IN THE SUPREME COURT OF IOWA

STATE OF IOWA Plaintiff-Appellant, v. EARNEST JONES HUNT, JR. Defendant-Appellee.	Supreme Court No. 20-1595

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR DUBUQUE COUNTY
HONORABLE MICHAEL J. SHUBATT, JUDGE

APPELLEE'S APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS FILED NOVEMBER 3, 2021

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CERTIFICATE OF SERVICE

On the 19th day of November, 2021, the undersigned certifies that a true copy of the forgoing instrument was served upon the Defendant-Appellee by placing on copy thereof in the United States mail, proper postage attached, addressed to Earnest Hunt Jr., 925 Nevada St. Apt. 1, Dubuque, Iowa 52001.

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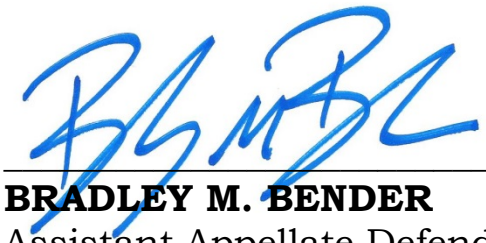

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QUESTION PRESENTED FOR REVIEW

I. Both the Fourth Amendment to the United States Constitution and article I, section 8 of the Iowa Constitution prohibit unreasonable searches and seizures by the government. Hunt argues the district court did not erred in concluding that the search of his person exceeded the plain-feel exception to the warrant requirement. Did the district court erred in granting the motion to suppress?

TABLE OF CONTENTS

Page

Certificate of Service 2

Question Presented for Review 3

Table of Authorities 5

Statement in Support of Further Review 7

Brief in Support of Further Review 13

Argument

I. Both the Fourth Amendment to the United States Constitution and article I, section 8 of the Iowa Constitution prohibit unreasonable searches and seizures by the government. Hunt argues the district court did not erred in concluding that the search of his person exceeded the plain-feel exception to the warrant requirement. Did the district court erred in granting the motion to suppress? 13

Conclusion 28

Attorney's Cost Certificate 28

Certificate of Compliance 29

TABLE OF AUTHORITIES

Cases: Pages:

Commonwealth v. Crowder, 884 S.W.2d 649 (Ky.1994) .. 10, 27

Illinois v. Wardlow, 528 U.S. 119 (2000)..... 16

Minnesota v. Dickerson, 508 U.S. 366 (1993). 8, 11, 17, 19, 27

State v. Bergmann, 633 N.W.2d 328 (Iowa 2001)..... 16

State v. Brown, 890 N.W.2d 315 (Iowa 2017)..... 14

State v. Bruegger, 773 N.W.2d 862 (Iowa 2009)..... 16

State v. Carey, No. 12-0230, 2014 WL 3928873
(Iowa Ct. App. Aug. 13, 2014)..... 23-25

State v. Cline, 617 N.W.2d 277 (Iowa 2000)..... 15

State v. Ericson, No. 14-1746, 2016 WL 719178
(Iowa Ct. App. Feb. 24, 2016) 10, 27

State v. Harriman, 737 N.W.2d 318
(Iowa Ct. App. 2007)..... 8, 11, 19, 27

State v. Kurth, 813 N.W.2d 270 (Iowa 2012)..... 14

State v. McGrane, 733 N.W.2d 671 (Iowa 2007)..... 16

State v. Naujoks, 637 N.W.2d 101 (Iowa 2001) 13

State v. Ochoa, 792 N.W.2d 260 (Iowa 2010)..... 15, 16

State v. Storm, 898 N.W.2d 140 (Iowa 2017) 14

State v. Struve, 956 N.W.2d 90 (Iowa 2021)..... 16

State v. Turner, 630 N.W.2d 601 (Iowa 2001) 14, 16

State v. Tyler, 830 N.W.2d 288 (Iowa 2013) 15

Terry v. Ohio, 392 U.S. 1 (1968) 16-19

Constitutional Provisions:

U.S. Const. amend. IV 15

Iowa Const. art. I, § 8 15

STATEMENT IN SUPPORT OF FURTHER REVIEW

The Defendant-Appellee Earnest Jones Hunt, Jr., pursuant to Iowa Rules of Appellate Procedure 6.1103, hereby makes Application for Further Review of the November 3, 2021 decision of the Iowa Court of Appeals in the case of *State of Iowa v. Earnest Jones Hunt, Jr.,* Supreme Court No. 20-0798.

