IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellant, v. MICHAEL HILLERY, Defendant-Appellee.	)))))))))	SUPREME COURT 19-0725

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

APPELLEE'S BRIEF AND ARGUMENT
AND
REQUEST FOR ORAL ARGUMENT

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FINAL

CERTIFICATE OF SERVICE

On the 6th day of March, 2020, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellee by placing one copy thereof in the United States mail, proper postage attached, addressed to Michael M. Hillery, 32549 Little Rd., Dyersville, IA 52040.

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Investigator Leitzen's promise not to arrest Hillery resulted in the discovery of the physical evidence. Should the district court's order suppressing the controlled substances and Hillery's statements be affirmed?

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Hannah v. Larche, 363 U.S. 420, 442, 80 S.Ct. 1502, 1515 (1960)

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Medina v. California, 505 U.S. 437, 445, 112 S.Ct. 2572, 2577 (1992)

Haley v. Ohio, 332 U.S. 596, 599, 68 S.Ct. 302, 303 (1948)

Stein v. New York, 346 U.S. 156, 185, 73 S.Ct. 1077, 1093 (1953)

Fikes v. Alabama, 352 U.S. 191, 77 S.Ct. 281 (1957)

Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019 (1938)

State v. Brown, 156 S.W.3d 722, 731-32 (Ark. 2004)

Penick v. State, 440 So.2d 547, 551 (Miss. 1983)

State v. Johnson, 346 A.2d 66, 68 (N.J. 1978)

State v. Ferrier, 960 P.2d 927, 932-33 (Wash. 1998)

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II. Whether the evidence would have been inevitably discovered during a constitutionally permissible search?

Authorities

DeVoss v. State, 648 N.W.2d 56, 62 (Iowa 2002)

State v. Watts, 801 N.W.2d 845, 850 (Iowa 2011)

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Chimel v. California, 395 U.S. 752, 763, 89 S.Ct. 2034, 2040 (1969), abrogated recognized by Davis v. United States, 564 U.S. 229, 234, 131 S.Ct. 2419, 2425 (2011)

ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because an issue raised involves a substantial question of enunciating or changing legal principles. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(f). Specifically, Hillery requests this Court adopt a "knowing and voluntary" Zerbst standard which requires law enforcement prior to questioning an individual to inform him that he is free to leave and free to terminate questioning at any time.

STATEMENT OF THE CASE

Nature of the Case: The Supreme Court granted the State's application for discretionary review of the district court order granting Appellee Michael Hillery's motion to suppress.

Course of Proceeding and Disposition Below: On February 28, 2019, Hillery was charged by way of Trial Information with possession of controlled substance (cocaine base) – third offense in violation of Iowa Code section 124.401(5) (2017) (Ct. I) and possession of controlled

substance (marijuana) – third offense in violation of Iowa Code section 124.401(5) (2019). (TI)(App. pp. 4-6).

On March 12, 2019, Hillery filed a motion to suppress challenging the unreasonable seizure of his person and the custodial interrogation without benefit of Miranda warnings. Hillery sought suppression of all evidence seized and his statements made subsequent to the illegal seizure. (MTS)(App. pp. 9-10). On March 27, 2019, Hillery filed an addendum to the motion to suppress asserting the evidence and his statements were obtained by promissory leniency in violation of his constitutional rights. (MTS Addendum)(App. pp. 11-12).

A hearing was held on March 29, 2019. (Tr. p. 1 L1-25). On April 3, 2019, the district court granted the motion to suppress. (4/3/19 Order)(App. pp. 13-15).

The State filed a motion to reconsider on April 30, 2019. (Motion to Reconsider)(App. pp. 16-18). The Attorney General's Office filed an application for discretionary review on May 2, 2019. (App for Discretionary Review)(App. pp. 19-33).

The application was granted by the Supreme Court on May 13, 2019. (5/13/19 SCt Order)(App. pp. 38-40).

Facts: The Dubuque Drug Task Force was engaged in an on-going investigation regarding the sale of heroin in which a person overdosed. The Task Force investigated Carl Watkins (nicknamed "Country") who resided at 1910 ½ Ellis Street in Dubuque. Watkins was not the person who sold the heroin which resulted in the overdose. (Tr. p. 7L8-p. 11L16, p. 21L5-19). Watkins' girlfriend, Stephanie, worked with Hillery. (Tr. p. 16L7-17).

On November 14, 2018, Investigator Leitzen drove by the residence located at 1910 ½ Ellis Street. (Tr. p. 21L20-23). When he drove by the residence, he observed Hillery, who was on a bicycle, ride up to the front door. Leitzen continued driving to his original destination. Approximately three minutes later, Leitzen returned to Watkins' residence. He observed Hillery getting onto his bicycle and riding away from the residence. Leitzen made eye contact with Watkins as he

walked back into the residence. (Tr. p. 21L20-p. 23L25). Leitzen did not see an exchange of anything. (Tr. p. 36L9-11). Leitzen assumed Hillery had purchased drugs from Watkins. (Tr. p. 24L9-25, p. 35L16-20, p. 39L2-23).

Leitzen followed Hillery. Leitzen did not want to stop Hillery in a location Watkins could observe. Leitzen observed Hillery walking his bicycle. He parked his vehicle, opened the car door and called to Hillery by name. Leitzen asked Hillery to stop a minute so he could talk to him. Leitzen did not identify himself as a police officer. Hillery ignored him and kept walking. Leitzen got out of his vehicle and followed Hillery. As he was walking behind him, he smelled a strong odor of fresh marijuana coming from Hillery. Leitzen called to him again which Hillery ignored. (Tr. p. 25L5-p. 26L9, p. 36L12-p. 37L12).

Because Leitzen was in plain clothes, he pulled out his badge, walked up to Hillery and showed him his badge. Hillery kept walking; telling Leitzen that he had done nothing

wrong. Leitzen then stepped in front of the bicycle to stop Hillery from walking any further. (Tr. p. 26L10-17). Leitzen testified:

Um, I told him that he needed to give me what he had just bought, and he told me that he did not buy anything. He said that he owed Stephanie some money, and he had stopped there to drop it off. Um, I told him that I was sure that he bought something, and he needs to give it to me. Um, I also told him that I was not looking to take him to jail that day. I said, I'm looking more for your cooperation to try and get your help to get into that place. Um, I said, That's not to say that you're not going to go to jail someday for this, but I'm not looking to take you to jail today for it. I just want your cooperation.

And at that time he reached into his left pants pocket and pulled out his hand, which was a balled-up fist at that time, and, um, as soon as he pulled out his balled-up fist, he again told me that he didn't buy anything, um, and that he didn't do anything wrong. And I held out my right hand underneath his -- his left hand, it was balled in a fist. I told him he needed to drop what he had in his hand, and at that time, he dropped one, it was just a little plastic baggy of what I clearly recognized to be crack cocaine. He dropped that into my hand, and as soon as he did that, he shoved his bicycle into me, which caused me to drop the crack cocaine, and I also dropped my radio, which broke into three different pieces, actually, on the ground, and then he took off running.
Um, at that time, I was able to push the bicycle out of the way, and I chased him down and grabbed onto him, and as soon as I did that, um, I did not have my radio to -- to call for any assistance or anything like that, and because I was trying to keep this quiet for strategic reasons, um, I caught him, and I -

- as soon as I caught him, he -- he immediately said, I thought you said I'm not going to jail today. And I said, I told you that I need your cooperation, and you're not going to go to jail today if you start cooperating, but that better happen pretty quickly, because there's officers coming, and I could hear them coming.

