the district court is to "first employ the evidentiary test to determine the admissibility of confessions challenged on grounds of a promise of leniency." *Madsen*, 813 N.W.2d at 726 n.1. Then, if the evidentiary test does not require exclusion, the court should proceed to "the totality-of-the-circumstances test to ensure the State has met its burden of establishing that defendant's confession was voluntary." *Id.* Nevertheless, if the defendant wants the court to analyze his statement under the evidentiary rule, he must make that argument to the district court: Trial counsel breaches an essential duty if he fails to

move to suppress a defendant's improperly induced confession "under the nonconstitutional, evidentiary promise of leniency prohibition favored in *McCoy* . . . ." *Madsen*, 813 N.W.2d at 723-24; *see also McCoy*, 692 N.W.2d at 28-29; *State v. Zarate*, No. 11-0530, 2012 WL 652449, at *5 (Iowa Ct. App. Feb. 29, 2012) (noting that the defendant "raised only constitutional claims in his suppression motion").

B. Despite Hillery's purely constitutional challenge to his confession, the district court suppressed his confession and the physical evidence in this case on common law evidentiary rule grounds.

The district court first erred by basing its suppression order on grounds not raised by Hillery in his motion or during the suppression hearing. In his addendum to his motion to suppress, Hillery argued for the suppression under the Fifth Amendment to the United States Constitution and Article I, sections 1 and 8 of the Iowa Constitution of "any evidence and statements" obtained after officers' alleged promise of leniency. Addendum to Motion to Suppress; App. 11. Hillery did not mention the common law evidentiary test or any case law in his motion. *See* Addendum to Motion to Suppress; App. 11.

At the suppression hearing, the State—without objection from Hillery—described Hillery's addendum as "alleging that investigators

violated the Defendant's Constitutional rights on the basis of promise of leniency." Supp. Hr'g Tr. 3:11-24. Hillery argued that his statements and decision to give Officer Leitzen the drugs were *involuntary* because they were premised on a promise of leniency. *See* Supp. Hr'g Tr. 43:19-45:5. Giving the drugs to the officer, Hillery argued, was "a de facto confession[.]" Supp. Hr'g Tr. 44:16-18. In support of his position, Hillery cited cases discussing both the federal voluntariness standard and Iowa's per se exclusionary rule, but pointed specifically to *Sharp v. Rohling*, 793 F.3d 1216, 1233-35 (10th Cir. 2015), a Tenth Circuit case analyzing whether a defendant's confession was voluntary in light of the totality of the circumstances. *See* Supp. Hr'g Tr. 43:23-45:1.

In response, the district court issued an order suppressing Hillery's statements on what appear to be common-law-evidentiary-rule grounds. Order, Apr. 3, 2019; App. 13. The court recognized that Hillery's challenge was a constitutional one, found that "[h]is statements were not voluntary[,]" but conducted no analysis of the factors set forth in federal or state voluntariness cases. *See id.* It then cited *State v. Polk*, an evidentiary rule case, and quoted from *Brady*

v. United States, which is no longer valid law. *Id.*; *Fulminante*, 499 U.S. at 285.

Without prompting from Hillery, the court also concluded that "[t]he evidence obtained after the promise of leniency was made is fruit of the poisonous tree and therefore is not admissible against him." Order, Apr. 3, 2019; App. 13. By this, the State assumes the district court was referring to the crack and marijuana Hillery handed Officer Leitzen.

This Court should reverse the district court's order and remand for an analysis of whether—in the totality of the circumstances—Hillery's statement was voluntary. Hillery did not ask the district court to rule on whether Officer Leitzen's statements amounted to an improper promise of leniency under the common law evidentiary test. And although this Court has instructed district courts to address the common law question before reaching the constitutional voluntariness issue, that does not mean that a district court should base its decision on an argument the defendant never made. *C.f. Madsen*, 813 N.W.2d at 723-27 & *id.* at 726 n.1 (finding that trial counsel breached an essential duty by failing to alternatively argue for

suppression of his client's statements "under the nonconstitutional, evidentiary promise of leniency prohibition favored in *McCoy*").