1. The State sought discretionary review of the Dubuque County District Court order which grants Defendant-Appellee's Earnest Jones Hunt, Jr.'s Motion to Suppress since the State failed to prove that the seized controlled substances met the criteria for the plain-feel exception to the Fourth Amendment. This Court transferred the case to the Court of Appeals who reversed the district court's ruling granting Hunt's motion and remanded the case. (Opinion p. 2).

2. The Court of Appeals concluded that the district court erred in concluding the plain-feel exception did not apply and the seizure of crack cocaine fell within the scope of the plain-feel exception. (Opinion pp. 7-10). Hunt argues that the Court of Appeals erred in reaching these conclusions. During a *Terry* search, an officer is permitted to seize contraband without

a warrant under the "plain feel" exception to the warrant requirement. *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993). To meet the "plain feel" exception, an officer is permitted to seize contraband without a warrant "[i]f a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent" as contraband. *Id.* at 375–76; *see also State v. Harriman*, 737 N.W.2d 318, 321 (Iowa Ct. App. 2007) (holding where "the identity of the contraband" (drugs) was "immediately apparent" during the pat down search, the drugs were admissible). The plain-feel doctrine does not apply when an officer must manipulate or squeeze an object in order to identify it as contraband. *Dickerson*, 508 U.S. at 375-76; *Harriman*, 737 N.W.2d at 320.

The crucial question on appeal is whether the object in Hunt's pocket had a contour or mass that made it "immediately apparent" as contraband to satisfy the plain-feel exception to the warrant requirement. Following an investigatory stop of a vehicle where Hunt was a passenger, Investigator Leitzen conducted a pat down search of Hunt to see if Hunt had a

weapon. (Hrg. Tr. p. 6, Line 25 – p. 12, Line 13). Leitzen did not find a weapon but felt small hard objects in Hunt's sweatshirt pocket. (Hrg. Tr. p. 12, Line 14 – p. 14, Line 13). Leitzen testified that he believed the objects to be bags of drugs, although he admitted he did not know from feel what kind of drugs. (Hrg. Tr. p. 12, Line 14 – p. 14, Line 13). Leitzen reached into Hunt's pocket and removed the bags. (Hrg. Tr. p. 12, Line 14 – p. 14, Line 13). Upon visual inspection, Leitzen believed that the bags contained drugs, but still did not know specifically what type. (Hrg. Tr. p. 12, Line 14 – p. 14, Line 13).

Contrary to the Court of Appeals' conclusions, it was proper for the district court to find significant that Leitzen could not identify what type of controlled substance was in the object seized from Hunt's sweatshirt pocket. It is clear from the testimony at the motion to suppress hearing and the body cam footage of the encounter that nature of the substance in the object seized from Hunt's sweatshirt pocket was not "immediately apparent" to Leitzen. (Hrg. Tr. p. 14, Line 14 – p. 20, Line 22; State's Exhibit 1). In fact, Leitzen testified he was a residential expert in all things drug related. (Hrg. Tr. p. 14,

Line 14 – p. 20, Line 22). Despite this expertise, Leitzen was unsure as to what exactly was contained in the bag even after he removed them and was examining them by feel and sight. (Hrg. Tr. p. 14, Line 14 – p. 20, Line 22; State's Exhibit #1). Most importantly, even after manipulating the contents and consulting with other officers, Leitzen was still unsure as to the what substance was contained in the bag. (Hrg. Tr. p. 14, Line 14 – p. 20, Line 22; State's Exhibit #1). Based on this record, the object in Hunt's pocket did not have the contour or mass that made it "immediately apparent" as contraband.

While absolute certainty may not be required, an item's incriminating nature is not "immediately apparent" if an officer is torn between multiple-choice options. *State v. Ericson*, No. 14-1746, 2016 WL 719178, at *2 (Iowa Ct. App. Feb. 24, 2016) (citing *Commonwealth v. Crowder*, 884 S.W.2d 649, 652 (Ky.1994)). Such a situation occurred in this case. Leitzen was torn between multiple choice options on what was contained in the bag seized from Hunt's sweatshirt pocket. Leitzen own testimony demonstrates that he did not immediately recognize the substance in question as crack cocaine and that it was only

recognized after further exploration and manipulation of the bag once it was seized. As such, the "immediately apparent" requirement of the plain feel doctrine has not been satisfied. *See Dickerson*, 508 U.S. at 375-76; *Harriman*, 737 N.W.2d at 320. Therefore, that the district court did not erred in granting Hunt's motion to suppress.

