IN THE SUPREME COURT OF IOWA
Supreme Court No. 20-1568

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BRENT ALAN HAUGE,
Defendant-Appellant.

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

APPELLEE'S BRIEF

THOMAS J. MILLER
Attorney General of Iowa

THOMAS E. BAKKE
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
(515) 281-4902 (fax)
Thomas.Bakke@ag.iowa.gov

DARIN J. RAYMOND
Plymouth County Attorney

AMY K. OETKEN
Assistant Plymouth County Attorney

ATTORNEYS FOR PLAINTIFF-APPELLEE

FINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Federal Statute

State Statute

Other Authorities

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. Hauge has Failed to Show the District Court Erred by Denying His Motion to Suppress.

Authorities

Arizona v. Johnson, 555 U.S. 323 (2009)
Coolidge v. New Hampshire, 403 U.S. 443 (1971)
Illinois v. Wardlow, 528 U.S. 119 (2000)
Johnson v. Zerbst, 304 U.S. 458 (1938)
Knowles v. Iowa, 525 U.S. 113 (1998)
Maryland v. Wilson, 519 U.S. 408 (1997)
Pennsylvania v. Mimms, 434 U.S. 106 (1977)
Schneckloth v. Bustamonte, 412 U.S. 218 (1973)
Terry v. Ohio, 392 U.S. 1 (1968)
United States v. Berryhill, 445 F.2d 1189 (9th Cir. 1971)
United States v. Burkett, 612 F.3d 1103 (9th Cir. 2010)
United States v. Fager, 811 F.3d 381 (10th Cir. 2016)
United States v. Garcia, 751 F.3d 1139 (10th Cir. 2014)
United States v. Golinveaux, 611 F.3d 956 (8th Cir.2010)
United States v. Jones, 254 F.3d 692 (8th Cir. 2001)
United States v. Lyons, 733 F.3d 777 (7th Cir. 2013)
United States v. Patton, 705 F.3d 734 (7th Cir. 2013)
United States v. Reyes, 349 F.3d 219 (5th Cir. 2003)
United States v. Upthegrove, 504 F.2d 682 (6th Cir. 1974)
United States v. White, 593 F.3d 1199 (11th Cir. 2010)
Commonwealth v. Elysee, 934 N.E.2d 837 (Mass. 2010)
Commonwealth v. Stampley, 771 N.E.2d 784 (Mass. 2002)
Cropper v. State, 123 A.3d 940 (Del. 2015)
DeVoss v. State, 648 N.W.2d 56 (Iowa 2002)
Graves v. State, 708 So.2d 858 (Miss. 1997)
Henson v. United States, 55 A.3d 859 (D.C. 2012)
Meier v. Senecaut, 641 N.W.2d 5327 (Iowa 2002)
Milledge v. State, 811 S.E.2d 796 (S.C. 2018)
Owens v. Commonwealth, 291 S.W.3d 704 (Ky. 2009)
People v. Moss, 842 N.E.2d 699 (Ill. 2005)
People v. Rutherford, 802 N.E.2d 340 (Ill. 2003)
State v. Askerooth, 681 N.W.2d 353 (Minn. 2004)

State v. Baker, 925 N.W.2d 602 (Iowa 2019)
State v. Baldon, 829 N.W.2d 785 (Iowa 2013)
State v. Becker, 458 N.W.2d 604 (Iowa 1990)
State v. Bergmann, 633 N.W.2d 328 (Iowa 2001)
State v. Brown, 156 S.W.3d 722 (Ark. 2004)
State v. Coleman, 890 N.W.2d 284 (Iowa 2017)
State v. Donaldson, 380 S.W.3d 86 (Tenn. 2012)
State v. Donnell, 239 N.W.2d 575 (Iowa 1976)
State v. Dukes, 547 A.2d 10 (Conn. 1988)
State v. English, No. 17-0836, 2018 WL 3060261 (Iowa Ct. App. June 20, 2018)
State v. Ferrier, 960 P.2d 927 (Wash. 1998)
State v. Finch, No. 02-1148, 2003 WL 22828750 (Iowa Ct. App. Nov. 26, 2003)
State v. Gogel, No. 11–0817, 2013 WL 2637673 (Iowa Ct. App. 2013)
State v. Johnson, 346 A.2d 66 (N.J. 1975)
State v. Kearns, 867 P.2d 903 (Haw. 1994)
State v. Lane, 726 N.W.2d 371 (Iowa 2007)
State v. Liggins, 524 N.W.2d 181 (Iowa 1994)
State v. Lowe, 812 N.W.2d 554 (Iowa 2012)
State v. McCright, 569 N.W.2d 605 (Iowa 1997)
State v. Naujoks, 637 N.W.2d 101 (Iowa 2001)
State v. O'Neill, 62 P.3d 489 (Wash. 2003)
State v. Pals, 805 N.W.2d 248 (Iowa 2010)
State v. Pettijohn, 899 N.W.2d 1 (Iowa 2017)
State v. Price, No. 13-0587, 2014 WL 1494952 (Iowa Ct. App. Apr. 16, 2014)
State v. Reinier, 628 N.W.2d 460 (Iowa 2001)
State v. Riley, 501 N.W.2d 487 (Iowa 1993)
State v. Robbins, 171 A.3d 1245 (N.H. 2017)
State v. Robinette, 685 N.E.2d 762 (Ohio 1997)
State v. Satern, 516 N.W.2d 839 (Iowa 1994)
State v. Schable, No. 17-0688, 2018 WL 2725314 (Iowa Ct. App. June 6, 2018)
State v. Smith, 637 A.2d 158 (N.J. 1994)
State v. Smith, 683 N.W.2d 542 (Iowa 2004)
State v. Sparr, 688 N.W.2d 913 (Neb. 2004)
State v. Storm, 898 N.W.2d 140 (Iowa 2017)
State v. Tague, 676 N.W.2d 197 (Iowa 2004)

State v. Turner, 630 N.W.2d 601 (Iowa 2001)
State v. Ulrey, 208 P.3d 317 (Kan. 2009)
State v. Williams, No. 19-1857, 2020 WL 7385260 (Iowa Ct. App. Dec. 16, 2020)
U.S. const., IV
Iowa const., art. I, sec. 8
George L. Blum, *Construction and Application by State Courts of Federal and State Constitutional Standards Governing Police Orders to Passengers in Car Lawfully Pulled Over for Traffic Stop*, 92 A.L.R.6th 171 (orig. pub'd 2014)

ROUTING STATEMENT

The State disagrees that retention is appropriate. First, as discussed below, the issue Hauge argues warrants retention was not preserved and this Court likely would not be able to address the issue in this direct appeal. Second, even under the test Hauge proposes he would not be entitled to relief. Finally, the State notes this Court has already granted further review in *State v. Williams*, Sup. Ct. No. 19-1857, which raises an identical claim, thus retaining this case would be merely duplicative and unnecessary. Transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

Brent Alan Hauge was charged with possession of a controlled substance, methamphetamine, second offense, in violation of Iowa Code section 124.401(5). Trial Info.; App. 4–5. Hauge filed a motion to suppress that was ultimately granted in part (suppressing statements made by Hauge before he received a *Miranda* warning) and denied in part (finding a pat-down search of Hauge to be lawful). *See* Mot. Supp.; Supp. Ruling; App. 8–9, 13–22. A "hybrid trial on

the minutes" was held and the district court found Hague guilty.[1] *See* T.Tr. 9:20–:25; Sent. Order; App. 23–26.