Nor did Hillery ask the district court to find that the physical evidence in the case was "fruit of the poisonous tree." *See* Order, Apr. 3, 2019 at 2; App. 14. Instead, Hillery contended that the act of handing over the drugs was itself a "de facto confession," which he argued was involuntary. Supp. Hr'g Tr. 44:16-20. The district court's actions here are problematic because, when a court reaches out and rules on issues not raised by the parties, it risks becoming an advocate. *See State v. Hicks*, 791 N.W.2d 89, 97-98 (Iowa 2010); *see also State v. Gaskins*, 866 N.W.2d 1, 41-42 (Iowa 2015) (Waterman, J., dissenting) (collecting cases).

Thus, regardless of the merits of its decision, the district court erred by basing its ruling on grounds not raised by the defendant. For that reason alone, this Court should reverse and remand for the district court to address Hillery's constitutional argument.

C. The officer's offer to keep Hillery out of jail that day if he agreed to cooperate with law enforcement—with a warning that Hillery may have to go to jail someday for his conduct—does not violate the common law evidentiary test.

The district court's suppression order also fails on the merits. Hillery's confession was not the result of an improper promise of leniency. Under the common law evidentiary test, an officer can generally tell a suspect that it is better to tell the truth than to lie. *Polk*, 812 N.W.2d at 674; *McCoy*, 692 N.W.2d at 28. An officer crosses the line, however, if he "also tells the suspect what advantage is to be gained or is likely from making a confession. Ordinarily the officer's statements then become promises or assurances, rendering the suspect's statements involuntary." *State v. Hodges*, 326 N.W.2d 345, 349 (Iowa 1982); *see also McCoy*, 692 N.W.2d at 28.

The Iowa Supreme Court has held that "[a]n offer to inform the county attorney of the defendant's cooperation, without any further assurances, is not improper." *Polk*, 812 N.W.2d at 675 (citing *State v. Whitsel*, 339 N.W.2d 149, 152 (Iowa 1983)). But a suggestion by officers that the defendant would receive "better treatment and less severe punishment" should he confess is an improper promise of leniency. *Id.* at 675-76 (citing *Hodges*, 326 N.W.2d at 346; *State v.*

Kase, 344 N.W.2d 223, 226 (Iowa 1984); *Quintero*, 480 N.W.2d at 50-51; and *McCoy*, 692 N.W.2d at 28).

Although the line between proper and improper statements is a thin one, Officer Leitzen did not cross it here. Seeking to further the Drug Task Force's investigation into the occupants of 1910 ½ Ellis Street, officers asked Hillery for his ongoing cooperation. Order, Apr. 3, 2019 at 1; App. 13; Supp. Hr'g Tr. 27:17-22. The officers sought to enlist Hillery as a confidential informant and wanted him to perform controlled buys with Watkins, who lived at the house. Supp. Hr'g Tr. 27:17-22. In return, Officer Leitzen told Hillery that he would not have to go to jail that day. Order, Apr. 3, 2019 at 1; App. 13; Supp. Hr'g Tr. 27:16-17; 28:13-25; 37:16-22. As the district court found, the officer made sure to inform Hillery that his cooperation did not necessarily mean that Hillery would not be charged and jailed for his actions in the future. Order, Apr. 3, 2019 at 1; App. 13; Supp. Hr'g Tr. 27:19-22; 29:24; 38:11-18. Hillery made his statement and gave officers the drugs he had purchased after entering into a cooperation agreement. He was not subjected to an improper promise of leniency.

The interaction between Officer Leitzen and Hillery is not of the type to which the common law evidentiary rule applies. Courts

suppress statements under this rule when officers use promises—often false promises—as inducements to secure a defendant's confession. In *Polk*, for example, the officer questioned the defendant in a jail interview room about a shooting in Waterloo. 812 N.W.2d 671-72. The defendant confessed only after the officer both "insinuated that cooperation could affect punishment" *and* suggested that if the defendant confessed, "he would spend less time away from his children." *Id.* at 675-76. The court in *Polk* concluded that this amounted to promise that "the defendant's confessions would likely reduce the punishment." *Id.* at 676.

