IN THE SUPREME COURT OF IOWA

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| STATE OF IOWA<br><br>Plaintiff-Appellee,<br><br>v.<br><br>JAHEIM CYRUS,<br><br>Defendant-Appellant | Supreme Court No. 21-0828 |

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
HON. BRENDAN GREINER (MOTION TO SUPPRESS) &
ODELL G. MCGHEE, II, (SENTENCING), JUDGES

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# AMENDED APPELLANT'S BRIEF, ARGUMENT AND REQUEST FOR ORAL ARGUMENT

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FINAL

## CERTIFICATE OF SERVICE

On the 23rd day of August, 2022, 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 Jaheim Cyrus, 2210 Dean Ave., Des Moines, IA 50317.

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Cases: Page:

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

**I. IS A CITIZEN SEIZED IN A SITUATION WHEREIN LAW ENFORCEMENT PULLS UP BESIDE THE CITIZEN'S CAR, TRAINS A SPOTLIGHT ON HIM AND ACTIVATES THE REAR OVERHEAD LIGHTS OF THE POLICE CRUISER? WOULD A REASONABLE PERSON HAVE PERCEIVED THAT HE WAS FREE TO LEAVE? SHOULD THE DISTRICT COURT HAVE TAKEN INTO ACCOUNT CYRUS' MINORITY STATUS IN APPLYING THE 'REASONABLE PERSON' TEST, OR SHOULD THE TEST BE ABANDONED IN FAVOR OF STRICT SCRUTINY?**

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State v. Turner, 630 N.W.2d 601, 606 (Iowa 2001)

State v. Akers, No. 17-0577, 2018 WL 1182616, at 4 (Iowa Ct. App. March 7, 2018)

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State v. Wilkes, 756 N.W.2d 838, 844 (Iowa 2008)

State v. Fogg, 936 N.W.2d 664, 669 (Iowa 2019)

State v. Harlan, 301 N.W.2d 717, 719–20 (Iowa 1981)

Iowa Code § 718.2 (2021)

Iowa Code § 321.424 (2021)

Iowa Code §§ 321.423(2)(3)(5)(6) (2021)

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David K. Kessler, *Free to Leave? An Empirical Look at the Fourth Amendment's Seizure Standar*d, 99 J. Crim. L. & Criminology 51, 51-52 (2008)

Alisa M. Smith et al., *Testing Judicial Assumptions of the "Consensual" Encounter: An Experimental Study*, 14 Fla. Coastal L. Rev. 285, 291 (2013)

Wayne R. LaFave, *Pinguitudinous Police, Pachydermatous Prey: Whence Fourth Amendment Seizures*, 1991 U. Ill. L. Rev. 729, 739-40 (1991)

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Marcy Strauss, *Reconstructing Consent*, 92 J. Crim. L. & Criminology 211, 212 (2001)

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## ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because it involves substantial issues of first impression in Iowa. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(c). Would a 'reasonable person' in a parked car feel free to leave after law enforcement pulls up alongside his vehicle, shines a spotlight on him and activates the rear emergency lights on the police cruiser? In applying the 'reasonable person' standard should the court consider a defendant's minority status? Should the reasonableness test be replaced by applying strict scrutiny to search and seizure cases?

## STATEMENT OF THE CASE

***Nature of the Case:*** This is an appeal, by Jaheim Romaine Cyrus, from conviction and sentencing for the offense of (Count I) carrying weapons in violation of Iowa Code § 724.4(1) (2019).

***Course of Proceedings:*** Cyrus was charged with the above-referenced carrying weapons charge and (Count II) Theft

in the Fourth Degree in violation of Iowa Code § 714.2(4) (2019), on November 23, 2020. (Trial Information) (App. pp. 4-5).

The defense filed a motion to suppress on January 25, 2021. (Motion to Suppress) (App. pp. 6-7). On February 26, 2021, a hearing was held on Cyrus' motion to suppress. (Transcript of Proceedings). On March 3, 2021, the court entered an order denying the motion to suppress. (Order on Motion to Suppress) (App. pp. 19-22).

On April 22, 2021, a stipulation to the minutes of testimony was filed. (Stipulation to the Minutes of Testimony) (App. pp. 23-24).

On April 22, 2021 and May 10, 2021, waivers of jury trial were filed. (Waivers of Jury Trial) (App. pp. 25-26). A hearing on the waivers of jury trial was held on May 10, 2021 and the court informed counsel that a trial on the minutes of testimony would occur on June 14, 2021. (Transcript of Proceedings p. 10 L 8-16).

On June 14, 2021, the court entered an order regarding the trial on the minutes of testimony and setting a date for sentencing. (Order Accepting Guilty Plea and Setting Sentencing) (App. pp. 27-29).[1]

Cyrus was given a suspended sentence of two years, placed on probation for a period of two years and fined $1,000 dollars. (06/14/21 Sentencing Order) (App. pp. 30-33).

