STATE CONSTITUTIONAL LAW—SEARCH AND SEIZURE—IOWA'S EXPANDED SEARCH-AND-SEIZURE PROTECTIONS. *STATE v. SHORT*, 851 N.W.2D 474 (IOWA 2014).

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I. INTRODUCTION

In *State v. Short*,[1] the Iowa Supreme Court held that a warrantless search of a probationer's apartment by police violated the search-and-seizure provision of the Iowa Constitution,[2] despite reasonable suspicion of criminal activity and a consent-to-search provision in the probationer's agreement.[3] While the warrantless search supported by reasonable suspicion would not have violated the Fourth Amendment,[4] the Iowa Supreme Court determined that the Iowa Constitution afforded greater constitutional protection.[5] The court's holding is in line with its recent delineations from federal search-and-seizure jurisprudence.[6] This Comment explores the Iowa Supreme Court's reasoning in interpreting the Iowa Constitution's search-and-seizure provision independently from its federal counterpart, and concluded that, while within its powers to do so, the Iowa Supreme Court should not diverge from federal interpretations without a set of criteria.

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1. 851 N.W.2d 474 (Iowa 2014).
2. IOWA CONST. art. I, § 8.
3. *Short*, 851 N.W.2d at 506.
4. U.S. CONST. amend. IV.
5. *Short*, 851 N.W.2d at 506.
6. *See* State v. Baldon, 829 N.W.2d 785, 803 (Iowa 2013) (holding that a parolee's consent-to-search provision in his parole agreement that permitted warrantless searches was not consented to voluntarily); State v. Pals, 805 N.W.2d 767, 773–75 (Iowa 2011) (applying the search-and-seizure provision of the Iowa Constitution differently than the Fourth Amendment to determine that consent to a warrantless search was not voluntary); State v. Ochoa, 792 N.W.2d 260, 266–67 (Iowa 2010) (applying the search-and-seizure provision of the Iowa State Constitution differently than the Fourth Amendment to determine that a warrantless and suspicion-less search of a parolee was unconstitutional).

II. STATEMENT OF THE CASE

On May 18, 2011, a burglary was reported in Plymouth County, Iowa.[7] A number of items were reported missing, including two televisions, two jewelry boxes, a camera, and a gift card to Minerva's Restaurant, which was later reported to have been used by Justin Short (Short).[8] Police determined that Short's girlfriend lived at 2721 Jones Street in Sioux City.[9] A search warrant was obtained for that address, describing the residence as a "single story wood frame home white and yellow in color with a single stall garage."[10] Police discovered that Short's girlfriend did not reside at 2721 Jones Street, but rather, next door at 2723 ½ Jones Street.[11] Instead of obtaining a new search warrant, the police received verbal authorization over the phone from a district associate judge to change the address on the warrant.[12] The incorrect address was scratched out and the correct address was substituted.[13] In the description of the residence, law enforcement scratched out the word "yellow" but retained the rest of the house's description.[14] Nothing was added to the warrant to reflect that the alterations were authorized via telephone.[15]

When police searched 2723 ½ Jones Street, the missing items were found and Short was apprehended.[16] Short admitted to the burglary after receiving his *Miranda* warnings.[17] Police learned that Short was on probation during the investigation, and as a result, probation officials were contacted but did not take part in the search.[18] At the District Court, Short maintained that all the evidence obtained as a result of the search should be suppressed because: (1) "he had a constitutionally protected expectation of privacy in the apartment"; (2) the "probation agreement did not give officers unfettered access to search" the apartment; (3) "the altered search warrant violated Iowa Code section 808.3";[19] and (4) the evidence gathered during the search

7. *Short*, 851 N.W.2d at 476.
8. *Id.*
9. *Id.*
10. *Id.* (internal quotation marks omitted).
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 476–77.
16. *Id.*
17. *Id.* at 477.
18. *Id.*
19. *Id.* (citing IOWA CODE ANN. § 808.3 (West 2015)).

was "fruit of an illegal search."[20] The State responded by claiming: (1) the warrant was valid despite alteration; (2) the exigent circumstances supported the search; (3) the waiver in Short's probation agreement authorized a warrantless search; and (4) the search was supported by reasonable suspicion.[21] The district court found that the telephonic authorization to alter the warrant violated Iowa Code section 808.3 and that no exigent circumstances allowed for an exception to the warrant requirement.[22] Ultimately, the district court sided with the State and upheld the warrantless search on the grounds that law enforcement had reasonable suspicion and the search was within the contemplation of the probation agreement.[23] Short appealed.[24] On appeal, the court of appeals shifted focus to article I, section 8 of the Iowa Constitution, holding the search valid because it was supported by reasonable suspicion and was limited in scope.[25] After granting further review, the Iowa Supreme Court vacated the judgment of the court of appeals, reversed the decision of the district court, and remanded the case to the district court.[26] The Iowa Supreme Court held that the warrantless search of a probationer violated the rights afforded by the Iowa state constitution's search-and-seizure provision.[27]