The Court of Appeals decision creates murky jurisprudence, and failed follow the principles and framework outlined in *Dickerson* and *Harriman*. As such, Court should grant Further Review because the Court of Appeals made a legal error in reaching its conclusion and such conclusion is in conflict with prior precedent and the record admitted during the trial court proceedings. The Court of Appeals has entered a decision in conflict with prior appellate decisions on an important legal matter. *See* Iowa R. App. P. 6.1103(1)(b)(1). Furthermore, this case presents an issue of broad public importance that the Supreme Court should ultimately decide. Iowa R. App. P. 6.1103(1)(b)(4). This Court should not allow the Court of Appeals opinion to re-muddy the waters on the

applicability of the plain-feel doctrine. More guidance from the Supreme Court is needed on this area of the law.

WHEREFORE, Defendant-Appellee respectfully requests this Court to grant further review of the decision of the Court of Appeals filed on November 3, 2021 and vacate the Court of Appeals decision as discussed herein and affirm the district court order suppressing the controlled substances found on his person.

BRIEF IN SUPPORT OF FURTHER REVIEW

The Defendant-Appellee Earnest Jones Hunt, Jr., pursuant to Iowa Rule of Appellate Procedure 6.1103(c)(4), hereby submits the following brief which identifies all of the Appellee's contentions and legal authorities in support of his Application for Further Review.

Background Facts and Proceedings. Hunt generally accepts the Court of Appeals' recitation of the course of proceedings and background facts. Any disputed facts and proceedings will be discussed below.

ARGUMENT

I. Both the Fourth Amendment to the United States Constitution and article I, section 8 of the Iowa Constitution prohibit unreasonable searches and seizures by the government. Hunt argues the district court did not erred in concluding that the search of his person exceeded the plain-feel exception to the warrant requirement. Did the district court erred in granting the motion to suppress?

Preservation of Error. On appeal, the State contends that the district court erred in granting Hunt's motion to suppress evidence. Hunt does not contest error preservation. *See State v. Naujoks*, 637 N.W.2d 101, 106 (Iowa 2001) (stating

that "[a]n adverse ruling on a motion to suppress will preserve error for [the Court's] review").

Standard of Review. When a party challenges a district court's denial of a motion to suppress, this Court's standard of review is de novo. *State v. Storm*, 898 N.W.2d 140, 144 (Iowa 2017). This Court will examine the whole record and "make 'an independent evaluation of the totality of the circumstances.'" *Id.* (quoting *State v. Brown*, 890 N.W.2d 315, 321 (Iowa 2017)). 'We give deference to the district court's fact findings due to its opportunity to assess the credibility of witnesses, but we are not bound by those findings.'" *Id.* (quoting *State v. Turner*, 630 N.W.2d 601, 606 (Iowa 2001)). "Each case must be evaluated in light of its unique circumstances." *State v. Kurth*, 813 N.W.2d 270, 272 (Iowa 2012).

The District Court Did Not Erred in Granting Hunt's Motion to Suppress. Hunt argues that the Court of Appeals erred in reversing the district court's conclusion that the search of Hunt's person exceeded the plain-feel exception to the warrant requirement.

The Fourth Amendment provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. The Iowa Constitution protects "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated." Iowa Const. art. I, § 8. Therefore, "[b]oth the Fourth Amendment to the United States Constitution and article I, section 8 of the Iowa Constitution prohibit unreasonable searches and seizures by the government." *State v. Tyler*, 830 N.W.2d 288, 291 (Iowa 2013).

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., 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 party raises both federal and state constitutional claims, the Court has discretion to consider either claim first or consider the claims simultaneously. *Ochoa*, 792 N.W.2d at 267. These constitutional protections generally require a warrant before an officer may seize a person, with noted exceptions. *State v. Struve*, 956 N.W.2d 90, 95 (Iowa 2021). The State has the burden of proving by a preponderance of the evidence that a warrantless search falls within one of the exceptions. *See State v. McGrane*, 733 N.W.2d 671, 676 (Iowa 2007).