And then a guy had stepped out of, I think it's the second apartment from the end, and told me that he called the police for me. Um, so short -- a short time after that, um, Officer Jay Murray arrived, and by that time, Mr. Hillery had advised me that he would, um, be cooperative, and he walked back up to where his bicycle was and sat down on the curb like I had asked him. And then, um, when Officer Murray arrived, I asked him to help me find the baggy of crack cocaine that I dropped when I got the bicycle shoved into me. He was able to locate it, um, and right in the parking lot, right near where I had -- where it had been dropped.

(Tr. p. 27L8-p. 29L12).

Hillery was not arrested on November 14, 2018. Leitzen stressed to him that he was not interested in taking him to jail that day. He only wished to gain Hillery's cooperation. Leitzen told Hillery that he was not going to jail that day before Hillery handed over the controlled substances. Leitzen stated that he did not promise him that he would never be charged. (Tr. p. 29L13-30L4, p. 37L16-p. 38L4). At some point, Hillery also turned over a bag of marijuana. (Tr. p. 30L5-31L4). Hillery

said he got both the cocaine and marijuana from Watkins. (Tr. p. 38L19-p. 39L1).

Investigator Williams was called to the scene to speak with Hillery. (Tr. p. 12L4-p. 13L15). Williams spoke with Hillery about performing controlled buys from the residence and at that time Hillery was possibly willing to do so. (Tr. p. 13L16-23). Williams said he never made a promise that he would not be charged with a crime if he cooperated. (Tr. p. 13L24-p. 14L2). If charges have not been filed, the Task Force members tell potential informants that depending on their cooperation and the work they can do for the Task Force, there would be a possibility that the charges would not be filed. Williams said there are no promises or guarantees. (Tr. p. 14L24-p. 15L6, p. 31L5-25).

The Task Force did eventually sign Hillery as a confidential informant. Hillery made some phone calls and attempted controlled buy from Watkins. Hillery's actions were unsuccessful. (Tr. p. 15L7-p. 16L2, p. 33L9-p. 34L9). Leitzen

opined Hillery was not cooperative. And Hillery was charged with another drug charge. Hillery was then charged with possession of controlled substances from the November 14, 2018 offense. (Tr. p. 34L18-p. 35L3).

ARGUMENT

I. Investigator Leitzen's promise not to arrest Hillery resulted in the discovery of the physical evidence. The district court's order suppressing the controlled substances and Hillery's statements should be affirmed.

Preservation of Error.

The State's application for discretionary review preserved error on only two grounds: (1) that physical evidence seized from the defendant is not a fruit of an involuntary statement; and (2) that a defendant's cooperation agreement does not render statements to police involuntary.[1] (App for Discretionary Review, ¶ 5)(App. p. 23). The State did not preserve error regarding the challenge that the district court's

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1 The Attorney General's Office noted that the district court's decision was based on a claim not raised, but did not assert this as a ground for review. (App for Discretionary Review, ¶¶ 2, 5)(App. pp. 20, 23).

suppression ruling based on common law evidentiary grounds was error because it was not raised below. State brief p. 24-27.

In the district court, Hillery challenged the admissibility of his statement made without benefit of Miranda warnings. (MTS ¶ 11, 12)(App. p. 10). Hillery also challenged his statements were involuntary. (MTS Addendum)(App. pp. 11-12). This Court may affirm on any ground urged by the prevailing party in the district court but not ruled on by the trial court. DeVoss v. State, 648 N.W.2d 56, 62 (Iowa 2002).

Standard of Review.

The Court reviews a constitutional challenge to the admissibility of a confession de novo. The Court reviews for correction of errors at law the district court's ruling on promises of leniency under the common law evidentiary test. State v. Polk, 812 N.W.2d 670, 674 (Iowa 2012).

Discussion.

The Iowa Supreme Court has advised district courts to first employ the evidentiary test.

In Madsen, the Court declined to abandon the common law evidentiary test in favor of the constitutional totality of the circumstances test used by the federal courts. State v. Madsen, 813 N.W.2d 714, 726 (Iowa 2012). The Court noted "the evidentiary rule has the advantage of clarity and is a better deterrent against police misuse of threats and promises of leniency to obtain confessions." State v. Madsen, 813 N.W.2d at 725. "The use of 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 Court directed the district courts to "first employ the evidentiary test to determine the admissibility of confessions challenged on grounds of a promise of leniency." Id. at 726 n.1. The Court reiterated this direction in Howard. State v. Howard, 825 N.W.2d 32, 39 (Iowa 2012). The district court

merely followed the Supreme Court's direction. There is no basis to reverse the district court on this ground.

Hillery's disclosure of the controlled substances and subsequent confession were induced by improper promises of leniency

Under the evidentiary test, a " 'confession can never be received in evidence where the prisoner has been influenced by any threat or promise.' " State v. McCoy, 692 N.W.2d 6, 27 (Iowa 2005)(other citation omitted). The Supreme Court in Polk summarized the benefits of the evidentiary test:

> We review challenges to confessions based on a promise of leniency under a common law evidentiary test. The defendant's confession is to be suppressed if it follows the officer's improper promise of leniency. We have adopted this exclusionary rule out of concern that " 'the law cannot measure the force of the influence used, or decide upon its effect upon the mind.' " The exclusionary rule eliminates the need for the court to attempt to read the mind of the defendant to determine if his confession in fact was induced by or made in reliance upon the promise of leniency.

State v. Polk, 812 N.W.2d at 674.

Leitzen's testimony demonstrates that his promises improperly induced Hillery's incriminating action of handing

over the controlled substances and subsequent confession.

Leitzen testified:

[] I told him that I was sure that he bought something, and *he needs to give it to me. Um, I also told him that I was not looking to take him to jail that day*. I said, *I'm looking more for your cooperation to try and get your help to get into that place*. Um, I said, *That's not to say that you're not going to go to jail someday for this, but I'm not looking to take you to jail today for it. I just want your cooperation*.

And at that time he reached into his left pants pocket and pulled out his hand, which was a balled-up fist at that time, and, um, as soon as he pulled out his balled-up fist, he again told me that he didn't buy anything, um, and that he didn't do anything wrong. And I held out my right hand underneath his -- his left hand, it was balled in a fist. *I told him he needed to drop what he had in his hand*, and at that time, he dropped one, it was just a little plastic baggy of what I clearly recognized to be crack cocaine. ***.

(Tr. p. 27L8-27L12, 29L13-24)(emphasis added).

I caught him, and I -- as soon as I caught him, he -- he immediately said, *I thought you said I'm not going to jail today. And I said, I told you that I need your cooperation, and you're not going to go to jail today if you start cooperating, but that better happen pretty quickly*, because there's officers coming, and I could hear them coming.

(Tr. p. 28L18-25)(emphasis added). Leitzen promised Hillery

he was not going to jail prior to Hillery producing the cocaine.

Up until that point, Hillery maintained that he had done nothing wrong. (Tr. p. 37L16-p. 38L4).

> An officer can tell a suspect that it is better to tell the truth without crossing the line between admissible and inadmissible statements from the defendant. However, the line is crossed "if the officer also tells the suspect what advantage is to be gained or is likely from making a confession." Under the latter circumstances, the officer's statements ordinarily become promises of leniency, rendering the statements involuntary.

State v. McCoy, 692 N.W.2d at 28 (other citation omitted).

Leitzen crossed the line. The district court correctly found Hillery's actions were induced by an improper promise of leniency.

The district court correctly suppressed the physical evidence obtained as a resulted of Leitzen's promise of leniency.

Hillery gave Leitzen the crack cocaine based on a promise not to be arrested. All of the evidence obtained flows from Leitzen's promises. Without the promise, Hillery maintained he had done nothing wrong.

Hillery acknowledges that the reported cases primarily deal with confessions and not physical evidence obtained by the defendant's admissions induced by a promise. See e.g.