III. MAJORITY

The Iowa Supreme Court, led by Justice Appel, held that a warrantless search of a probationer's home by police violated the search-and-seizure provision of the Iowa Constitution even though the search was supported by reasonable suspicion and the probationer had signed a consent-to-search provision in his probation agreement.[28] This decision reveals the expanded search-and-seizure rights that Iowa citizens have under the Iowa Constitution, as compared to the federal Constitution. In reaching this decision, the Iowa Supreme Court had two major obstacles to overcome: (1) supported by reasonable suspicion, the warrantless search was not in violation of the virtually identical federal search-and-seizure provision;[29] and (2) Short's status as a

20. *Short*, 851 N.W.2d at 477.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 478.
27. *Id.*
28. *Id.* at 506.
29. *Id.*

probationer, coupled with a consent-to-search provision in his probation agreement, may have afforded him fewer search-and-seizure rights than that of an ordinary Iowa citizen.[30]

A. *Majority's Ten Established Principles of Independent State Constitutional Law*

In overcoming the first obstacle, the Iowa Supreme Court stated that its decisions concerning article I, section 8 of the Iowa Constitution may be reached "independently of federal constitutional analysis."[31] Much of the majority's opinion is reserved for justifying Iowa's independent analysis of state constitutional law in what Justice Mansfield refers to as the majority's "ten 'established principles of independent state constitutional law.'"[32] The majority's first established principle is that the Iowa Supreme Court has the responsibility to independently construe the Iowa Constitution and that this constitutional approach has been thoroughly explored in *State v. Ochoa*,[33] *State v. Pals*,[34] and the special concurrence in *State v. Baldon*.[35] These cases call for a departure from the "lockstep" approach to interpretation of state constitutional provisions.[36] The second established principle asserts that the original protectors of individual rights were state constitutions and that the federal Constitution later followed suit.[37] In support, the majority points out that constitutional rights originated from state constitutions.[38] Additionally, the court notes that eight state constitutions had search-and-seizure provisions prior to the adoption of the federal Constitution.[39] The majority's third

30. *Id.* at 492.
31. *Id.* at 481.
32. *Id.* at 519 (Mansfield, J., dissenting) (alterations omitted).
33. 792 N.W.2d 260 (Iowa 2010).
34. 805 N.W.2d 767 (Iowa 2011).
35. 829 N.W.2d 785, 803–35 (Iowa 2013) (Appel, C.J., concurring).
36. *Ochoa*, 792 N.W.2d at 266. "Lockstepping" refers to the approach where state courts refuse to engage in independent analyses when construing state constitutional provisions that have similar federal counterparts, all the while recognizing the ability to interpret differently. Robert F. Williams, *A "Row of Shadows": Pennsylvania's Misguided Lockstep Approach to its State Constitutional Equality Doctrine*, 3 WIDENER J. PUB. L. 343, 346–47 (1993).
37. *Short*, 851 N.W.2d at 481 (majority opinion).
38. *Id.*
39. *Id.* Justice Mansfield pointed out the fact that Iowa became a state fifty years after the Federal Constitution was adopted, subtracting from the argument that the Iowa Constitution was protecting individual rights before the federal Constitution. *Id.* at 520 (Mansfield, J., dissenting).

principle is that Iowa has always championed individual rights and that the Iowa Bill of Rights is not merely an "appendage controlled by federal court interpretations."[40] In support of this principle, the majority points out cases where Iowa was ahead of the national curve in extending individual rights to African Americans.[41] Additionally, the majority makes a construction argument by drawing attention to a minor difference between the Fourth Amendment and article 1, section 8 of the Iowa Constitution.[42]

In the Iowa search-and-seizure provision, there is a semicolon between the reasonableness clause and the warrant clause.[43] The majority asserts that this particular choice of grammar suggests a special relationship between the reasonableness clause and the warrant clause.[44] It is unclear what this relationship is exactly.[45] The fourth principle argues that independent state constitutional interpretation has been renewed as a result of the diminution in substance of federal rights being incorporated into the Due Process Clause of the Fourteenth Amendment.[46] The majority states that the "incorporation of the Bill of Rights . . . [has] created a tendency for the United States Supreme Court to dilute the substance of the rights themselves."[47] This dilution has permeated search-and-seizure principles and resulted in an increase of state departures from federal precedent that provides only the "lowest levels of constitutional protection."[48] The fifth principle

40. *Id.* at 482 (majority opinion).

41. *Id.* at 484 (citing Coger v. Nw. Union Packet Co., 37 Iowa 145, 154–57 (1873) (rejecting the notion that African Americans should be segregated while using public transportation); Clark v. Bd. of Dirs., 24 Iowa 266, 276–77 (1868) (holding that race could not be used to refuse admittance into school); *In re* Ralph, 1 Morris 1, 7 (Iowa 1839) (rejecting the Fugitive Slave Act)).

42. *Id.* at 483.

43. IOWA CONST. art. I, § 8 ("The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized.").

44. *Short*, 851 N.W.2d at 483; *see also* State v. Ochoa, 792 N.W.2d 260, 268–69 (2010) ("Ordinarily, a semicolon is used to emphasize the relationship between the two clauses of a sentence.").