On June 14, 2021, a notice of appeal was filed. (Notice of Appeal) (App. pp. 34-35).

***Facts:*** City of Des Moines police officer Shawn Morgan was working the third shift patrol (1:00 p.m-11:00 p.m.) on October 16, 2020, at about 9:00 p.m., when he was dispatched to 2617 Ashby Avenue to investigate a suspicious light gold Chevrolet Impala. (Suppression Hrg. pp. 9 L 13-22, 10 L 18-25, 11 L 1-23).

Morgan located a vehicle matching the description parked on the north side of the intersection of 26th and Ashby, he pulled

[1] The court did not file findings of facts and conclusions of law.

to the left side of the vehicle, with the front of the police cruiser next to the rear 1/3 of Cyrus' Impala. Morgan observed an individual inside the car and activated his spotlight. (Suppression Hrg. p. 11 L 24-25, p. 12 L 1-8, p. 34 L 17-24). The spotlight activated by Morgan is extremely bright. (Suppression Hrg. p. 27 L 17-25, p. 28 L 1-25, p. 29 L 1-15). The top rear warning lights of the police car were also activated prior to Morgan stopping. (Suppression Hrg. p. 16 L 7-9, p. 35 L 16-25, p. 36 L 1-21).

Next, the individual in the Impala opened the driver's side door and looked back at Morgan. (Suppression Hrg. p. 13 L 1-12). He started to exit the Impala, putting his left foot on the ground, but then Morgan approached the vehicle, and engaged the occupant, Mr. Cyrus, in conversation. Cyrus then put his foot back in the vehicle. (Suppression Hrg. p. 12 L 25, p. 13 L 1-9, p. 33 L 20-25, p. 34 L 1-16, Defendant's Exhibit A Dashcam Video 02:07-02:24).[2]

[2] All video times referenced are approximate.

Morgan testified that he detected "…a strong odor of marijuana." (Suppression Hrg. p. 14 L 9-14). Morgan asked Cyrus if there was marijuana in the car and Cyrus denied being in possession of marijuana. (Suppression Hrg. p. 14 L 15-24).

Morgan patted Cyrus down and discovered a round of ammunition in the left front pocket of Cyrus' jacket. (11/23/20 Minutes of Testimony p. 4) (Conf. App. p. 7). Morgan searched the Impala and discovered a handgun in the center console. (Minutes of Testimony p. 4) (Conf. App. p. 7).

Morgan testified that Cyrus was lawfully parked at the time of the interaction. (Suppression Hrg. p. 22 L 7-8). Morgan was in full uniform and was armed. (Suppression Hrg. p. 26 L 2-12). Morgan's vehicle was partially blocking Cyrus' ability to drive away. (Suppression Hrg. p. 37 L 7-18).

Morgan forgot to put on his body cam, or a component thereof, prior to confronting Cyrus. (Suppression Hrg. p. 13 L 15-25, p. 14 L 1-6; Minutes of Testimony pp. 4-5) (Conf. App. pp. 7-8). As a result, the only portions of the verbal exchange

available to review are from the dash cam of the police cruiser. Conversation between Morgan and Cyrus took place, but was not recorded. (Suppression Hrg. p. 23 L 1-p. 25 L 10). Much of what can be heard consists of voices talking on the police radio. (Suppression Hrg. p. 38 L 21-25, p. 39 L 1-10; Defendant's Exhibit A Dashcam Video). Morgan acknowledged "that the statement that induce[d] [Cyrus] to take his left foot and put it back into his car" was directed toward Cyrus and not over the police radio. (Suppression Hrg. p. 39 L 11-15; Defendant's Exhibit A Dashcam Video at 1:52-2:32).

Morgan admitted that he could have parked behind Cyrus and then approached him on foot. When Morgan exited the police cruiser he did so more quickly than usual because Cyrus' driver's door was open and he wanted to make sure he stayed where he was. (Suppression Hrg. p. 40 L 10-p. 41 L 24).

Morgan also admitted that his car was at least partially blocking Cyrus' access to the only through street 26th Place. (Suppression Hrg. p. 37 L 4-18). Ashby comes to a dead end in

both directions. https://iowadot.gov/maps/msp/citypdf/DES-MOINES-ci.pdf.

Jaheim Cyrus was called by the defense. (Suppression Hrg. p. 47 L 5-7). Cyrus testified that upon being approached by Morgan, he asked "Can I get out of my car?" Morgan responded "No, just stay in the car." (Suppression Hrg. p. 47 L 16-25, p. 48 L 1-25, p. 49 L 1-3). Cyrus testified that he did not feel free to leave his vehicle. (Suppression Hrg. p. 50 L 23-25).

Additional relevant facts will be discussed below.