In *Madsen*, the defendant confessed after the officer "implicitly conveyed the message that by confessing, [the defendant] could avoid public charges against him." 813 N.W.2d at 726. In *McCoy*, the defendant admitted guilt following the officers repeated statements that "if he didn't pull the trigger, he won't be in any trouble." 692 N.W.2d at 28-20. And in *Howard*, the defendant confessed only after the officer "strategically planted in [the defendant's] mind that he would receive treatment, and nothing more, if he confessed." 825 N.W.2d at 41 (quotation omitted). In cases like these, regardless of whether the totality of the circumstances show that the confession

was voluntary, the Iowa Supreme Court has determined that the evidentiary test is a "better deterrent against promises of leniency that can lead to wrongful convictions." *See Madsen*, 813 N.W.2d at 726.[3]

That is not the case here. Officer Leitzen confronted Hillery on the street with strong evidence of his guilt and offered to keep Hillery out of jail that day if he agreed to cooperate. Supp. Hr'g Tr. 27:11-22; 28:13-25; 37:16-22. After Hillery agreed to assist in the investigation, he was not, in fact, arrested that day. Supp. Hr'g Tr. 16:18-17:18. The officers upheld their end of the bargain, and only arrested and charged Hillery for the crimes at issue here after it became apparent that they could not "rely on [Hillery's] information nor his cooperation," and after he was arrested on separate drug charges. *See* Order, Apr. 3, 2019 at 1; App. 13; Supp. Hr'g Tr. 15:7-16:2; 32:1-35:3.

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[3] The State continues to urge the Court to abandon the common law evidentiary rule for a voluntariness standard. This would simplify the analysis, while still safeguarding a defendant's ability to challenge his confession. Like the common law rule, the constitutional test works to ferret out confessions by innocent people by assessing whether a defendant's statement was, in fact, coerced. Should the Supreme Court retain this case or address it on further review, the State reserves the right to argue—for all the reasons set forth in *Madsen* and others—that this Court should abandon the common law test. *See* 813 N.W.2d at 724-726.

By offering Hillery the chance to enter into a cooperation agreement, Officer Leitzen merely agreed to inform the prosecutor of Hillery's cooperation. *See Whitsel*, 339 N.W.2d at 153 (holding that an offer to inform the county attorney of the defendant's cooperation without any further "promises" or "guarantees" was not a promise of leniency); *see also Doornick v. State*, No. 18-0429, 2019 WL 1933991, at *4 (Iowa Ct. App. May 1, 2019) (collecting cases and concluding that the officer's suggestion that the defendant's truthfulness would "probably weigh a bit with the county attorney with what ultimately comes down the pike" was not an improper promise of leniency). Although Officer Leitzen offered to delay any possible jail time, he made clear that Hillery may have to spend time in jail for the incident in the future. Supp. Hr'g Tr. 27:19-22; 29:24; 38:11-18; Order, Apr. 3, 2019 at 1; App. 13. The officer did not promise Hillery that he would receive "better treatment and less severe punishment" if he confessed. *Compare Hodges*, 326 N.W.2d at 346 (suggesting to a defendant that a confession would lead to "a much better chance of [the defendant] receiving a lesser offense than first degree murder" was an improper promise of leniency).

As this Court has recognized, confessions are helpful law enforcement tools, *Polk*, 812 N.W.2d at 674, and officers frequently use cooperation agreements—both formal and informal—to assist in large-scale drug investigations. *C.f. United States v. Guarno*, 819 F.2d 28, 31 (2d Cir. 1987) (noting that "law enforcement officials have legitimate reasons for protecting the secrecy of ongoing investigations and the identities of the targets of those investigations"). The State has found no Iowa caselaw applying the evidentiary rule to a cooperation agreement of this type, and for good reason; an offer to enter into a long-term cooperation agreement is not the type of "promise" that warrants per se exclusion of any statements that follow. As discussed in detail below, such an offer does inform whether a defendant's statements are voluntary. But the common law evidentiary rule has no application here. The district court erred in suppressing Hillery's statement.

D. Even if there was a promise warranting exclusion of Hillery's statement, the district court erred by also excluding the physical evidence in this case.

