IN THE SUPREME COURT OF IOWA

STATE OF IOWA Plaintiff-Appellee, vs. JUAN DANIEL SALCEDO, Defendant-Appellant.	S.CT. NO. 18-1353

APPEAL FROM THE IOWA DISTRICT COURT
FOR JOHNSON COUNTY
THE HONORABLE PATRICK R. GRADY, JUDGE

APPELLANT'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

SEAN P. SPELLMAN (AT0007464)
SPELLMAN LAW, P.C.
4000 Westown Parkway, Suite 120
West Des Moines, IA 50266
Telephone: 515-222-4330
Facsimile: 515-222-9005
Email: sean@spellmanlawpc.com

MARY K. SPELLMAN (AT0010085)
SPELLMAN LAW P.C.
4000 Westown Parkway, Suite 120
West Des Moines, Iowa 50266
Telephone: 515-222-4330
Facsimile: 515-222-9005
Email: molly@spellmanlawpc.com

ATTORNEYS FOR DEFENDANT-APPELLANT

CERTIFICATE OF SERVICE

On the 20th of March, 2019, the undersigned certifies that a true copy of the forgoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Juan Salcedo, 50 Avenue D, Apt. 3G, New York, NY 10009. The undersigned further certifies that on the 20th of March, 2019, a copy was mailed via United States mail, proper postage attached, to the following:

Elizabeth Beglin,
Assistant Johnson County Attorney
417 South Clinton Street
PO Box 2450
Iowa City, Iowa 52244

Louis Sloven,
Assistant Attorney General
Hoover State Office Building, 2nd Fl.
1305 E. Walnut Street
Des Moines, Iowa 50319

RESPECTFULLY SUBMITTED:

/s/ Sean P. Spellman
SEAN P. SPELLMAN (AT0007464)
SPELLMAN LAW, P.C.
4000 Westown Parkway, Suite 120
West Des Moines, IA 50266
Telephone: (515) 222-4330
Facsimile: (515) 222-9005
Email: sean@spellmanlawpc.com

Mary K. Spellman
MARY K. SPELLMAN (AT0010085)
SPELLMAN LAW, P.C.
4000 Westown Parkway, Suite 120
West Des Moines, IA 50266
Telephone: (515) 222-4330
Facsimile: (515) 222-9005
Email: molly@spellmanlawpc.com

ATTORNEYS FOR DEFENDANT-APPELLANT.

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Iowa Code Section 321.297

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ROUTING STATEMENT

The Iowa Supreme Court should retain this case because issues raised involve a substantial issue of first impression or changing legal principles in Iowa. Iowa R. App. P. 6.903(2)(d) & 6.1101(2)(c), (f).

Salcedo argues that a request for a consent search unrelated to the purpose of the stop is an unlawful extension of the stop and article I, section 8 of the Iowa Constitution does not allow a request for a consent search without reasonable suspicion to believe a crime other than the traffic violation has been committed.

Additionally, Salcedo requests this Court adopt a knowing and intelligent standard for consent searches under the Iowa Constitution and require law enforcement to advise individuals of their right to refuse to consent to a warrantless search when no exigencies are present.

Finally, Salcedo argues that Iowa Code Section 321.297 is unconstitutionally void for vagueness, and that it conflicts with Iowa Code Section 321.285 to the extent that there is a discussion of minimum and maximum speeds and a person of ordinary understanding is not sufficiently put on notice to understand which conduct is prohibited. Salcedo argues that Iowa Code Section 321.297 is so vague that even the stopping officer in Salcedo's case did not have an accurate understanding of the law. Additionally, Salcedo argues that he did not commit a violation of Iowa Code Section

321.297(2) and there was no probable cause to stop his vehicle. The Iowa Supreme Court has never interpreted Iowa Code Section 321.297(2). Salcedo requests this Court interpret Iowa Code Section 321.297(2) and find that it is unconstitutional due to being void for vagueness and because it leads to arbitrary or discriminatory behavior by law enforcement

STATEMENT OF THE CASE

Nature of the Case: Defendant-Appellant Juan Salcedo appeals The Honorable Patrick R. Grady's "Order" denying the Defendant-Appellant's Motion to Suppress in Johnson County District Court Case No. FECR117126.

Course of Proceedings: On December 12 2017, the State charged Salcedo with "Manufacture, Deliver, or Possess with Intent to Manufacture or Deliver Marijuana", a Class D Felony, in violation of Iowa Code Section 124.401(1)(D) and "Failure to Affix a Drug Tax Stamp", a Class D Felony, in violation of Iowa Code Sections 453B.12, 453B.3, and 453B.1 Trial Information App. P. 4. See Iowa Code Sections 124.401(1)(D), 453B.12, 453B.3, and 453B.1. Salcedo filed a written arraignment and plea of not guilty on December 12, 2017. Arraignment & Plea; App. P. 7. At the same time, Salcedo also waived his right to a speedy Trial. Arraignment & Plea; App. P. 7.