## ARGUMENT

**I. THE DISTRICT COURT ERRED IN OVERRULING CYRUS' MOTION TO SUPPRESS AS CYRUS WAS SEIZED WHEN LAW ENFORCEMENT PULLED UP BESIDE HIS CAR, TRAINED A SPOTLIGHT ON HIM AND ACTIVATED THE REAR OVERHEAD LIGHTS OF THE POLICE CRUISER THUS CREATING A SITUATION WHEREIN A REASONABLE PERSON WOULD NOT HAVE PERCEIVED THAT HE WAS FREE TO LEAVE. ADDITIONALLY, THE DISTRICT COURT SHOULD HAVE TAKEN INTO ACCOUNT CYRUS' MINORITY STATUS IN APPLYING THE 'REASONABLE PERSON' TEST, OR THE STRICT SCRUTINY STANDARD.**

***Standard of Review:*** Appellate review of constitutional claims is de novo. State v. Tague, 676 N.W.2d 197, 201 (Iowa

2004). The appellate court will make 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). In a motion to suppress, the State bears the burden of showing by a preponderance of the evidence that an officer's warrantless seizure was constitutional. Tague, 676 N.W.2d at 204.

***Preservation of Error:*** Error was preserved by virtue of Cyrus' motion to suppress the evidence obtained from the stop, arguing both his Fourth Amendment and Article I, section 8 rights were violated, and the district court's subsequent adverse ruling. (Motion to Suppress pp. 1-2, 03-03-21 Order on Motion to Suppress) (App. pp. 6-7, 19-22).

***Discussion:*** The complained-of seizure in this case was not supported by reasonable suspicion or probable cause at the time of occurrence. *See* State v. Akers, No. 17-0577, 2018 WL 1182616, at 4 (Iowa Ct. App. March 7, 2018) (evidence supplying probable cause obtained after the seizure occurred

"could not serve as an after-the-fact justification for the traffic stop."). The informant did not report observing any criminal activity, nor was any criminal activity observed by Officer Morgan. (Minutes of Testimony p. 3, Suppression Hrg. p. 22 L 7-8) (Conf. App. p. 6).

The Fourth and Fourteenth Amendments to the United States Constitution and Article I, section 8 of the Iowa Constitution protect individuals from unreasonable searches and seizures. State v. Hoskins, 711 N.W.2d 720, 725-26 (Iowa 2006). "When the police stop a car and temporarily detain an individual, the temporary detention is a 'seizure'" subject to the requirement of constitutional reasonableness. State v. Predka, 555 N.W.2d 202, 205 (Iowa 1996) (quoting Whren v. United States, 517 U.S. 806, 810 (1996)).

Warrantless searches and seizures are per se unreasonable unless an exception to the warrant requirement exists. Hoskins, 711 N.W.2d at 726. "As a general matter, the decision to stop an automobile is reasonable where the police

have probable cause to believe that a traffic violation has occurred." Whren, 517 U.S. at 810. Police may detain a person on less than probable cause when they suspect the person is about to commit a crime or believe criminal activity is taking place. State v. Pals, 805 N.W.2d 767, 773–74 (Iowa 2011); Terry v. Ohio, 392 U.S. 1, 23 (1968).

**A. The totality of the circumstances demonstrate that Cyrus was seized without reasonable suspicion or probable cause.**

"A traffic stop is unquestionably a seizure." State v. Tyler, 830 N.W.2d 288, 292 (Iowa 2013). Although this case does not involve a textbook traffic stop, the totality of the circumstances of the encounter demonstrate that Cyrus was seized for constitutional purposes.

A seizure occurs if "the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." Florida v. Botstick, 501 U.S. 429, 437 (1991) (citation and internal quotation omitted); see also U.S. v. Mendenhall, 446

U.S. 544, 554 (1980) (the question is whether under all the circumstances surrounding the incident, "a reasonable person would have believed that he was not free to leave."). This Court will "make an independent evaluation [based on] the totality of the circumstances as shown by the entire record." State v. Kurth, 813 N.W.2d 270, 272 (Iowa 2012) (citation omitted). "Each case must be evaluated in light of its unique circumstances." Id. "[T]he location of the patrol car(s) in relation to the parked vehicle [is] a factor in determining whether a seizure occurred under the Fourth Amendment." State v. Wilkes, 756 N.W.2d 838, 844 (Iowa 2008).

More recently, in State v. Fogg, the Iowa Supreme Court noted:

> [F]or a seizure to occur, there must be more—'objective indices of police coercion,' '[t]he element of coercion,' or 'coercive or authoritative behavior.' One way of looking at the matter is whether the officer was simply engaging in activity that any private person would have a right to engage in.

State v. Fogg, 936 N.W.2d 664, 669 (Iowa 2019) (quoting Wilkes, 756 N.W.2d at 843-44 and citing State v. Harlan, 301 N.W.2d

717, 719–20 (Iowa 1981)).