When police have reasonable suspicion that a crime is being or about to be committed, they may conduct a pat-down search of a suspect. *State v. Bergmann*, 633 N.W.2d 328, 332 (Iowa 2001) (citing *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968)); *see also Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) ("[A]n officer

may, consistent with the Fourth Amendment, conduct a brief investigatory stop when the officer has a reasonable articulable suspicion that criminal activity is afoot."). The purpose of a *Terry* search is "to determine whether the person is in fact carrying a weapon," and the search is "strictly 'limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby.'" *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993) (quoting *Terry*, 392 U.S. at 24, 26). "If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed." *Id.* Protective searches for weapons are limited and are not meant to discover evidence of crime. *Id.* at 373.

During a *Terry* search, an officer is permitted to seize contraband without a warrant under the "plain feel" exception to the warrant requirement. *See id.* The United States Supreme Court in *Dickerson* described the "plain feel" exception as follows:

> If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity [as contraband] immediately apparent, there has been

no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context.

....

[W]hether the officer detects the contraband by sight or by touch, however, the Fourth Amendment's requirement that the officer have probable cause to believe that the item is contraband before seizing it ensures against excessively speculative seizures.

Id. at 375–76 (citations omitted).

The *Dickerson* Court then applied this test to the facts before it. *Id.* at 377–78. The Court concluded the officer who conducted the authorized pat-down search exceeded the narrow scope of *Terry* at the time he gained probable cause to believe a lump in Dickerson's jacket pocket was contraband. *Id.* at 378–79. The Court noted that the officer never thought the lump was a weapon, and he determined the lump was crack cocaine only after "squeezing, sliding and otherwise manipulating the contents of the defendant's pocket." *Id.* at 378. The Court further observed the officer then removed a small plastic bag containing crack cocaine from the defendant's pocket. *Id.* at 369. The Court concluded the plain-feel exception did not apply

because the continued exploration of the jacket pocket after the officer concluded it contained no weapon was not authorized under *Terry* or any other exception to the warrant requirement. *Id.* at 378–79. Because this "further search" was constitutionally invalid, the *Dickerson* Court concluded that the seizure of the cocaine was likewise unconstitutional. *Id.* at 379.

As established by *Dickerson*, during a *Terry* search, an officer is permitted to seize contraband without a warrant "[i]f a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent" as contraband. *Id.* at 375–76; *see also State v. Harriman*, 737 N.W.2d 318, 321 (Iowa Ct. App. 2007) (holding where "the identity of the contraband" (drugs) was "immediately apparent" during the pat down search, the drugs were admissible). The plain-feel doctrine does not apply when an officer must manipulate or squeeze an object in order to identify it as contraband. *Dickerson*, 508 U.S. at 375-76; *Harriman*, 737 N.W.2d at 320.

In this case, Hunt was a person of interest in a shooting that occurred in Dubuque, Iowa on December 24, 2019. (Hrg.

Tr. p. 6, Line 25 – p. 12, Line 13). On December 25, 2019, the Dubuque City Police Department received a tip that Hunt was traveling as a passenger in a Black Impala. (Hrg. Tr. p. 6, Line 25 – p. 12, Line 13). Dubuque Police Investigator Chad Leitzen testified that he located the vehicle and observed it making a turn without signaling. (Hrg. Tr. p. 6, Line 25 – p. 12, Line 13). As such, Leitzen stated that he conducted a traffic stop on the vehicle and approached it with his gun drawn. (Hrg. Tr. p. 6, Line 25 – p. 12, Line 13). Leitzen identified the passenger of the vehicle as Hunt. (Hrg. Tr. p. 6, Line 25 – p. 12, Line 13).

Leitzen testified that Hunt was ordered to keep his hands on the dash. (Hrg. Tr. p. 6, Line 25 – p. 12, Line 13). Leitzen stated that Hunt "seemed nervous". (Hrg. Tr. p. 6, Line 25 – p. 12, Line 13). Leitzen asked Hunt to exit the vehicle . (Hrg. Tr. p. 6, Line 25 – p. 12, Line 13). Leitzen testified that Hunt asked if he was under arrest and Leitzen said he was not, but was being detained for an ongoing investigation. (Hrg. Tr. p. 6, Line 25 – p. 12, Line 13). Leitzen testified that he put Hunt in handcuffs because Hunt was making him nervous. (Hrg. Tr. p. 6, Line 25 – p. 12, Line 13). Leitzen testified that then asked

Hunt for permission to search his pockets, which Hunt said no. (Hrg. Tr. p. 6, Line 25 – p. 12, Line 13).

