IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. BRENT HAUGE, Defendant-Appellant.	)))))))))	S.CT. NO. 20-1568

APPEAL FROM THE IOWA DISTRICT COURT
FOR PLYMOUTH COUNTY
HONORABLE DANIEL P. VAKULSKAS

APPELLANT'S BRIEF AND ARGUMENT

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FINAL

CERTIFICATE OF SERVICE

On the 10th day of June, 2021, 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 Brent Hauge, 505 Oak Street, Sheldon, Iowa 51201.

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ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because the issues raised involve substantial questions of first impression or of enunciating or changing legal principles in Iowa. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(c) and (f).

Hauge requests that the State v. Becker, 458 N.W.2d 604, 607-608 (Iowa 1990) rule, providing passengers cannot automatically be removed from vehicles absent reasonable suspicion, should continue to endure under the Iowa Constitution though it has been overruled under the Fourth Amendment by Maryland v. Wilson, 519 U.S. 408, 413-15, 117 S.Ct. 882, 885-86 (1997).

STATEMENT OF THE CASE

NATURE OF CASE

This is an appeal by Defendant-Appellant, Brent Hauge, from his conviction following a bench trial for Possession of Methamphetamine, a controlled substance, second offense, an aggravated misdemeanor, in violation of Iowa Code 124.40(5).

COURSE OF PROCEEDING

On July 3, 2019, the State charged Hauge with Possession of Methamphetamine, a Controlled Substance, Second Offense, an aggravated misdemeanor in violation of Iowa Code §124.401(5). (7/3/19 Trial Information) (App. pp. 4-5). Hauge pled not guilty and waived his right to a speedy trial. (7/17/19 Written Plea of Not Guilty) (App. pp. 6-7).

On September 3, 2019, Hauge filed a Motion to Suppress. 09/03/19 Motion to Suppress) (App. pp. 8-9). The motion argued, in part, that: (1) the traffic detention of Hauge was illegal on an impermissible extension of the grounds for the traffic stop and that Hauge should have been permitted to leave; (2) the pat-down of Hauge was based on a warrant for another passenger and did not justify a pat-down of Hauge; and (3) any purported consent was not voluntary. (9/3/19 Motion to Suppress) (App. pp. 8-9).

The State filed a Resistance to Hauge's motion. The State argued that: (1) the officer requested Hauge step out of

the vehicle based on the warrant for the passenger; (2) the officer had Hauge step out of the vehicle for officer safety; (3) and (3) Hauge consented to the pat-down. (12/2/19 Resistance to Motion) (App. pp. 10-12).

On March 11, 2020, the district court issued a written ruling denying Hauge motion to suppress, in part. The court found that: (1) Deputy Peterson did not have reason to believe that Hauge had a weapon and therefore was not allowed to complete a pat-down; (2) however, Hauge gave consent for Peterson to perform the pat-down show in Exhibit 102; (3) the scope of the pat-down was not exceeded when Peterson went into Hauge's pocket based on the "plain feel" exception to the warrant requirement; (4) because Hauge was not provided his Miranda rights after being detained any statements made by Hauge pertaining to the identification of the object found in his pocket was barred. (Ex. 102; 3/11/20 Order) (App. pp. 13-22).

A bench trial was y held on September 1, 2020. At the conclusion of the bench trial, the district court found Hauge guilty of Possession of Methamphetamine, Second Offense. (11/25/2020 Order of Disposition) (App. pp. 23-26).

Hauge filed a notice of appeal on December 1 2020. (12/1/20 Notice of Appeal) (App. pp. 27-29).

FACTS

Suppression Hearing

During the Suppression hearing, Officers Scherle and Peterson testified to the following:

On June 14, 2019 at approximately at 10:30 am, Officer Scherle was traveling in Merrill, Iowa on Highway 75 and Main Street and came into contact with a vehicle. (Supp. Tr. p. 6, L11-14; p. 6, L13-22). Scherle noticed all occupants of the vehicle staring at him as they passed him while he parked Larry's Automotive. (Supp. Tr. p. 6, L23-p.7, L2). He noticed that specifically that the back, female passenger continued to look at him. (Supp. Tr. p. 7, L14-16). Scherle began to

follow the vehicle northbound and noticed the car overtaking another vehicle and clocked the vehicle speeding. (Supp. Tr. 8, L1-6). He initiated a traffic stop of the vehicle and the driver stopped. (Supp. Tr. p. 8, L9-13).

At the same time that Scherle was traveling northbound, Deputy Peterson was also traveling north on Highway 75. (Supp. Tr. p. 21, L19-21). Peterson assisted Scherle with the traffic stop and approached the passenger side. (Supp. Tr. p. 22, L6-10). Peterson shined his flashlight into the vehicle in order to send all the occupants of the vehicle and noticed three people including a woman in the backseat. (Supp. Tr. p. 22, l11-16). Peterson also noticed a man in the front seat, later identified as Hauge. Peterson noticed that the front seat passenger looking straightforward or at the floor. Peterson stated that Hauge did not attempt to make any eye contact with him. Peterson testified that it struck him as odd. (Supp. Tr. p. 25, L1-7). Peterson then he noticed the passenger reach down to the passenger door pocket. (Supp.

