IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff–Appellee, v. DANIELLE BROWN, Defendant–Appellant.	)	S. CT. NO. 16–0563

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
HONORABLE MARY PAT GUNDERSON, JUDGE (Suppression)
HONORABLE WILLIAM A. PRICE, JUDGE (Trial & Sentencing)

APPELLANT'S BRIEF AND ARGUMENT AND REQUEST FOR ORAL ARGUMENT

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FINAL

CERTIFICATE OF SERVICE

On 8th day of February, 2017, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant–Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Danielle Joleen Brown, 6494 168th Avenue, Indianola, IA 50125.

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ROUTING STATEMENT

The Iowa Supreme Court should retain this case because the issue raised involves a substantial issue of first impression in Iowa. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(c). Specifically, it argues the search of the belongings of an individual not named in a warrant for the premises but present for the execution of the warrant is outside the scope of the warrant and unconstitutional under both the Fourth Amendment of the U.S. Constitution and article I, section 8 of the Iowa Constitution.

STATEMENT OF THE CASE

Nature of the Case: Defendant–Appellant Danielle Brown appeals her conviction, sentence, and judgment following a jury and verdict finding her guilty of Possession of a Controlled Substance (Marijuana), Second Offense, an aggravated misdemeanor, in violation of Iowa Code section 124.401(5) (2016).

Course of Proceedings: On November 5, 2015, the State charged Defendant–Appellant Danielle Brown with Possession

of a Controlled Substance (Marijuana), a serious misdemeanor. (Trial Information)(App. pp.9–11). The district court arraigned Brown in open court on November 12, 2015, and she entered a plea of not guilty. (Arraignment Tr. p.1 L.1–p.4 L.12)(Arraignment Order)(App. pp.31–33).

Brown filed a motion to suppress challenging the search of her purse during the execution of a search warrant on December 23, 2015. (Mot. Suppress)(App. pp.38–40). The State resisted the motion. (State's Resist. Mot. Suppress)(App. pp.43–49). The district court held a hearing on the motion to suppress, and afterword both parties submitted briefs supporting their respective positions. (Status Conference Order)(App. pp.41–42). The district court denied the motion to suppress. (Ruling Denying Def.'s Mot. Suppress)(App. pp.78–83).

On March 7, 2016, the State filed a motion to amend the trial information, alleging Brown had a prior conviction under Iowa Code chapter 124 and enhancing the charge from a serious to an aggravated misdemeanor. (Mot. Amend Trial

Information; Amend. Trial Information)(App. pp.89–90; 93–94). The district court granted the motion. (Order Approve Am. Trial Information)(App. pp.91–92).

A jury trial commenced on March 7, 2016. (Trial Tr. p.1 L.1–25). On March 8, 2016, the jury found Brown guilty of Possession of a Controlled Substance. (Trial Tr. p.309 L.12–p.310 L.8)(Verdict)(App. p.105). After the jury verdict, Brown stipulated she had a previous conviction for Possession of a Controlled Substance with Intent to Deliver, a class "D" felony, in violation of Iowa Code section 124.401(1)(d) on or about June 15, 2014, in Polk County District Court Case No. FECR177826. (Trial Tr. p.318 L.13–p.319 L.23).

Prior to sentencing, Brown filed a renewed motion for judgment of acquittal and a motion for a new trial, which the State resisted. (Mot. New Trial; Renewed Mot. Judgment Acquittal; State's Resist.)(App. pp.106–115). On March 25, 2016, the district court denied Brown's post-trial motions and proceeded immediately into sentencing. (Sentencing Tr. p.3 L.10–p.7 L.2). The court declined to place Brown on

probation, and instead sentenced her to ninety days in jail and the minimum fine of $625, which it suspended, plus surcharges. (Sentencing Tr. p.13 L.18–25; p.15 L.5–8)(Sentencing Order)(App. p.116–120). It also ordered the Department of Transportation to revoke Brown's driver's license for one hundred and eighty days. (Sentencing Tr. p.14 L.13–17) (Sentencing Order)(App. p.117).

Brown timely filed a notice of appeal on March 25, 2016. (Notice Appeal)(App. p.121).

Facts: On October 2, 2015, at approximately 5:45 a.m., Des Moines police officers executed a search warrant at 6106 Southwest Second Street in Des Moines. (Trial Tr. p.172 L.15–18; p.173 L.8–11). The officers were looking for evidence related to the use, sale, and distribution of narcotics. (Trial Tr. p.172 L.24–p.173 L.4). Because there was information that there was a firearm at the house, the SWAT team, comprised of ten officers, entered the residence first. (Trial Tr. p.173 L.14–23). In addition to the SWAT team, there were approximately six or seven narcotics detectives on standby

near the residence, observing the scene. (Trial Tr. p.173 L.14–23; p.201 L.8–12). It took the SWAT team less than five minutes to enter and secure the residence. (Trial Tr. p.201 L.13–22).

Officers did not know who Brown was prior to the execution of the search warrant, nor was she known as being associated with the residence. (Trial Tr. p.198 L.14–p.199 L.14). The SWAT officers found Brown and four other individuals in a small, crowded bedroom in the northeast corner on the first floor of the house. (Trial Tr. p.176 L.7–p.177 L.7; p.200 L.9–p.201 L.7). A SWAT officer handcuffed Brown where she was found. (Trial Tr. p.176 L.13–22; p.249 L.23–p.250 L.4). Officer Carney testified he photographed Brown after a SWAT officer secured her. (Trial Tr. p.245 L.19–25; 18–19; p.247 L.16–25)(Ex.3)(App. pp.99–100). Officers took all the house's handcuffed occupants, including Brown, and detained them in the living room. (Trial Tr. p.176 L.18–p.177 L.7; p.199 L.15–p.200 L.1).

During the search, Officer Scarlett found Brown's purse on the floor of the northeast bedroom. (Trial Tr. p.226 L.16–22). Officer Scarlett searched the purse and found a zippered pouch that contained baggies; one of the baggies which contained a small amount of marijuana. (Trial Tr. p.178 L.20–22; p.189 L.15–18; p.226 L.19–25)(Ex.5)(App. pp.103–104). Brown's purse also contained a pink billfold, which had her state-issued identification card inside. (Trial Tr. p.179 L.1–4; p.226 L.25–p.227 L.1)(Ex.3 & 4)(App. pp.99–102).

Officer Fong and Officer Carney questioned Brown after reading her the Miranda warnings. (Trial Tr. p.191 L.14–23). Brown admitted to the officers she smoked methamphetamine and marijuana on a regular basis. (Trial Tr. p.191 L.24–p.192 L.5). Brown was arrested for the possession of the marijuana found in her purse.