45. Justice Mansfield finds this punctuation inconsequential and noted that what was merely noted in *Ochoa* was now being used as evidence of the framers' intent. *Short*, 851 N.W.2d at 522 (Mansfield, J., dissenting).

46. U.S. CONST. amend. XIV, § 1; *Short*, 851 N.W.2d at 485 (majority opinion).

47. *Short*, 851 N.W.2d at 485.

48. *Id.* at 486 (quoting State v. Black, 815 S.W.2d 166, 193 (Tenn. 1991) (Reid, C.J., concurring in part and dissenting in part)).

warns against the "lockstep" approach.[49] The majority was alerted by the tendency of the approach to serve as a "precommitment device," preventing courts from truly examining the independent facts and law.[50] The court also promotes the idea that allowing states to either adopt or reject innovative legal claims may serve as an indicator to the U.S. Supreme Court on whether to federalize these new rules.[51] Furthermore, the Iowa Supreme Court cited other state supreme courts that have independently analyzed constitutional provisions with language parallel to its federal counterpart.[52]

As its sixth principle, the majority pointed out the irony in uniformity of federal precedent.[53] First, allowing the U.S. Supreme Court to interpret state constitutional law is akin to delegating state power to the Supreme Court.[54] Second, Fourth Amendment jurisprudence is inconsistent and plagued with different standards.[55] As Jennifer Friesen claims, the independent holdings of states will "bring stability and simplicity to constitutional law in the face of frequent, baffling inconsistencies and changes in [U.S.] Supreme Court doctrines."[56] The Iowa Supreme Court concluded that a clearer warrant requirement will result in more uniformity, not less.[57] For the seventh principle, the Iowa Supreme Court focused on the burdens a stricter warrant requirement will place on law enforcement and lawyers.[58] The court looked to law enforcement in states that applied independent state constitutional law, such as New York, New Jersey, Washington, and Oregon, as a means to brush off any argument that stricter search-and-seizure standards would weigh in favor of adhering to federal precedent.[59] Furthermore, the court pointed out that the only search-

49. *Id.* at 486–87.

50. *Id.* at 487 (quoting Adrian Vermeule, *The Judicial Power in the State (and Federal) Courts*, 2000 SUP. CT. REV. 357, 366 (2000)).

51. *Id.* (citing Jeffrey S. Sutton, *What Does—And Does Not—Ail State Constitutional Law*, 59 U. KAN. L. REV. 687, 712–13 (2011)).

52. *Id.*; *see* State v. Gerschoffer, 763 N.E.2d 960, 965 (Ind. 2002); State v. Arrington, 319 S.E.2d 254, 260 (N.C. 1984); People v. Barber, 46 N.E.2d 329, 331 (N.Y. 1943); Commonwealth v. Edmunds, 586 A.2d 887, 894–95 (Pa. 1991).

53. *Short*, 851 N.W.2d at 487–89.

54. *Id.* at 487 (citing Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 403–04 (1984)).

55. *Id.* at 488.

56. *Id.* at 488–89 (citing JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES § 1:03[4][b], at 1–16 (4th ed. 2006)).

57. *Id.* at 489.

58. *Id.* at 489–90.

59. *Id.* at 489.

and-seizure standard with which law enforcement need be familiar with was the strictest.[60] As for the burdens placed on lawyers, the majority noted that there were numerous state constitutional cases and that independent state interpretations should be no surprise to lawyers at this point in time.[61] As the eighth principle, the Iowa Supreme Court sees no need for criteria to be used in determining when a state should engage in independent constitutional analysis.[62] The majority's approach, as originally set forth in *Ochoa*, was to merely adopt federal precedent when it is persuasive.[63] Criteria may complicate matters, in that they demand "elaborate discussion" of the criteria itself at the cost of discussion about the underlying constitutional issues.[64] In the ninth principle, the Iowa Supreme Court reserved the right to apply more stringent state standards in cases where there are parallel federal constitutional provisions.[65] This remains true even when the parties have not advocated a stricter state analysis.[66] While this right was reserved, the court will generally adhere to the federal standard in instances where no party has advocated the Iowa constitutional standard.[67] The final principle, as described in Justice Mansfield's dissent, was merely an encore of the first principle.[68] The majority concluded that they reaffirm the approach to independent state constitutional law found in *Baldon*, *Pals*, and *Ochoa*.[69] Justice Cady wrote a special concurrence for the purpose of "emphasiz[ing] the importance of independently interpreting [the] Iowa Constitution."[70] The concurrence explains that allowing states to interpret their own constitutions as an exercise of federalism is not just a "means of permitting state experimentation," but also a way in which "liberty, equality, and human dignity" are expanded.[71]

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60. *Id.* Where state constitutional provisions provide stricter search-and-seizure protections to citizens than the federal Constitution, practicality would ensure that law enforcement adhere to the stricter state constitution search-and-seizure provision.

61. *Id.*

62. *Id.* at 490.

63. State v. Ochoa, 792 N.W.2d 260, 267 (Iowa 2010).

64. *Short*, 851 N.W.2d at 490 (citing ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 162, 167–68 (2009)).