Tr. p. 27, L5-7). Peterson saw Hauge grab a lottery ticket from the door and then Hauge used the officer's flashlight to look at the lottery ticket "as though he couldn't see it and turned to utilize my light." (Supp. Tr. p. 28, L21-25). Hauge then focused his attention staring straight down at the floor again and not making eye contact. (Supp. Tr. p. 31, L18-20). Officer Peterson did not notice any large objects on Hauge's person nor did he see a weapon, while Hauge was in the vehicle. (Supp. Tr. p. 52, L14-19).

Officer Scherle then confirmed that the back seat female passenger had an active mittimus warrant for her arrest. (Supp. Tr. p. 31, L21-p.32, L4). The mittimus warrant, for failure to serve sentence, which was based on the underlying charge of domestic abuse with a deadly weapon. (Supp. Tr. p. 33, L3-4; p. 49, L18-20). The decision was made to request all occupants exit the vehicle and first the driver was asked to step out and then the front seat passenger. (Supp. Tr. p. 34, L13-19). Peterson testified that Hauge was asked to exit the

vehicle because of the nature of the warrant for the backseat passenger. Peterson also testified that Hauge was asked to leave the vehicle because defendant was reaching multiple times out of "my line of sight, the deflection not wanting to make eye contact." (Supp. Tr. p. 43, L21-p. 35, L2).

After Hauge stepped out of the vehicle, Peterson asked if Hauge had any guns and Hauge said he did not. (Supp. Tr. p. 40, L13-23). Officer Peterson told Hauge that he was not under arrest but was detained. (Supp. Tr. p. 41, L13-17). Officer Peterson then patted Hauge down and while patting down, Officer Peterson felt an object in the front right pocket. Peterson recognized it as a pipe. (Supp. Tr. 40, L24-p. 41, L6). The officer then walked Hauge to the police car, and then removed the pipe from Hauge's pocket. (Supp. Tr. p. 49, L4-7).

Bench Trial Evidence

Officer Peterson also testified during Hauge's bench trial though Officer Scherle did not. Officer Peterson trial

testimony was substantial identical to his testimony from the suppression hearing. During his trial testimony, Peterson did clarify that before he removed the pipe from Hauge's pocket, he handcuffed Hauge. (Trial p. 16, L20-p. 17, L6). Peterson also confirmed that he found a glass pipe and a small plastic bag of a crystal-like substance believed to be methamphetamine. (Trial p. 17, L10-11).

Also, during the trial Hauge testified. Hauge stated during his interaction with Peterson he asked repeatedly after Peterson took his identification if he was detained and Peterson confirmed that he was not free to leave. (Trial p. 33, L5-17). Hauge also testified that when Peterson asked if he could pat-down Hauge, he felt like he could not say no. (Trial p. 35, L18-22).

Other relevant facts will be discussed below.

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT DENIED HAUGE'S MOTION TO SUPPRESS EVIDENCE RESULTING FROM AN IMPROPER SEARCH AND SEIZURE UNDER ARTICLE I, SECTION 8 OF THE IOWA CONSTITUTION.

A. Preservation of Error: When a pre-trial motion to suppress is overruled by the trial court, no further objection at trial is necessary to preserve error. State v. Richards, 229 N.W.2d 229, 232 (Iowa 1975). In this case, the district court partially overruled Hauge's pretrial Motion to Suppress. (9/3/19 Motion Suppress; 12/2/19 Brief in Support State's Resistance to Defendant's Motion; 3/11/2020 Order) (App. pp. 8-22). Error was therefore preserved.

B. Standard of Review: The Court reviews the district court's denial of a motion to suppress based on deprivation of a constitutional right to de novo. In re Pardee, 872 N.W.2d 384, 390 (Iowa 2015). "In our review, we must make "an independent evaluation of a totality of circumstances as shown by the entire record." Id. (quoting State v. Tyler, 867 N.W.2d 132, 136 (Iowa 2015)). The Court also considers

"both the evidence presented during the suppression hearing and that introduced at trial. State v. Breur, 577 N.W.2d 41, 44 (Iowa 1998) (citing State v. Jackson, 542 N.W.2d 842, 844 (Iowa 1996)). The Court gives deference to the district court's factual findings "due to its opportunity to evaluate the credibility of the witnesses," but it is not bound by its findings. State v. Lane, 726 N.W.2d 371, 377 (Iowa 2007).