No evidence in the case was fingerprinted or DNA tested. (Trial Tr. p.205 L.6–11). A criminalist from the Division of Criminal Investigation's laboratory testified she received the substance, weighed it with a result of 0.06 grams, and

identified the substance as marijuana. (Trial Tr. p.254 L.7–9; p.261 L.25–p.262 L.6; L.22–p.263 L.3).

Any additional relevant facts will be discussed below.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS.

A. Preservation of Error: Trial counsel filed a motion to suppress, seeking the exclusion of the evidence found in Brown's purse under the Fourth and Fourteenth Amendments to the United States Constitution and article I, section 8 of the Iowa Constitution. (Mot. Suppress)(App. pp.38–40). Error was preserved by the motion to suppress, and the court's denial of the motion. (Mot. Suppress; Suppress. Ruling)(App. pp.38–40; 78–83). See State v. Breuer, 577 N.W.2d 41, 44 (Iowa 1998) (citing State v. Brown, 309 N.W.2d 425, 426 (Iowa 1981)) (noting an adverse ruling on a pretrial suppression motion preserves error for appellate review).

To the extent this Court concludes error was not properly preserved for any reason, Brown respectfully requests that this

issue be considered under the Court's familiar ineffective-assistance-of-counsel framework. See State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1983).

B. Standard of Review: The Court reviews alleged violations of constitutional rights de novo. State v. Hoskins, 711 N.W.2d 720, 725 (Iowa 2006) (citing State v. Freeman, 705 N.W.2d 293, 297 (Iowa 2005)). The Court makes "'an independent evaluation of the totality of the circumstances as shown by the entire record.'" State v. Turner, 630 N.W.2d 601, 606 (Iowa 2001) (quoting State v. Howard, 509 N.W.2d 764, 767 (Iowa 1993)). The Court also considers "both the evidence presented during the suppression hearing and that introduced at trial." Breuer, 577 N.W.2d at 44 (citing State v. Jackson, 542 N.W.2d 842, 844 (Iowa 1996)). The Court gives deference to the district court's factual findings "due to its opportunity to evaluate the credibility of the witnesses," but it is not bound by its findings. State v. Lane, 726 N.W.2d 371, 377 (Iowa 2007).

When a defendant asserts an ineffective assistance of counsel claim, the reviewing Court makes an independent evaluation of the totality of the circumstances, which is the equivalent of a de novo review. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984).

C. Discussion: The district court erred in denying the motion to suppress because the search of the Brown's purse violated her constitutional rights under both the Fourth Amendment to the U.S. Constitution and article I, section 8 of the Iowa Constitution. The district court also erred in concluding Iowa Code section 808.7 authorized the search of Brown's purse and the officers were able to search the purse because it was supported by probable cause.

1. The search of Brown's purse violated her rights under both the Fourth Amendment to the United States Constitution and Article I, section 8 of the Iowa Constitution.

The Fourth Amendment to the U.S. Constitution and article I, section 8 of the Iowa Constitution both protect individuals, their homes, papers, and effects from

unreasonable searches and seizures. U.S. Const. amend. IV; Iowa Const. art. I, § 8. The Fourth Amendment of the U.S. Constitution applies to the states through incorporation by the Fourteenth Amendment. State v. Wilkes, 756 N.W.2d 838 (Iowa 2008) (citation omitted). Brown challenged the search of her purse under both federal and state constitutional provisions. (Mot. Suppress)(App. pp.38–40). Evidence that is obtained in violation of either of these constitutional provisions "is inadmissible, no matter how relevant or probative the evidence may be." State v. Manna, 534 N.W.2d 462, 643–44 (Iowa 1995) (citing State v. Schrier, 283 N.W.2d 338, 342 (Iowa 1979)).

To determine whether there has been a violation of the Fourth Amendment the Court has adopted a two-step approach; the Court has also noted the test can be helpful in resolving cases under the Iowa Constitution. State v. Lowe, 812 N.W.2d 554, 567 (Iowa 2012) (citations omitted); State v. Fleming, 790 N.W.2d 560, 564 (Iowa 2010). First, the Court determines whether the individual has a legitimate expectation

of privacy in the area searched. Lowe, 812 N.W.2d at 567 (citing Fleming, 790 N.W.2d at 564). If a legitimate expectation of privacy exists, the Court determines whether the State unreasonably invaded that protected interest. Id. at 567–68.

"An expectation of privacy must be subjectively and objectively legitimate" and the Court determines its existence "'on a case by case basis.'" Lowe, 812 N.W.2d at 567 (quoting State v. Naujoks, 637 N.W.2d 101, 106 (Iowa 2001)). It is generally recognized in society that a woman has an expectation of privacy in her purse. See New Jersey v. T.L.O., 469 U.S. 325, 337–38 (1985) (noting the search of a purse or other bag carried by a person would be a severe violation of expectations of privacy). Thus, the question becomes whether the State unreasonably invaded her privacy interest in her purse. See Lowe, 812 N.W.2d at 567–68.

As a general rule, a valid search warrant authorizes the search of any container found on the premises that might contain the object of the search. United States v. Ross, 456

U.S. 798, 820–21 (1982). However, notwithstanding this general principle, a search warrant for the premises does not authorize the search of an individual who is not named in the warrant but merely happens to be at the searched premises during the execution of the warrant. Ybarra v. Illinois, 444 U.S. 85, 91–96 (1979). Thus, clearly an individual does not lose the protections of the Fourth Amendment by merely entering the residence or business of another. Id.

Additionally, courts have recognized that "special concerns" arise when the items to be searched belong to visitors to the premises, and not the premises' residents or owners, because the "searches may become personal searches outside the scope of the premises search warrant." United States v. Giwa, 831 F.2d 538, 544 (5th Cir. 1987). Courts have recognized that just as one does not lose Fourth Amendment protections by merely entering another's residence or business, neither does one's personal effects. State v. Nabarro, 525 P.2d 573, 586–87 (Haw. 1974) ("Personal belongings brought by their owner on a visit to a friend's

house retain their constitutional protection until their owner meaningfully abdicates control or responsibility."). As one court has explained:

> To overcome [the substantial interest a visitor has in the privacy of all his possessions], the federal and state constitutions require a warrant supported by probable cause. And a warrant to search premises only cannot logically meet this requirement since by hypothesis there is no way to know, at the time the warrant is issued, whether the visitor or his possession will even be present at the premises when the warrant is executed, let alone whether his possession are likely to contain the items listed in the warrant.

Id. at 587. Noting that the authority of a premise warrant does not necessarily include the authority to search every item on the premise, another court stated:

> It should not be assumed that whatever is found on the premises described in the warrant necessarily falls within the proper scope of the search; rather, it is necessary to examine why a person's belongings happen to be on the premises. The Fourth Amendment protects people, not places, and the protective boundary established by requiring a search warrant should encompass those extensions of a person which he reasonably seeks to preserve as private, regardless of where he may be.