65. *Id.* at 491–92.

66. *Id.* at 492.

67. *Id.* at 491.

68. *Id.* at 527 (Mansfield, J., dissenting).

69. *Id.* at 492 (majority opinion); *see* State v. Baldon, 829 N.W.2d 785 (Iowa 2013); State v. Pals, 805 N.W.2d 767 (Iowa 2011); State v. Ochoa, 792 N.W.2d 260 (Iowa 2010).

70. *Short*, 851 N.W.2d at 507 (Cady, C.J., concurring).

71. *Id.*

B. Majority's Analysis of Search-and-Seizure Case Law

After resolving the issue of the court's ability to independently interpret the state constitutional provision, the remaining half of the majority's decision resolved the issue of whether a warrant was needed to search a probationer's home under Iowa precedent.[72] Though the court had not specifically addressed whether a probationer's home may be searched without a warrant, the court did consider whether a parolee may be subject to a warrantless search in *State v. Cullison*.[73] In *Cullison*, it was held that there was an unreasonable search and seizure when a parolee was subjected to a warrantless search, the same as if a non-parolee was subjected to a warrantless search.[74] The Iowa Supreme Court upheld *Cullison* and concluded that a search warrant was needed for probationers just as if they were law-abiding citizens.[75] While researching federal and state search-and-seizure case law, the *Cullison* court found that cases either diluted the rights of parolees under the Fourth Amendment or afforded the full range of rights.[76] The *Cullison* court rejected the line of cases that diluted the rights of the parolee for not being "constitutionally sound, reasonable, fair or necessary."[77]

Though the decision in *Cullison* did not explicitly refer to article 1, section 8 of the Iowa Constitution,[78] it was later stipulated in *Baldon* that the *Cullison* decision was based on the Iowa Constitution.[79] The Iowa Supreme Court thus determined in *Short* that the warrant requirement for parolees in *Cullison* applies equally to probationers.[80] The Iowa Supreme Court then looked into state and federal developments in search-and-seizure case law post-*Cullison*.[81] Focusing on *Griffin v. Wisconsin*,[82] *United States v. Knights*,[83] and *Samson v. California*,[84] the Iowa Supreme Court determined that the U.S.

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72. *Id.* at 492–507 (majority opinion).
73. 173 N.W.2d 533 (Iowa 1970).
74. *Id.* at 540.
75. *Id.* at 536.
76. *Id.* at 536–39.
77. *Id.* at 536.
78. *Short*, 851 N.W.2d at 528–29 (Zager, J., dissenting).
79. State v. Baldon, 829 N.W.2d 785, 820 (Iowa 2013). This stipulation was challenged in both the *Baldon* dissent and *Short* dissent. *Baldon*, 829 N.W.2d at 842 (Mansfield, J., dissenting); *Short*, 851 N.W.2d at 528–29 (Zager, J., dissenting).
80. *Short*, 851 N.W.2d at 496 (majority opinion).
81. *Id.* at 498–500.
82. 483 U.S. 868 (1987).
83. 534 U.S. 112 (2001).
84. 547 U.S. 843 (2006).

Supreme Court had developed new doctrine that "dramatically and substantially undercut[] the traditional warrant requirement, probable cause, and particularity requirements," in addition to being contrary to *Cullison*.[85] As the Iowa Supreme Court found no question that the police had reasonable suspicion to search Short's home, the relevant issue became whether *Cullison* was still good law or whether it should be overruled by *Griffin*, *Knights*, and *Samson*.[86] The Iowa Supreme Court was not persuaded by the federal cases that left diminished protections of the Fourth Amendment's warrant clause, instead upholding *Cullison* and, therefore, protecting both probationers and parolees from warrantless searches.[87]

IV. DISSENTS

Justice Waterman's dissent asserted: (1) Iowa should interpret the state's search-and-seizure provision in the same manner as its federal counterpart,[88] and (2) the court should utilize a set of criteria when determining whether to diverge from interpretations of parallel federal constitutional provisions.[89] Waterman suggested that Iowa adopt a set of guidelines such as those proposed by Justice Konenkamp in *State v. Schwartz*,[90] a South Dakota case.[91] Justice Waterman warned that more restraint was needed when interpreting the Iowa Constitution because it is difficult to amend.[92] Additionally, the dissent claimed that "long-standing tradition of adherence to settled federal precedent," which Iowa had followed until it spontaneously diverged during *Ochoa*, should have been followed as pre-*Ochoa* jurisprudence, and that there was now less uniformity and certainty than before this sudden divergence.[93] Justice Mansfield wrote separately to respond to each of the "majority's 'ten established principles of independent state constitutional law.'"[94]

85. *Short*, 851 N.W.2d at 500.
86. *Id.*
87. *Id.* at 506.
88. *Id.* at 510–17 (Waterman, J., dissenting).
89. *Id.* at 517–19.
90. 689 N.W.2d 430, 440 (S.D. 2004).
91. *Short*, 851 N.W.2d at 518–19 (Waterman, J., dissenting).
92. *Id.* at 508.
93. *Id.* at 519.
94. *Id.* at 519–27 (Mansfield, J., dissenting) (alterations omitted).