Hague now appeals arguing the court erred in denying his request to suppress evidence obtained from his pat-down search. The State disagrees.

Course of Proceedings

The State accepts the defendant's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

Facts

On June 14, 2019, Officer Colin Scherle observed a two-door car drive past him with every occupant in the vehicle staring at him. *See* Supp. Tr. 5:4–7:16. A female passenger in the rear seat continued to stare at Scherle after the vehicle passed by. *See* Supp. Tr. 7:13–:16. Scherle followed the car and eventually initiated a traffic stop for speeding. *See* Supp. Tr. 7:13–8:9. Deputy Kyle Petersen was nearby, and he stopped to provide Scherle assistance, approaching the passenger side of the car as Scherle spoke to the driver. *See* Supp. Tr. 21:4–22:16.

[1] Defense counsel explained that although the parties were stipulating to the evidentiary value of the minutes of testimony, both parties were additionally calling a witness to testify. T.Tr. 9:20–:25.

Petersen observed the male passenger in the front seat, Hauge, was acting unusually. *See* Supp. Tr. 23:22–26:23. Hauge stared straight ahead, refusing to make eye contact with Petersen, or to even look at him. *See* Supp. Tr. 23:22–26:23, 29:23–30:10. Petersen observed Hauge reach out of Petersen's line of sight towards the area where the pocket of the door would be. *See* Supp. Tr. 27:4–30:10. Hauge retrieved an object, used Petersen's flashlight to look at it (while still refusing to look at or acknowledge Petersen), and then repeated the quick movement to return the object before returning to stare straight ahead. *See* Supp. Tr. 27:4–31:20.

The two officers performed a check of the vehicle's occupant's information and discovered that the female passenger in the rear seat had an active arrest warrant for a conviction involving a dangerous weapon. *See* 32:1–33:20; *see* State's Ex. 2 (Scherle Body Cam Video) at 4:55–5:15. The officers discussed Hauge's unusual behavior and Scherle informed Petersen that the driver had also been "sweating profusely." *See* Supp. Tr. 32:1–33:14. The officers decided to remove everyone from the two-door vehicle in order to arrest the passenger in the rear seat. *See* Supp. Tr. 33:2–34:3; State's Ex. 2 (Scherle Body Cam Video) at 2:25–:40.

Petersen asked Hauge to exit the vehicle, and once Hauge did, Petersen asked if he could perform a pat-down search. *See* Supp. Tr. 36:24–41:5; State's Ex. 2 (Scherle Body Cam Video) at 8:58–9:10. Hauge immediately replied, "yup." *See* State's Ex. 2 (Scherle Body Cam Video) at 9:05–:10.

A pat-down search was performed, and Petersen felt an object in Hauge's pocket he immediately identified as a methamphetamine pipe. *See* Supp. Tr. 41:3–:5, 47:3–:25; T.Tr. 15:12–16:14. Petersen placed Hauge under arrest and he found the methamphetamine pipe and a baggie of methamphetamine in Hauge's pocket. *See* T.Tr. 16:15–17:20. At the "hybrid trial on the minutes," Hauge admitted that he had a methamphetamine pipe in his pocket and that he also knowingly had methamphetamine in his pocket. *See* T.Tr. 9:20–:25, 37:23–38:20. He additionally admitted that he had a prior conviction for possession of a controlled substance. *See* T.Tr. 37:3–:13.

ARGUMENT

I. Hauge has Failed to Show the District Court Erred by Denying His Motion to Suppress.

Preservation of Error

The State partially contests error preservation. Although Hauge moved to suppress, the grounds raised below did not include a

challenge to the lawfulness of the officer's order for Hauge to exit the vehicle which is one of the primary issues raised in his appeal. *See* Mot. Supp.; App. 8–9. Hauge's motion to suppress included challenges to Hague's detention, the pat-down search of his person, and his pre-*Miranda* statements. *See* Mot. Supp.; App. 8–9. Even at the hearing on the motion to suppress, Hauge's counsel explained they were primarily urging suppression of the pat-down search and the defendant's statements. *See* Supp. Tr. 74:4–:19. And the court's ruling on the motion to suppress only addressed two issues: (1) the pat-down search and (2) the pre-*Miranda* statements of the defendant. *See* Supp. Ruling; App. 13–22. Thus, error is not preserved for the challenge that the officer's order for Hauge to exit the vehicle was unlawful. That claim cannot be considered on appeal. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

And even if this Court were to liberally construe Hauge's motion to suppress, the constitutional arguments raised on appeal were still not preserved. On appeal, Hauge argues this Court should decline to

follow the United States Supreme Court's opinion in *Maryland v. Wilson*, 519 U.S. 408 (1997), and should apply a different standard for the lawfulness of exit orders under the Iowa Constitution. *See* Appellant's Br. pp.24–45. He additionally argues this Court should adopt a per se requirement that officers advise an individual of their right to decline a consent search to establish consent under the Iowa Constitution. *See* Appellant's Br. pp.45–51. But neither argument for a novel approach under the Iowa Constitution was raised or ruled upon below. *See* Mot. Supp.; Supp. Ruling; App. 8–9, 13–22. Although Hauge's motion to suppress referred to the Iowa Constitution, a vague passing reference is not sufficient to preserve error for the nuanced arguments made on appeal. The Iowa Court of Appeals addressed a nearly identical issue in a recent case also urging an independent approach under the Iowa Constitution for exit orders, finding a vague reference to the Iowa Constitution—and in that case the issue was even addressed somewhat at the suppression hearing unlike this case where it was not—inadequate to preserve error for the argument made on appeal:

> In Williams's appellate brief, many pages are dedicated to a comprehensive and thoughtful analysis of other states' treatment of *Wilson*. But other than a minimal reference to

> article 1, section 8 of the Iowa Constitution in the motion to suppress and his attempt at the suppression hearing to distinguish these facts from *Wilson*, Williams made no argument and the court did not rule on the question of any departure from federal precedent on this constitutional issue. As a general rule, "[i]ssues not raised before the district court, including constitutional issues, cannot be raised for the first time on appeal." Because this issue was not preserved for appeal, we apply *Wilson* case law as written and decline to reach the merits of Williams's claim the Iowa Constitution requires a different interpretation.