United States v. Micheli, 487 F.2d 429, 432 (1st Cir. 1973) (internal citations and quotation marks omitted).

a. The search of Brown's purse violated the Fourth Amendment to the U.S. Constitution

In recognition of the "special concerns" that arise when the personal effects of individuals not named in a warrant are searched, courts have utilized various tests to determine whether these belongings may be searched pursuant to the warrant for the premises under the Fourth Amendment. State v. Gilstrap, 332 P.3d 43, 44 (Ariz. 2014). Courts apply various tests when examining whether the property was properly searched, including what has been generally labeled as the "possession test," the "relationship test," and the "notice test." Id.

The possession test hinges on whether the property is in the possession of an individual not named in the warrant when the search is executed; if the property is within the third party's possession, then it cannot be lawfully searched pursuant to a warrant for the premises. See, e.g., United

States v. Teller, 397 F.2d 494, 497 (7th Cir. 1968) (upholding the search of a female resident's purse when she placed the purse on the bed and left the room because the purse was no longer in her possession). Some courts construe the possession test strictly, requiring the item be worn or carried by the individual in order to be found outside the scope of the warrant. See, e.g., State v. Reid, 77 P.3d 1134, 1143 (Or. Ct. App. 2003) (applying the possession test and finding a jacket that was "physically separate from [the defendant]" and therefore not in his possession, allowing it to be searched pursuant to the warrant). However, other courts apply a more liberal construction of possession and have found a person can possess an item even if they are not physically touching the item under certain circumstances. See, e.g., State v. Worth, 683 P.2d 622, 625 (Wash. Ct. App. 1984) (finding a visitor's purse that was resting against the chair where the visitor was seated was in her possession, and therefore, could not be searched).

Other courts have declined to follow the possession test and criticized it as being both too narrow and too broad. See, e.g., Micheli, 487 F.2d at 431 (criticizing the possession test for being too broad because it gives an object protection if an individual simply picks it up before the police enter, but also as too narrow because it fails to protect the privacy interests of visitors who simply set their personal effects down for convenience). The strict interpretation of possession has been criticized by some courts, which have noted that the protections of the Fourth Amendment are "hardly furthered by making its applicability hinge upon whether the individual happens to be holding or wearing his personal belongings." Id.

Because of the criticisms of the possession test, other courts have applied a relationship test, which focuses on the relationship the person has with the premises listed in the warrant. See, e.g., State v. Beals, 410 So.2d 745, 748–49 (La. 1982) (finding the defendant had a "special connection" with the premises and finding the search of the defendant, who was present at the time of the search, was within the scope of the

warrant when evidence established the defendant resided at the premises and the probable cause for the warrant was partially based on information that the defendant had engaged in a drug transaction on the premises); Micheli, 487 F.2d at 432 (finding a briefcase belonging to a co-owner of the business could be searched as part of the warrant for the search of the business because as co-owner he had a special relationship to the place being searched); Giwa, 831 F.2d at 544–45 (adopting the relationship test); United States v. Neet, 504 F. Supp. 1220, 1227–28 (D. Colo. 1981) (finding the search of a man's briefcase was allowed because the man had entered the house with the case when the cocaine delivery was to take place and tried to destroy the cocaine when officers arrived, but also finding the search of a woman's purse was not permitted when the officers had no prior knowledge of her existence or involvement in any narcotics transactions).

Still other courts apply the third test—the notice test. The notice test focuses on whether any notice was given to the police that the item belonged to a visitor rather than a person

named in the warrant. Gilstrap, 332 P.3d 43 at 45 (citing Nabarro, 525 P.2d at 573). Some courts require that the police have actual notice that the property was the personal property of a visitor, while others only require that the officer should have known that the property belonged to the visitor. See, e.g., State v. Lambert, 710 P.2d 693, 697–98 (Kan. 1985) ("Since the officer executing the search warrant had no reason to believe that the purse lying on the kitchen table next to the [female] defendant belonged to [the premise's male occupant], the officer could not reasonably believe that the purse was part of the premises described in the search warrant."); State v. Lohr, 263 P.3d 1287, 1291–92 (Wash. App. 2011) ("[I]f an item is readily recognizable as belonging to an individual not named in the warrant, the item is not within the warrant's scope."); Waters v. State, 924 P.2d 437, 439 (Alaska Ct. App. 1996) (finding insufficient evidence that the officers actually knew or reasonably should have known the purse was the defendant's); State v. Thomas, 818 S.W.2d 350, 360 (Tenn. Crim. App. 1991) (finding the officers should have realized the

purse belonged to the female visitor and not the male resident). If the police do not have notice that an item belongs to a visitor to the premises, "the police are entitled to assume that all objects within the premises lawfully subject to search under a warrant are part of those premises for the purpose of executing the warrant." Nabarro, 525 P.2d at 588.

Still other courts have fashioned their own, hybrid versions of the tests. See State v. Jackson, 260 P.3d 1240, 1243–44 (Kan. Ct. App. 2011) (holding officers may not search a visitor's personal property if they have actual or reasonable constructive notice that the property is not subject to the warrant with the exception that if the individual has more than a casual relationship to the premises and there is a relationship between the visitor and the illegal activities described in the warrant, then a search is allowed); State v. Light, 306 P.3d 534 (N.M. Ct. App. 2013) (citations omitted) ("The underlying rationale of the notice approach, the relationship approach adopted in Micheli, or the hybrid approach adopted by the court in Jackson, and our

consideration of the lack of evidence connecting Defendant to the criminal activities, lead us to conclude that the search of the Defendant's purse was impermissible."); State v. Wills, 524 N.W.2d 507, 509 (Minn. Ct. App. 1994) (applying both the physical proximity and the special relationship tests). In an unpublished decision, the Iowa Court of Appeals appears to adopt a hybrid test. See State v. Barbosa-Quinones, 778 N.W.2d 67, 2009 WL 4111127, at *6 (Iowa Ct. App. 2009) (unpublished table decision) (quoting Wayne LaFave, Search and Seizure § 4.10(b) at 746 (2004)) ("[The] limitation on the police authority to execute the warrant by searching into the personal effects [of visitors] comes into play only if the police 'knew or should have known' that the effects belonged to a 'mere visitor.'")

In this case, the Court should find the search of Brown's purse violated the Fourth Amendment. There is no dispute that Brown was not named in the warrant, nor was even she known to known to police prior to the execution of the warrant. (Trial Tr. p.198 L.14–p.199 L.14). Additionally, the

warrant did not attempt to include an "all persons" provision allowing for the search all individuals present during the warrant's execution; rather, the only individual the warrant allowed the search of was Jeffrey Sickles. (Suppress. Ex.1)(App. pp. 51–68). Under any of the tests discussed above and applied by courts under the Fourth Amendment, the search of Brown's purse was unconstitutional. See People v. Lujan, 484 P.2d 1238, 1241–42 (Colo. 1971) (finding the search of a guest of the residence's purse was not permissible incident to the search warrant, and therefore, ordering the evidence found in the purse suppressed).