The Iowa Code specifically lists those occupations authorized to use emergency lights and other emergency equipment. Iowa Code § 321.424 (Iowa 2021). Flashing lights are prohibited with the following exceptions:

> a. On an authorized emergency vehicle.
> b. On a vehicle as a means of indicating a right or left turn, a mechanical failure, or an emergency stop or intent to stop.
> c. On a motor vehicle used by a rural mail carrier when stopping or stopped on or near a highway in the process of delivering mail, if such a light is any shade of color between white and amber and if it is mounted as a dome light on the roof of the vehicle.
> d. On a vehicle being operated under an excess size permit issued under chapter 321E.
> e. A flashing blue light on a vehicle upon which a blue light is permitted pursuant to subsection 3 of this section.
> f. A flashing white light, including a flashing headlamp, is permitted on a vehicle pursuant to subsection 7.
> g. Flashing red and amber warning lights on a school bus as described in section 321.372, and a white flashing strobe light mounted on a school bus as permitted under section 321.373, subsection 7.
> h. A flashing amber light is permitted on a towing or recovery vehicle, a utility maintenance vehicle, a municipal maintenance vehicle, a highway maintenance vehicle, a construction vehicle, a solid waste or recycling collection service vehicle, or a

> vehicle operated in accordance with subsection 6 or section 321.398 or 321.453.
> i. Modulating headlamps in conformance with 49 C.F.R. § 571.108 S7.9.4. are permitted on a motorcycle.
> j. On a vehicle being operated as an escort vehicle for a funeral procession as provided in section 321.324A.

Iowa Code § 321.423(2) (Iowa 2021). The use of amber, blue, and red flashing lights is likewise restricted. Iowa Code § 321.423(3), (5), (6) (2021). Public safety is paramount among reasons for proscribing the impersonation of public officials, and the limitation of who may employ emergency lights, as discussed in State v. Speaks:

> Speaks, along with three other defendants, decided to run away. Because they did not have any money and the Blazer they were driving was having trouble, the four decided to stop a passing car using the light bar on top of the Blazer. The bar contained four yellow lights used by Blake Privitt's father in his duties as a mail carrier. After Privitt made a few unsuccessful attempts to make a stop, Speaks took over as the driver. Speaks was able to get Hauser to stop, ultimately leading to her death.

State v. Speaks, 576 N.W.2d 629, 631 (Iowa Ct. App. 1998). Under the provisions of the Iowa Code, a private person would

not have had the right to pull alongside another vehicle, park in the middle of the road, shine a blinding light into the driver's face, and activate emergency lights as Morgan did in this case. If a private individual did these things, they would be subject to prosecution. See e.g. Iowa Code §§ 718.2 (2021) (forbidding impersonating a public official); 321.424 (listing the entities allowed to display emergency lights on vehicles and proscribing their placement).

"Encounters with the police remain consensual '[s]o long as a reasonable person would feel free to disregard the police and go about his business.'" State v. Lowe, 812 N.W.2d 554, 570 (Iowa 2012) (quoting State v. Smith, 683 N.W.2d 542, 547 (Iowa 2004)). No reasonable person would feel free to leave after a police car pulled up beside their car and parked blocking the street, trained a spotlight on them, activated rear-facing warning lights, and the officer quickly exited his car.

There is also a portion of the video depicting Cyrus putting his left foot outside of the car, as if to exit, Morgan saying

something to him, and Cyrus putting his foot back in the car. (Suppression Hrg. p. 39 L 11-15, Defendant's Exhibit A Dashcam Video at 1:52-2:32). Cyrus asserted that during the exchange he asked Morgan "Can I get out of my car?" He went on to testify that Morgan's response was "No, just stay in the car." (Suppression Hrg. p. 47 L 16-p. 49 L 3, p. 50 L 23-25).

The district court found that "Mr. Cyrus is not credible; the video fails to corroborate his testimony and he was impeached for dishonesty (based upon his admission to prior juvenile convictions for burglary and theft Tr. p. 51 L 16-23). (Order on Motion to Suppress p. 3) (App. p. 21). The court stated it was "not convinced Officer Morgan said anything directly to Mr. Cyrus following 'How are you tonight?'." (Order on Motion to Suppress p. 3) (App. p. 21).

The court's conclusions are contradicted by the evidence. Morgan acknowledged that he said something to Cyrus, and that Cyrus put his foot back in the car after that. (Suppression Hrg. p. 34 L. 13-16, p. 39 L. 11-15). However, Morgan claimed

that he did not recall telling Cyrus to stay in his car. (Suppression Hrg. p. 15 L. 11-14).

The squad-car video shows Morgan exit his car, say "three-zero-three" into his radio, then say something to Cyrus before continuing to speak to dispatch. (Defendant's Exhibit A Dashcam Video at 2:12-2:30). While the audio of what Morgan said to Cyrus is quiet because his body camera was not on, if one listens to the video at high volume through speakers or headphones, what Morgan said is audible: he said "stay in the car for me." (Defendant's Exhibit A Dashcam Video at 2:21). The district court was incorrect in concluding that Morgan did not order Cyrus to remain in his car.