State v. Williams, No. 19-1857, 2020 WL 7385260, at *3 (Iowa Ct. App. Dec. 16, 2020) (footnote omitted) (quoting *State v. McCright*, 569 N.W.2d 605, 607 (Iowa 1997)). Hauge's arguments urging a departure from the federal framework for both exit orders and consent pat-down searches were not preserved and should not be addressed on appeal. Because error was not preserved, only the existing framework should be applied in considering Hauge's claims.

Standard of Review

The Court reviews de novo when a defendant alleges a constitutional error occurred. *State v. Tague*, 676 N.W.2d 197, 201 (Iowa 2004) (citing *State v. Naujoks*, 637 N.W.2d 101, 106 (Iowa 2001)). "The court makes an 'independent evaluation of the totality

of circumstances as shown by the entire record.' " *Id.* (quoting *State v. Turner*, 630 N.W.2d 601, 606 (Iowa 2001)). The court grants "considerable deference to the trial court's findings regarding the credibility of witnesses, but [is] not bound by them." *Id.* (citing *Turner*, 630 N.W.2d at 606; *State v. Liggins*, 524 N.W.2d 181, 186 (Iowa 1994)). "In determining whether the court erred in overruling the motion to suppress [our appellate courts] may consider not only the evidence adduced in the motion to suppress but the later trial testimony." *State v. Donnell*, 239 N.W.2d 575, 577–78 (Iowa 1976) (citing *United States v. Upthegrove*, 504 F.2d 682, 684 n.4 (6th Cir. 1974)). An appellate court may affirm a district court's ruling on any ground urged below, whether or not it formed the basis for the court's original ruling. *See DeVoss v. State*, 648 N.W.2d 56, 62–63 (Iowa 2002).

Merits

On appeal, Hague argues the court should have suppressed the evidence obtained because, in his view, the officer unlawfully ordered him to exit the vehicle in which he was a passenger and by conducting an unlawful pat-down search. *See* Appellant's Br. pp.24–51. The State disagrees.

A. The officer's exit order was lawful.

Hauge argues the officer's exit order was unlawful because he was a passenger in the stopped vehicle. He invites the Court to adopt a reasonable suspicion standard under article I, section 8 of the Iowa Constitution, as several states have adopted more stringent standards under their state constitutions, before a police officer may lawfully order a passenger to exit a vehicle stopped for traffic violations. Appellant's Br. pp.24–45. Specifically, he urges in light of this Court's recent expansions of protections from warrantless searches and seizures under the Iowa Constitution it should decline to follow *Maryland v. Wilson*, 519 U.S. 408 (1997), and return to the earlier standard applied in *State v. Becker,* 458 N.W.2d 604 (Iowa 1990) (some articulable suspicion of wrongdoing), *abrogated on other grounds by Knowles v. Iowa,* 525 U.S. 113, 117–18 (1998). Appellant's Br. pp.24–45.

The State disagrees that the adoption of a one-size-fits-all standard is warranted in this case or moving forward. *Cf. State v. Coleman,* 890 N.W.2d 284, 300–01 (Iowa 2017) ("There is no categorical approach to pat-down searches," rather "[t]he validity of a pat-down search . . . depends upon the facts of each case."). In any

event, even applying the long-abandoned *Becker* reasonable suspicion standard as Hauge proposes, the officer's exit order was lawful.

1. This Court should decline Hauge's invitation to return to the standard adopted in State v. Becker.

In *Pennsylvania v. Mimms* the United States Supreme Court noted that "[t]he touchstone of our analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.' " *Pennsylvania v. Mimms,* 434 U.S. 106, 108–09 (1977) (quoting *Terry v. Ohio,* 392 U.S. 1, 19 (1968)). In *Terry v. Ohio* the Court had recognized "it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties." *Id.* at 110 (quoting *Terry*, 392 U.S. at 23). Thus, the Court found the officer's exit order for a driver following a traffic violation stop reasonable along with the pat-down that followed based on observing a large bulge under the driver's jacket. *Id.* at 109–12.

Twenty years later, the Supreme Court extended the *Mimms* rule to passengers in vehicles stopped for traffic violations, noting "the same weighty interest in officer safety is present regardless of whether the occupant of the stopped car is a driver or passenger."

Wilson, 519 U.S. at 413–15. The Court found the "additional intrusion on the passenger minimal" upholding the officer's exit order for passengers "pending completion of the stop." *Id.* at 414–15.

Prior to the *Wilson* opinion, the Iowa Supreme Court had taken a different approach for passenger exit orders. In *State v. Becker,* decided after *Mimms* but before *Wilson,* the Iowa Supreme Court held that immediately ordering a passenger from a vehicle following a traffic stop was unjustified "unless some articulable suspicion exists concerning a violation of 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." *Becker,* 458 N.W.2d at 607. The Court declined to extend the *Mimms* rule concerning drivers to passengers. *Id.* at 607–08.

Three years later in *State v. Riley,* the Iowa Supreme Court found it permissible for an officer to talk to a passenger in a stopped vehicle and ask for identification. *Riley,* 501 N.W.2d 487, 488–89 (Iowa 1993). And furtive movements under the front seat by the passenger upon the officer's approach combined with his failure to provide identification reasonably supported the officer's exit order and his check under the passenger's seat for weapons. *Id.* at 489–90.

In *State v. Smith*, the Iowa Supreme Court noted that in *Wilson* the Supreme Court had "overruled *Becker* sub silentio as far as its reliance on the Fourth Amendment," and reaffirmed *Riley* in that officers may lawfully talk to a passenger in a stopped vehicle and request identification information. *Smith,* 683 N.W.2d 542, 545 (Iowa 2004); *see also State v. Finch*, No. 02-1148, 2003 WL 22828750, *4 (Iowa Ct. App. Nov. 26, 2003) ("[B]ased on the holding in *Wilson*, we conclude Officer Schneider could order Finch out of the vehicle pending completion of the stop, regardless of whether he had any suspicion Finch was involved in criminal activity at that time, and in doing so did not violate Finch's rights under the Fourth Amendment.").