Under the possession test, Brown possessed the purse, making it outside the scope of the warrant for the premises. It is unclear from the record whether or not Brown was physically holding the purse prior to her being handcuffed. However, a photograph taken of Brown shortly after she was handcuffed shows that the purse was right next to her. (Ex. 3)(App. pp.99–100). As defense counsel aptly pointed out at the suppression hearing, the State cannot circumvent the

protections of the Fourth Amendment by removing the purse from Brown's shoulder or removing Brown from the room, thereby separating her from her property. (Suppress. Tr. p.42 L.5–15). The purse was sufficiently in Brown's possession so that it was unreasonable for police to believe that they could search it pursuant to the warrant. See Jackson, 260 P.3d at 1243 (citing Reid, 77 P.3d at 1134) ("Under the possession test, police may assume any object not worn by *or in the close physical proximity of the guest* is subject to the warrant." (emphasis added)); People v. Reyes, 223 Cal. App. 3d 1218, 1227 (Cal. Ct. App. 1990) (finding the defendant possessed his clothes when he was alone and showering in a closed bathroom despite the fact he was not wearing the clothes when the police entered the bathroom); Worth, 683 P.2d at 624 (finding a purse that was resting against the chair of its visitor–owner was an extension of the visitor's person and could not be searched subject to a warrant for the premises).

Neither does the relationship test permit the search of Brown's purse during the execution of the warrant. There is

nothing in the record that establishes Brown had any sort of special relationship to the premise; rather, the record establishes she was a mere a visitor. Cf. Barbosa Quinones, 778 N.W.2d 67, at *7 (noting the defendant was not a mere visitor when she lived at the premises listed in the warrant). Brown was not a resident of the house, nor was there any evidence that she was an overnight guest, such as the police finding her sleeping or with a suitcase of her effects. Cf. id.; Beals, 410 So.2d at 748–49 (allowing the search because the individual resided at the premises). Brown was never mentioned in the warrant, and officers did not know her to have any relationship to the residence, nor was she even found in the same area of the house as Jeffrey Sickles, the target of the investigation. (Suppress. Tr. p.25 L.5–11; p.27 L.7–12; Trial Tr. p.198 L.14–p.199 L.14)(Suppress. Ex.1)(App. pp. 51–68). See Neet, 504 F. Supp. at 1227–28.

Additionally, the search cannot be supported when applying the notice test. The record establishes that the police actually knew that the purse belonged to Brown. While

unclear whether she was wearing it when the SWAT team entered, it was directly in front of her when she was handcuffed. (Ex.3)(App. pp.99–100). Additionally, Officer Scarlett testified that he saw Brown's identification and "stuff" with Brown's name on it in the purse.[1] (Suppress. Tr. p.17 L.17–20).

Furthermore, even without actual notice, the police had should have known the purse itself belonged to a female found in the residence. The only person that the warrant authorized the search of was the target of the warrant, a man named Jeffrey Sickles. (Suppress. Ex.1)(App. pp. 51–68). Even prior to finding Brown's identification in the purse, the police had reason to know that the purse did not belong to Jeffrey Sickles because of the nature of the item itself as one typically belonging to a woman, which alerted them to the fact the purse was out of the scope of the warrant. See Thomas, 818 S.W.2d at 360 (finding the officers should have realized the

[1] When questioned by defense counsel at the suppression hearing as to what specific "stuff" he saw, the officer could not remember. (Suppress. Tr. p.17 L.17–20).

purse belonged to the female visitor and not the male resident).

Brown did not give up the constitutional protections of the Fourth Amendment simply by entering a residence for which there was a search warrant for the premises; nor did she relinquish her privacy interests in her purse. See Nabarro, 525 P.2d at 586–87; Micheli, 487 F.2d at 432. Applying any of the tests used by other courts to determine whether the personal property of an individual, who is present on the premises during the execution but not named in the warrant, can be searched pursuant to a warrant for the premises under the Fourth Amendment, the Court should find the district court erred in denying the motion to suppress. Brown had possession of her purse, had no special relationship to the premises, and the police officers were actually aware or should have been reasonably aware the purse belonged to her and was therefore outside the scope of the warrant for the premises. Thus, the Court should find the

search of Brown's purse violated her constitutional rights under the Fourth Amendment.

b. The search of Brown's purse violated her rights under article I, section 8 of the Iowa Constitution

The search of Brown's purse under these circumstances also violates her constitutional rights under article 1, section 8 of the Iowa Constitution. Iowa Const. art. 1; §8. 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 260, 267 (Iowa 2010).

When independently evaluating the Iowa Constitution's guarantee against unreasonable searches and seizures, the Iowa Supreme Court has generally examined several factors, including related decisions from other states, the rationale of

the federal decisions, the scope and meaning of Iowa's search and seizure clause, and whether the federal interpretation is consistent with Iowa law. 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 n.2 (Iowa 2001); Ochoa, 792 N.W.2d at 268–91.

While article I, section 8 uses nearly identical language as the Fourth Amendment and was generally designed with the same scope, import and purpose, the Iowa Supreme Court jealously protects its authority to follow an independent approach under the Iowa Constitution. Ochoa, 792 N.W.2d at 267 (citations omitted). 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., id.; Cline, 617 N.W.2d at 285.

The Iowa Supreme Court has held: "The linguistic and historical materials suggest the framers of the Fourth Amendment, and by implication the framer of article I, section

8 of the Iowa Constitution intended to provide a limit on arbitrary searches and seizures." Ochoa, 792 N.W.2d at 273. "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." Id. at 274. "This priority placement has led one observer to declare that, more than the United States Constitution, the Iowa Constitution 'emphasizes rights over mechanics.'" State v. Baldon, 829 N.W.2d 785, 809–10 (Iowa 2013) (Appel, J., concurring) (quoting Donald P. Racheter, The Iowa Constitution: Rights over Mechanics, in The Constitutionalism of American States 479, 479 (George E. Connor & Christopher W. Hammons eds., 2008)).

The Iowa Constitution has a "strong emphasis on individual rights." State v. Short, 851 N.W.2d 474, 482 (Iowa 2014). "[T]he Iowa framers placed considerable value on the sanctity of private property. Ochoa, 792 N.W.2d at 274–75. Furthermore, Iowa courts have long been concerned "'about giving police officers unbridled discretion to rummage at will

among a person's private effects.'" State v. Gaskins, 866 N.W.2d 1, 10 (Iowa 2015) (quoting Arizona v. Gant, 556 U.S. 332, 345 (2009)).