Even if this Court concludes that Officer Leitzen improperly promised leniency, however, it must reverse the district court's suppression of the physical evidence both because (1) the "fruit of the

poisonous tree" doctrine does not apply to the common law evidentiary rule, and (2) officers would have legally discovered the drugs regardless of the officer's promise.

To start, the "fruit of the poisonous tree" doctrine does not apply here. "Fruit of the poisonous tree" refers to "indirect or secondary evidence obtained as a result of a prior illegality." *State v. Lane*, 726 N.W.2d 371, 380 (Iowa 2007). The doctrine is an extension of the exclusionary rule and operates to exclude the "fruits" of the prior illegality "if they were an exploitation of that prior illegality." *Id.* (citing *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963)).

Although typically applied following a violation of the Fourth Amendment to the United States Constitution or Article I, section 8 of the Iowa Constitution, "it is generally assumed that the fruit of the poisonous tree doctrine applies to involuntary confessions . . . ." *See* Mark E. Cammack, *The Rise and Fall of the Constitutional Exclusionary Rule in the United States*, 58 Am. J. Comp. L. 631, 650 (2010); *see also In re J.D.F.*, 553 N.W.2d 585, 590 (Iowa 1996). Nevertheless, in most cases, application of the doctrine first requires a violation of the *constitution*, not a common law rule. *See, e.g.*, *United States v. Elie*, 111 F.3d 1135, 1141-42 (4th Cir. 1997) (holding

that "the 'tainted fruits' analysis applies only when a defendant's constitutional rights have been infringed"). At the very least, the doctrine requires a statutory violation—accompanied by legislative intent to exclude resulting evidence—not the violation of a common law evidentiary principle. *See*, *e.g.*, *Hicks*, 791 N.W.2d at 97-98.

The doctrine outlined in *Wong Sun*, does not apply, for example, to violations of *Miranda*. *See United States v. Patane*, 542 U.S. 630, 633-34 (2004) (plurality opinion) (stating that because it is a "prophylactic employed to protect against violations of the Self-Incrimination Clause[,] . . . the exclusionary rule articulated in cases such as *Wong Sun* does not apply"); *State v. Smith*, No. 13-0993, 2014 WL 3511811, at *4 (Iowa Ct. App. July 16, 2014) (citing *Patane* for the proposition that "the suppression of physical evidence obtained as a result of an *unMirandized* statement is not a recognized *Miranda* remedy"); *State v. Wondergem*, No. 98-0721-CR, 2000 WL 665692, at *3-4 (Wis. Ct. App. May 23, 2000) (emphasis in original) (collecting cases and noting that the majority of courts addressing the issue have "concluded that nontestimonial physical evidence derived from a statement taken in violation of *Miranda* is admissible *as long as the statement itself was voluntary*").

Iowa cases applying the common law evidentiary rule do not hold differently. Like the rule set forth in *Miranda*, the primary reason for the continued application of the common law evidentiary rule is to deter "against promises of leniency that can lead to wrongful convictions." *See Madsen*, 813 N.W.2d at 725-26; *Polk*, 812 N.W.2d at 674. *But see State v. Kase*, 344 N.W.2d 223, 226 (Iowa 1984). It is a prophylactic rule, not constitutional one.

Indeed, as with *Miranda*, the common law evidentiary rule is not typically applied to bar subsequently discovered physical evidence. In *McCoy*, the Court referred to the "fruit of the poisonous tree" when deciding to prohibit the State from using the defendant's trial testimony in its case-in-chief or for impeachment on retrial. *See* 692 N.W.2d at 29-31. In *State v. Kase*, and *State v. Zarate*, the courts suppressed as fruit of the poisonous tree *statements* made in subsequent interviews. In both, however, the defendants brought only constitutional challenges, and the "fruits" at issue were statements, not physical evidence. *See Kase*, 344 N.W.2d at 225-26; *Zarate*, 2012 WL 652449, at *5.