In arguing this Court should turn back to the *Becker* approach under the Iowa Constitution, Hauge points to several states that have declined to follow *Mimms* and/or *Wilson* under their respective state constitutions. *See* Appellant's Br. pp.34–35. The states Hauge identifies include Hawaii, New Jersey, Washington,[2] Massachusetts,

[2] The State points out that the text of the analogous provision in the Washington Constitution differs in that it "contains an express right to privacy." *State v. Storm*, 898 N.W.2d 140, 153 (Iowa 2017) (rejecting calls to adopt Washington's approach under Iowa

and Vermont. However, depending on how the question is framed, numerous jurisdictions would still allow an officer discretion to ask a passenger to either get out of or remain with a stopped vehicle.[3] *See, e.g.*, *State v. Robbins*, 171 A.3d 1245, 1250–51 (N.H. 2017); *State v. Donaldson*, 380 S.W.3d 86, 91–96 & n.10 (Tenn. 2012) (analyzing *Mimms*, adopting its view of balancing of interests, and explaining that Tennessee Constitution sometimes "offers more protection than the corresponding provisions of the Fourth Amendment"—but stating that "[i]n this instance, we see no reason to construe our constitution in a manner different from the federal constitution"); *State v. Ulrey*, 208 P.3d 317, 322 (Kan. 2009); *Owens v. Commonwealth*, 291 S.W.3d 704, 708–09 & n.19 (Ky. 2009); *State v. Askerooth*, 681 N.W.2d 353, 367 (Minn. 2004) (analyzing traffic stop under Article I, Section 10 of the Minnesota Constitution, and noting that "[i]t is correct that a police officer may order a driver out of a lawfully stopped vehicle without an articulated reason"); *State v. Sparr*, 688

Constitution because "[t]he Iowa Constitution lacks a separate privacy provision").

[3] *See also* George L. Blum, *Construction and Application by State Courts of Federal and State Constitutional Standards Governing Police Orders to Passengers in Car Lawfully Pulled Over for Traffic Stop*, 92 A.L.R.6th 171 (orig. pub'd 2014) (compiling cases).

N.W.2d 913, 921–22 (Neb. 2004); *State v. O'Neill*, 62 P.3d 489, 499 (Wash. 2003) (assessing seizure under Article I, Section 7 of Washington Constitution and stating that "[o]nce a driver has been validly stopped, a police officer may order him or her to get out of the vehicle" in every case because "[s]uch an intrusion is de minimis"); *People v. Rutherford*, 802 N.E.2d 340, 349 (Ill. 2003); *State v. Robinette*, 685 N.E.2d 762, 767 (Ohio 1997) (reanalyzing facts under Section 14, Article I of the Ohio Constitution on remand, but still holding police officer's "instruction for Robinette to exit the vehicle was also justified because it was a traffic stop"); *State v. Smith*, 637 A.2d 158, 162–64 (N.J. 1994) (determining that *Mimms* rationale "satisfies the New Jersey Constitution as well"); *State v. Dukes*, 547 A.2d 10, 22–23 (Conn. 1988) (noting, under Article I, Section 7 of the Connecticut Constitution, an officer conducting a traffic stop may "ask that an occupant exit the vehicle; any intrusion upon an occupant's personal liberty in directing that action is de minimis because, on balance, it serves to protect the officer").

This Court should decline Hauge's invitation to adopt a bright-line rule under article I, section 8 of the Iowa Constitution to require an officer to have a reasonable suspicion of criminal activity by an

automobile passenger, or that the exit order is otherwise necessary to effect an arrest or search, to support a vehicle exit order. Such a rule is not feasible in practice when split-second decisions as to present danger must be made and, in any regard, is unwarranted because existing standards have not been applied as *per se* rules without regard to the circumstances. *Coleman,* 890 N.W.2d at 301 (noting validity of a pat-down search is a key to ensuring officer safety and "depends upon the facts of each case"); *Commonwealth v. Elysee*, 934 N.E.2d 837, 840–41 (Mass. 2010) (quoting *Commonwealth v. Stampley*, 771 N.E.2d 784, 787 (Mass. 2002)) (noting officers "need not point to specific facts that the occupants are armed and dangerous"); *Smith,* 637 A.2d at 168 (noting "sometimes in a matter of seconds, an officer must determine whether a protective pat-down is necessary to secure his or her safety") (citations omitted); *Riley,* 501 N.W.2d at 490 (recognizing dangers in roadside encounters).

And even with the *Wilson* rule, protections remain in place for passengers' constitutional rights. In *Arizona v. Johnson*, for example, the Court maintained that the *Terry* reasonable suspicion standard must be satisfied to support a pat-down. *Johnson,* 555 U.S. 323, 330–32 (2009). And the stop itself must be lawful before an exit

order may take place. *See State v. Schable*, No. 17-0688, 2018 WL 2725314, at *3–5 (Iowa Ct. App. June 6, 2018) (finding passenger exit order unlawful because officer did not perform a *Terry* stop on the vehicle and he "had no individualized suspicion regarding" the defendant passenger); *see also State v. Baker*, 925 N.W.2d 602, 610–13 (Iowa 2019) (discussing cause necessary to stop a vehicle).

Hauge urges that a return to the standard articulated by this Court in *Becker* is necessary to avoid arbitrary and discriminatory law enforcement. The State disagrees. The problem in *Becker* was the officer's *immediate* exit order with no basis to suspect the passenger of wrongdoing or of presenting a danger to the officer. *Becker,* 458 N.W.2d at 606–08. That is not the situation in this case given the officer's observations of Hauge's unusual behavior and furtive movements combined with the need to remove and arrest the passenger located in the rear seat of the two-door car. Thus, the exit order in this case demonstrates the opposite of the concerns Hauge claims exists, and this Court should decline to consider a new standard when Hauge has failed to show a problem with the existing approach under *Wilson*.

This Court should conclude that adoption of a new rule under the Iowa Constitution pertaining to the treatment of passengers in vehicles stopped for traffic violations is unwarranted. The *Wilson* rule authorized the officer to order Hauge to exit the vehicle, and his rights were not violated by that order.

2. *Even if this Court returned to the* Becker *standard, the officer's exit order was lawful.*

Even if this Court were inclined to accept Hauge's proposal to return to a *Becker* approach under the Iowa Constitution, the officer's exit order was lawful. The Court in *Becker* explained an exit order to a passenger would be justified if (1) the officer had "some articulable suspicion . . . concerning a violation of law" by the passenger, (2) the order was "required to facilitate a lawful arrest of another person," or (3) the order was "required to facilitate a . . . lawful search of the vehicle." *Becker*, 458 N.W.2d at 607. The removal of Hauge from the vehicle was supported, at a minimum, by both of the first two *Becker* exceptions.