C. Discussion: The Fourth Amendment of the United States Constitution[1] and article I, section 8 of the Iowa Constitution protects individuals, homes, papers, and effects from unreasonable searches and seizures. U.S. Const., amend IV; Iowa Const. art. I, § 8; State v. Naujokes, 637 N.W.2d 101, 107 (Iowa 2000).

Searches or seizures conducted without a warrant are per se unreasonable, subject only to certain limited exceptions. State v. Cline, 617 N.W.2d 277, 282 (Iowa 2000)

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[1] The Fourth Amendment applies to the states through incorporation by the Fourteenth Amendment. State v. Wilkes, 756 N.W.2d 838 (Iowa 2008).

(abrogated on unrelated grounds by State v. Turner, 630 N.W.2d 601, 606 n.2 (Iowa 2001)). It is the State's burden to prove by a preponderance of the evidence that a warrantless search or seizure falls into one of the exceptions. State v. McGrane, 733 N.W.2d 671, 676 (Iowa 2007). The State has the burden to prove by a preponderance of the evidence that a recognized exception to the warrant requirement applies. State v. Lewis, 675 N.W.2d 516, 522 (Iowa 2004).

In the present case, Hauge acknowledges that law enforcement was authorized to stop the vehicle due to a traffic violation. See Whren v. United States, 517 U.S.806, 809-810, 116 S.Ct. 1769, 1772 (1996). However, Hauge contends that law enforcement did not have the authority to order him out of the vehicle. Further, Hauge argues that he did not provide consent to the officer to reach into his pocket.

1). Preliminary Matter Hauge was seized

Under both the Fourth Amendment and the article I, section 8 ordering an individual out of the vehicle is a seizure.

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, 111 S.Ct. 2382, 2387 (1991) (quotation marks and citation omitted). See State v. Wilkes, 756 N.W.2d at 843 (citations omitted). When a vehicle is temporarily detained during a traffic stop, all occupants of the vehicle (including passengers) are also detained. Brendlin v. California, 552 U.S. 249, 257-258, 127 S. Ct. 2400, 2407 (2007). When an officer orders the passenger out of the vehicle. State v. Schable, 919 N.W.2d 766 (Iowa Ct. App. 2018).

Here, the driver and passengers of the car would not have believed that they were free to leave. Two uniformed police officers were on the scene in two separate police vehicles. (Supp. Tr. p. 21, L19-21; p. 22, L6-10). Thus, the subsequent removal from the vehicle and pat-down and the purported request for the pat-down occurred while Hauge was

seized.

2). Searches and Seizures under the Iowa Constitution

While article I, section 8 uses nearly identical language as the Fourth Amendment and was generally designed with the same scope, import, and purpose, the Iowa Supreme Court jealously protects its authority to follow an independent approach under the Iowa Constitution. Id. (citations omitted). This Court's approach to independently construing provisions of the Iowa Constitution that are nearly identical to the federal counterpart is supported by the Iowa's case law. See, e.g.id; State v. Cline, 617 N.W.2d 277, 285 (Iowa 2000), abrogated on other grounds by State v. Turner, 630 N.W.2d 601 (Iowa 2001). The Iowa Supreme Court has held: "The linguistic and historical materials suggest that the framers of the Fourth Amendment, and by implication the framer of article I, section 8 of the Iowa Constitution intended to provide a limit on arbitrary searches and seizures." State v. Ochoa, 792 N.W.2d 260, 273 (Iowa 2010). As a general matter, the drafters of the

Iowa Constitution placed the Iowa Bill of Rights at the beginning of the constitution, for apparent emphasis." Id. at 274. "This priority placement has led one observer to declare that, more than the United States Constitution, the Iowa Constitution, 'emphasizes rights over mechanics.'" State v. Baldon, 829 N.W.2d 785, 809-10 (Iowa 2013) (Appel, J. concurring) (quoting Donald P. Racheter, The Iowa Constitution: Rights over Mechanics, in The Constitutionalism of American States 479, 479 (George E. Connor & Christopher W. Hammons eds., 2008). Accordingly, the Court construes article I, section 8 "in a broad and liberal spirit." State v. Coleman, 890 N.W. 284, 286 (Iowa 2017) (citation omitted) (internal quotation marks omitted).