The closest the Court has come to applying the doctrine to physical evidence is in *In re J.D.F.*, a juvenile delinquency case. In

that case too, however, the juvenile made only a constitutional argument, although, as in *Kase*, the Court analyzed the issue using an outdated voluntariness standard. *See In re J.D.F.*, 553 N.W.2d at 589-90. And although the Court in *In re J.D.F.* appeared willing to apply the doctrine to physical evidence found after a coerced confession, it did not do so in that case. Instead, it found that the officers' motivation for securing the gun was to protect the public, not to compile evidence of the juvenile's guilt, thus removing the deterrent effect of suppression. *See id.* at 590. The Court also found, as was the case here, that "the gun would have inevitably been discovered without [the juvenile's] assistance." *Id.* at 590-91.

Despite Hillery's argument to the contrary below, the district court here suppressed Hillery's statement on common-law-evidentiary-rule grounds, not because officers violated Hillery's constitutional rights. Thus, assuming that Officer Leitzen's statements amounted to an improper promise of leniency, the court's reasoning supports the exclusion of Hillery's statement, but it does not support the suppression of the physical evidence obtained in this case. Without a constitutional violation, there can be no application of the "fruit-of-the-poisonous-tree" doctrine.

Even if the doctrine does generally apply to violations of the common law evidentiary rule, however, it does not apply here. The question to ask under the *Wong Sun* analysis is whether, assuming that officers acted illegally in the first instance, the evidence to which the defendant objects was "come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun*, 371 U.S. at 487-88. In other words, if officers would have inevitably obtained the physical evidence in question acting properly, it need not be suppressed. *See State v. Christianson*, 607 N.W.2d 910, 912 (Iowa 2001).

That is the case here. The drugs obtained in this case were not a product of any alleged illegality. Had Hillery refused Officer Leitzen's cooperation offer, the officer could have—and would have—legally searched Hillery under one of two "well-recognized exceptions to the warrant requirement" and would have discovered the drugs. *See Naujoks*, 637 N.W.2d at 107-08.

First, Officer Leitzen had probable cause to believe that a drug crime had just taken place, and exigent circumstances existed. Probable cause is based on the totality of the circumstances and is present if "a person of reasonable prudence would believe a crime has

been committed or that evidence of a crime might be located in the particular area to be searched." *Naujoks*, 637 N.W.2d at 108.

Here, Officer Leitzen saw Hillery, whom the officer knew had a history of drug convictions, bike up to a house that officers were investigating for drug trafficking crimes. Supp. Hr'g Tr. 7:8-8:16; 21:5-19; 21:5-22:14; 23:6-19; 24:1-8 Not more than three minutes later, Officer Leitzen saw Hillery walk away from Watkins—the suspected drug dealer—and leave on his bike. Supp. Hr'g Tr. 22:18-23:4; 23:20-25. That, coupled with the strong smell of marijuana obvious to Officer Leitzen as he walked closer to Hillery, gave the officer probable cause to believe that Hillery had just purchased drugs. Supp. Hr'g Tr. 24:9-25:4; 26:3-7; 26:18-27:4; 37:3-12; 39:2-23. Or, just based on the odor of marijuana, Officer Leitzen had probable cause to believe that Hillery illegally possessed marijuana. *See State v. Watts*, 801 N.W.2d 845, 848-49 (Iowa 2011). Either way, a reasonable person would have believed that Hillery had committed a crime and that evidence of that crime might be found on his person. *See Naujoks*, 637 N.W.2d at 108.

Exigent circumstances also existed because of the probability that, unless the drugs were immediately seized, Hillery would have

concealed or destroyed them. *See id.* An officer "must have specific, articulable grounds to justify a finding of exigency." *Id.* at 109. Here, Hillery knew that Officer Leizten had seen him buy drugs; had the officer not secured the drugs when he initially confronted Hillery, Hillery would have likely used, concealed, or destroyed them. *State v. Kern*, 831 N.W.2d 149, 174 (Iowa 2013) ("The exigent-circumstances exception is important to narcotics investigations because drugs are 'easily destroyed.'"); *see also Illinois v. McArthur*, 531 U.S. 326, 331-32 (2001) (finding that exigent circumstances existed where "the police had good reason to fear that, unless restrained, [the defendant] would destroy the drugs before they could return with a warrant"). Officer Leitzen had both probable cause and exigent circumstances here, which would have allowed him to legally search Hillery without a warrant.