First, Deputy Petersen had articulable suspicion concerning potential wrongdoing by Hauge. At the very moment the vehicle passed by Officer Scherle, at approximately 10:30 P.M., the occupants of the vehicle caught his attention by staring at him and continuing to

stare at him long after they passed. *See* Supp. Tr. 6:11–7:16; *see, e.g.*, *State v. Satern*, 516 N.W.2d 839, 841 (Iowa 1994) (discussing shared-knowledge doctrine). After the traffic stop was initiated, Deputy Petersen walked up to the passenger side of the car while Officer Scherle spoke to the driver. *See* Supp. Tr. 21:4–22:16. Petersen immediately noted Hauge exhibiting "peculiar or odd" behavior, including his refusal to acknowledge or even look at Petersen. *See* Supp. Tr. 23:22–26:23 (explaining Hauge's demeanor and that avoidance shows the person may have something to hide from the officer), 29:23–30:10. Hauge "looked straight forward, like a statue, down at the floor, and didn't make any attempt to look up at the [officer] shining the light at him, which struck very odd to [the officer]." Supp. Tr. 25:3–:7. Petersen took this unusual behavior as a red flag, that the avoidance could be related to criminal activity. Supp. Tr. 25:25–26:23. Hauge then suddenly reached down out of Petersen's sight towards the car door's pocket area—while continuing to refuse to look at the officer—and retrieved an object. Supp. Tr. 27:4–30:10 (explaining it ended up that Hauge was retrieving a lottery ticket and he used the officer's flashlight to look at the lottery ticket while still refusing to acknowledge or look at the officer). He

repeated this sudden behavior returning the object to the door's pocket area, and Hauge returned to "staring straight down at the floor . . . and not making eye contact or acknowledging [the officer's] presence whatsoever." Supp. Tr. 30:25–31:13 ("Once again, I couldn't see his hands the entire time, and I wasn't sure what he was exactly doing."). Besides Hauge's behavior, Officer Scherle also noted the driver was also sweating profusely. *See* Supp. Tr. 33:2–:20; State's Ex. 2 (Scherle Body Cam Video) at 2:25–:40. The officers also discovered that the passenger in the rear seat of the two-door car had an arrest warrant regarding a conviction for a charge involving a dangerous weapon. Supp. Tr. 32:1–33:20; *see* State's Ex. 2 (Scherle Body Cam Video) at 4:55–5:15.

Based on his observations (including Hauge's peculiar behavior, furtive movements, and close proximity to a person known to have an active warrant for a conviction involving a dangerous weapon), Deputy Petersen had an articulable suspicion that Hauge may have been involved in wrongdoing and that the officers' safety may have been in danger. *See* Supp. Tr. 33:2–:20 (explaining the officers concluded "that this could potentially be a serious situation that [they had] on [their] hands"). In the post-*Becker*, pre-*Wilson* case *Riley*,

the Iowa Supreme Court found that a passenger's "furtive movements were enough to arouse [the officer]'s suspicion and make him fear for his safety." 501 N.W.2d at 489–90. The Court approved of that officer having ordered the passenger out of the vehicle followed by a search under the passenger's seat: "The question, then, is whether [the officer]'s concern for his safety upon seeing Riley's furtive movements, thus warranting the search under the front seat, was justified under the circumstances. We believe it was." *Id.* at 490. The same is true here, and the exit order was thus lawful even if this Court returned to the *Becker* standard.

Second, the exit order was separately justified to facilitate the arrest of the passenger in the rear seat. The officers discovered the rear passenger of the two-door car had an active arrest warrant for a conviction involving a dangerous weapon. *See* Supp. Tr. 32:1–33:20; State's Ex. 2 (Scherle Body Cam Video) at 4:55–5:15. There was no physical way to facilitate the arrest of the rear-seat passenger without removing a person from the front seat of the two-door car, and the rear seat passenger was removed from the car on the side Hauge had been seated. *See* Supp. Tr. 34:1–:3 ("I would ask [Hauge] out of the vehicle so we could get to the back rear passenger female, who had

the warrant."). Additionally, the car was stopped on the side of an interstate and it was safer (both for the officers and the passenger) for the rear-seat passenger to exit towards the highway's shoulder, not into a lane of traffic. *See* Supp. Tr. 19:2–:6 (noting exiting through the passenger's side would avoid traffic), 35:2–:21 (explaining the geographic and safety concerns that would have been created if the rear-seat passenger had been required to exit through the driver's side door). Thus, the order for Hauge to exit the car, in order to facilitate the arrest of the rear-seat passenger, was lawful and expressly permitted under the *Becker* standard.

Even if this Court returned to the *Becker* standard under the Iowa Constitution, the officer's order for Hauge to exit the vehicle would have been permissible. This Court should affirm.

B. The pat-down search was lawful.

Hague next argues that the pat-down of his person was unlawful. First, he argues "this Court should adopt a *Zerbst* knowing and intelligent waiver standard for consent searches and seizures under the Iowa Constitution." *See* Appellant's Br. pp.45–48. And in the alternative, he argues his consent to the pat-down search was

involuntary considering the totality of the circumstances. *See* Appellant's Br. pp.48–51. Hague's arguments should be rejected.

The Fourth Amendment to the United States Constitution and article I, section 8 of the Iowa Constitution both safeguard the right to be free from "unreasonable searches and seizures." U.S. const., IV amend.; Iowa const., art. I, sec. 8. A warrantless search is per se unreasonable and any evidence resulting from the search is inadmissible unless it falls within one of the well-recognized exceptions. *State v. Pettijohn*, 899 N.W.2d 1, 14 (Iowa 2017). One of these "carefully drawn exceptions" is the consent search. *Id.* at 14 & 25. "A warrantless search conducted by free and voluntary consent" does not violate either constitutional provision. *State v. Reinier*, 628 N.W.2d 460, 465 (Iowa 2001); *see Schneckloth v. Bustamonte*, 412 U.S. 218, 248–49 (1973).

Where the State seeks to justify a search based on the defendant's consent, it must "demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied." *Schneckloth*, 412 U.S. at 248; *Reinier*, 628 N.W.2d at 465. The concept of "voluntariness" should not "be taken literally to mean a 'knowing' choice." *Schneckloth*, 412 U.S. at 224.

Rather, it is an accommodation of "the legitimate need for [consent] searches and the equally important requirement of assuring the absence of coercion." *Id.* at 227; *see also State v. Lowe*, 812 N.W.2d 554, 572 (Iowa 2012). Whether a defendant's consent to a search was in fact voluntary "is a question of fact to be determined from the totality of the circumstances." *Schneckloth*, 412 U.S. at 227. The analysis considers "subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents." *Id.* at 229.

A number of factors bear on whether a defendant's consent was voluntarily given. *See State v. Lane*, 726 N.W.2d 371, 378 (Iowa 2007). They include "'personal characteristics of the defendant,'" including his or her " 'age, education, intelligence, sobriety, and experience with the law[.]' " *Pettijohn*, 899 N.W.2d at 32 (quoting *United States v. Jones*, 254 F.3d 692, 696 (8th Cir. 2001)). Courts also look to " 'features of the context in which the consent was given,' " such as the defendant's knowledge of his or her right to refuse consent, whether he or she was free to leave or subject to restraint, whether officers asserted any claim of authority to search before asking for the defendant's consent, a show of force or other

coercive action by police, officers' use of deception without a justifiable and reasonable basis, whether police threatened to obtain a search warrant despite their lack of sufficient basis to get a warrant, and whether there was illegal police action just before consent was given. *Id.*; *see also Lowe*, 812 N.W.2d at 572–73; *Reinier*, 628 N.W.2d at 465–66 (collecting cases). No one factor is "individually controlling;" each "must be considered in combination with all of the circumstances." *Reinier*, 628 N.W.2d at 465; *see also Schneckloth*, 412 U.S. at 229 (discussing the need in each case for "the most careful scrutiny" without the use of "any infallible touchstone").