The Iowa constitution has a "strong emphasis on individual rights." State v. Short, 851 N.W.2d 474, 482 (Iowa 2014). Iowa courts have long been concerned "about giving police officers unbridled discretion to rummage at will among a person's private efforts." State v. Gaskins, 866 N.W.2d 1,

10 (Iowa 2015) (quoting Arizona v. Gant, 556 U.S. 332, 345 (2009)). In addition, this Court has repeatedly determined the Iowa Constitution provides significant individual rights in the context of warrantless seizures and searches. Short, 851 N.W.2d at 506 (holding a valid warrant is required for law enforcement's search of a home under the Iowa Constitution); Cline, 617 N.W.2d 292-93 (holding the good faith exception is incompatible with the Iowa Constitution); State v. Fleming, 790 N.W.2d 560, 567-568 (Iowa 2010) (finding the search of a rented room violated the Iowa Constitution when the warrant for the area was not supported by probable cause): Baldon, 829 N.W.2d at 802 (finding a parole agreement containing a prospective search provision was insufficient to establish voluntary consent); Ochoa, 792 M.W.2d at 291 (holding the warrantless search of a parolee's room by a general law enforcement officer without particularized suspicion violated the state constitution); State v. Tague, 676 N.W.2d 197, 206 (Iowa 2004) (finding a traffic stop did not meet the

reasonableness test of article I, section 8); Coleman, 890 N.W.2d at 285 (finding article I, section 8 required law enforcement to terminate a valid traffic stop once the reasonable suspicion that an offense was being committed no longer existed); State v. Brown, 905 N.W.2d 846, 847 (Iowa 2018) (finding the search of a purse belonging to person not named in the warrant for the premise violated the Iowa Constitution). The application of the Iowa Constitution to the present case will provide Iowa citizens a "fundamental guarantee" of protection against unreasonable searches and seizures." See Cline, 617 N.W.2d at 292.

2). History of passengers' removal from vehicles in the Iowa Supreme Court.

Although the United States Constitution under Mimms and Wilson would permit automatic removal of passengers under these circumstances for purposes of the Fourth Amendment, this Court should nevertheless conclude that such automatic removal is not permitted under the Io Constitution.

In State v. Becker, 458 N.W.2d 604, 607-608 (Iowa 1990) the Iowa Supreme Court held, under the Fourth Amendment, that an officer who validly stops a vehicle based on a law violation by the driver is not permitted to order the passenger out of the car absent reasonable suspicion to believe the passenger has committed a crime, unless doing so is required to facilitate a lawful arrest of another person or a lawful search of the vehicle. Becker held, absent such additional justification, removal of the passenger amounts to a Fourth Amendment violation "requir[ing] suppression of evidence obtained after [the passenger] was ordered from the car." Becker, 458 N.W.2d at 608.

The Becker case was decided only under the Fourth Amendment, and did not consider or reference the scope of Iowa Constitution article I, section 8. In reaching its decision, our Iowa Supreme Court "recognized that the United States Supreme Court [in Mimms, 434 U.S.at 110, 98 S.Ct. at 333 (1977)] had held *drivers* could be ordered out of a car, but had

not yet ruled on whether passengers fell within the scope of that rule." State v. Smith, 683 N.W.2d 542, 544 (Iowa 2004) (emphasis in original). "In the absence of controlling authority" from the United States Supreme Court, our Iowa Supreme Court in Becker "distinguished the two sorts of cases." Id. at 544-45. Becker emphasized that the privacy rights of the driver and passenger are not the same as to intrusions occurring after the initial stop of a vehicle based on a law violation by the driver. Becker, 458 N.W.2d at 607. Our Court noted the Mimms pronouncement was made with regard to "a driver known to the officer to have violated the traffic laws" and "[a] person in that position is, in many states, including, Iowa, technically subject to full custodial arrest." Id. The Court reasoned that, an officer who "elects to temporarily pursue a lesser intrusion [with regard to the arrestable driver]... has the right to condition that election on certain aspects of detention and search which are conducive to the officer's safety." Id.

> The situation of the passenger, on the other hand, is entirely different. The fact that the driver [committed a traffic offense] authorizes the officer to stop the vehicle in which the passenger is riding. The resulting intrusion on the passenger which flows from the initial stop is an unavoidable consequence of action justifiably taken against the driver. Further intrusion is not justified, however, unless some articulable suspicion exists concerning a violation of a law by that person, or unless further interference with the passenger is required to facilitate a lawful arrest of another person or lawful search of the vehicle.

Id. Our Iowa Supreme Court in Becker "therefore declined to extend Mimms to passengers in all routine traffic stops." Smith, 683 N.W.2d at 545. That is, Becker held that "[a]bsent an articulable suspicion of wrongdoing vis-à-vis the passenger (or a need to move the passenger to effectuate a lawful arrest or search), law enforcement officers were not permitted to immediately order passengers from vehicles stopped for routine traffic violations." Id.

Seven years after Becker was decided, the United States Supreme Court issued its decision in Maryland v. Wilson, 519 U.S. 408, 413-15, 117 S.Ct. 882, 885-86 (1997) which, over

the dissenting opinions of Justices Stevens and Kennedy, "extended the Mimms doctrine to passengers." Smith, 683 N.W.2d at 545. Wilson thus "overruled Becker sub silentio as far as its reliance on the Fourth Amendment." Id. However, our Iowa Supreme Court has not yet addressed whether the Becker rule should nevertheless endure under the *State* Constitution.