Alternatively, for the same reasons set forth above, Officer Leitzen could have arrested Hillery for drug crimes and searched him incident to arrest. "An officer may make a warrantless arrest when there is a reasonable belief that an indictable public offense has been committed and a reasonable ground for believing the person to be arrested has committed it." *State v. Evans*, No. 15-0616, 2016 WL

5408303, at *5 (Iowa Ct. App. Sept. 28, 2016). Here, before he made any offer of cooperation, Officer Leitzen both observed Hillery engage in a likely drug transaction and detected a strong odor of marijuana coming from him. Either one of those things is enough to give the officer probable cause to arrest, and then search Hillery for drugs. *See Evans*, 2016 WL 5408303, at *5-6 (citing *United States v. Perdoma*, 621 F.3d 745, 749 (8th Cir. 2010) and stating that "an officer ha[s] probable cause to arrest a suspect for marijuana possession when an odor of marijuana [i]s determined to emanate from the specific person"); *State v. Gaskins*, 866 N.W.2d 1, 8 (Iowa 2015) (approving of searches-incident-to-arrest for the purpose of "safeguarding any evidence the arrestee may seek to conceal or destroy").

Under either exception to the warrant requirement, officers would have inevitably obtained the physical evidence in this case through lawful means, regardless of any alleged improper promise of leniency. This Court should reverse the district court's decision to suppress the physical evidence in this case.

At the very least, this Court should reverse the district court's decision as it applies to the physical evidence, and remand to give the State a chance to develop the record. *See Naujoks*, 637 N.W.2d at 107-

08 ("The State must prove by a preponderance of the evidence that a warrantless search falls within one of the exceptions."); *State v. Tyler*, 867 N.W.2d 136, 171 (Iowa 2015) (reversing and remanding to allow the State "to develop an additional record" as to whether any exceptions to the warrant requirement or exclusionary rule applied). Because Hillery did not argue that the drugs should be suppressed on "fruit-of-poisonous-tree" grounds, the State did not have the opportunity to argue below how it would have inevitably obtained the evidence at issue. For all those reasons, the district court's order suppressing the physical evidence in this case cannot stand.

E. The totality of the circumstances show that Hillery's statement was voluntary and, even if it was not, the drugs remain admissible under the inevitable discovery doctrine.

Nor must Hillery's statement or the drugs be suppressed under a constitutional analysis. Hillery moved to suppress "any evidence and statements" obtained after a promise of leniency, in violation of the Fifth Amendment to the United States Constitution and Article I, sections 1 and 8 of the Iowa Constitution.[4] The district court did not

[4] Because Hillery did not ask the district court to apply the Iowa constitution differently from the U.S. constitution, this Court should "apply the same analysis to each constitutional provision." *Madsen*, 813 N.W.2d at 722.

make any specific findings relating to whether, in the totality of the circumstances, Hillery's statement was voluntary. *See* Order, Apr. 3, 2019; App. 13. It did, however, broadly conclude that Hillery's "statements were not voluntary." *Id.* at 1. To the extent the district court's order was based on a constitutional analysis, it was in error.

A defendant's statement is voluntary if, under the totality of the circumstances, his "will is not overborne or his capacity for self-determination is not critically impaired." *Madsen*, 813 N.W.2d at 722; *see also Schneckloth*, 412 U.S. at 225-26. In making this determination, courts look to a number of factors, including the defendant's age; his prior experience with the criminal justice system; whether the officers used deception; whether the defendant appeared able to understand the officer's questions and responded appropriately; the length of the defendant's detention and interrogation; the defendant's physical and emotional reaction to the interrogation; and whether officers used physical punishment, including deprivation of food and sleep. *Madsen*, 813 N.W.2d at 722-23 (quoting *State v. Payton*, 481 N.W.2d 325, 328-29 (Iowa 1992)); *see also Schneckloth*, 412 U.S. at 226. Courts also assess whether the defendant knew of and waived his *Miranda* rights, the defendant's

level of education, and whether any improper promises were used to secure the confession. *State v. Morgan*, 559 N.W.2d 603, 608 (Iowa 1997); *see also Tyler*, 867 N.W.2d at 176-77. No one factor is determinative. *See Hodges*, 326 N.W.2d at 348. Moreover, "coercive police activity is a necessary predicate to a finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Colorado v. Connelly*, 479 U.S. 157, 167 (1986).