The Iowa Supreme Court has determined under the Iowa Constitution our courts require a more critical eye when reviewing the totality of the circumstances in determining if consent to search was given voluntarily. *See State v. Pals*, 805 N.W.2d 248, 782–83 & 779 (Iowa 2010) (adopting a "*Schneckloth* 'with teeth' test"); *State v. Baldon*, 829 N.W.2d 785, 823 (Iowa 2013) (stating that the Court has "insisted on a more realistic analysis of what amounts to 'voluntary consent' in the context of automobile searches"). For example, in *Pals* the Court found the defendant's consent to search invalid because the encounter was "inherently coercive," recognizing among

other factors the defendant was subjected to a non-consensual pat-down search and was detained in a police car before consent to search was requested. *Pals*, 805 N.W.2d at 782–83.

The Court ultimately evaluates whether a defendant's consent "was in fact voluntarily given, and not the result of duress or coercion," and it does so under the totality of the circumstances, with no one factor controlling the analysis. *See Schneckloth*, 412 U.S. at 248–49; *Pettijohn*, 899 N.W.2d at 32–38 (analyzing the totality of the circumstances to determine whether the defendant's consent "was voluntary and uncoerced"); *Lowe*, 812 N.W.2d at 572–575 ("The question of voluntariness requires the consideration of many factors, although no one factor itself may be determinative."); *Pals*, 805 N.W.2d at 782–83 (stating that a warning that the defendant is free to leave or can voluntarily refuse consent "is not always required[,]" but is "an important factor in determining whether a consent to search is truly voluntary").

1. This Court should decline Hauge's invitation to find that officers are required to inform persons of their right to refuse consent in order to find that consent was voluntarily given.

For the first time on appeal Hauge requests this Court answer a question left unanswered in *State v. Pals*: "An evaluation of such a

per se requirement that police advise an individual of his or her right to decline to consent to a search . . . is reserved for another day." 805 N.W.2d at 782. Hague essentially urges this Court break with the conclusion in *Schneckloth v. Bustamonte* that a defendant's waiver of his Fourth Amendment rights need not meet the stringent standard outlined in *Johnson v. Zerbst*, 304 U.S. 458 (1938), which requires a knowing and intelligent waiver of rights that "promot[e] the fair ascertainment of truth at a criminal trial." *Schneckloth*, 412 U.S. at 218. Even if this Court were inclined to overlook Hauge's failure to preserve error on this argument, it should decline his invitation.

Schneckloth remains persuasive and should not be jettisoned here. In *Schneckloth*, the defendant asked the United States Supreme Court to conclude that consent to search was the equivalent of a waiver of the right to be free from warrantless searches and, therefore, any consent to search must be an intentional relinquishment or abandonment of a known right or privilege. *Id.* at 235. The Court responded that its cases did not "reflect an uncritical demand for a knowing and intelligent waiver in every situation where a person has failed to invoke a constitutional protection." *Id.* Instead, the Court noted, the requirement of a knowing and

intelligent waiver has been applied only to the rights that ensure a criminal defendant's right to a fair trial, such as the validity of a waiver of counsel, the right to confrontation, to a jury trial, to a speedy trial, and the right to be free from twice being placed in jeopardy. *Id.* at 237–38.

The Supreme Court found that "there is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment." *Id.* at 241. Unlike a criminal trial and the rights associated with it, "the Fourth Amendment 'is not an adjunct to the ascertainment of truth.' The guarantees of the Fourth Amendment stand 'as a protection of quite different constitutional values—values reflecting the concern of our society for the right of each individual to be let alone." *Id.* at 242. As such, the Court found, consent is voluntary under the Fourth Amendment even where the consenting party has no knowledge of the existence of the right being waived. *Id.* at 234. Knowledge of the right is just one fact within the totality of the circumstances relevant to the question. *Id.* at 248–48.

Iowa's adoption of a "*Schneckloth* 'with teeth' test" adequately protects the right "to be let alone." *Pals*, 805 N.W.2d at 779 & 782;

Schneckloth, 412 U.S. at 242. Under that test, it is the State's burden to show that "consent was in fact voluntarily given, and not the result of duress or coercion, express or implied." *Schneckloth*, 412 U.S. at 248. The unlimited universe of factors relevant to the totality of the circumstances test, of course, includes whether the person knew of the right to refuse. *See Pals*, 805 N.W.2d at 782–83. In the context of a traffic stop, courts evaluating the voluntariness of a defendant's consent should consider factors like whether the officer informed the defendant that (1) he was free to leave, (2) the officer had concluded business related to the stop, and (3) he may voluntarily refuse consent without repercussion or retaliation. *Id.* The more critical eye applied to the totality of the circumstances test gives Iowa courts the tools they need to test the voluntariness of a defendant's consent, *see, e.g.*, *State v. Gogel*, No. 11–0817, 2013 WL 2637673, at *3 (Iowa Ct. App. 2013) (finding consensual search involuntary), and it adequately protects the important liberty interests this Court has identified. *See Pals*, 805 N.W.2d at 780-783.

For these reasons, few jurisdictions have felt compelled to diverge from *Schneckloth*. And many of the ones that have involved consent searches of the defendant's home and are based on "the legal

principle that a person's home is a zone of privacy . . . as sacrosanct as any right or principle under [their] state constitution[s] and case law." *See, e.g.*, *State v. Brown*, 156 S.W.3d 722, 728–29 (Ark. 2004) (knock and talk); *State v. Ferrier*, 960 P.2d 927, 934 (Wash. 1998) (knock and talk); *State v. Johnson*, 346 A.2d 66, 68 (N.J. 1975) (consent search of an apartment). Moreover, most do not go so far as to require a warning by officers. Instead, they simply hold it is the State's burden to show that the defendant knew that he had the right to refuse consent. *See, e.g.*, *Johnson*, 346 A.2d at 68 (stating that, in a non-custodial situation, "the police would not necessarily be required to advise the person of his right to refuse to consent to the search"). *But see State v. Kearns*, 867 P.2d 903, 909 (Haw. 1994) (requiring the defendant be "informed of his right to decline to participate in the encounter or that he could leave at any time"). Other jurisdictions hold that the defendant himself must first raise the knowledge question. *See Graves v. State*, 708 So.2d 858, 863–64 (Miss. 1997) (placing the burden on the defendant to raise the issue of whether his waiver was knowledgeable).