The fact that Morgan activated his warning lights, shined a spotlight on Cyrus, blocked the only road which would allow Cyrus to leave, exited his vehicle quickly so that Cyrus would not leave, and ordered him to remain in his car demonstrate that this was a seizure, not a consensual encounter. The

district court erred in concluding otherwise, and in denying Cyrus' motion to suppress.

**B. This Court should take Cyrus' minority status into consideration when evaluating whether a reasonable person in his position would have felt free to end the police encounter.**

This Court should consider empirical data supporting the "…common sense observation that most reasonable people do not feel free to leave when approached by the police in a variety of circumstances." See Fogg, 936 N.W.2d at 677 (Appel, J., dissenting) (citing David K. Kessler, *Free to Leave? An Empirical Look at the Fourth Amendment's Seizure Standar*d, 99 J. Crim. L. & Criminology 51, 51-52 (2008) and Alisa M. Smith et al., *Testing Judicial Assumptions of the "Consensual" Encounter: An Experimental Study*, 14 Fla. Coastal L. Rev. 285, 291 (2013)).

The defense argued below that the 'reasonable person' test is a legal fiction. "As Professor Wayne LaFave puts it, 'the Court finds a perceived freedom to depart in circumstances when only the most thick-skinned of suspects would think such a choice was open to them.'" (Brief in Support of Motion to Suppress p.

5 (quoting Wayne R. LaFave, *Pinguitudinous Police, Pachydermatous Prey: Whence Fourth Amendment Seizures*, 1991 U. Ill. L. Rev. 729, 739-40 (1991)) (App. p. 12).

Other state courts have criticized the 'reasonable person' test as applied to Fourth Amendment cases:

> It is, of course, a convenient legal fiction to suppose that most people would elect to walk away from a police officer who asks to speak with them. Most would probably believe that it is, at least, in their best interests to cooperate, if not their duty. Indeed, walking away, or more precisely flight, can itself be a basis for a seizure.

State v. Wilt, No. 19108, 2002 WL 272593, at *4 (Ohio Ct. App. Feb. 22, 2002).

A dissenting judge of the Virginia Court of Appeals has noted that the "free to walk away test" is a legal fiction. Hill v. Commonwealth, 812 S.E.2d 452, 463 (Va. Ct. App 2018) (aff'd, 832 S.E.2d 33 (Va. Ct. App. 2019) (Humphreys, J., dissenting) ("[T]he encounter is not consensual at all and our oft repeated observation that these encounters are by definition consensual because citizens can ignore the officer and just walk away is as

much a legal fiction as most citizens believe it to be.") The Wisconsin Supreme Court has observed that "[t]o some extent, the 'reasonable person' here is a legal fiction. That defendants often consent to searches of areas that reveal incriminating evidence demonstrates that people often do not feel free to decline an officer's request, even absent a manifest show of authority." County of Grant v. Vogt, 850 N.W.2d 253, 262 n. 14 (Wis. 2014).

The district court gave short shrift to Cyrus' request for additional scrutiny based upon the fact that Cyrus is a Black man. (Order on Motion to Suppress p. 3) (App. p. 21). The defense argued that the Fourth Amendment reasonable person test violates the principles of the Iowa Constitution because it "assumes whiteness." (Brief in Support of Motion to Suppress p. 6) (App. p. 13). "[C]ourts almost never determine whether particular races or cultures may be particularly susceptible to such authoritative pressures." Marcy Strauss, *Reconstructing Consent*, 92 J. Crim. L. & Criminology 211, 212 (2001).

> If nearly 91% of Iowans are white, and the test "will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs," how are Iowa's communities of color accounted for? Is the Iowa version of the 'reasonable person' only 4.1% Black? Does that mean it only accounts for 4.1% of the Black Community's perspectives on policing? Less than that?

(Brief in Support of Motion to Suppress p. 6) (App. p. 13).

In light of recent, well-known events involving Black suspects and the police, defense counsel posits the very real possibility that had Cyrus not acquiesced, he may have put his life in danger:

> Exercise of citizen rights in the face of police rights may cause police to escalate the intrusiveness of the encounter and place the citizen at risk of both physical harm and formal arrest. Failure to exercise citizen rights by responding to the officer, however, may be viewed as consensual conduct removing the encounter from Fourth Amendment analysis."

James A. Adams, *Search and Seizure as Seen by Supreme Court Justices: Are They Serious or Is This Just Judicial Humor*, 12 St. Louis U. Pub. L. Rev. 413, 441 (1993) (quoted in Brief in Support of Motion to Suppress pp. 6-7) (App. pp. 13-14).