3.) Hauge's improper removal from the vehicle under article I, section 8 of the Iowa Constitution.

Hauge respectfully requests this Court should now address the issue and hold the Becker rule, though no longer the law under the Federal Constitution, endures under the Iowa Constitution. Cf. Racing Ass'n of Central Iowa v. Fitzgerald, 675 N.W.2d 1, 4-6 (Iowa 2004) (Iowa Supreme Court initially found practice unconstitutional under both federal and state constitutions, the United States Supreme Court subsequently found practice permissible under the federal constitution, and the Iowa Supreme Court then re-analyzed issue but retained initial opinion that practice

violated state constitution).

Particularly in the search and seizure context, the Iowa Supreme Court has applied our State Constitution in a more exacting manner than the United States Constitution. See, e.g., Cline, 617 N.W.2d at 292-93 (good faith exception); State v. Ochoa, 792 N.W.2d 260 (Iowa 2010) (parole searches); State v. Pals, 805 N.W.2d at 782-83 (Iowa 2011) (consent searches); State v. Short, 851 N.W.2d 474 (Iowa 2014) (search of probationer's residence); State v. Coleman, 890 N.W.2d 284 (2017) (scope of stop when reasonable suspicion no longer present). The "Iowa Constitution is declared to be the supreme law of the State …, and it is the responsibility of this court, not the United States Supreme Court, to say what the Iowa Constitution means." Cline, 617 N.W.2d at 285 (internal quotation marks omitted). Although, the Iowa Supreme Court "cannot interpret the Iowa Constitution to provide *less* protection than that provided by the United States Constitution, [it] is free to interpret our constitution as

providing greater protection for our citizens' constitutional rights." Id. "The degree to which we follow United States Supreme Court precedent, or any other precedent, depends solely upon its ability to persuade us with the reasoning of the decision." Ochoa, 792 N.W.2d at 267. In considering how to interpret the Iowa Constitution, our Court will look to Iowa's history of jurisprudence as well as to persuasive case law from other states or federal courts, dissenting opinions, or secondary sources. Short, 851 N.W.2d at 481.

A number of other state courts, in considering the issue under their state constitutions, have rejected the application of the Mimms rule (authorizing automatic removal from the vehicle) to passengers. See e.g., State v. Bacome, 154 A.3d 1253 (N.J. 2017) (declining to adopt Wilson's extension of Mimms rule to passengers under state constitution); State v. Mendez, 970 P.2d 722 (Wash. 1999) (same; abrogated on unrelated grounds by Brendlin, 551 U.S. at 259, 127 S.Ct. at 2408 n.5); Com. v. Gonsalves, 711 N.E.2d 108 (Mass. 1999)

(rejecting on state constitutional grounds both Mimms rule for drivers as well as Wilson's extension of that rule to passengers); State v. Sprague, 824 A.2d 539 (Vt. 2003) (same); State v. Kim, 711 P.2d 1291 (Haw. 1985) (declining to adopt Mimms rule for drivers under state constitution). Our own Iowa Supreme Court in Becker, after analyzing the issue, concluded that extension of the Mimms rule to passengers was inappropriate. Becker, 458 N.W.2d at 607-608. This Court should now conclude that such holding is correct under the Iowa Constitution.

There are "reasons to have serious reservations about the Wilson decision." 4 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 9.6(a) (5th ed. Oct. 2017 Update) (hereinafter LaFave).

The problem with the Wilson rule lies in its authorization for *automatic* removal of the passenger from the vehicle during routine traffic stops without any need for a particularized safety concern. Importantly, even absent the Wilson rule,

officers would still under the rationale of Terry be able to order passengers to exit the vehicle in cases where they have a reasonable articulable suspicion of a safety concern. Wilson, 519 U.S. at 415, 117 S.Ct. at 887 (Stevens, J., dissenting); Gonsalves, 711 N.E.2d at 111-112 (exit order must be supported by reasonable suspicion of safety concern); Sprague, 824 A.2d at 545 (same). See also State v. Smith, 637 A.2d 158, 618 (N.J. 1994) (exit order must be based on "specific and articulable facts that would warrant heightened caution", though the burden "does not rise to the Terry standard that must be met for a protective pat-down"); Mendez, 970 P.2d at 220-21 (similarly holding). The safety concerns undergirding Wilson are thus adequately protected against by the reality that "it does not take much for a police officer to establish a reasonable basis to justify an exit order… based on safety concerns" in those particular cases where such concerns actually exist. Gonslaves, 711 N.E.2d at 112-113. To instead "permit an officer, in the absence of any

specific and articulable facts, to order [occupants] to step out of the vehicle" is an unwarranted intrusion on privacy interests. Id. See also 4 LaFave § 9.6(a) (a rule which "'applies equally to traffic stops in which there is not even a scintilla of evidence of any potential risk to the police officer,' is bound to produce results far exceeding those that would occur if individualized suspicion were required") (quoting Wilson, 519 U.S. at 416, 117 S.Ct. at 887 (Stevens, J., dissenting)).