State v. McCoy, 692 N.W.2d 6 (Iowa 2005); State v. Polk, 812 N.W.2d 670 (Iowa 2012); State v. Howard, 825 N.W.2d 32, 39 (Iowa 2012); State v. Madsen, 813 N.W.2d 714 (Iowa 2012). However, the Court addressed the suppression of physical evidence in Kase and In Re J.D.F. State v. Kase, 344 N.W.2d 223 (Iowa 1984); In Re J.D.F., 553 N.W.2d 585 (Iowa 1996).

In Kase, a DCI agent told the defendant that if she told him what she knew about the victim's "death and signed a consent to search her apartment no criminal charges would be filed against her; otherwise, she was told, she would be charged with murder." State v. Kase, 344 N.W.2d 223, 226 (Iowa 1984). After this statement Kase signed a consent to search and made statements to the agent. Id. The Supreme Court determined the statements should have been suppressed. Id. Kase argued that the consent to search her apartment was involuntary for the same reasons as her oral statements. The Court agreed with this contention but the search in question was conducted pursuant to a warrant. Id.

Probable cause for the warrant was independent from "any information which was elicited from statements of the defendant." Id.

In Re J.D.F. also addressed whether physical evidence should be suppressed based on an officer's promise of leniency. In Re J.D.F., 553 N.W.2d 585 (Iowa 1996). An officer responded to a report of a juvenile carrying a weapon. When the officer arrived in the area, he observed "what he thought to be a gun sticking out the front of JDF's pants." When the officer attempted to investigate, JDF fled. JDF outran the officer. The officer located JDF again and apprehended him. When seized, JDF did not possess a weapon. Id. at 587. JDF denied possessing a gun. Ultimately, the officer "told him that if he showed them its location, he would not take him into custody at juvenile hall nor would he file charges against him." After this promise, JDF led police to the gun. The officer then took him home and released him to a relative. The County Attorney filed charges

the next day. Id. The Court determined "[t]his appears to be a clear case where JDF's inculpatory admission was induced by the police promising they would take him home rather than to the juvenile intake center." Id. at 589. The Court, therefore, concluded, "the inculpatory statements and the act of leading the police to the gun cannot be used as evidence against JDF." Id. at 590.

The JDF Court next considered whether the physical evidence should have been suppressed. The Court found that it appeared that it was not a case "where the officers' motivation was to obtain incriminating information from JDF." Id. Instead the officer's action was primarily to protect the public from potential harm. Id. The Court also considered that the gun would likely have been discovered without JDF's assistance. Id. The Court ruled the gun was admissible to prove JDF committed a delinquent act. Id. at 590-91.

In the present case, the officers did not have an independent basis to obtain the physical evidence.[2] Nor is there a valid public safety exception involved in the present case. Kase and JDF illustrates that where the officer's improper promise of leniency results in production of physical evidence, that evidence is also subject to suppression.

Hillery's complaint is not that the State has violated a cooperation agreement

State confuses Hillery's producing the crack cocaine based on the promise not to be arrested with the subsequent cooperation agreement. State's brief pp. 31-33. Leitzen only told Hillery he wanted his cooperation. (Tr. p. 27L22, p. 28L20-23, p. 29L23-24). Williams later discussed a cooperation agreement with Hillery. (Tr. p. 13L6-p. 15L6, 31L5-25). Williams eventually signed Hillery as an informant. (Tr. p. 15L7-25). The record does not disclose if there was an actual written cooperation agreement, and if so, what the

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2 Hillery addresses the State's alternative arguments in Division II.

terms of the agreement were. Even if there was a cooperation agreement, this is not what prompted the "confession" of turning over the drugs and admitting to buying it from Watkins. Leitzen's improper promise of leniency induced Hillery to act. The district court should be affirmed.

The district court may be affirmed on other grounds urged in the district court but not ruled upon.

Hillery's statements and actions were not voluntary

The issue of voluntariness arises when the court considers whether a defendant provided voluntary consent or voluntarily confessed. Voluntary consent and voluntary confessions have been analyzed under two similar sets of factors. Voluntariness does not differ whether a defendant ultimately consents to a search or confesses to a crime. The nature of voluntariness resides with personal characteristics of the defendant and the pressures exerted by the police.

The United States Constitution requires voluntariness for confessions and consent. The Fifth and Fourteenth Amendments require that a confession be voluntary,

controlled by the Fifth Amendment where, "no person 'shall be compelled in any criminal case to be a witness against himself.'" Dickerson v. United States, 530 U.S. 428, 433, 120 S. Ct. 2326, 2330 (2000) (other citation omitted). The Fourth and Fourteenth Amendments require that "consent not be coerced, by explicit or implicit means, implied threat or covert force." Schneckloth v. Bustamonte, 412 U.S. 218, 228, 93 S.Ct. 2041, 2048 (1973) (citing Boyd v. United States, 116 U.S. 616, 635, 6 S.Ct. 524, 535 (1886)).

Involuntary statements cannot be used against a defendant at trial. State v. Hrbek, 336 N.W.2d 431, 435 (Iowa 1983)(citing Mincey v. Arizona, 437 U.S. 385, 398, 98 S.Ct. 2408, 2418 (1978)). Involuntary confessions cannot be used because of their "inherent lack of reliability." State v. McCoy, 692 N.W.2d at 28 (quoting State v. Quintero, 480 N.W.2d 50, 52 (Iowa 1992)). Admission of an involuntary statement in a criminal trial denies the defendant due process and requires reversal. State v. Trigon, Inc., 657 N.W.2d at 441, 445 (Iowa

2003)(citing State v. Davis, 446 N.W.2d 785, 788 (Iowa 1989)).

Voluntariness is dependent upon the circumstances surrounding the defendant. There is no "talismanic definition" of voluntariness. Schneckloth v. Bustamonte, 412 U.S. 218, 224, 93 S.Ct. 2041, 2046 (1973). The court looks to the totality of the circumstances when determining voluntariness for both consent and confessions. Schneckloth v. Bustamonte, 412 U.S. 218, 226, 93 S.Ct. 2041, 2047 (1973); United States v. Watson, 423 U.S. 411, 424, 96 S.Ct. 820, 828 (1976). For consent cases, the court ultimately considers whether consent was the product of "duress or coercion, express or implied." United States v. Mendenhall, 446 U.S. 544, 557, 100 S.Ct. 1870, 1879 (1980). But see United States v. Watson, 423 U.S. 411, 424, 96 S.Ct. 820, 828 (1976) (considering whether defendant's will had been overborne). For confession cases, the court ultimately considers "'whether a defendant's will was overborne by the circumstances surrounding the giving of the confession." Dickerson v. United

States, 530 U.S. 428, 434, 120 S.Ct. 2326, 2331 (2000) (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 226, 93 S.Ct. 2041, 2047 (1973)). There is no meaningful difference between these two inquiries into voluntariness although the language of each inquiry is different. Taken together, the inquiry for voluntariness may be posed as whether a defendant's will was overborne through duress or coercion. No single factor is determinative of a confession's voluntariness. State v. Cullison, 227 N.W.2d 121, 127 (Iowa 1975). The confession must be considered in light of the totality of the circumstances of the defendant's case. Id.

Federal courts have considered various, albeit not exclusive, factors for voluntary consent and voluntary confessions under the totality of the circumstances test. There are many factors considered for voluntary confessions. See Withrow v. Williams, 507 U.S. 680, 694, 113 S.Ct. 1745, 1754 (1993)(factors the court considers for voluntary confessions include police coercion, length of interrogation,

location, continuity of custody, defendant's maturity, defendant's education, defendant's physical condition, defendant's mental health, and advisement of rights while in custody); See also Schneckloth v. Bustamonte, 412 U.S. 218, 226, 93 S.Ct. 2041, 2047 (1973)(additional factors include defendant's age, defendant's intelligence, and use of punishment); United States v. Greer, 566 F.2d 472, 473 (5th Cir. 1978)(additional factors include pattern of interrogation, intervening occurrences, and violation of legal processes); Brown v. Illinois, 422 U.S. 590, 603, 95 S.Ct. 2254, 2262-63 (1975)(additional factors include the temporal proximity between police illegality and the confession, the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct).