Leitzen testified that he then advised Hunt he was going pat him down. (Hrg. Tr. p. 6, Line 25 – p. 12, Line 13). Leitzen testified that the purpose of the pat down was to see if Hunt had a weapon. (Hrg. Tr. p. 6, Line 25 – p. 12, Line 13). Leitzen did not find a weapon but felt small hard objects in Hunt's sweatshirt pocket. (Hrg. Tr. p. 12, Line 14 – p. 14, Line 13). Leitzen testified that he believed the objects to be bags of drugs, although he admitted he did not know from feel what kind of drugs. (Hrg. Tr. p. 12, Line 14 – p. 14, Line 13).

Leitzen reached into Hunt's pocket and removed the bags. (Hrg. Tr. p. 12, Line 14 – p. 14, Line 13). Upon visual inspection, Leitzen believed that the bags contained drugs, but still did not know specifically what type. (Hrg. Tr. p. 12, Line 14 – p. 14, Line 13). Leitzen stated that Hunt was ultimately charged with a controlled substance violation. (Hrg. Tr. p. 12, Line 14 – p. 14, Line 13).

Hunt did not challenge the officer's authority to do a pat down search for weapons. Rather, Hunt argued that the officer

exceeded that authority once he continued to search his person without his consent after determining that whatever was in Hunt's pocket was not a weapon. The district court agreed and granted Hunt's motion to suppress:

> The State has not met its burden of showing that there was probable cause to believe that Defendant had drugs in his pocket. The item in Defendant's pocket could have been anything, and Leitzen's testimony that he knew it was drugs lacked sufficient explanation as to how and why he knew that to be true.

Therefore, the crucial question on appeal is whether the object in Hunt's pocket had a contour or mass that made it "immediately apparent" as contraband to satisfy the plain-feel exception to the warrant requirement.

It was proper for the district court to find significant that Leitzen could not identify what type of controlled substance was in the object seized from Hunt's sweatshirt pocket. It is clear from the testimony at the motion to suppress hearing and the body cam footage of the encounter that nature of the substance in the object seized from Hunt's sweatshirt pocket was not "immediately apparent" to Leitzen. (Hrg. Tr. p. 14, Line 14 – p.

20, Line 22; State's Exhibit 1[1]). In fact, Leitzen testified he was a residential expert in all things drug related. (Hrg. Tr. p. 14, Line 14 – p. 20, Line 22). Despite this expertise, Leitzen was unsure as to what exactly was contained in the bag even after he removed them and was examining them by feel and sight. (Hrg. Tr. p. 14, Line 14 – p. 20, Line 22; State's Exhibit #1). Most importantly, even after manipulating the contents and consulting with other officers, Leitzen was still unsure as to the what substance was contained in the bag. (Hrg. Tr. p. 14, Line 14 – p. 20, Line 22; State's Exhibit #1). Based on this record, the object in Hunt's pocket did not have the contour or mass that made it "immediately apparent" as contraband.

The district court did not err by distinguishing this case from *State v. Carey*, No. 12-0230, 2014 WL 3928873 (Iowa Ct. App. Aug. 13, 2014). In *Carey*, the Iowa Court of Appeals affirmed the denial of the defendant's motion to suppress under the plain-feel exception to the warrant requirement. *Id.* at *7. In that case, officers stopped the defendant who they suspected

[1] State's Exhibit #1 contains body cam footage from Officers Ryan Shermann and Stan Ryan.

was involved in a shooting that occurred in Waterloo. *Id.* at *1. While talking with the defendant, the officer conducted a pat down search to ensure he did not have any weapons. *Id.* During the pat down, the officer felt an object in a rear pocket through the defendant's clothing. *Id.* Based on the officer extensive experience with drugs cases including an assignment with a local K9 unit, the officer immediately believed the object he felt was a plastic bag of marijuana. *Id.* When the officer retrieved the object from defendant's pocket, he observed a clear plastic sandwich bag with the end "completely twisted around just like typical marijuana is packaged." *Id.* The bag contained tobacco as well as a small amount of marijuana, including some marijuana seeds and stems. *Id.*