There is also "reason to think that the [Wilson] Court's assessment of the danger to police from passengers riding in vehicles stopped for traffic violations is somewhat skewed." 4 LaFave § 9.6(a). In the absence of empirical scientific study in the context of routine traffic stops, the Wilson court relied only on raw statistics from the FBI indicating that "[i]n 1994 alone, there were 5,762 officer assaults and 11 officers killed during traffic pursuits and stops." Wilson, 519 U.S. at 413, 117 S.Ct. at 886. See also Id. at n.2 (acknowledging that "the

empirical data" in the area is "sparse"). But the use of such raw statistics to anecdotally assert that routine traffic stops are highly dangerous "share one crippling methodological flaw" – "[t]hey fail to appropriately account for the frequency of the police activity, namely traffic stops, in the risk calculation." Illya D. Lichtenberg and Alisa Smith, *How Dangerous are Routine Police-Citizen Traffic Stops? A Research Note*, 29 Crim. Just. 419, 420 (2001) (hereinafter Lichtenberg and Smith). The Lichtenberg and Smith study published in 2001 (subsequent to Wilson), "indicate[s] that the incidence rate of violence toward officers in traffic stops may be lower than commonly perceived" when the frequency of traffic stops area accounted for. State v. Miller, 370 P.3d 882, 888 n.5 (Or. Ct. App. 2016) *review granted*, 361 Or. 524 (Or. May 25, 2017). "According to the study, on average over a ten-year period, 'the risk of homicide to a police officer during a traffic encounter was one in 6.7 million' stops and 'the risk of assault to a police officer was one in 10,256 stops.'" State v. Jimenez, 353 P.3d

1227, 1231 n.9 (Or. 2015) (quoting Lichtenberg and Smith, 29 J.Crim. Just. at 420). "The 10,256 number", moreover, "is based on a 'low-end estimate' of the total number of stops." Miller, 370 P.3d at 157 n.5 (quoting Lichtenberg and Smith, 29 J. Crim. Just. at 424). "If a 'mid-range estimate' [of the total number of stops] is used… the risk of assault drops to one in 20,512 stops." Id. See also Jimenez, 353 P.3d at 1231 n.9 (declining "a per se expansion of police powers based on anecdotal evidence of dangers to police officers in the absence of scientific data supporting a need for wider police latitude").

Even assuming the dangerousness of routine traffic encounters, however, there is no empirical evidence supporting the conclusion that allowing automatic removal of passengers absent any particularized or case-specific suspicion of danger improves officer safety. 4 LaFave, § 9.6(a). As noted by Justice Stevens in his dissent from Wilson:

> [The majority's] statistics do not tell us how many of the incidents involved passengers. [Even] [a]ssuming that many of the assaults were committed by passengers, we do not know how many occurred after the passenger got out of the vehicle, how many took place while the passenger remained in the vehicle, or indeed, whether any of them could have been prevented by an order commanding the passengers to exit. There is no indication that the number of assaults was smaller in jurisdictions where officers may order passengers to exit the vehicle without any suspicion than in jurisdictions where they were then prohibited from doing so. Indeed, there is no indication that any of the assaults occurred when there was a complete absence of any articulable basis for concern about the officer's safety – the only condition under which I would hold that the Fourth Amendment prohibits an order commanding passengers to exit a vehicle. […]

Wilson, 519 U.S. at 416–17, 117 S. Ct. at 887 (Stevens, J., dissenting). "In short, the statistics are as consistent with the hypothesis that ordering passengers to get out of a vehicle increases the danger of assault as with the hypothesis that it reduces that risk.'" Id.

The "number of stops in which an officer is actually at risk", moreover, "is dwarfed by the far greater number of routine stops" during which passengers would be subject to

automatic removal. Id. 519 U.S. at 418, 117 S. Ct. at 888 (Stevens, J., Dissenting). "In the overwhelming majority of cases posing a real threat, the officer would almost certainly have some ground to suspect danger that would justify ordering passengers out of the car." Id. "In contrast, the potential daily burden on thousands of innocent citizens is obvious." Id. 519 U.S. at 419, 117 S.Ct. at 888 (Stevens J., Dissenting). "That burden may well be 'minimal' in individual cases", "[b]ut countless citizens who cherish individual liberty and are offended, embarrassed, and sometimes provoked by arbitrary official commands may well consider the burden to be significant." Id. Moreover "[t]he number of cases in which the [automatic exit] command actually protects the officer from harm may well be a good deal smaller than the number in which a passenger is harmed by exposure to inclement weather, as well as the number in which an ill-advised command is improperly enforced" resulting in harm to the passenger. Id. at n.6 (Stevens J., dissenting). See also 4

LaFave § 9.6(a) (noting that if the occupant "does not obey the [exit] order, the officer may utilize a show of force or actual force to ensure compliance").