Iowa has consistently used the federal factors to determine voluntary confessions. See State v. Smith, 546 N.W.2d 916, 926 (Iowa 1996)(factors the court considers for voluntary confessions include the defendant's age; prior

experiences with law enforcement; intoxication; intellectual capacity; physical and emotional reaction to the interrogation; whether *Miranda* warnings were provided; whether officers acted in a deceptive manner; whether defendant appeared to understand and respond to questions; the length of the detention and interview; and whether the defendant was subject to physical punishment); See also State v. Payton, 481 N.W.2d 325, 328-29 (Iowa 1992)(additional factors include whether defendant was mentally "subnormal").

Federal courts have generally used similar factors to determine voluntary consent. See United States v. Watson, 423 U.S. 411, 424, 96 S.Ct. 820, 828 (1976)(factors the court considers for voluntary consent include threat of force, use of actual force, promissory leniency, subtle coercion, arrest, custody, location, defendant's knowledge of rights, defendant's prior experience with law enforcement, defendant's intelligence, advisement of rights, and defendant's ability to make free choice); See also United States v. Perry, 437 F.3d

782, 785 (8th Cir. 2006)(additional factors include defendant's age, defendant's education, whether defendant was intoxicated, duration, intimidation, punishment, police misrepresentations, and whether defendant objected to search).

Interestingly, one factor that is not generally considered for voluntary confessions but is considered for voluntary consent cases is the assertion of police authority. See Florida v. Royer, 460 U.S. 491, 502, 103 S.Ct. 1319, 1326 (1983) (holding police conduct amounted to show of authority where reasonable person would not have felt free to leave); See also Johnson v. United States, 333 U.S. 10, 13, 68 S.Ct. 367, 368 (1948)("Entry to defendant's living quarters, which was the beginning of the search, was demanded under color of office. It was granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right."); Amos v. United States, 255 U.S. 313, 317, 41 S.Ct. 266, 268 (1921)("We need not consider whether it is possible

for a wife, in the absence of her husband, thus to waive his constitutional rights, for it is perfectly clear that under the implied coercion here presented, no such waiver was intended or effected.").

Iowa has consistently used the federal factors to determine voluntary consent. See State v. Reiner, 628 N.W.2d 460, 465-66 (Iowa 2001)(factors the court considers for voluntary consent include knowledge of the right to refuse consent, assertion of police authority, show of force or other coercive action by police, threats by police, illegal police action prior to consent); See also State v. Lane, 726 N.W.2d 371, 383 (Iowa 2007)(additional factors include the temporal proximity between police illegality and the consent, the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct).

The Fourth, Fifth, and Fourteenth Amendments require voluntariness for a defendant's consent to search and confession to a crime. The factors enumerated above are

considered in the totality of the circumstances analysis to determine voluntariness for consent and confession cases. Although different courts have used different factors for each analysis, all the factors are rooted in the central inquiry of whether a defendant's will was overborne through duress or coercion by considering an individual's characteristics and pressures exerted by the police. Voluntary confession and voluntary consent factors have been, and should be, used interchangeably.

"The State bears the burden of proving by a preponderance of the evidence that an accused's confession is voluntary." State v. Bowers, 661 N.W.2d 536, 541 (Iowa 2003). The State concedes Hillery was not provided Miranda warnings. State's brief p. 46. The record does not show Hillery's level of education or intelligence. Hillery had some prior involvement with the criminal justice system. (Tr. p. 11L17-p. 12L3, p. 24L1-8). Hillery has several convictions for drug possession which suggests he is a user as opposed to a

trafficker. (TI)(App. pp. 4-6). While Hillery smelled of raw marijuana, there was no evidence whether Hillery was under the influence of marijuana. (Tr. p. 26L3-7, p. 27L1-4, p. 37L3-12). The evidence shows that Leitzen's statements were coercive. (Tr. p. 25L22-p. 30L4, p. 37L16-p. 39L1). Hillery was induced to provide incriminating evidence and statements based on Leitzen's promise of leniency. This is not a case involving a violation of a cooperation agreement. There was no cooperation agreement at the time Hillery turned over the drugs. The totality of the circumstances demonstrate Hillery's statements and actions were involuntary. The district court should be affirmed.

Iowa should adopt a more rigorous analysis of the totality of the circumstances for confession cases to allow for a more realistic assessment of voluntariness.

Hillery challenged the promise of leniency violated Article I, section 8. (MTS Addendum)(App. pp. 11-12). A state is free "*as a matter of its own law* to impose greater restrictions on police activity" than required by the federal constitution. Ohio

v. Robinette, 519 U.S. 33, 42, 117 S.Ct. 417, 422-23 (1996) (Ginsburg, R., concurring)(quoting Oregon v. Hass, 420 U.S. 714, 719, 95 S.Ct. 1215, 1219 (1975)). No federal law precludes a state from requiring its police officers to inform citizens that they are free to leave and free to end questioning at any time. Ohio v. Robinette, 519 U.S. 33, 45, 117 S.Ct. 417, 424 (1996) (Stevens, J., dissenting). See also Michigan v. Mosley, 423 U.S. 96, 120, 96 S.Ct. 321, 334 (1975) (Brennan, J., dissenting)("Each State has power to impose higher standards governing police practices under state law than is required by the Federal Constitution."). This Court agrees that, "There is no question that state courts, as noted by Justice Ginsburg in *Robinette,* are free to develop their own search and seizure law under their state constitutions." State v. Pals, 805 N.W.2d 767, 779 (Iowa 2011).

The Iowa Constitution does not contain a provision against self-incrimination similar to the Fifth Amendment, but this Court "held such a right to be implicit in the 'due process

of law' guaranteed by article I, section 9." State v. Iowa Dist. Court for Webster County, 801 N.W.2d 513, 518 n.2 (2011) (citing State v. Height, 91 N.W. 935, 938 (Iowa 1902)). A confession must be voluntary under the Fifth Amendment's self-incrimination provision. Dickerson v. United States, 530 U.S. 428, 433, 120 S.Ct. 2326, 2330 (2000). It follows that voluntariness is also required by Article I, Section 9 of the Iowa Constitution. Iowa is free to impose greater restrictions on police activity than those required by the federal constitution. This includes the requirement that officers must first inform individuals that they are free to leave and free to terminate questioning at any time before asking the individual questions (hereafter referred to as "inform-then-ask").

The Supreme Court has acknowledged the United States Supreme Court's unrealistic determinations of voluntariness under the Schneckloth totality test. State v. Baldon, 829 N.W.2d 785, 834-835 (Iowa 2013) (Appel, J., concurring) (discussing the unrealistic determinations under the totality

test where the United States Supreme Court found voluntary consent where armed officers prevented passengers from leaving the confined space of a vehicle in Florida v. Bostick, 501 U.S. 429, 438-40, 111 S.Ct. 2382, 2388-89 (1991) and where armed officers blocked building exits in INS v. Delgado, 466 U.S. 210, 218, 104 S.Ct. 1758, 1763-64 (1984)). See cf. State v. Fogg, 956 N.W.2d 664, 675-676 (Iowa 2019) (Appel, J., dissenting) (discussion the application of the "free-to-leave standard" in INS v. Delgado, 466 U.S. 210, 104 S.Ct. 1758 (1984), United States v. Drayton, 536 U.S. 194, 201, 122 S.Ct. 2105, 2110 (2002), California v. Hodari D., 499 U.S. 621, 626, 111 S.Ct. 1547, 1550–51 (1991)).