The Court should adopt a notice test under the Iowa constitution, as it adequately balances the protections given to an individual by the constitution with the needs of law enforcement executing a search warrant. See Naujoks, 637 N.W.2d at 107 (citations omitted). It provides an individual not named in the search warrant with the protections of article I, section 8, while recognizing the privacy interests one has in their personal effects. It also provides a workable rule for law enforcement, without any undue burden.

In addition, the application of the notice test appears to be consistent with case law. As previously discussed, in State v. Barbosa-Quinones, 778 N.W. 2d 67 (Iowa Ct. App. 2009), the Court of Appeals in an unpublished opinion, seems to adopt a hybrid of the relationship and notice tests. However, the Iowa Supreme Court's subsequent decision in State v.

Fleming appears to reject both the possession and relationship test under the Iowa Constitution.

In State v. Fleming, the Iowa Supreme Court unanimously ruled that a search of a renter's bedroom was unconstitutional under the Iowa Constitution unless the officers obtained a warrant that was supported by probable cause authorizing the search of the renter's room. State v. Fleming, 790 N.W.2d 560, 568 (Iowa 2010). Importantly, this search would have been allowed by courts that apply the relationship test, as it was clear that Fleming, as a resident of the home, had a special relationship to the premise. See id. at 568–69. Nor was Fleming in possession of every item in his room, which would allow for the search of his room under the possession test. See id. Rather, the Supreme Court determined that in order to search a renter's bedroom, the police must make an independent showing of probable cause, written as part of the search warrant. Id.

Therefore, Brown requests the Court determine that the search of Brown's purse violated her rights under the Iowa

Constitution. Brown had a legitimate and reasonable expectation of privacy in her purse. As discussed above, the police knew the purse belonged to Brown, or at the very least should have known it did not belong to the male subject of the warrant. Therefore, by searching the purse without making an independent showing of probable cause to a magistrate, the police exceeded the scope of the warrant by searching the purse.

2. The district court erred in determining the search of Defendant's purse was valid under Iowa Code section 808.7.

The district court also erred in determining that Iowa Code section 808.7 authorized the search of Brown's purse under the circumstances.

Iowa Code section 808.7 provides:

> In the execution of a search warrant the person executing the same may reasonably detain and search any person or thing in the place at the time for any of the following reasons:
>
> 1. To protect the searcher from attack.
>
> 2. To prevent the disposal or concealment of any property subject to seizure described in the warrant.

> 3. To remove any item which is capable of causing bodily harm that the person may use to resist arrest of effect an escape.

Iowa Code § 808.7 (2016).

The handcuffing of Brown in the bedroom was unquestionably a warrantless seizure, as the warrant in this case did not specifically authorize the search or seizure of Brown. See State v. VanHecke, 723 N.W.2d 448, 2006 WL 2265361, at *3 (Iowa Ct. App. 2006) (unpublished table decision). In Michigan v. Summers, the U.S. Supreme Court held "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." Michigan v. Summers, 452 U.S. 692, 705 (1981). "The justifications for such detentions are to minimize the risk of harm to officers, prevent flight of suspects if incriminating evidence is found, and facilitate the orderly completion of the search." VanHecke, 723 N.W.2d 448, at *4 (citing Summers, 452 U.S. at 702–03).

In this case, in determining the search of Brown's purse was lawful pursuant to Iowa Code section 808.7, the district court relied heavily on the Iowa Court of Appeal's decision in State v. Smith. State v. Smith, 476 N.W.2d 86 (Iowa Ct. App. 1991). In Smith, the police received information that Smith was staying in room 206 at the Conway Inne, selling cocaine, and had stolen a fur coat that she planned to sell to a man. Id. at 87–88. Through investigation, the police discovered the man was a known cocaine dealer. Id. at 88. The police also learned that one of the hotel room's occupants had been seen with a known cocaine dealer. Id. A warrant was issued for the search of the room and some of the occupants, but not Smith. Id. at 88–90. Smith and two others, one of which the warrant authorized the search of, arrived at the hotel room during the execution of the warrant, and the officers searched them. Id. at 90. Officers found incriminating items in Smith's purse that were used against her at trial. Id. at 87.

In Smith, the Court found Smith's purse could be searched pursuant to Iowa Code section 808.7 because it was

reasonable for the police to detain and search her for the reasons articulated in section 808.7. Id. at 90. The Court emphasized that the police had previously identified Smith as associated with the subjects of the search warrant, received information identifying her and the illegal activities in the room, and Smith had accompanied one of the subjects of the warrant to the premises. Id. Furthermore, the Court of Appeals found that the search was not like the one that occurred in Ybarra, but was like the protective search in Michigan v. Long. Id. In Long, the U.S. Supreme Court upheld the protective search of a vehicle for weapons when the police officer had an articulable, reasonable suspicion that the individual is armed and dangerous. Michigan v. Long, 463 U.S. 1032, 1034–35 (1983).

The Court's decision in Smith and Iowa Code section 808.7 may very well authorize the initial detention and pat down search of Brown. However, the rationale for allowing the search does not extend to the subsequent search of Brown's purse. Thus, Iowa Code 808.7 does not permit the search.

Unlike the defendant in Smith, Brown was not known prior to the search or connected to the premises. (Suppress. Tr. p.25 L.5–11; Trial Tr. p.198 L.14–p.199 L.14). See State v. Prior, 617 N.W.2d 260 (Iowa 2000) (noting the defendant was never linked to the premises or suspected drug dealer prior to the execution of the warrant). In contrast to Smith, Brown was immediately handcuffed upon the SWAT team's entrance into the house, and later removed to another room in the residence, leaving her purse in the bedroom. (Suppress. Tr. p.9 L.8–19; p.10 L.9–13; p.19 L.23–p.20 L.1; p.26 L.9–24). There was at least one officer tasked with watching over her, and there were at least two officers in the room where the purse was located. (Suppress. Tr. p.18 L.5–11; p.32 L.14–23).

At the suppression hearing, both officers were questioned about the possibility the residence's occupants could attack them. Officer Fong testified:

> A. I would say that with [a male occupant's] attitude when we arrived, *if he was not handcuffed he could have been assaultive toward others.*
>
> Q. As far as the others, there were no specific concerns about that?

> A. Well, we were conducting a drug investigation, sir, and specifically methamphetamine, and people are often unpredictable. We know the house contained firearms. *We are not going to let people be unsecured in a house where we know they are methamphetamine users and there are firearms present.* That would be unsafe.