"…[T]here is also reason to question the Wilson Court's conclusion that when a passenger is ordered out of the vehicle, the additional intrusion on the passenger is minimal." 4 LaFave § 9.6(a) (quotation marks omitted). "When an officer commands passengers innocent of any violation to leave the vehicle and stand by the side of the road in full view of the public, the seizure is serious, not trivial." Wilson, 519 U.S. at 422, 117 S.Ct. at 890 (Kennedy, J., dissenting). "The traffic violation sufficiently justifies subjecting the driver to detention and some police control for the time necessary to conclude the business of the stop." Id. 519 U.S. at 420, 117 S.Ct. at 879 (Stevens J., dissenting). A similar "restraint on the liberty of blameless passengers… is, in contrast, entirely arbitrary." Id. "…[W]holly innocent passengers in a taxi, bus, or private car" should be free to "remain comfortably seated within the vehicle

rather than exposing themselves to the elements and the observations of curious bystanders" absent any particularized safety concerns. Id.

"But the greatest concern" with the Wilson automatic exit rule is that it "is readily subject to manipulation and abuse." 4 LaFave § 9.6(a). "…[B]ecause the Wilson case confers upon the police an automatic right to require a passenger to exit the vehicle, there will be no mechanism for regular judicial review of individual police decisions, and thus it is very possible that these decisions will be based on considerations having no legitimate connection with any risk of harm to the officer." Id. "As Justice Stevens put it in Mimms, 'to eliminate any requirement that an officer be able to explain the reasons for his actions… leaves police discretion utterly without limits,' which means, of course, that certain 'citizens will be subjected to this minor indignity while others – perhaps those with different colored skin – may escape it entirely.'" Id. (quoting S, 434 U.S. at 122, 98 S.Ct. at 339 (Stevens J., dissenting)).

"Indeed, it is a certainty that exit orders will be given for reasons unrelated to any risk of harm", despite Wilson's reliance on concerns of officer-safety as distinct from crime detection. 4 LaFave § 9.6(a). "…[I]t is beyond dispute that a significant part of traffic law enforcement today is really concerned with drug[]" investigation whereby officers conduct traffic stops and then, "by one means or another" seek to "get[] the occupants of the vehicle out of the car to afford the officers a better view of the interior and of the occupants' possessions" to "determin[e] whether drugs" might be discovered. Id. (Officer's typical practice after identifying passenger during traffic stop is "if the passenger will allow me, I'll search them But "[t]hat a small percentage of routine traffic stops may result in the detection of more serious crime is no reason to subject the vast majority of citizens to routine orders to leave their vehicles." Sprague, 824 A.2d at 545-46.

This Court should accordingly hold that, under article I, section 8 of the Iowa Constitution, an officer who validly stops

a vehicle based on a law violation by the driver is not permitted to order the passenger out of the car absent reasonable suspicion to believe the passenger has committed a crime. Becker, 458 N.W.2d at 607-608.

In the present case Hauge, though only a passenger in the vehicle, was ordered out of the van without any reasonable suspicion to believe he committed a crime.

Hauge's state constitutional rights were violated thereby, "require[ing] suppression of evidence obtained after [he] was ordered from the car." Id. at 608.

The Court should find the Iowa Constitution offers greater protection that the U.S. Constitution with regards to police ordering passengers to exit a vehicle during a traffic stop. The Iowa Constitution should require some level of reasonable particularized suspicion that the passenger poses a risk to officer or a reasonable basis of specific articulable facts that a crime other than the traffic violation has been committed before a driver may be ordered out of the vehicle

during a traffic stop.

3). Hauge's consent was not voluntary under the Iowa Constitution.

Exceptions to the search warrant requirement now go well beyond those recognized at the time of the enactment of the Fourth Amendment and include consent searches. Schneckloth v. Bustamonte, 412 U.S. 218, 222-223 (1973). Consent to search is valid only if it is voluntary. State v. Pals, 805 N.W.2d at 767, 777–82 (Iowa 2011). Under the federal constitutional standard, a "totality of the circumstances" test is applied to evaluate whether consent is voluntary and not the product of duress or coercion. Bustamonte, 412 U.S. at 247-248, 93 S.Ct. 2058-59 (1973). Under that test, a waiver of Fourth Amendment rights does not require that the consenting party have knowledge of the right being waived. Id. at 235-48, 93 S.Ct. at 2051-59 (discussing knowing and intelligent waiver under Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019 (1938)). Rather, knowledge of the right to refuse consent is just one factor to consider under the totality of the

circumstances. Id. at 248-49, 93 S.Ct. at 2059.