The totality test also provides an unrealistic determination of voluntariness for persons similarly situated to Hillery. The totality test does not give due weight to the factor of whether the defendant was informed of his right to leave or end questioning at any time. Whether a defendant is informed of the right to leave or end questioning is merely one

factor among many and is not determinative. As a result, a court may determine under the totality test that a defendant's confession was voluntary where a defendant was unaware of his rights to end questioning and leave. As in Bostick and INS v. Delgado, such a result is an unrealistic determination of voluntariness. Moreover, this allows, if not encourages, police to elicit incriminating statements from a defendant without informing him of his right to end questioning and leave. This Court can curb the unrealistic determinations of voluntariness by providing a bright-line rule requiring police to inform-then-ask. This rule applies a single factor from the totality test in a different and stricter way, thereby allowing a more rigorous analysis of voluntariness.

The language that grounds voluntariness in the implicit self-incrimination provision of Article I, section 9 is different from the language in the Fifth Amendment. *Compare* Iowa Const. art. I, § 9 ("no person shall be deprived of life, liberty, or property, without due process of law") *with* U.S. Const. amend.

V (no person "shall be compelled in any criminal case to be a witness against himself"). Article I, section 9 is akin to the U.S. Constitution's Due Process Clause found in the Fourteenth Amendment, where states are prohibited from "depriving[ing] any person of life, liberty, or property, without due process of law." Callender v. Skiles, 591 N.W.2d 182, 187 (Iowa 1999).

The Fourteenth Amendment's Due Process Clause guarantees fundamental fairness. Moran v. Burbine, 475 U.S. 412, 432, 106 S.Ct. 1135, 1147 (1986). "Due process is designed to ensure fundamental fairness in interactions between individuals and the state." State v. Nail, 743 N.W.2d 535, 539 (Iowa 2007). The Due Process Clause requires that tactics used to elicit incriminating statements must be in accord with requirement of fundamental fairness. Moran v. Burbine, 475 U.S. at 467 n.62, 106 S.Ct. at 1165 n.62 (1986) (Stevens, J., dissenting)(citing Mincey v. Arizona, 437 U.S. 385, 402, 98 S.Ct. 2408, 2418 (1978); Beecher v. Alabama,

389 U.S. 35, 38, 88 S.Ct. 189 (1967) (per curiam); Miller v. Fenton, 474 U.S. 104, 109–110, 106 S.Ct. 445, 449 (1985). Fundamental fairness is measured against the community's sense of fair play, decency, and justice. See United States v. Russell, 411 U.S. 423, 432, 93 S.Ct. 1637, 1643 (1973); Hannah v. Larche, 363 U.S. 420, 442, 80 S.Ct. 1502, 1515 (1960); Rochin v. California, 342 U.S. 165, 173, 72 S.Ct. 205, 210 (1952).

In many cases this Court has "deemed the federal and state due process and equal protection clauses to be identical in scope, import, and purpose." Callender v. Skiles, 591 N.W.2d at 187. This Court, however, is not bound by federal interpretations of the Fourteenth Amendment's Due Process Clause despite its similar language to the Iowa Constitution's Due Process Clause. Id. The Iowa Due Process Clause's unique location within the Iowa Constitution and its unique place in Iowa's history allow for an interpretation different from the Fourteenth Amendment's Due Process Clause. See

State v. Ochoa, 792 N.W.2d 260, 274 (Iowa 2010)("As a general matter, the drafters of the Iowa Constitution placed the Iowa Bill of Rights at the beginning of the constitution, for apparent emphasis."). State v. Ochoa, 792 N.W.2d 260, 274 (Iowa 2010). State v. Baldon, 829 N.W.2d 785, 809 (Iowa 2013) (Appel, J., concurring)("This priority placement has led one observer to declare that, more than the United States Constitution, the Iowa Constitution 'emphasizes rights over mechanics.'")(other citation omitted). The Iowa Bill of Rights' unique placement in the Iowa Constitution emphatically demonstrates the heightened value placed on individual rights protected by Iowa's Due Process Clause. As a result, the Iowa Due Process Clause should afford citizens greater protection of their individual rights. These rights include the sense of fair play, decency, and justice guaranteed by fundamental fairness, which should be more rigorously analyzed than they are at the federal level.

The criminal procedure due process question is more narrowly framed in terms of fundamental fairness. State v. Becker, 818 N.W.2d 135, 152 (Iowa 2012), overruled on other grounds by Alcala v. Marriott Intern., Inc., 880 N.W.2d 699 (Iowa 2016). The touchstone of due process analysis remains fundamental fairness. Id. at 152 (citing Medina v. California, 505 U.S. 437, 445, 112 S.Ct. 2572, 2577 (1992)). The admission of an involuntary statement or consent offends the deeply rooted fundamental right against self-incrimination. See Medina v. California, 505 U.S. at 445, 112 S.Ct. at 2577)("Among other things, it is normally 'within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion,' and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'").

The sense of fair play, decency, and justice guarantee by fundamental fairness in Iowa's Due Process Clause demands a more rigorous analysis of voluntariness. A more rigorous analysis should give deserved weight to one of the totality test's most overlooked and undervalued factors: whether the defendant, during a non-custodial interrogation, was apprised of his right to leave or end police questioning at any time. A more rigorous analysis would also avoid unrealistic determinations of voluntariness where an individual was unaware of his rights.

Requiring police to inform-then-ask promotes fair play, decency, and justice as guaranteed by fundamental fairness under Iowa's Due Process Clause. The bright-line rule to inform an individual of his rights applies a voluntariness standard that is different and stricter than the federal totality test. The inform-then-ask rule allows for a more rigorous voluntariness analysis. The more rigorous analysis furthers Iowa's tradition and dedication to greater protection of

individual rights under Iowa's Constitution.

Justice Marshall acknowledged the importance of knowing one's rights in order to act voluntarily in Schneckloth. The terms 'voluntary' or 'involuntary' are used as shorthand for assessments of police conduct that may be coercive and compel some individuals to give incriminating statements. Schneckloth v. Bustamonte, 412 U.S. 218, 290 n.7, 93 S.Ct. 2041, 2080 n.7 (1973) (Marshall, J., dissenting) (citing Haley v. Ohio, 332 U.S. 596, 599, 68 S.Ct. 302, 303 (1948); Stein v. New York, 346 U.S. 156, 185, 73 S.Ct. 1077, 1093 (1953); Fikes v. Alabama, 352 U.S. 191, 77 S.Ct. 281 (1957)). Justice Marshall acknowledged that the determination of voluntariness under the totality test produces disconcerting and unrealistic results. Schneckloth, 412 U.S. at 290, 93 S.Ct. at 2080 (Marshall, J., dissenting) ("The Court's half-hearted defense, that lack of knowledge is to be 'taken into account,' rings rather hollow, in light of the apparent import of the opinion that even a subject who proves

his lack of knowledge may nonetheless have consented 'voluntarily,' under the Court's peculiar definition of voluntariness.").

Involuntariness should turn on whether an individual made a knowing choice where he knew of the available alternatives. Schneckloth, 412 U.S. at 284-85, 93 S.Ct. at 2077 (Marshall, J., dissenting)("I have difficulty in comprehending how a decision made without knowledge of available alternatives can be treated as a choice at all."). For voluntary confessions cases, this would mean that the defendant made a knowing choice to confess where he knew that he was able to leave or end police questioning at any time. An inform-then-ask rule would give the defendant the proper information to make a knowing and meaningful choice in a potentially intimidating and coercive situation.

Iowa should apply federal standards more strictly under Iowa's Due Process Clause, which offers greater protections for individual rights. A waiver of Fourth Amendment rights does

not require that the consenting party have knowledge of the right being waived. Schneckloth v. Bustamonte, 412 U.S. 218, 235-48, 93 S.Ct. 2041, 2051 (1973)(discussing knowing and intelligent waiver under Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019 (1938)). Rather, knowledge of the right to refuse consent is just one factor to consider under the totality of the circumstances. Schneckloth v. Bustamonte, 412 U.S. 218, 244-49, 93 S.Ct. 2041, 2059 (1973).