(Suppress. Tr. p.34 L.6–19) (emphasis added). When questioned whether he believed the search of the purse was necessary to protect himself from attack, Officer Scarlett answered:

> A. Well, obviously, we've found weapons in purses before. I think it would be good to search if as far as protection standpoint because there is more than one individual in the residence. And any time that has happened, I have seen individuals, whether they are handcuffed, still get up and try to fight with officers; try to run to different areas of the residence.

(Suppress. Tr. p.18 L.12–21). Officer Scarlett acknowledged the scenario was "farfetched," but stated it was not "out of the realm of possibility." (Suppress. Tr. p.18 L.22–p.19 L.5).

With regards to whether someone would get a weapon out of the purse to use to resist arrest or escape custody,

Officer Scarlett testified it was along the same lines, and "a farfetched scenario." (Suppress. Tr. p.20 L.7–15). Officer Fong testified there was "[a]lways the risk of somebody running." However, when asked if there was anything particular he could testify to specifically that would indicate these individuals would try to escape, he acknowledged he could not provide anything because he was not supervising the detainees and was conducting other duties. (Suppress. Tr. p.33 L.16–24). In addition, Officer Fong testified that everyone but one male occupant was cooperative during the search. (Suppress. Tr. p.33 L.5–10).

At most, the officers' testimony justifies the detention and handcuffing the residence's occupants while the officers executed the search warrant. (Suppress. Tr. p.34 L.6–19). See also Summers, 452 U.S. at 704–705. However, it is clear from the record that all the individuals in the residence were secured immediately upon the entrance of the SWAT team, remained handcuffed in a different area of the house, and were watched over by at least one officer at the time Officer Scarlett

searched Brown's purse. (Suppress. Tr. p.26 L.8–24; p.32 L.14–p.33 L.15). According to Officer Fong's testimony, only individuals that were deemed cooperative would get their handcuffs moved to the front of their person; however, they would still be handcuffed. (Suppress. Tr. p.33 L.5–12). In addition, there was only one male occupant that Fong testified could have been assaultive *if not handcuffed.* (Suppress. Tr. p.34 L.6–11). No officer testified that there was any reason to believe that one of the occupants was going to be assaultive when handcuffed or try to run from the scene; rather, the only testimony regarding an individual trying to get a weapon from the purse to use to escape or assault an officer was from Officer Scarlett, who acknowledged it was a farfetched scenario. (Suppress. Tr. p.18 L.22–p.19 L.5; p.20 L.7–15).

Moreover, while it appeared the officers believed there might have been firearms present in the residence, the minutes of testimony indicated the officers learned "Jeffrey Sickles may have access to an AR-15 rifle and shotgun." (Suppress. Tr. p.24 L.17–20; p.36 L.22–25)(Mins. Test.)(App.

p.12). Neither an AR-15 rifle nor a shotgun, both large and long firearms, would have fit in Brown's purse. (Ex.3)(App. pp.99–100). In addition, even assuming arguendo circumstances related to officer safety made it permissible for the officer to check Brown's purse for a gun, the safety rationale does not extend to the opening and search of zippered pouch found inside Brown's purse, which was clearly too small to hold any kind of firearm or weapon. (Ex.5)(App. pp.103–104). See also Lujan, 484 P.3d at 1242 ("It has been argued that the purse was merely frisked for weapons but the argument is unpersuasive, inasmuch as the police officer searched all of the various compartments of the purse . . . .").

Under the circumstances in this case, none of the reasons that Iowa Code section 808.7 lists for a reasonable detention and search existed to justify an invasion into Brown's reasonable expectation of privacy in her purse. See Naujoks, 637 N.W.2d at 108–09. There were no specific, articulable and reasonable grounds to believe that the handcuffed individuals posed any more of a threat to officers'

safety or that they would escape "than any other police encounter with persons suspected of criminal activity." See id. at 109. Nor was there any testimony that established the evidence would be destroyed unless the purse was searched. See id. at 108 (citing State v. Hatter, 342 N.W.2d 851, 854 (Iowa 1983). See also Gaskins, 866 N.W.2d at 14 (quoting United States v. Frick, 490 F.2d 666, 673 (5th Cir.1973)) (noting the "officers' safety was not endangered and the defendant could have only . . . destroy[ed] evidence if he had 'the skill of Houdini and the strength of Hercules.'"). While it may have been reasonable to detain Brown during the search, once she was detained and to the extent the officers believed they had probable cause to search her purse, nothing prevented the officers from applying for a search warrant to a neutral, detached magistrate. See State v. Anderson, 977 P.2d 983, 988 (Mont. 1999).

In this case, the district court's reliance on Smith was misplaced given the differences in the pertinent facts and the inapplicability of Smith's underlying rationale of a protective

search. Because none of the reasons permitting a search listed in Iowa Code section 808.7 were present when considering the search of Brown's purse, the search was not reasonable and is not authorized by the statute.

Additionally, assuming arguendo that Iowa Code section 808.7 authorized the search of Brown's purse, the statue cannot be used to validate an otherwise unconstitutional search. In State v. Lambert, the Kansas Supreme Court examined a nearly indistinguishable situation to Brown's and a similar state statute.[2] State v. Lambert, 710 P.3d 693 (Kan. 1985). The Kansas Supreme Court, citing the U.S. Supreme Court's decision in Ybarra concerning a similar Illinois statute, acknowledged the state statute could not diminish the constitutional rights of individuals. Lambert, 710 P.2d at 698. The court ruled "the legislature cannot by statute make a

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[2] In State v. Lambert, the prosecution argued the search was pursuant to K.S.A. 22-2509, which allows a person executing a search warrant to reasonably detain and search any person in order "to protect himself from attack, or . . . prevent the disposal or concealment of any things particularly described in the warrant." K.S.A. 22-2509 (2016); Lambert, 710 P.2d at 698.

search warrant a general warrant to search, thereby depriving individuals of rights guaranteed by the Constitution." Id.

As discussed above, the district court erred in concluding the search of Brown's purse was valid under Iowa Code section 808.7 because there was no evidence it was reasonable for officer safety or to prevent the disposal or concealment of any property subject to the seizure. In addition, it is clear that Iowa Code section 808.7 cannot authorize the search of Brown's purse if the search violates her constitutional rights under either the federal or state constitution, as discussed in Division I.A.1. See id.; Knowles v. Iowa, 525 U.S. 113, 117–18 (1998) (noting that while an Iowa statute authorized the search, the search considered by the Court violated the Fourth Amendment). Therefore, the district court erred in concluding the search was permissible under Iowa Code section 808.7.