Under the constitutional analysis, an improper promise of leniency, standing alone, is generally not enough to render a defendant's statement involuntary. *See Fulminante*, 499 U.S. at 285-86; *see, e.g.*, *United States v. Romano*, 630 Fed. App'x 56, 58-59 (2d Cir. 2015) (stating that "it is well established that promises of leniency, without more, do not render a confession involuntary"). Nor is a confession "involuntary merely because the suspect was promised leniency if he cooperated with law enforcement officials." *See Guarno*, 819 F.2d at 31; *see also United States v. Shears*, 762 F.2d 397, 401-02 (4th Cir. 1985) ("Government agents may initiate conversations or cooperation, they may promise to make a defendant's cooperation known to the prosecutor, and they may even

be able to make and breach certain promises without rendering a confession involuntary."); *United States v. Long*, 852 F.2d 975, 978 (7th Cir. 1988) (distinguishing cases in which the defendant is led "to believe that he or she will receive lenient treatment when this is quite unlikely" with "making a promise to bring the defendant's cooperation to the attention of the prosecutor or to seek leniency, without more[,]" and stating that the former is improper while the latter is not). "So long as the characteristics of the suspect and the conduct of the law enforcement officials do not otherwise suggest that the suspect could not freely and independently decide whether to cooperate or remain silent, a confession made pursuant to a cooperation agreement is not the product of coercion." *Guarno*, 819 F.2d at 31. This is particularly true where the suspect was "confronted by overwhelming evidence of guilty when the cooperation agreement was offered." *Id.*

Here, even assuming Officer Leitzen's statements amounted to an improper promise of leniency, the totality of the circumstances does not support a conclusion that Hillery's will was overborne. Hillery is an adult whose criminal history demonstrates substantial experience with the criminal justice system. *See* Trial Information;

App. 4; Supp. Hr'g Tr. 24:1-8. Although his level of education is not in the record, Hillery appeared to understand the officer's questions. *See* Supp. Hr'g Tr. 26:10-31:25. Hillery was not *Mirandized*, but Officer Leitzen and Hillery were on a public sidewalk, not in an interview room, and Hillery was not handcuffed or under arrest at the time. Supp. Hr'g Tr. 25:13-31:25. Hillery's interaction with Officer Leitzen was not long, the officer did not deceive Hillery in any way, nor did he subject Hillery to physical punishment or emotional strain. Supp. Hr'g Tr. 25:13-31:25. Instead, Officer Leitzen offered Hillery the chance to cooperate to avoid the consequences for conduct that Hillery knew the officer had seen occur. Supp. Hr'g Tr. 26:10-31:25. In light of all these circumstances, it was error for the district court to find that Hillery's statement was involuntary.

Finally, for the reasons set forth above, the physical evidence obtained here was not fruit of any alleged illegality. Officers could have legally seized it independent of the cooperation offer or "promise of leniency." Thus, even if the Court finds that Hillery's statement was involuntary, it should reverse the district court's order suppressing the drugs.

CONCLUSION

For all the reasons discussed above and in the State's application for discretionary review, the State respectfully asks this Court to reverse the district court's suppression order as it applies to both Hillery's statement and the physical evidence obtained in the case.

REQUEST FOR NONORAL SUBMISSION

The State requests that this case be submitted without oral argument. Should the Court grant oral argument, the State asks to be heard.

Respectfully submitted,

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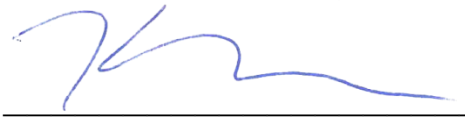

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CERTIFICATE OF COMPLIANCE

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Dated: March 12, 2020

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