The Iowa Court of Appeals concluded that the seizure of the contraband during a lawful *Terry* pat-down search was justified pursuant to the plain-feel exception to the warrant requirement. *Id.* at 7. To support this conclusion, the Iowa Court of Appeals found that the officer had probable cause to believe the item he felt in Carey's back pocket was a controlled substance:

> Officer Bose has extensive experience with narcotics investigations. He has made hundreds of narcotics arrests in Black Hawk County and has had regular exposure to drug cases due to his assignment with a K9 Unit. He has extensive experience with how marijuana is packaged and sold.
>
> Officer Bose testified he immediately recognized the contents of Carey's back pocket to be a plastic bag of marijuana during the pat-down search he conducted. He made this determination based upon the "very distinct feel" of the bag in Carey's pocket. He explained that smaller quantities of marijuana are usually tied in the corner of a sandwich bag and packaged very tightly with a knot. He testified that packaged marijuana has a different texture than other objects because of seeds and stems. He testified the object in Carey's pocket "felt like a dime sack of weed in a clear plastic bag with a swiveled end on it." Officer Bose denied manipulating the object in any way before making the determination that it was a bag of marijuana. There is nothing in the record that contradicts this testimony.
>
> When Officer Bose removed the object from Carey's pants pocket, he observed a clear plastic bag with the end "completely twisted around just like typical marijuana is packaged." The officer first observed tobacco in the bag, but he could also see green flecks of marijuana and marijuana stems.

Id. at *6-7.

Unlike *Carey*, the record in this case clearly establishes that Leitzen did not know what was in the bags he thought he felt and the incriminating contents of the bag was only detected

after Leitzen seized the bag from Hunt's sweatshirt pocket, inspected and manipulated the contents of bag, and consulted with other officers to determine the identity of the contents. Furthermore, unlike *Carey*, the record is clear that, at the time Leitzen seized the bag from Hunt's sweatshirt pocket, Leitzen only knew that it was some kind bags that that had some type of substance. The bag in Hunt's pocket did not have contour or mass that made it "immediately apparent" as contraband. Therefore, the district court correctly concluded that Leitzen's testimony that he knew it was drugs lacked sufficient explanation as "to how and why he knew that to be true" given that Leitzen was still uncertain as to what was contained the seized bag even after the object was seized. The record in this case lacks the specificity regarding the object discovered that supported the search in *Carey*.

The plain-feel exception does not demand "absolute certainty" from an officer, only probable cause to believe the item is contraband, and the district court required the State to establish a higher degree of proof to seize contraband than probable cause. (State's Brief pp. 12-14). While absolute

certainty may not be required, an item's incriminating nature is not "immediately apparent" if an officer is torn between multiple-choice options. *State v. Ericson*, No. 14-1746, 2016 WL 719178, at *2 (Iowa Ct. App. Feb. 24, 2016) (citing *Commonwealth v. Crowder*, 884 S.W.2d 649, 652 (Ky.1994)). Such a situation occurred in this case. Leitzen was torn between multiple choice options on what was contained in the bag seized from Hunt's sweatshirt pocket. Leitzen own testimony demonstrates that he did not immediately recognize the substance in question as crack cocaine and that it was only recognized after further exploration and manipulation of the bag once it was seized. As such, the "immediately apparent" requirement of the plain feel doctrine has not been satisfied. *See Dickerson*, 508 U.S. at 375-76; *Harriman*, 737 N.W.2d at 320.

After a careful review of this case and deferring to the district court's credibility finding, this Court should conclude that the district court did not erred in granting Hunt's motion to suppress. The seizure of the bag from Hunt's sweatshirt pocket did not fall within the plain-feel exception to the warrant

requirement. Consequently, the evidence obtained from the pocket shall be excluded from the trial in this case.

CONCLUSION

For all of the reasons discussed in the Division above, Hunt respectfully request that this Court affirm the district court order suppressing the controlled substances found on his person.

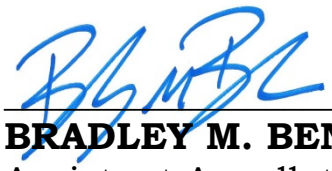
ATTORNEY'S COST CERTIFICATE

I, the undersigned, hereby certify that the true costs of producing the necessary copies of the foregoing Application for Further Review was $3.37, 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 FOR FURTHER REVIEWS

This application complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because:

> [X] this application has been prepared in a proportionally spaced typeface using Bookman Old Style, font 14 point and contains 4,187 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).



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