3. No well-recognized exception to the warrant requirement existed that permitted the search of Brown's purse.

It is well established that under Iowa law, warrantless searches are per se unreasonable unless they fall into one of

the well-recognized exceptions to the warrant requirement. Naujoks, N.W.2d at 107 (citing State v. Canas, 597 N.W.2d 488, 492 (Iowa 1999)). It is the State's burden to prove by a preponderance of the evidence that a warrantless search or seizure falls into one of the exceptions. State v. McGrane, 733 N.W.2d 671, 676 (Iowa 2007) (citing State v. Gillespie, 619 N.W.2d 345, 350 (Iowa 2000)). The Court evaluates the reasonableness of a search or seizure using an objective standard. State v. Legg, 633 N.W.2d 763, 767 (Iowa 2001) (citing Cline, 617 N.W.2d at 280–81).

The district court found the search of Brown's purse was valid because the officers had probable cause to search it. First, there was not probable cause to search Brown's purse. However, even assuming there was probable cause to search Brown's purse, probable cause alone is not a recognized exception to the warrant requirement. See id. (citing Cline, 617 N.W.2d at 282) (listing some well-recognized exceptions).

First, the State failed to establish there was probable cause to search the purse. "In the context of evidentiary

searches, 'probable cause' exists when a reasonably prudent person would believe that evidence of a crime will be discovered in the place to be searched." State v. Moriarity, 566 N.W.2d 866, 868 (Iowa 1997) (citations omitted). Here, Officer Fong testified the occupants were smoking methamphetamine when the SWAT team arrived; however, there was no information given specifically about Brown's part in this activity. See Light, 306 P.3d at 539–40 (quoting State v. Garcia, 166 P.3d 848, 855 (Wash. Ct. App. 2007)) ("[A generalized belief that all persons present in a location are involved in criminal activity] is insufficient to establish the required nexus between the Defendant and the criminal activity"). Nor was there any reason to believe that evidence of any crime would be in Brown's purse. In fact, Officer Fong testified he believed he knew what happened in the room when the officers arrived and that he did not believe anyone had tried to conceal evidence in Brown's purse. (Trial Tr. p.203 L.10–15; p.204 L.14–18). Thus, there was no probable cause for the search of the purse.

Second, even assuming arguendo that there was probable cause to search Brown's purse, probable cause alone is not a recognized exception to the warrant requirement. See Naujoks, N.W.2d at 107 (citing Cline, 617 N.W.2d at 282). There would have to be probable cause *coupled with exigent circumstances* in order to justify a warrantless search. Id. Here, the district court did not find, nor did the State argue, there was any exigency that supported the search of Brown's purse. (Suppress. Tr. p.41 L.3–p.42 L.1)(Suppress. Ruling; State's Resist. Def.'s Mot. Suppress; State's Resist. Def.'s Brief;)(App. pp.43–45; 69–83). As discussed in Division I.A.2, there were no exigent circumstances, such as officer safety or destruction of evidence that could support the search of the zippered pouch inside of Brown's purse. While it may have been reasonable to detain Brown during the execution of the search warrant, once she was detained and to the extent the officers believed they had probable cause to search her purse, nothing prevented the officers from applying for a search

warrant to a neutral, detached magistrate. See Fleming, 790 N.W.2d at 568 n.4; Anderson, 977 P.2d at 988.

No exception to the warrant clause supported the search of Brown's purse. Therefore, the district court erred in concluding the officers' search was valid because there was probable cause to search Brown's purse. Because the search was outside the scope of the warrant, was not supported by probable cause, and did not fall into any other well-recognized exception to the warrant requirement, the district court erred in denying the motion to suppress.

4. To the extent the Court believes error was not adequately preserved, trial counsel was ineffective.

Brown asserts the previous arguments are preserved. See Lamasters v. State, 821 N.W.2d 856, 864 (Iowa 2012) (citations omitted) ("If the court's ruling indicates the court *considered* the issue and necessarily ruled on it, even if the court's reasoning is 'incomplete or sparse,' the issue has been preserved."). See also State v. Paredes, 775 N.W.2d 554, 561 (Iowa 2009) (citing State v. Williams, 695 N.W.2d 23, 27–28

(Iowa 2005)) ("We have previously held that where a question is obvious and ruled upon by the district court, the issue is adequately preserved."). However, to the extent the Court concludes error was not preserved for any reason, counsel was ineffective.

To prevail on an ineffective-assistance-of-counsel claim, a defendant must establish (1) counsel failed to perform an essential duty and (2) the defense was prejudiced as a result. State v. Brothern, 832 N.W.2d 187, 192 (Iowa 2013) (quoting Lamasters, 821 N.W.2d at 866). As discussed above, the search of Brown's purse violated her constitutional rights under both the federal and state constitutions, Iowa Code section 808.7 did not authorize the search, and it did not fall into any of the well-recognized exceptions to the warrant requirement.

Appellant hereby incorporates by reference the argument outlined above. As the argument is legally meritorious, defense counsel breached an essential duty by failing to specifically make the above argument. See State v. Clay, 824

N.W.2d 488, 496 (Iowa 2012) (stating counsel has a duty to know the law). Cf. State v. Greene, 592 N.W.2d 24, 29 (Iowa 1999) (stating counsel is not incompetent for failing to pursue a meritless issue.).

If error was not preserved, Brown was prejudiced by counsel's failure to adequately argue the applicable law. As argued above, the search of her purse was unconstitutional under both the federal and state constitutions, Iowa Code section 808.7 did not authorize the search, and the State did not prove the search was permissible under an exception to the warrant requirement. If counsel had been more specific in his argument, the district court would have been alerted to the applicable law and the motion to suppress would have been granted. See State v. Leckington, 713 N.W.2d 208, 218 (Iowa 2006) (citing Strickland v. Washington, 466 U.S. 668, 694 (1984)) (finding prejudice if "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'"). The State would not

have been able to admit the illegally seized evidence at trial. See id.

D. Conclusion: Defendant–Appellant Danielle Brown respectfully requests the Court reverse her conviction for Possession of a Controlled Substance (Marijuana), Second Offense, and remand to the district court for dismissal of the charge.

II. THE DISTRICT COURT ENTERED AN UNAUTHORIZED AND ILLEGAL SENTENCE BY ORDERING BROWN TO PAY COURT COSTS ASSOCIATED WITH THE DISMISSED CHARGE.

A. Preservation of Error: The general rule of error preservation is not applicable to void, illegal, or procedurally defective sentences. State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994). An illegal sentence is "one not authorized by statute." Tindell v. State, 629 N.W.2d 357, 359 (Iowa 2001). See also State v. Poyner, 743 N.W.2d 872, 2007 WL 4322193, at *2 (Iowa Ct. App. 2007) (unpublished table decision) (holding where the district court's taxation of costs to defendant was authorized by statute, the defendant "did not

receive an illegal sentence"). The Court is permitted to correct an illegal sentence at any time. Iowa R. Crim. P. 2.24(5)(a) (2016).