On April 11, 2021, police in Minnesota pulled a vehicle over for having expired license tags and an air freshener dangling from the rear-view mirror. Vanessa Romo, et. al., *Kim Potter is found guilty of manslaughter in the death of Daunte Wright*, NPR (December 23, 2021) (available at https://www.npr.org/2021/12/23/1066012247/kim-potter-trial-daunte-wright). After stopping the vehicle, the police realized that the driver, Daunte Wright, was wanted for failure to appear on a weapons charge. Id. Wright freed himself from an officer who was trying to handcuff him and attempted to drive away. Id. Officer Kim Potter fatally shot Wright. Id.

In 2020, Andre Hill emerged from his garage holding a cell phone in his hand and was fatally shot by a police officer. Alia Chughtai, *Know their names: black people killed by the police in the* US, Al Jazeera (available at https://interactive.aljazeera.com/aje/2020/ know-their-names/index.html).

On the night of June 12, 2020, 27-year-old Rayshard Brooks was confronted by Atlanta police based upon a complaint that he passed out in his car. When the police attempted to restrain Brooks, he fled on foot and was fatally shot in the back. Id.

Philando Castile, his girlfriend, and her four-year-old daughter were driving in suburban Minneapolis-St. Paul when they were stopped by police. Castile informed police that he had a permit to carry weapons and that there was a firearm in the vehicle. Shortly thereafter, the police officer shot and killed Castile. Id.

These are only a few examples of young Black men being gunned down without justification as a result of being stopped or investigated by members of law enforcement. Professor Adams' fear of increased police "intrusiveness" (quoted above) is more than theoretical; it is a fact, and its occurrence is not uncommon.

In State v. Harrison, this Court determined that a license plate frame obscuring the name of the county of issuance is a violation of the law and that the officer's observation of the obscured portion of the plate provided justification for stopping Harrison's vehicle. State v. Harrison, 846 N.W.2d 362, 369 (Iowa 2014). The dissent articulated concern that "…unbridled discretion to stop vehicles on the open road…without some constitutional restraints, African–Americans and other minority groups may be subject to stops for 'driving while black.'" Id. at 374 (Appel, Justice dissenting) (citing David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J.Crim. L. & Criminology 544, 550–53 (1997)).

In State v. Lyon, it was determined that police had probable cause initiate a traffic stop based upon a non-functioning license plate light. State v. Lyon, 862 N.W.2d 391 (Iowa 2015).

The defendant in another case was convicted of Operating While Intoxicated based upon the existence of non-impairing marijuana metabolites in his system in State v. Childs, 898 N.W.2d 177 (Iowa 2017). The dissent noted that marijuana laws disproportionately affect Black citizens and opined that inactive metabolite laws could be a contributing factor to the disparity. Id. at 199 (Appel, J., dissenting).

In State v. Brown, this Court found that probable cause existed justifying the stop of Brown's vehicle which ran a red light. State v. Brown, 930 N.W.2d 840 (Iowa 2019). In his dissent, Chief Justice Cady protested the majority's refusal to address the subjective motive of the arresting officer and asserted that "[o]ur law must, instead, prohibit pretextual traffic stops motivated by race or any other classification, even when probable cause for a traffic violation exists." Id. at 863 (Cady, C.J., dissenting). He noted that pretextual stops are among the reasons that the Black population is disproportionately affected by the criminal justice system. Id.

In a separate dissenting opinion, Justice Appel noted that pretextual stops are among the reasons that the Black population is disproportionately affected by the criminal justice system, and that they can engender "fear and surprise" due to an "unsettling show of authority" and produce "substantial anxiety" which is born by motorists. Id. at 922. (Appel, J., dissenting) (citations omitted).

The Iowa Supreme Court has found the existence of probable cause to search a defendant's vehicle following an encounter with an officer who approached the vehicle to tell the driver she was illegally parked. State v. Warren, 955 N.W.2d 848, 865 (Iowa 2021). Additionally, the driver admitted her driver's license was suspended; the officer subsequently found it was revoked. Id.

None of these factors, supportive of stops and searches, were present in the instant case. Cyrus was legally parked, no equipment infractions were noted, and Morgan did not observe Cyrus committing a crime.

This Court has recognized it should apply Article I, section 8, "in a broad and liberal spirit." State v. Height, 91 N.W. 935, 937 (Iowa 1902); State v. Cline, 617 N.W.2d 277, 285-86 (Iowa 2000) (abrogated on other grounds by State v. Turner, 630 N.W.2d 601, 606 n.2 (Iowa 2001)). Its protections "are not meant to benefit the public generally. They are meant to protect individual citizens and their reasonable expectations of privacy." State v. Gaskins, 866 N.W.2d 1, 16 (Iowa 2015).

As an example of the broad and liberal interpretation of Article I, section 8, the Cline Court referred to the fact that Iowa was one of the first states to adopt the exclusionary rule as a remedy for unreasonable searches and seizures and did so years before the U.S. Supreme Court's decision in Weeks v. United States, 232 U.S. 383 (1914). Cline, 617 N.W.2d at 285. Although Iowa's initial adoption of the rule was in a civil case from 1876, the Court later adopted it for criminal proceedings in 1902. Id. (citing Reifsnyder v. Lee, 44 Iowa 101 (1876); State v. Height, 91 N.W. 935, 940 (1902)).