In response to the first principle, Justice Mansfield questioned whether a philosophical approach can be binding.[95] As to the second principle, Justice Mansfield found the majority's argument that stated were "the original protectors of individual rights" unavailing, as Iowa became a state fifty years after the federal Bill of Rights was ratified, and Iowa adopted its version of the search-and-seizure provision merely because it was already in the Federal Constitution.[96] Mansfield found the third principle plagued with "overenthusiastic reading[s] of nineteenth-century sources" and interpretations of state constitutional provisions that had no parallel federal counterpart.[97] Additionally, Mansfield viewed the slight difference in punctuation of article I, section 8 to be inconsequential and undeserving of a different interpretation than the Fourth Amendment.[98] As to the fourth principle, Mansfield declared that the recent article I, section 8 interpretations have led to less clarity and predictability, and that the *Knights* decision did not water down any constitutional protections.[99] Justice Mansfield responded to the fifth principle as a "straw man attack," noting that each member of the court was fully aware that it may engage in independent constitutional analysis.[100] Deference was the issue, not whether the court had authority to independently interpret Iowa's Constitution.[101]

Justice Mansfield rejected the ironies provided by the sixth principle, arguing that allowing Iowa to exercise its powers of federalism provided no "bulwark against federal power" if Short were charged under federal law, and that the different standard will only increase confusion, not create a clearer standard.[102] With regards to the seventh principle, Justice Mansfield warned that it was not enough for the majority to conclude that there will be no burdens on law enforcement or lawyers simply because the consequences of the decision are unforeseen.[103] Additionally, as for the burden placed on lawyers, Justice Mansfield pointed out that the Iowa Supreme Court will consider independent state constitutional arguments regardless of

95. *Id.* at 520. Justice Mansfield ultimately doubted that philosophical approaches such as original intent, legal realism, and economic analysis can be binding. *Id.*

96. *Id.*

97. *Id.* at 521.

98. *Id.* at 522.

99. *Id.* at 522–23.

100. *Id.* at 523.

101. *Id.*

102. *Id.* at 525.

103. *Id.* at 526.

whether a party advocates it, meaning that it behooves lawyers not to come up with such arguments, as they can merely free-ride on whatever innovation the court comes up with.[104] Justice Mansfield lightly touched on the eighth principle, merely stating that the court owed more to the people than a criteria-less, independent analysis.[105] Justice Mansfield was puzzled by the ninth principle, which reserved the court's right to stray from federal precedent despite generally adhering to it, because the court did not do that here.[106] Finally, Justice Mansfield viewed the tenth principle as merely an encore of the first principle.[107] Justice Zager's dissent asserted that the warrantless search was constitutional under both state and federal constitutions, and that *Cullison* was not the proper case on which to rest the disposition.[108]

Justice Zager questions the majority's conclusion that *Cullison* interpreted the Iowa Constitution when the opinion does not mention article I, section 8.[109] Moreover, Justice Zager determined that there were material factual and legal distinctions between *Cullison* and the current case.[110] As such, Justice Zager concluded that *Cullison* was not authority on the matter and that the court should follow the later U.S. Supreme Court decisions of *Griffin*,[111] *Samson*,[112] and, specifically, *Knights*.[113] Additionally, Justice Zager suggested that the majority incorrectly framed the issue when it neglected to consider that the probationer waived his search-and-seizure rights in the probation

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104. *Id.*

105. *Id.*

106. *Id.* Justice Mansfield does acknowledge that the ninth principle "involves at least *some* degree of deference to federal precedent," but that in practice, the Iowa Supreme Court has not afforded any deference to federal precedent. *Id.*

107. *Id.* at 527.

108. *Id.* at 527 (Zager, J., dissenting).

109. *Id.* at 528–30. Justice Zager pointed out that it has been tradition for the Supreme Court of Iowa to quote the provision of the Iowa Constitution being interpreted. *Id.* at 528–29. Were the court in *Cullison* truly interpreting article I, section 8, it would have been an "inexplicable oddity" that the Supreme Court of Iowa did not quote or mention the provision anywhere in the decision. *Id.* at 529. Furthermore, the Fourth Amendment was quoted in its entirety and mentioned numerous times by the court, which lends more weight to the proposition that *Cullison* stands for a Fourth Amendment decision and not an article I, section 8 decision. *Id.* at 530.

110. *Id.* at 530–31. In *Cullison*, there was no consent-to-search provision in the parole agreement, the search was conducted by a parole officer, and there was no degree of individualized suspicion. *Id.*

111. Griffin v. Wisconsin, 483 U.S. 868 (1987).

112. Samson v. California, 547 U.S. 843 (2006).

113. United States v. Knights, 534 U.S. 112 (2001) (unanimously upholding a probation search under the Fourth Amendment when there was reasonable suspicion and a consent-to-search provision in the probation agreement).

agreement.[114] To conclude his dissent, Justice Zager found that probable cause was present and that probationers were subject to a "different set of circumstances than law-abiding citizens."[115]

V. THE SOUNDNESS OF THE COURT'S ANALYSIS

By holding that a warrantless search of a probationer's apartment by police violated Iowa's search-and-seizure provision despite being supported by reasonable suspicion of criminal activity, the court departed from well-settled federal precedent in *Knights*.[116] While courts may interpret substantially identical provisions of their state constitutions differently than the analogous federal provisions, there must be valid reasons to do so.