In State v. Pals, our Iowa Supreme Court discussed criticisms to the federal approach. It referred the dissenting opinions in Schneckloth and Ohio v. Robinette, 519 U.S. 33, 117 S.Ct. 417 (1996), in which justices questioned how a person could validly relinquish a constitutional right without knowing he or she could exercise the right. Pals, 805 N.W.2d at 777-78.

The Pals court also noted that a number of state supreme courts have adopted a requirement of a knowing – not just a voluntary – waiver of the right to refuse consent under their state constitutions. Id. at 779 (citing State v. Brown, 156 S.W.3d 722, 731-32 (Ark. 2004); Penick v. State, 440 So.2d 547, 551 (Miss. 1983); State v. Johnson, 346 A.2d 66, 68 (N.J. 1978); State v. Ferrier, 960 P.2d 927, 932-33 (Wash. 1998)).

Additionally, the Pals Court remarked that the "academic commentary on Schneckloth has been generally unfavorable." Id. at 780-81. A number of commentators agree with Justice

Marshall's dissent in Schneckloth, while others criticize the totality of the circumstances test as lacking in predictability. Id. at 781. Others have noted that requiring police to inform suspects of their right to refuse consent neither jeopardized the viability of consent searches nor placed an unreasonable burden on police. Id. at 781-82.

Nevertheless, the Pals court "reserved for another day" the question of whether "a per se requirement that police advise an individual of his or her right to decline to consent to a search" as adopted by New Jersey, Washington, Mississippi, or Arkansas, is "required to establish consent under article I, section 8 of the Iowa Constitution." Id. at 782.

Hauge now asks this Court to resolve the question left open in Pals and adopt a "knowing and voluntary" standard for consensual searches and seizures under Article I Section 8 of the Iowa Constitution. For the reasons discussed above and in Pals, this Court should adopt a Zerbst knowing and intelligent waiver standard for consent searches and seizures

under the Iowa Constitution. Applying such a standard, Hauge's purported consent was not knowing and voluntary because he was not advised of his right to decline consent.

Even if this Court declines to adopt such a "knowing and voluntary" standard for consent, however, it should nevertheless conclude Hauge's consent was involuntary even under the "Iowa version" of the federal "totality of the circumstances" test applied in Pals. Pals, 805 N.W.2d at 783. Such approach is "similar to that of the Ohio Supreme Court" in State v. Robinette, 685 N.E.2d 762, 771 (1997) (hereinafter "Robinette III"). The standard applied in Robinette III is "the totality of the circumstances must clearly demonstrate that a reasonable person would believe that he or she had the freedom to refuse to answer further questions and could in fact leave." Robinette III, 685 N.E.2d at 245.

The factors considered by the Iowa Supreme Court in Pals included: (1) if the consenter was detained at the time of the consent; (2) if the consenter was subjected to a "pat down

search" or other projected authority of the officer; (3) if the consenter was "advised that he was free to leave or that he could voluntarily refuse consent without any retaliation by police;" and (4) if the officer advised the consenter that he had "concluded business related to the stop at the time" the officer asked for consent. See Pals, 805 N.W.2d at 782-83. Hauge's consent was not voluntary under the Iowa version of the "totality of the circumstances" test applied in Pals.

First, Hauge notes the officer ordered him out of the vehicle and then subjected him to a pat-down search (purportedly for weapons). Such "projected authority" over Hauge "is a factor to be considered in determining the voluntariness of the search." Pals, 805 N.W.2d at 782 (pat-down before request for consent).

Second, "the setting of a traffic stops on a public road [is] inherently coercive." Id. at 783. "In this setting, police plainly have the upper hand and are exerting authority in a fashion that makes it likely that a citizen would not feel free to decline

to give consent for a search even though the search is unrelated to the rationale of the original stop." Id. "…[T]he potential for coercion exists even in seemingly innocuous circumstances involving seizures." State v. Pettitjohn, 899 N.W.2d 1, 33 (Iowa 2017). "In other words, coercion can easily find its way into human interactions when detention is involved." Id. (quoting State v. Baldon, 829 N.W.2d 785, 798 (Iowa 2013)). Third, Hauge "was never advised that he was free to leave or that he could voluntarily refuse consent without any retaliation by police" which is, "at a minimum, a strong factor cutting against the voluntariness of the search…." Pals, 805 N.W.2d at 783.

Finally, "[t]he lack of closure of the original purpose of the stop makes the request for consent more threatening." Id.

Under these circumstances Hauge's consent for the officer to go inside his pocket was not voluntary. The evidence retrieved from Hauge's pocket should thus have been suppressed.

CONCLUSION

For all the above reasons, Hauge requests this court vacate his conviction, sentence, and judgment and remand the case to the district court for a new trial with suppression of the evidence from the unlawful search and seizures.

NONORAL SUBMISSION

Oral submission is not requested unless this Court believes it may be of assistance in the resolution of the issue presented.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $3.87, and that amount has been paid in full by the Office of the Appellate Defender.

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