As *Schneckloth* recognizes, a person's right to be free from "arbitrary intrusion by the police" must be balanced against the

community's "real interest in encouraging consent" searches. 412 U.S. at 242–243. Consensual interviews and searches are important law enforcement tools. As the Supreme Court noted, "it is no part of the policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals." *Schneckloth*, 412 U.S. at 243 (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 488 (1971)). "Without such investigation, those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved. In short, the security of all would be diminished." *Id.* at 225. Allowing searches and seizures pursuant to a suspect's voluntary consent is an appropriate balance of "the competing interests of legitimate and effective police practices against our society's deep fundamental belief that the criminal law cannot be used unfairly." *Reinier*, 628 N.W.2d at 465. For all of those reasons, this Court should decline Hauge's unpreserved request to extend the Iowa Constitution beyond the rule set forth in *Pals*.

2. *Hague's consent to the pat-down search was voluntary.*

Hague argues in the alternative that his consent to the pat-down search was not voluntarily given. Appellant's Br. pp.48–51. The State disagrees.

The State first notes that the district court found that Hauge immediately and unequivocally gave his consent for Deputy Petersen to perform a pat-down search: "when Deputy Petersen asked if he could search the Defendant, the Defendant responded with an affirmative, and unequivocal, 'yup.' ". *See* Supp. Ruling p. 6. And the district court concluded there was no evidence of coercion, recognizing the deputy only asked a single time if he could perform the pat-down search. *See* Supp. Ruling p.6; App. 18.

The trial court's findings are supported by the video from Officer Scherle's body camera.[4] In that video, Deputy Petersen can be seen and heard communicating with Hauge, ordering him to exit the car and then asking if he can check him for weapons. State's Ex. 2 (Scherle Body Cam Video) at 8:10–9:10. Deputy Petersen informed Hauge he was not free to leave, but he made it clear that Hauge was

[4] There was no body worn camera video for Deputy Petersen. *See* Supp. Tr. 49:20–:25.

not under arrest. State's Ex. 2 (Scherle Body Cam Video) at 8:10–9:00. Once Hauge exits the vehicle, Petersen can be heard asking Hauge if he had any weapons on him. State's Ex. 2 (Scherle Body Cam Video) at 8:58–9:05. Petersen then tells Hauge not to put his hands into his pockets. State's Ex. 2 (Scherle Body Cam Video) at 9:00–:07. And then Petersen calmly asks, "Can I check you for weapons real quick?" State's Ex. 2 (Scherle Body Cam Video) at 9:05–:08. Hauge immediately and without hesitation responds, "Yup." State's Ex. 2 (Scherle Body Cam Video) at 9:05–:10.[5]

The totality of the circumstances show Hauge's unequivocal consent was given voluntarily. The total interaction with the police and Hauge to the point where Petersen asked for consent was very short, and this consideration weighs against finding involuntariness. *See Lowe*, 812 N.W.2d at 572 (finding Audsley provided valid consent to search, in part because "[t]he questioning of Audsley was of a short duration, perhaps twenty minutes"); *cf. State v. Lane*, 726 N.W.2d

[5] The video is entirely inconsistent with Hauge's self-serving trial testimony where he claims instead of responding "Yup" he told Deputy Petersen " 'Well, you're going to pat me down anyway, whether I say yes or no, so yeah—' or something to that effect." T.Tr. 35:14–:16. Hauge's trial testimony was demonstrably not credible and should not be given weight in this Court's analysis.

371, 379 (Iowa 2007) (upholding consent obtained after "a lengthy discussion"). The video also demonstrated "[t]here [was] no evidence of threats or physical intimidation." *Lowe*, 812 N.W.2d at 574. Further, Hauge demonstrated he knew his rights and he was not afraid to question Petersen's requests and orders. When Petersen first asked Hauge for his identification Hauge questioned why and he asked whether he was being detained. *See* State's Ex. 2 (Scherle Body Cam Video) at 4:33–:55 (discussing Hague asking if he was being detained when Petersen had asked him for identification). And again, when Petersen asked Hague to exit the vehicle he initially refused, questioning whether he was under arrest and whether he had to comply with Hauge's request for him to exit. *See* Supp. Tr. 37:19–:25; State's Ex. 2 (Scherle Body Cam Video) at 8:10–9:45. Hauge's demonstrated knowledge of his criminal rights and his willingness to question—not simply submit to—Petersen's authority demonstrated his consent to the pat-down search was given voluntarily. *Cf. Lowe*, 812 N.W.2d at 573.

Hauge tries to undermine his voluntary consent by attempting to draw parallels between his case and the search in *Pals*. *See* Appellant's Br. pp.49–51. But the State submits that considering the

totality of the circumstances, Petersen's request to perform a pat-down search for weapons was much less "inherently coercive" than the request for consent to search in *Pals*. Notably, Hauge was standing just outside the vehicle he had been a passenger in, in full view of the general motoring public, rather than having been confined to a police vehicle. *See* State's Ex. 2 (Scherle Body Cam Video) at 8:10–9:10; *see also State v. English*, No. 17-0836, 2018 WL 3060261, at *2–3 (Iowa Ct. App. June 20, 2018). Thus, while this case involves consent obtained during a traffic stop, it does not involve the same flavor of "inherent coercion" present in *Pals*. Moreover, *Lowe* was decided after *Pals*, and *Lowe* listed its fifth environment-related factor as "whether consent was given in a public or in a secluded location"—which seems like a repudiation of the statement from *Pals* that "the setting of a traffic stop on a public road [is] inherently coercive." *Compare Lowe*, 812 N.W.2d at 573 (quoting *United States v. Golinveaux*, 611 F.3d 956, 959 (8th Cir.2010)), *with Pals*, 805 N.W.2d at 783.

Similarly, Hauge notes that Deputy Petersen ordered Hague out of the vehicle, and he compares this "projected authority" to that of *Pals*. *See* Appellant's Br. p.50. But again, the projected authority

stemming solely from an exit order falls short compared to the "inherent coercion" in *Pals* where the request for consent occurred after the defendant was subjected to a non-consensual pat-down search and was detained in a police cruiser. *See Pals*, 805 N.W.2d at 782. And in *Pals*, the police "asked Pals to come back to [the officer's] patrol car." *Id.* at 770. But the officer's exit order was not listed by the Court as a consideration in its voluntariness analysis. *Id.* at 782–83. Thus, even *Pals* appears to recognize that exit orders have a negligible impact on the analysis, or at the minimum, it pales in comparison to the other instances of projected authority in that case. Hauge's consent to the pat-down search was voluntarily given.

This Court should reject Hauge's argument that his consent to the pat-down search was given involuntarily. The denial of his motion to suppress the pat-down search should be affirmed.

3. Even if this Court finds Hauge's consent was invalid, the pat-down search was lawful based on Deputy Petersen's observations.