A. Independent Constitutional Analysis

It is settled law that state courts may interpret the provisions in their own state constitutions; this is true whether the provision is entirely unique to that state or merely a clone of a provision from the Federal Constitution.[117] While the dissenters recognized this, they cautioned against the majority's eagerness to depart from federal precedent.[118] While Justice Zager acknowledged that the court need not be bound by federal interpretations, he urged "some analytical consistency."[119] Justice Waterman criticized the lack of criteria used by the majority and called for more guidance.[120] Justice Mansfield agreed with his fellow dissenter on requiring criteria, stating that the court "owe[d] the citizens of the state a bit more" than the court's "best independent judgment."[121] Justice Mansfield goes further as his dissent specifically addressed the "majority's ten 'established principles of independent state constitutional law'" in an attempt to prove that none of the majority's ten points were established principles.[122]

Concern over confusion and lack of uniformity was a common thread in all three dissents, and rightfully so; there was already a

114. *Short*, 851 N.W.2d at 527–28 (Zager, J., dissenting).
115. *Id.* at 544.
116. 534 U.S. 112 (2001).
117. State v. Ochoa, 792 N.W.2d 260, 267 (Iowa 2010).
118. *Short*, 851 N.W.2d at 517 (Waterman, J., dissenting); *id.* at 526 (Mansfield, J., dissenting); *id.* at 534 (Zager, J., dissenting).
119. *Short*, 851 N.W.2d at 534 (Zager, J., dissenting).
120. *Id.* at 517–19 (Waterman, J., dissenting).
121. *Id.* at 526 (Mansfield, J., dissenting).
122. *Id.* at 519 (alterations omitted).

"Tower of Babel-like cacophony" of state search-and-seizure provisions, potentially contributing to confusion among judges, lawyers, and law enforcement.[123] It was possible that evidence from the same crime will be admissible in federal court but not state court, depending on how law enforcement conducted the search.[124] But uniformity of the courts was surely not an acceptable alternative to meaningful constitutional protections. The majority responded to this concern about lack of uniformity, stating that uniformity may increase throughout state implementation of a stricter, yet simpler warrant requirement.[125] Whipsawing, which occurs when conflicts between state and federal courts result in constant, shifting standards, will no longer be a problem because state search-and-seizure standards will be insulated from inconsistencies and future changes in federal doctrine.[126] Additionally, the clear standard set forth by the Iowa Supreme Court may in fact decrease confusion for judges, lawyers, and law enforcement; the stricter standard will remove much of the constitutional gray-area commonly encountered by law enforcement while conducting searches.[127]

With Iowa law enforcement erring on the side of caution, evidence admissible in state court will easily satisfy federal standards.[128] The Iowa Supreme Court's interpretation of its own constitution is no more bound by U.S. Supreme Court decisions than it is bound by the opinions of other state supreme courts interpreting their own constitutions.[129] When the Iowa Supreme Court asserted that the degree to which it follows Supreme Court precedent "depends solely upon its ability to persuade," it did so because those Supreme Court cases are not binding authority, but persuasive authority.[130] When Justice Waterman warned in his dissent that "[p]ersuasion is in the eye of the beholder" and more restraint was needed in constitutional interpretation, one must worry

123. *Id.* at 516 (Waterman, J., dissenting).

124. *See id.*

125. *Id.* at 488–89 (majority opinion).

126. State v. Ochoa, 792 N.W.2d 260, 266 (Iowa 2010). State courts are whipsawed when U.S. Supreme Court decisions force them to reverse precedent. *See id.* In a way, the law enforcement community was whipsawed as a result of the new search-and-seizure standards. *Short*, 851 N.W.2d at 516–17 (Waterman, J., dissenting).

127. Stronger, more restrictive warrant requirements will establish a bright-line rule, ensuring uniformity that is currently lacking in federal precedent. *Short*, 851 N.W.2d at 488–89 (majority opinion).

128. *Id.* "[L]aw enforcement officers need to be acquainted only with one standard, namely, whatever standard is most restrictive." *Id.* at 489.

129. *Ochoa*, 792 N.W.2d at 267.