The Iowa Supreme Court has reiterated its concern that "unlimited discretion to stop vehicles on the open road may give rise to allegations of racial discrimination, characterized by the descriptive phrase 'driving while black.'" State v. Coleman, 890 N.W.2d 284, 287 (Iowa 2017).

Racial disparities in policing lead to racial disparities in incarceration. Chief Justice Cady acknowledged that link:

> As I mentioned last year, the criminal justice system in Iowa and across the nation is marked by racial disparities. There is an overrepresentation of African Americans and other minorities in the criminal justice system—from arrest to incarceration. For example, Iowa incarcerates 9.4% of its adult African American males, which is the third highest percentage in the nation.

Chief Justice Mark S. Cady, *2015 State of the Judiciary* p. 4 (Jan. 14, 2015) (available at http://www.iowacourts.gov/wfdata/files/StateofJudiciary/2015/print%20and%20web%20speech.pdf).

Nationwide, Black individuals are incarcerated in state prisons at a rate of 5 to 1 compared to whites. Ashley Nellis, Ph.D., *The Color of Justice: Racial and Ethnic Disparity in State*

*Prisons*, The Sentencing Project, (2016, updated 2021) at 18 (available at https://www.sentencingproject.org/publications /color-of-justice-racial-and-ethnic-disparity-in-state-prisons/). In Iowa, "the rate of imprisonment among Black people is more than nine times that for whites." Id. at 9.

Pretextual stops are not consistent with the guarantees of Article I, section 8 of the Iowa Constitution. Such stops allow for the expansion of warrantless intrusions and are not faithful to the underlying justifications of warrant exceptions. In Gaskins, the Iowa Supreme Court rejected Arizona v. Gant's "evidence gathering" rationale for warrantless automobile searches as allowing the search-incident-to-arrest exception to swallow the warrant requirement. Gaskins, 866 N.W.2d at 13. The Court found "construing the exception so broadly 'would serve no purpose except to provide a police entitlement'" and that such entitlements are "incompatible with Iowans' robust privacy rights." Id. (quoting Arizona v. Gant, 556 U.S. 332, 347, (2009)). Allowing law enforcement to use traffic stops as a

subterfuge for seizing a person for an unrelated criminal investigation is the definition of a "police entitlement."

Cyrus recommends that this Court recognize a different standard for approaching pretextual stops under Article I, section 8 of the Iowa Constitution. Since the stop was pretextual, all evidence obtained thereof should be excluded.

The federal government may not "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." Rose v. Mitchell, 443 U.S. 545, 555–56 (1979). "To be certain, the Equal Protection Clause prohibits selective enforcement of the law based on racially discriminatory grounds. Brown, 930 N.W.2d at 851 (citation omitted).

It is unknown whether the disparities in question have been caused intentionally (i.e. with "invidious intent"), or unintentionally. However, there may appear "… a clear pattern,

unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face." Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266, (1977). This pattern may be due to implicit bias. "Any verdict, judgment, or sentence motivated by any type of bias is unjust." State v. Plain, 898 N.W.2d 801, 829 (Iowa 2017) (Cady, C.J., concurring specially).

Empirical evidence supports the existence of implicit bias in the criminal justice system:

> Researchers also find that, when officers automatically focus attention on black individuals as dangerous and unconsciously interpret their behaviors as hostile, they are more likely to conduct unnecessary stops and frisks triggered not by conscious racial animus but by implicit racial biases. The objective but easily malleable standards of 'reasonable suspicion' and 'reasonable force' do little to constrain officers from acting on these implicit biases. In short, social cognition confirms how implicit biases 'perpetuate discrimination through covertly influencing who is deemed suspicious, who is stopped and searched, who is deemed a threat, what determinations of 'reasonable force' are made, who is judged to be armed and dangerous, and who gets shot.

Shawn E. Fields, *Weaponized Racial Fear*, 93 TLN L.R. 931, 953-54 (2019) (footnotes omitted).

In recognizing the existence of racial bias, the law provides that criminal defendants have a Sixth Amendment right to an impartial jury which must be drawn from a fair cross-section of the community. Plain, 898 N.W.2d at 821. A criminal defendant is entitled to a jury "…composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds." Batson v. Kentucky, 476 U.S. 79, 86 (1986) (citations and internal quotation marks omitted).

Since criminal defendants have a right to be judged by a jury of their peers, the 'reasonable person' standard should take into account the fact that there are racial differences in how police action is perceived. There are empirical reasons for these differences:

> A separate study on racial disparities in the traffic context found African Americans to be more than two-and-a-half times as likely to be stopped by police as whites and found African American men to be four times as likely to be stopped as white women. Further tilting the scales, federal law enforcement agencies, in their training of state and municipal police, have aggressively promoted traffic enforcement as the primary entry point for drug enforcement, for which African Americans are known to be selectively targeted. It is now standard law enforcement policy to use the traffic stop as a pretext for drug enforcement.