In State v. Pals, the Iowa Supreme Court discussed criticisms to the federal approach. It referred to the dissenting opinions in Schneckloth and Ohio v. Robinette, in which justices questioned how a person could validly relinquish a constitutional right without knowing he or she could exercise the right. State v. Pals, 805 N.W.2d at 777-78.

The Pals Court also noted that several state supreme courts have adopted a requirement of a knowing – not just a voluntary – waiver of the right to refuse consent under their state constitutions. Id. at 779 (citing State v. Brown, 156

S.W.3d 722, 731-32 (Ark. 2004); Penick v. State, 440 So.2d 547, 551 (Miss. 1983); State v. Johnson, 346 A.2d 66, 68 (N.J. 1978); State v. Ferrier, 960 P.2d 927, 932-33 (Wash. 1998)).

Additionally, the Pals Court remarked that the "academic commentary on Schneckloth has been generally unfavorable." Id. at 780-81. Several commentators agree with Justice Marshall's dissent in Schneckloth, while others criticize the totality of the circumstances test as lacking in predictability. Id. at 781. Others have noted that requiring police to inform suspects of their right to refuse consent neither jeopardized the viability of consent searches nor placed an unreasonable burden on police. Id. at 781-82.

While Pals addressed consent, the same analysis can be used for voluntariness of a statements. The circumstances of the present case intertwine consent (production of the drugs) and confession (admission of possession of drugs and related statements). Hillery requests this Court adopt a "knowing and voluntary" Zerbst standard which requires the law

enforcement to inform-then-ask. Applying such a standard, Hillery's statements and production of physical evidence was not knowing and voluntary because he was not advised of his right to decline to comply with Leitzen's demands he hand over the suspected drugs, he was free to leave and could end questioning at any time.

Leitzen failed to provide Hillery with his Miranda warnings

Any statements a defendant makes during a custodial interrogation are presumed coerced unless he is advised of his constitutional rights under the Miranda doctrine. State v. Davis, 446 N.W.2d 785, 787-88 (Iowa 1989) (citing Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966)). Statements made without an adequate Miranda warning require suppression. Id. Miranda warnings are required where the record establishes both custody and interrogation. State v. Trigon, Inc., 657 N.W.2d 441, 444 (Iowa 2003).

To determine whether a defendant was in custody, the court must consider whether there was a formal arrest or

restraint on defendant's freedom of movement to the degree of a formal arrest. State v. Miranda, 672 N.W.2d 753, 759 (Iowa 2003). The appropriate test is "whether a reasonable person in the [defendant's] position would understand himself to be in custody." Id. (quoting State v. Countryman, 572 N.W.2d 553, 557 (Iowa 1997)). Four factors are considered to determine whether a defendant was in custody: (1) the language used to summon the individual; (2) the purpose, place, and manner of interrogation; (3) the extent to which the defendant is confronted with evidence of [his] guilt; and (4) whether the defendant is free to leave the place of questioning. State v. Trigon, Inc., 657 N.W.2d at 444. Hillery was in custody for the purposes of requiring a Miranda warning.

Arguably, Hillery was free to ignore Leitzen when Leitzen first started requesting he stop to speak to Leitzen.

> [L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.

> Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification. The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds. If there is no detention—no seizure within the meaning of the Fourth Amendment—then no constitutional rights have been infringed.

State v. Pickett, 573 N.W.2d 245, 247 (Iowa 1997)(quoting Florida v. Royer, 460 U.S. 491, 497–98, 103 S.Ct. 1319, 1324 (1983)). However, when Leitzen "stepped in front of his bicycle and stopped him, [], from walking any farther" Hillery was no longer free to go about his business. (Tr. p. 26L14-17). Cf. State v. Fogg, 956 N.W.2d 664 (Iowa 2019)(Appel, J. dissenting)("the cases suggest that where the facts demonstrate a police vehicle blocks another vehicle from egress, a seizure ordinarily occurs."). Hillery was not free to leave. Additionally, Hillery ran away and was apprehended by Leitzen. (Tr. p. 28L13-25). At that time, Hillery was clearly not free to leave.

Hillery was stopped on the sidewalk in public. Leitzen confronted Hillery with the allegations he had purchased controlled substances and he *needed* to give him what he had just purchased. (Tr. p. 25L22-p. 28L12). The Court examines "whether a confrontational and aggressive style is utilized in questioning, or whether the circumstances seem more relaxed and investigatory in nature." State v. Smith, 546 N.W.2d 916, 924 (Iowa 1996). The record shows that Leitzen's demand that Hillery give him what he had just purchased was more confrontation than relaxed in nature.

The record does not specify how long Leitzen's interaction with Hillery lasted. Even if the interaction was relatively brief, the Court has held that custody can be found where the defendant believes questioning will not stop until the "interrogators receive the answers they seek." State v. Miranda, 672 N.W.2d 753, 760 (Iowa 2003)(citing United States v. Griffin, 922 F.2d 1343, 1348-49 (8th Cir. 1990)). Leitzen impeded Hillery's travel on the sidewalk, he demanded

that Hillery produce what he had purchased. Hillery denied any wrongdoing, but Leitzen persisted. (Tr. p. 27L8-p. 28L25).

The facts establish that a reasonable person in Hillery's position would believe that he was in custody for Miranda purposes. Hillery was interrogated.

Interrogation, for Miranda purposes, refers to express questioning by police and any words or actions by police that are "reasonably likely to elicit an incriminating response from the suspect." State v. Peterson, 663 N.W.2d 417, 424 (Iowa 2003)(quoting Rhode Island v. Innis, 446 U.S. 291, 300-01, 100 S.Ct. 1692, 1689-90 (1980)). Leitzen's statements to Hillery were reasonably likely to elicit incriminating responses from Hillery. Leitzen challenged Hillery's assertion he had not done anything wrong. Leitzen "told him he needed to give me what he had just bought"; Leitzen "told him that I was sure that he bought something, and he needs to give it to me"; Leitzen said he was "looking more for [his] cooperation" to get into Watkins' place; Leitzen told Hillery "he needed to drop

what he had in his hand"; and Leitzen told Hillery he needed his "cooperation, and [he was] not going to go to jail today if [he] start[ed] cooperating". (Tr. p. 27L8-25).

Hillery was subject to a custodial interrogation prior to making incriminating statements and producing the controlled substances. Leitzen failed to read the Miranda warnings before questioning Hillery, and, as a result, his incriminating statements and resulting physical evidence should be suppressed. The district court should be affirmed.

II. The evidence would not have been inevitably discovered because a hypothetical seizure and search of Hillery would be unreasonable as it was unsupported by any exception to the warrant requirement.

Preservation of Error.

Hillery challenged that seizure of his person was unreasonable and violated the United States and Iowa Constitutions. (MTS)(App. pp. 9-10). Hillery argued there was not probable cause to stop Hillery. (MTS ¶ 9)(App. p. 10). This Court may affirm on any ground urged by the prevailing party

in the district court but not ruled on by the trial court. DeVoss v. State, 648 N.W.2d 56, 62 (Iowa 2002).

The State below did not assert that the police had probable cause and exigent circumstances or the officer had probable cause to arrest Hillery and search him incident to that arrest. State's brief pp. 38-42. The prosecutor in district court argued that Leitzen had reasonable suspicion and was conducting a *Terry* stop. (Tr. p. 40L10-p. 42L11). The parties "must take necessary measures to construct a record in order to preserve error for appellate review." DeVoss v. State, 648 N.W.2d 56, 60 (Iowa 2002)(other citation omitted).

Standard of Review.