130. *Id.*

about the court being bound to less-than-persuasive authority.[131] As of 2007, thirty-three states have found greater search-and-seizure protections in their state constitutions than afforded by the Fourth Amendment, indicating that a majority of courts were unpersuaded by federal innovations in search-and-seizure jurisprudence.[132] Furthermore, where states have deviated from the Federal Constitution's minimum guarantees in support of prevailing innovations, the U.S. Supreme Court may take these deviations into consideration when determining whether to federalize new standards.[133] As such, independent state constitutional analysis may maximize the efficiency of federal constitutional development by flipping the "top-down" approach on its head.[134] The U.S. Supreme Court will be able to pick and choose the best innovations in state constitutional law, and states will benefit in that they will not have to wait for the federal go-ahead before ensuring that rights are guaranteed to citizens by their state constitutions. However, the dissent rightfully called for criteria used to guide the court in engaging in independent state constitutional analysis; the concern being that the court may misuse its independent analysis, contributing to uncertainty and "result-oriented jurisprudence."[135] In his dissent, Waterman proposed a set of criteria put forth by Justice Konenkamp in *Schwartz*:

> In deciding whether a state constitutional provision should receive a divergent interpretation, we should examine (1) the text of the provision at issue; (2) the territorial, legal, and constitutional history surrounding the provision; (3) the structural differences in the State and Federal Constitutions; and (4) the matters of unique state tradition or concern that bear on the meaning of the provision.[136]

Though Waterman refered to Justice Konenkamp's "neutral set of divergence standards" as a "useful roadmap" for determining when to construe an Iowa constitutional provision differently,[137] the majority

131. *Short*, 851 N.W.2d at 508 (Waterman, J., dissenting).

132. *See generally* Michael J. Gorman, *Survey: State Search and Seizure Analogs*, 77 MISS. L.J. 417, 419–29, 434–38, 440–64 (2007).

133. *Short*, 851 N.W.2d at 487 (citing Sutton, *supra* note 51, at 712–13).

134. *Id.*

135. *Id.* at 519 (Waterman, J., dissenting) (quoting State v. Schwartz, 689 N.W.2d 430, 445 (S.D. 2004)).

136. *Id.* at 518 (quoting *Schwartz*, 689 N.W.2d at 440 (Konenkamp, J., concurring)).

137. *Id.* at 518–19.

thoroughly, yet informally, touched upon all of these.[138] However, just because the majority made a thorough analysis without the guidance of any criteria did not ensure that will always be the case.[139] Criteria will enhance predictability in determining when state courts can appropriately diverge from federal standards.[140] However, if the criteria proposed were too strict, the outcome will closely resemble that of the lockstep approach.[141] But if the criteria proposed are too lax or there are no criteria, constitutional divergence may run rampant in unforeseeable ways.[142] Criteria must take a middle ground approach to ensure that state constitutional divergence be restrained and methodical.

B. Should the Court Have Diverged from Federal Precedent?

As noted in *Ochoa*, Fourth Amendment decisions are not binding on the Iowa Supreme Court's interpretation of article I, section 8 of the

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138. To satisfy Konenkamp's first criterion, the majority examined the text of article I, section 8 of the Iowa Constitution and compared it to the Fourth Amendment. *Id.* at 483, 500 (majority opinion). To satisfy Konenkamp's second criterion, the majority looked to Iowa's constitutional history in its third established principle of independent state constitutional law. *Id.* at 482–85. To satisfy the third criterion, the majority compared the structural differences between the two search-and-seizure provisions in its analysis of whether *Cullison* should be overruled, focusing on the semicolon between the reasonableness clause and the warrant clause in article I, section 8. *Id.* at 500–05. The majority satisfied the fourth criterion throughout its ten established principles of state constitutional law: Iowa places a strong emphasis on individual rights; the Fourth Amendment rights afforded to citizens have been diluted over the years by the U.S. Supreme Court, there are concerns about the lockstep approach, and Fourth Amendment jurisprudence has created an uncertainty that leaves concerns about uniformity. *Id.* at 482–89.

139. The majority addressed its own lack of criteria as its eighth established principle of independent state constitutional law, stating that a criteria approach was based on the flawed premise that "U.S. Supreme [C]ourt interpretations . . . are presumptively correct for interpreting analogous state provisions," and that the criteria approach complicated judicial decisions by drawing too much attention to the criteria itself and not the underlying issue. *Id.* at 490 (quoting WILLIAMS, *supra* note 64, at 135).

140. Criteria will provide much more guidance than the Iowa Supreme Court's current approach, which depends solely on the persuasiveness of the U.S. Supreme Court reasoning. State v. Ochoa, 792 N.W.2d 260, 267 (Iowa 2010).

141. The majority looked to the criteria approach used by Supreme Court of Washington in its determination not to use any criteria. *Short*, 851 N.W.2d at 490–91. Washington has emphasized that the criteria are "nonexclusive" and merely an interpretive aid used to develop a "sound basis for . . . state constitutional law," not a strict requirement that need be satisfied in every instance of independent constitutional analysis. State v. Wethered, 755 P.2d 797, 800 (Wash. 1988).

142. As Justice Waterman warned, while constitutional interpretations can easily suffer from judicial oversight, they are difficult to amend. *Short*, 851 N.W.2d at 508 (Waterman, J., dissenting).