In resisting the motion to suppress, the State noted there were justifications supporting Deputy Petersen's request to pat down Hauge. *See* State's Br. Resisting Mot. Supp.; App. 10–12. These justifications included Hauge's demeanor (including furtive

movements and avoidance) combined with the fact that the passenger in the rear seat of the vehicle had an active warrant for a conviction involving a dangerous weapon. *See* Supp. Tr. 31:1–33:20. The district court considered this argument but concluded the officer would not have been justified to perform a pat-down search for weapons. *See* Supp. Ruling pp.4–6; App. 16–18. But this Court can affirm on any ground urged below, even if the district court's ruling was based on another ground. *See DeVoss*, 648 N.W.2d at 62–63.

The United States Supreme Court has explained pat-down searches of a driver or any passenger should be based on a "reasonable suspicion that they may be armed and dangerous." *Knowles*, 525 U.S. at 117–18 (citing *Terry*, 392 U.S. at 1); *see Johnson,* 555 U.S. at 332–33. The Iowa Supreme Court similarly recognizes pat-downs are allowed when an officer has reasonable suspicion of criminal activity or believes "the person is armed and the officer's safety is in danger." *State v. Bergmann*, 633 N.W.2d 328, 333 (Iowa 2001) (citing *Terry,* 392 U.S. at 27, 30-31).

Deputy Petersen was justified in his belief that Hague may have been armed and dangerous, and a pat-down search for weapons was thus permissible. Petersen observed Hauge acting "peculiar or odd"

including his refusal to look at or make eye contact with the officer. *See* Supp. Tr. 30:1–:10; *see also Milledge v. State*, 811 S.E.2d 796, 803 (S.C. 2018) (recognizing avoidance of eye contact was a legitimate consideration for determining whether individual may be a danger to officers); *Cropper v. State*, 123 A.3d 940, 945–46 (Del. 2015) (considering individual's "difficult time making eye contact"). While refusing to acknowledge or look at the officer, Hauge also made sudden furtive movements outside Petersen's line of sight towards an area of the vehicle where a weapon could have been hidden. *See* Supp. Tr. 27:4–31:13. An officer's observation of furtive movements—specifically reaching out of an officer's sight in a vehicle just as was the case here—has been recognized as an appropriate justification for a *Terry* search. *Riley*, 501 N.W.2d 489–90; *see United States v. Burkett*, 612 F.3d 1103, 1107 (9th Cir. 2010) (considering furtive movements in approving of frisk of passenger). Additionally, during the exit order Hauge was non-compliant, was "fidgeting throughout the car" while Petersen "couldn't see his hand movements," became agitated, and immediately before the pat-down search, Hauge placed his hand into his pocket. *See* Supp. Tr. 37:1–40:17; T.Tr. 35:8–:10 (admitting that he placed his hand in his pocket

and Petersen had to tell him to take his hand out before the pat-down search). Hague's unusual physical behavior contributed to Petersen concluding Hague may be armed and dangerous.

The surrounding circumstances are also important to consider in addition to Petersen's observations of Hauge's physical behavior. The traffic stop occurred late at night on the side of the rural interstate. *See* Supp. Tr. 6:11–8:9. The two officers were outnumbered by the three occupants of the vehicle. *See* Supp. Tr. 6:11–8:21; *see also United States v. White*, 593 F.3d 1199, 1203 (11th Cir. 2010) (considering fact officers were outnumbered); *United States v. Reyes*, 349 F.3d 219, 225 (5th Cir. 2003) (same); *Henson v. United States*, 55 A.3d 859, 870 (D.C. 2012) ("Moreover, the officers were outnumbered by appellant and his two companions . . . ."); *People v. Moss*, 842 N.E.2d 699, 712 (Ill. 2005) (considering fact the two officers were outnumbered by three persons). The officers knew the rear-seat passenger had an active arrest warrant regarding a conviction involving a dangerous weapon, the driver was sweating profusely, Hauge was acting "peculiar or odd," and even when the vehicle had merely driven past Officer Scherle the occupants had been staring at him. *See* Supp. Tr. 7:3–:16, 30:7–:10, 32:1–33:20; *see also*

Illinois v. Wardlow, 528 U.S. 119, 124 (2000) ("Our cases have also recognized that nervous, evasive behavior is a pertinent factor in determining reasonable suspicion."); *United States v. Lyons*, 733 F.3d 777, 782 (7th Cir. 2013) (quoting *United States v. Patton*, 705 F.3d 734, 740 (7th Cir. 2013)) ("A display of nervousness is frequently recognized as a sign that a suspect has something to hide, including a weapon."). Further, the officers' suspicions of a person can contribute to an officer's suspicions of their companions. *See State v. Price*, No. 13-0587, 2014 WL 1494952, at *3 (Iowa Ct. App. Apr. 16, 2014) ("[P]resence of a companion of an arrestee at the time and point of the arrest is an important factor to be considered in determining whether a law enforcement officer has a clear articulable reason to believe he is in danger from a companion who could be armed and dangerous"); *see also Lyons*, 733 F.3d at 782–83 (recognizing defendant's "decision to associate himself" with another whom officers had suspicions "properly contributed to the officers' suspicion of him"); *United States v. Berryhill*, 445 F.2d 1189, 1193 (9th Cir. 1971) ("We think that *Terry* recognizes and common sense dictates that the legality of such a limited intrusion into a citizen's personal privacy extends to a criminal's companions at the time of

arrest. It is inconceivable that a peace officer effecting a lawful arrest of an occupant of a vehicle must expose himself to a shot in the back from defendant's associate because he cannot, on the spot, make the nice distinction between whether the other is a companion in crime or a social acquaintance."). And the need for the officers to arrest the rear-seat passenger, thereby turning their backs or attention away from Hauge during her arrest, contributes to the justification to perform a pat-down on Hauge. *See* Supp. Tr. 34:20–36:7 (explaining the geographic and safety concerns created by Hauge's presence in dealing with the arrest of the other passenger and his concern of having to turn his back to Hauge); *see also United States v. Fager*, 811 F.3d 381, 385–86 (10th Cir. 2016) (quoting *United States v. Garcia*, 751 F.3d 1139, 1147 (10th Cir. 2014)) ("[W]hen an officer must 'turn his or her back to a defendant, we require[] little beyond this concern to support the officer's reasonable suspicion.' " (second alteration in original)). The circumstances surrounding Hauge's behavior reasonably contributed to Petersen's suspicion and concern for his safety.

Therefore, given the totality of the circumstances, even if Hague's consent was invalid, the pat-down search was lawful because

Deputy Petersen justifiable concluded Hauge may be armed and dangerous. This Court should reject Hauge's claim. The denial of Hague's motion to suppress his pat-down search should be affirmed.

CONCLUSION

This Court should affirm Brent Alan Hauge's conviction and sentence.

REQUEST FOR NONORAL SUBMISSION

Oral submission is unnecessary.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

THOMAS E. BAKKE
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
Thomas.Bakke@ag.iowa.gov

CERTIFICATE OF COMPLIANCE

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) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **8,526** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: June 11, 2021

THOMAS E. BAKKE
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
Thomas.Bakke@ag.iowa.gov