The standard of review is de novo because Hillery has a constitutional right to be free from an unreasonable search and seizure. State v. Watts, 801 N.W.2d 845, 850 (Iowa 2011). The Court independently evaluates the totality of the circumstances found in the record. State v. Vance, 790 N.W.2d 775, 780 (Iowa 2010). The Court gives "deference to

the factual findings of the district court due to its opportunity to evaluate the credibility of the witnesses, but [is] not bound by such findings." State v. Lane, 726 N.W.2d 371, 377 (Iowa 2007).

Discussion.

The Fourth Amendment to the United States Constitution and Article I, section 8 of the Iowa Constitution protect persons from unreasonable searches and seizures. U.S. Const. amend. IV; Iowa Const. art. I, § 8. Hillery challenged the seizure of his person under both the Fourth Amendment to the United States Constitution and Article I, section 8 of the Iowa Constitution. (MTS ¶ 5-6)(App. p. 9). While these provisions use nearly identical language and were generally designed with the same scope, import, and purpose, this Court jealously protects its authority to follow an independent approach under our state constitution. State v. Ochoa, 792 N.W.2d 260, 267 (Iowa 2010). This Court's approach to independently construing provisions of the Iowa Constitution

that are nearly identical to the federal counterpart is supported by Iowa's case law. See e.g. State v. Ochoa, 792 N.W.2d at 267; State v. Cline, 617 N.W.2d 277, 285 (Iowa 2000), overruled on other grounds by State v. Turner, 630 N.W.2d 601, 606 (Iowa 2001). Even where a party has not advanced a different standard for interpreting a state constitutional provision, the Court may apply the standard more stringently than federal case law. State v. Bruegger, 773 N.W.2d 862, 883 (Iowa 2009). When a defendant raises both federal and state constitutional claims, the Court has discretion to consider either claim first or consider the claims simultaneously. State v. Ochoa, 792 N.W.2d at 267.

Generally, unless an exception applies, a search or seizure must be conducted pursuant to a warrant to be reasonable. State v. Kreps, 650 N.W.2d 636, 641 (Iowa 2002). Valid exceptions exist for warrantless searches (1) with consent, (2) based on probable cause and exigent circumstances, (3) involving items in plain view, or (4) incident

to arrest. State v. Eubanks, 355 N.W.2d 57, 58–59 (Iowa 1984).

Had Hillery refused to give Leitzen the controlled substances, he could not have been legally searched.

The State asserts that had Hillery refused to cooperate with law enforcement, he was subject to search based on two warrant exceptions: (1) probable cause and exigent circumstances; and (2) search incident to lawful arrest. State's brief pp. 38-42.

Probable cause and exigency circumstances

Probable cause with exigent circumstances is one exception to the warrant requirement. State v. Lewis, 675 N.W.2d 516, 522 (Iowa 2004). If a warrantless search is not supported by probable cause and exigent circumstances, the search is unreasonable. State v. Naujoks, 637 N.W.2d 101, 107-08 (Iowa 2001).

"The standard for probable cause is whether 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." State v. Naujoks, 637 N.W.2d 101, 108 (Iowa 2001). Leitzen lacked probable cause to search Hillery. At the time Leitzen stopped Hillery, he knew that Hillery had unspecified drug convictions. (Tr. p. 24L1-8). Watkins was *suspected* of being a dealer. (Tr. p. 21L5-19). Hillery had been at the residence for approximately three minutes. (Tr. p. 21L24-p. 23L4, p. 35L21-p. 36L8). Leitzen did not see an exchange of any item. (Tr. p. 36L9-11). Leitzen believed Hillery smelled of raw marijuana. (Tr. p. 26L3-7, p. 26L18-p. 27L7, p. 37L3-12).

Leitzen's assumption that Hillery had purchased drugs from Watkins was merely suspicion. Leitzen did not observe anything to support his assumption of a drug buy; he saw nothing indicating an exchange. He only knew that Watkins was suspected of dealing and Hillery had been a user. He guessed they were not friends but did not point to any real information to support that assumption. (Tr. p. 24L16-25, p. 39L7-19). Furthermore, Williams and Leitzen only referred to

Watkins as a suspected cocaine dealer. (Tr. p. 7L8-p. 8L9, p. 10L6-17, p. 23L6-10, p. 24L9-25). The purported smell of marijuana does not support the suspicion that Hillery had just purchased drugs from Watkins.

The Iowa Supreme Court has determined that the smell of marijuana *may* provide probable cause for the warrantless search of the interior of a car or an individual. The Court's opinions have stopped short of definitively finding probable cause based on the "plain smell" alone. State v. Moriarty, 566 N.W.2d 866, 869 (Iowa 1997)(An unused alligator clip and the plain smell of burnt marijuana provided the officer with probable cause to search the defendant's person.); State v. Merrill, 538 N.W.2d 300, 302 (Iowa 1995)(The smell of burnt marijuana, coupled with Merrill's furtive movements provided the police officer with sufficient probable cause.); State v. Longo, 608 N.W.2d 471, 474 (Iowa 2000)(suspicious demeanor and inconsistent stories). See also State v. Eubanks, 355 N.W.2d 57, 29 (Iowa 1984)(The Court's conclusory statement

that the "odor of that controlled substance in the automobile gave the patrolman reasonable cause to conduct a comprehensive search of the car" was dicta because the fighting issue was whether the search of defendant's purse was a container within the automobile.); B. John Burns, 4A Iowa Practice: Criminal Procedure § 37:5 (2019 ed.)("Despite hints in the dicta, the Supreme Court has never expressly held that the odor of burnt marijuana alone constitutes sufficient probable cause for a warrantless search, although it has been considered in combination with other factors.").

The State cites State v. Watts to support its argument that probable cause existed based on the smell alone. State's brief p. 39. Watts is not controlling. State v. Watts, 801 N.W.2d 845 (Iowa 2011). In Watts, the Iowa Supreme Court found probable cause for issuance of an arrest warrant where the officer's affidavit indicated his experience in investigating controlled substance and the odor of marijuana was "overpowering" when Watts opened the door. Id. at 853-54. In

support of its holding, the Watts Court indicated that a trained officer's detection of a sufficiently distinctive odor, by itself or in combination with other factors, could establish probable cause. Id. at 854. It recognized that other courts had held that the odor of raw or growing marijuana by itself could provide probable cause for a search. Id. at 854-55.

It does not appear that Watts considered the issue under Article I, section 8 of the Iowa Constitution. Watts was decided under the Fourth Amendment. The Iowa Supreme Court has said that while Fourth Amendment case law may provide an admirable floor, "it is certainly not a ceiling." State v. Baldon, 829 N.W.2d 785, 791 (Iowa 2013). In Ingram, the Court went even further and explicitly "decoupled" Iowa law from the "winding and often surprising decisions" of the United States Supreme Court. State v. Ingram, 914 N.W.2d 794, 797 (Iowa 2018).

Relative to this case, the Iowa Supreme Court has not spoken on whether the odor of marijuana, standing alone, is

enough to establish probable cause for a warrantless search under Article I, section 8 of the Iowa Constitution. What the Court has clearly expressed, however, is its preference for warrants under Article I, Section 8 of the Iowa Constitution. Id. at 816; State v. Pettijohn, 899 N.W.2d 1, 22-23 (Iowa 2017); State v. Gaskins, 866 N.W.2d 1, 16 (Iowa 2015); State v. Ochoa, 792 N.W.2d 260, 285 (Iowa 2010).