Iowa Constitution.[143] Why, then, was the holding in *Knights* unpersuasive and *Cullison* controlling? In *Knights*, a warrantless search of a probationer by law enforcement was unanimously upheld under the Fourth Amendment when there was reasonable suspicion of criminal activity and a consent-to-search provision as a condition on probation.[144] The Supreme Court rested its decision on the fact that the probation agreement had significantly reduced Knights's reasonable expectation of privacy and that, as a probationer, Knights was afforded fewer liberties than law-abiding citizens.[145] It made no difference to the U.S. Supreme Court that the search was conducted for an "investigatory" purpose rather than a "probationary" purpose because Knights's probation agreement did not explicitly confine Knights's consent to only probationary searches.[146] Balancing Knights's privacy against governmental interests, the U.S. Supreme Court determined that reasonable suspicion, rather than the more stringent standard of probable cause, was needed.[147] The facts in *Knights* were more similar to *Short* than any of the other cases cited in the opinion, yet the majority rested its opinion on *Cullison* instead.[148]

In *Cullison*, a parolee was subject to a warrantless search by his parole supervisor.[149] Without referring to article I, section 8 of the Iowa Constitution, the Iowa Supreme Court held that the warrantless search was unconstitutional,[150] finding that parolees were afforded the same constitutional protections as law-abiding citizens.[151] Of note, the parole agreement in *Cullison* did not contain a consent-to-search provision such as the one in *Knights* and *Short*.[152] The soundness of the majority's reasoning hinged upon *Cullison*, an Iowa case that in no way stated

143. 792 N.W.2d at 267.
144. U.S. v. Knights 534 U.S. 112, 122 (2001).
145. *Id.* at 119.
146. *Id.* at 116.
147. *Id.* at 121.
148. State v. Short, 851 N.W.2d 474, 506 (Iowa 2014).
149. State v. Cullison, 173 N.W.2d 533, 535 (Iowa 1970).
150. The majority concluded that "*Cullison* stands for the proposition that the protective arm of article I, section 8 'extends to all alike, worthy and unworthy, without distinction.'" *Short*, 851 N.W.2d at 496 (quoting State v. Gansz, 297 So. 2d 614, 616 (Fla. Dist. Ct. App. 1974)).
151. *Cullison*, 173 N.W.2d at 540 (refusing to strip or dilute a parolee's privileges against unreasonable searches and seizures based solely on his status as a parolee).
152. Cullison only agreed to "conduct himself honestly, obey the law, keep reasonable hours, refrain from excessive use of intoxicants, and remain at all times in Montgomery County." *Id.* at 534. Justice Zager found it suspect that the majority ignored the lack of a consent-to-search provision in the *Cullison* probation agreement. *Short*, 851 N.W.2d at 531 (Zager, J., dissenting).

that it was decided under article I, section 8 of the Iowa Constitution and was decided over three decades before the U.S. Supreme Court's decision in *Knights*.[153] Regardless, the Iowa Supreme Court concluded that *Cullison* was decided under article I, section 8 by citing *Baldon*.[154] From there, the court refused to overrule *Cullison*, claiming that to do so in favor of the U.S. Supreme Court Fourth Amendment jurisprudence would result in an "innovative reconfiguration of traditional search and seizure law under the Iowa Constitution."[155] However, it seemed that Iowa was merely lockstepped with federal search-and-seizure precedent until *Ochoa*, when it first decided to diverge.[156] The use of *Cullison* as controlling precedent conveniently allowed for the court to ignore *Knights*, *Griffin*, and *Samson*.[157] However, as state constitutions are not bound by federal precedent, this concern is somewhat alleviated.[158] Yet, just as Justice Mansfield believed the Iowa Supreme Court owed more to its citizens than the state's best independent judgment, it also owed them more than *Cullison* as the basis for its decision in *Short*.[159] Though perfectly within its power to do so, the Iowa Supreme Court should not have diverged from federal precedent in this case with so little guidance.[160]

VI. CONCLUSION

In *State v. Short*, the Iowa Supreme Court held that a warrantless search of a probationer's apartment by police violated article I, section 8 of the Iowa Constitution despite reasonable suspicion of criminal activity and a consent-to-search provision in the probation agreement. In doing so, the court strayed away from federal precedent concerning the virtually identical search-and-seizure provision of the Fourth Amendment. The court determined *State v. Cullison* was controlling

153. *See supra* note 116 and accompanying text.

154. *Short*, 851 N.W.2d at 495 ("[W]ithout expressly saying so, we decided *Cullison* based on the Iowa Constitution." (quoting State v. Baldon, 829 N.W.2d 785, 796 n.2 (Iowa 2013)).

155. *Id.* at 500.

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

157. *Short*, 851 N.W.2d at 500.

158. *Ochoa*, 792 N.W.2d at 267.

159. *Short*, 851 N.W.2d at 526 (Mansfield, J., dissenting).

160. As its ninth principle of independent analysis, the majority stated that the Iowa Supreme Court will generally apply the federal standard but reserves the right to diverge. *Id.* at 491 (majority opinion). However, since *Ochoa*, the Iowa Supreme Court has afforded no weight to federal precedent in search-and-seizure precedent; the current case was no exception. *Id.* at 527 (Mansfield, J., dissenting).

and refused to overturn that decision in favor of the standards set forth in later U.S. Supreme Court decisions regarding the Fourth Amendment. As such, probationers are afforded the same constitutional guarantees under the Iowa Constitution's search-and-seizure provision as law-abiding citizens, though these same guarantees are not extended to probationers under the Fourth Amendment.

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