B. Standard of Review: The Court reviews challenges to the legality of a sentence for errors at law. State v. Sisk, 577 N.W.2d 414, 416 (Iowa 1998).

C. Discussion: At sentencing, the State recommended a sentence for Brown and stated, "In terms of the companion simple misdemeanor, SMAC357205, the State would move to dismiss that case at the defendant's costs." (Sentencing Tr. p.7 L.5–19). The State then explained the reasons for its recommendation. (Sentencing Tr. p.7 L.20–p.8 L.18). The defense made its sentencing recommendations, but did not address the State's statement regarding the attached simple misdemeanor. (Sentencing Tr. p.8 L.21–p.9 L.21). At the sentencing hearing, the district court ordered Case No. SMAC357205 dismissed, but it did not address the related court costs. (Sentencing Tr. p.15 L.4–5). However, in the written sentencing order, the district court dismissed the

charges instituted under Case No. SMAC357205, then stated: "Pursuant to the plea agreement Defendant is ordered to pay court costs on these counts/cases...." (Sentencing Order)(App. p.118). This order that Brown be assessed costs associated with charges she was not convicted of amounted to a statutorily unauthorized, illegal sentence.

Court costs "are taxable only to the extent provided by statute." City of Cedar Rapids v. Linn Cnty., 267 N.W.2d 673, 673 (Iowa 1978). "In the absence of such statutory authorization, a court has no power to award costs against a defendant . . . ." Woodbury Cnty. v. Anderson, 164 N.W.2d 129, 133 (Iowa 1969) (citation omitted). Under the Iowa Code, a court may order a defendant responsible for court or prosecution costs associated with a particular charge only when the defendant pleads or is found guilty on such charge. No statutory provision authorizes holding a defendant responsible for court or prosecution costs associated with a charge that is ultimately dismissed. See Iowa Code § 815.13 (2016) (stating prosecution "fees and costs are recoverable by

the [prosecuting] county . . . from the defendant unless the *defendant is found not guilty or the action is dismissed . . . .*" (emphasis added)); Iowa Code § 910.2 (2016) ("In all criminal cases *in which there is a plea of guilty [or] verdict of guilty* . . . the sentencing court shall order that restitution be made by each offender . . . to the clerk of court for . . . court costs . . . ." (emphasis added)).

"Iowa Code section 815.13 and section 910.2 clearly require . . . only such . . . costs attributable to the charge on which a criminal defendant is convicted should be recoverable under a restitution plan." State v. Petrie, 478 N.W.2d 620, 622 (Iowa 1991). "Fees and costs not clearly associated with any single charge should only be assessed proportionally against the defendant." Id. (holding the restitution order should have been limited to requiring defendant to pay court costs associated with charge on which he was convicted and should not have included costs relating to charges dismissed pursuant to plea agreement that was silent on payment of fees and costs). See also State v. Dudley, 766 N.W.2d 606, 624

(Iowa 2009) ("[I]t is elementary that a winning party does not pay court costs."); State v. Hill, 682 N.W.2d 82, 2004 WL 433844, at *2 (Iowa Ct. App. 2004) (unpublished table decision) (finding the district court erred in ordering defendant to pay total court costs from mistrial, as defendant was required to pay restitution only for court costs associated with the charge to which he ultimately pled guilty, and court costs not clearly associated with the charge to which he pled guilty should be assessed against defendant at a rate of one half); State v. Wheeler, 821 N.W.2d 286, 2012 WL 3026274, at *1–2 (Iowa Ct. App. 2013) (unpublished table decision) (finding the defendant should not have been taxed court costs on a charge that the State dismissed); State v. Foth, 882 N.W.2d 873, 2016 WL 719044, at *7 (Iowa Ct. App. 2016) (unpublished table decision).

While parties to a plea agreement are free to "mak[e] a provision covering the payment of costs" even in the absence of independent statutory authorization, there was no plea agreement entered into in this case. See Petrie, 478 N.W.2d at

622. The form sentencing order stated that the taxation of court costs associated with dismissed charges to Brown was "[p]ursuant to the plea agreement." (Sentencing Order)(App. p.118). However, it is apparent from the record at sentencing that there was no plea agreement. (Sentencing Tr. p.7 L.3–p.12 L.20). Rather, the only mention of the court costs related to Case No. SMAC357205 is the State's unilateral statement it would be dismissing the simple misdemeanor case with costs to Brown. (Sentencing Tr. p. 7 L.16–19). Such a statement by the State, without any agreement from the defendant, does not amount to an agreement to pay court costs.

Because Brown's payment of court costs associated with the dismissed charge in Case No. SMAC357205 was neither authorized by statute nor required under any plea agreement in the present case, the court entered an illegal sentence in requiring Brown to pay such costs. See Petrie, 478 N.W.2d at 622 (holding it was error to require the defendant to pay court costs attributable to dismissed charges where order for

payment of costs was not authorized by statute and plea agreement was silent on payment of costs).

It appears that the court costs associated with the dismissed case, Case No. SMAC357205, was assessed as part of the sentence in Case No. SRCR289414, which was the only case with any conviction entered. (Sentencing Order) (App. p.118). Accordingly, the improper assessment of costs associated with the dismissed charges in Case No. SMAC357205 can be reached in the instant appeal from the conviction and sentence entered in Case No. SRCR289414. See State v. Jenkins–Wells, 868 N.W.2d 201, 2015 WL 3623642, at *1 n.1 (Iowa Ct. App. 2015) (unpublished table decision) ("We reject the State's argument that Jenkins–Wells was required to appeal from the dismissed cases. The assessed court costs of the dismissed cases were included in the sentence for this theft case."). Alternatively, Brown respectfully requests that this Court treat the notice of appeal that Brown filed in Case No. SRCR289414 as an application for discretionary review in Case No. SMAC357205, and that

this Court grant that application. See Iowa R. App. P. 6.108 (2016).

Brown did not enter a plea agreement covering the payment of costs. Because Brown's payment of costs associated with the dismissal of Case No. SMAC357205 was not authorized by statute nor agreed to by the parties, the district court entered an illegal sentence in assessing Brown the court costs for the that action. The portion of the court's sentencing order taxing to Brown the costs associated with the dismissed case, Case No. SMAC357205, should be vacated. See (Sentencing Order p.3)(App. p.118) (dismissing Case No. SMAC357205, and then stating: "Pursuant to the plea agreement Defendant is ordered to pay court costs on these counts/cases . . . .").

D. Conclusion: Defendant–Appellant requests that this Court vacate the portion of the district court's sentencing order that requires Brown to pay the court costs associated with the dismissed Case No. SMAC357205 and remand to the district court to enter a corrected order vacating the provision

requiring Brown to pay costs associated with the dismissed case.

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 $5.85, and that amount has been paid in full by the Office of the Appellate Defender.

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