Unlike the present case, Watts involved the validity of a search warrant. The Watts Court was asked to determine whether the officer's affidavit supported the magistrate's probable-cause finding to issue an arrest warrant. State v. Watts, 801 N.W.2d at 853-54. This is a significant distinction, given the Iowa Supreme Court's preference for warrants and unwillingness to invalidate a properly-issued warrant. State v. Angel, 893 N.W.2d 904, 911-912 (Iowa 2017); State v. Ochoa, 792 N.W.2d 260, 291 (Iowa 2010). Fifty years ago, the Court recognized:

"It is also well established that issuance of search warrants by a disinterested magistrate empowered to issue warrants, who

can evaluate the existence or nonexistence of probable cause, is to be preferred over the hurried action of peace officers who may happen to make arrests."

State v. Oliveri, 156 N.W.2d 688, 691 (Iowa 1968).

Iowa's search and seizure clause is "meant to protect individual citizens and their reasonable expectations of privacy." State v. Gaskins, 866 N.W.2d at 16. Allowing an officer to stop, detain, and search a pedestrian based solely upon a perceived odor of marijuana, without more, creates a police entitlement that is contrary to our preference for warrants and "incompatible with Iowans' robust privacy rights." Id. at 13.

The Kansas Court of Appeals rejected the government's request to adopt a rule allowing the search of a person based solely on the smell of marijuana coming from the person. State v. Hadley, 410 P.3d 140, 151 (Kan. Ct. App. 2017). The government conceded and the Court of Appeals recognized that odor alone had not been deemed sufficient to find probable cause to search a person for drugs. Id. The

government asked the Kansas Court of Appeals to follow various other states that had adopted such a rule. Id.

The Hadley Court declined the government's invitation. Id. Rejecting a "plain smell" rule, the Court instead relied upon Kansas Supreme Court precedent that "the totality of circumstances – not simply the odor of marijuana alone – should be considered in evaluating the existence of probable cause. Id. at 154-55 (citing State v. Fewell, 184 P.3d 903 (Kan. 2008)). The Hadley Court ultimately upheld the search under the totality of the circumstances, which included the "significant circumstance" of the odor of burnt marijuana, the continuous duration of the odor, the fact the odor came from an individual, the training and experience of the officer, and the on-scene investigation. Id. at 155-59. This Court should also reject a rule that the "plain smell" alone is probable cause to search a person.

In addition to lacking probable cause, Leitzen also lacked exigent circumstances justifying a search. Exigent

circumstances are determined by considering several factors: "danger or violence and injury to the officers; risk of the subject's escape; or the probability that, unless immediately seized, evidence will be concealed or destroyed." State v. Naujoks, 637 N.W.2d 101, 108 (Iowa 2001). Officers must have "specific, articulable grounds to justify a finding of exigency," and the reasonableness of the search is determined using an objective standard. Id. at 109.

Hillery was not in a vehicle so as to permit application of the "automobile exception" to the warrant requirement. See State v. Storm, 898 N.W.2d 140, 145 (Iowa 2017)(exception is based, in part, on inherent mobility of automobiles). He was walking down the street when Leitzen stopped him. Leitzen did not testify that Hillery was dangerous or was going to destroy evidence.

In the present case, Leitzen did not see Hillery buy drugs. He had driven away for approximately three minutes and did not see an exchange of anything. Leitzen did not inform

Hillery he smelled marijuana. The record lacks any information that Hillery had any motivation to destroy the suspected marijuana to avoid detection. While Hillery may have used some of the marijuana before Leitzen obtained a warrant, there is no indication Hillery would have used all of the suspected marijuana. The blanket assumption or rule that drugs will be destroyed or used prior to obtaining a search warrant would swallow the exigency requirement.

The controlled substances would not have been inevitably seized based on the probable cause and exigent circumstances exception.

Search incident to arrest

A search incident to a lawful arrest is a recognized exception to the Fourth Amendment's warrant requirement. State v. Garcia, 461 N.W.2d 460, 462 (Iowa 1990). The State has the burden to prove the exception is applicable. Id.

A warrantless arrest must be supported by probable cause. State v. Ceron, 573 N.W.2d 587, 592 (Iowa 1997); State v. Harris, 490 N.W.2d 561, 563 (Iowa 1992).

Probable cause exists when the facts and circumstances within the arresting officer's knowledge would warrant a person of reasonable caution to believe that an offense is being committed. *Draper v. United States*, 358 U.S. 307, 313, 79 S.Ct. 329, 333 L.Ed.2d 327, 332 (1959); *see* Iowa Code § 804.7 (warrantless arrest authorized where police officer has "reasonable ground for believing" arrestee committed crime). The "reasonable ground for belief" standard of Iowa Code section 804.7 is the same as probable cause. *Kraft v. City of Bettendorf*, 359 N.W.2d 466, 469 (Iowa 1984).

To sustain a finding of probable cause, the facts must rise above mere suspicion but need not be strong enough to sustain a guilty conviction. *State v. Gregory*, 327 N.W.2d 218, 220 (Iowa 1982). All of the evidence available to the arresting officer may be considered, regardless of whether or not each component would support a finding of probable cause by itself. *State v. Bumpus*, 459 N.W.2d 619, 623 (Iowa), *cert. denied*, 498 U.S. 1001, 111 S.Ct. 563, 112 L.Ed.2d 570 (1990).

State v. Harris, 490 N.W.2d at 563.

Probable cause to effectuate an arrest is present "*if the totality of the circumstances* as viewed by a reasonable and prudent person would lead that person to believe that a crime has been or is being committed and that the arrestee

committed or is committing it." State v. Freeman, 705 N.W.2d 293, 298 (Iowa 2005)(emphasis added). To establish possession of a controlled substance, a person must have exercised dominion and control over the substance, had knowledge of its presence, and had knowledge that it was a controlled substance. State v. Thomas, 847 N.W.2d 438, 442 (Iowa 2014).

Under the facts as presented at the suppression hearing, Leitzen did not have probable cause to arrest Hillery for possession of marijuana. As argued above, the smell of marijuana alone does not establish probable case. Additionally, the mere odor of marijuana on a person does not necessarily indicate the person possessed marijuana. The person may have never possessed marijuana but came from a location where marijuana was present. Leitzen did not see an exchange of any item. (Tr. p. 36L9-11). Leitzen was merely suspicious that Hillery purchased controlled substances from Watkins. (Tr. p. 24L9-25, p. 35L16-20, p. 39L2-23). Without

more, the totality of the circumstances did not establish probable cause to arrest Hillery for possession of marijuana.

In an arrest situation, officers may search the arrestee's person and the area within the arrestee's immediate control. Chimel v. California, 395 U.S. 752, 762-63, 89 S.Ct. 2034, 2040 (1969); State v. McGrane, 733 N.W.2d 671, 676 (Iowa 2007). The purpose is to prevent an arrestee from destroying evidence or gaining possession of a weapon that may be used to harm officers. Arizona v. Gant, 556 U.S. 332, 338, 129 S.Ct. 1710, 1716 (2009); State v. McGrane, 733 N.W.2d at 676. The search incident to arrest exception must be narrowly construed and limited to address those interests it was created to serve. State v. Gaskins, 866 N.W.2d 1, 8 (Iowa 2015).

For this exception to apply, there must first be a valid custodial arrest. Chimel v. California, 395 U.S. 752, 763, 89 S.Ct. 2034, 2040 (1969), abrogated recognized by Davis v. United States, 564 U.S. 229, 234, 131 S.Ct. 2419, 2425 (2011). An arrest requires probable cause. State v. Freeman,

705 N.W.2d 293, 298 (Iowa 2005); State v. Ceron, 573 N.W.2d 587, 589 (Iowa 1997). Because there was no probable cause to support Hillery's warrantless arrest, as argued above, there can be no valid search incident to arrest.

The district court's order suppressing Hillery's statements and seized physical evidence should be affirmed.

CONCLUSION

Michael Hillery respectfully requests this Court affirm the district court's order suppressing the physical evidence and his statements.

REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $4.51, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

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

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/s/ Martha J. Lucey *Dated: 3/6/20*

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