Trevor George Gardner, *Police Violence and the African American Procedural Habitus,* 100 BU L.R. 849, 872-73 (2020) (footnotes omitted).

The Iowa Constitution provides that "[a]ll laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens." Iowa Const. art. 1, § 6.

"For legislation to be violative of the Iowa Constitution under the rational basis test, the classification must involve extreme degrees of overinclusion and underinclusion in relation

to any particular goal." Ames Rental Property Ass'n v. City of Ames, 736 N.W.2d 255, 260 (Iowa 2007) (citation and internal quotation omitted).

No particular statute is at issue in the instant case. Police practices, and whether those practices conform to the state and federal constitutions, are at the center of the instant controversy.

Recently, Justice Mansfield noted that the Massachusetts Supreme Judicial Court addressed the issue of racially motivated stops by adopting a burden-shifting approach which allows the defendant to articulate facts germane to the issue of racial profiling for purposes of demonstrating "a reasonable inference that the officer's decision to initiate the stop was motivated by race or another protected class." Warren, 955 N.W.2d at 871 (Mansfield, J., concurring). Once the defendant establishes the inference, the burden shifts to the government. "This Batson-challenge-to-a-traffic-stop approach wouldn't necessarily ban pretextual stops but would certainly require a

substantial race-neutral pretext." Id.

In State v. Fogg, Justice Appel addressed the perception of reasonable individuals approached by the police:

> Common sense, social-psychological research, and empirical studies combine to strongly suggest that reasonable people generally do not believe they can simply disregard an approaching, uniformed police officer, and certainly would not feel free to leave under the circumstances of this case.

Fogg, 936 N.W.2d at 680 (Appel, J., dissenting) (citations omitted).

As the defense summarized, the officer pulled up next to Cyrus' vehicle in a marked police cruiser (when he could have pulled up behind him) and blocked the street, trained his spotlight on the driver's side door, stopped with the engine running, and exited the police cruiser with the spotlight still shining directly on Cyrus' face. The video depicts Cyrus attempting to exit his car, but after conversation with Morgan, he put his foot back in the car. "At that point, the officer's words and actions conveyed the message that compliance was required." (Brief in Support of Motion to Suppress p. 8) (App.

p. 15).

Certain authors have suggested replacing the reasonableness test with strict scrutiny standard:

> The standard adopted must address three primary considerations: the fourth amendment's structure and objectives, the protections accorded other fundamental rights, and the policy concerns adhering to balancing tests generally. Taking these considerations into account, the standard that emerges as the soundest alternative to the Court's current vague balancing test is a single-tiered strict scrutiny standard based on a compelling government interest-least intrusive means test.

Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MN L.R. 383, 431 (1988). See also Cynthia Lee, *Package Bombs, Footlockers, and Laptops: What the Disappearing Container Doctrine Can Tell Us About the Fourth Amendment*, 100 JCRLC 1403, 1486-87 (2010) (suggesting that the U.S. Supreme Court draw upon its equal protection jurisprudence in discerning Fourth Amendment violations). Cyrus urges this Court to embrace this standard of review. Adoption of such an approach by this Court would underscore the preference for search warrants and could make

the racial component of search and seizure moot.

Pretextual stops endorse unbridled police discretion at the expense of Iowans' privacy and security interests. Pretextual stops also increase the risk of disparate treatment of minorities within the justice system. Pretextual stops are antithetical to Iowa's respect for civil liberties and equal protection, and are therefore unconstitutional under Article I, section 8 of the Iowa Constitution.

The State has a greater interest in enforcing moving violations, which are inherently dangerous, than it does parking violations. See Stephen D. Hayden, *Parking While Black: Pretextual Stops, Racism, Parking, and an Alternative Approach* 44 S IL U L.J. 105, 142 (2019). In this case, even though Cyrus was parked, there was no parking violation to investigate. The stop in this case was entirely pretextual. Officer Morgan was dispatched to investigate a report of someone engaging in perfectly legal conduct. Cyrus was seized from the moment Morgan pulled up next to him, pointed the spotlight on him and

activated rear-facing top lights. No reasonable person would have felt free to leave under these circumstances, particularly when viewed through the lens of disparate treatment of racial minorities by the police.

This matter should be reversed and remanded with directions to grant Cyrus' motion to suppress.

## CONCLUSION

***WHEREFORE,*** Jaheim Cyrus respectfully requests that this Court reverse and remand this matter with directions to grant his motion to suppress for the reasons asserted above.

## 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 $5.82, and that amount has been paid in full by the Office of the Appellate Defender.

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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/ Josh Irwin* Dated: 8/23/22

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