On April 18, 2018, Salcedo filed a motion to suppress. Mot. Suppress; App. P. 8. On April 19, 2018, Salcedo's co-defendant, Jairo Rodriguez, filed a joinder in Salcedo's motion to suppress. Joinder; App. P. 20. On May 16, 2018, the State filed a resistance to the Defendants' motions to suppress. State Resistance; App. P. 24. An evidentiary hearing on the defendants' motions to suppress was held on May 17, 2018. Suppress. Tr. 1:1-3:2. At the evidentiary hearing, the State presented testimony from Johnson County Sheriff's Deputy Cody O'Hare, who conducted the traffic stop and subsequent search of Salcedo's vehicle. Suppress. Tr. 3:15-55:11. Suppress Ruling; App. P. 32. The State also submitted, and the district court received, a copy of Deputy O'Hare's dash camera video and Deputy O'Hare's body camera video into evidence. Suppress. Tr. 24:21-25:6; Exhibit 1; Suppress Ruling; App. P. 32. On July 11, 2018, the district court issued a written ruling denying the defendants' motion to suppress. Suppress Ruling; App. P. 32.

On August 8, 2018, Salcedo filed an Application for Discretionary Review and Request for Stay. App. for Rev; App P. 39. On August 22, 2018, the State filed a Resistance to Salcedo's Application for Discretionary Review. Resistance to App for Rev; App. P. 70. On August 23, 2018, Salcedo filed a Reply to the State's Resistance. Reply to Resistance; App. P. 76. On August 23, 2018, the State filed a Response to Salcedo's Reply. Response to Reply; App. P. 82. On September 10, 2018, the Supreme

Court granted Salcedo's Application for Discretionary Review and Request for Stay. Supreme Court Order; App. P. 84.

Facts: At approximately 9:00 p.m. on November 2, 2017, Deputy Cody O'Hare of the Johnson County Sheriff's Office conducted a stop of a vehicle being driven by Mr. Salcedo. Suppress. Tr. P. 7:2-23; Mins. Test; App. Vol. II P. 4. Deputy O'Hare had been traveling behind the vehicle being driven by Salcedo for approximately three (3) miles on Interstate 80 in Johnson County, Iowa, wherein Salcedo's vehicle traveled at a speed from about 57 miles an hour to about 62 miles per hour, although mostly traveling around 60 miles per hour. Suppress Tr. 9:14-17 Exhibit 1 (21:04:10 – 21:04:55); Mins Test; App.Vol II P. 4. The speed limit in the area where the deputy first encountered Mr. Salcedo was 70 miles per hour, and the speed limit later decreased to 65 miles per hour as the deputy continued to drive behind and alongside Salcedo's vehicle Suppress Tr. 9:12-13; 35:21-36:5. When the speed limit dropped to 65 miles per hour, Salcedo's vehicle traveled from between 57 miles per hour to 62 miles per hour. Suppress Tr. 36:1-5. The minimum speed limit in the area where Salcedo's vehicle traveled was 40 miles per hour. Suppress Tr. 31:10-14. When the deputy first encountered. Salcedo's vehicle, the deputy was traveling in the left lane, which is where Mr. Salcedo's vehicle was traveling. Suppress Tr. 9:18-22 Mins Test; App. Vol II P. 4. There were no other vehicles and no other traffic on in the area or on the road. Suppress Tr. 8:10-11 Mins Test; App. Vol II P. 4. After

coming upon Salcedo's vehicle in the left lane, the deputy switched into the right lane and slowed to the pace of Salcedo's vehicle, followed alongside and behind Salcedo's vehicle in the right lane, and paced the Salcedo's vehicle for a distance of three to a little over three miles. Suppress Tr. 11:8-21.

The deputy had no information regarding the driver of the vehicle including whether or not the driver might have been a young or inexperienced driver or an elderly driver who was trying to be cautious in the dark of night. Suppress Tr. 32:7-11. The area of interstate where Salcedo's vehicle traveled was not largely illuminated by street lights. Suppress Tr. 32:12-14.

During the three miles that the deputy traveled alongside and behind Salcedo's vehicle, the deputy radioed in the license plate to dispatch and confirmed via radio dispatch that the vehicle being driven by Salcedo was from the state of California, that it was a rental vehicle, that it was legally registered, that there were no warrants for the registered owner, and that the vehicle was in good standing Suppress Tr. 29:25-30:23. Exhibit 1 (21:05:00 – 21:05:20) Just one week prior to this date, Deputy O'Hare had completed a drug interdiction course and drug investigation course. Suppress Tr. 6:1-6. In his drug interdiction training, Deputy O'Hare had learned that the state of California was a common point of entry for illegal drugs into the United States and that rental cars are at times used to transport drugs from California to other points within the United States. Suppress Tr. 6:1-23.

After traveling alongside Salcedo's vehicle for anywhere between three to four miles, during which time the deputy was running the vehicle through dispatch, the deputy finally initiated traffic stop of Salcedo's vehicle based upon the vehicle traveling slower than the posted speed limit in the left lane. Suppress Tr. 11:8-18; 43:1-5. Mins. Test. App. Vol II P. 4. The deputy believed that Salcedo had violated Iowa Code Section 321.297 and the deputy believed that Iowa Code Section 321.297 prohibited drivers from traveling under the speed limit in the left lane Suppress Tr. 10: 19-25; 11:1-2. Mins. Test; App. P. 4. The deputy was of the opinion that the fact that Salcedo's vehicle traveled in the left land at a speed below the speed limit provided probable cause to stop the vehicle, but that there was a possibility that the traffic stop could also lead into further activity and that there was further criminal activity going on. Suppress Tr. 43:1 - 44:22. The deputy testified that "the probable cause for this violation was for the violation of the 321.297". Suppress Tr. 31:1-2. The deputy believed that there was no reason the vehicle should be traveling under the speed limit that evening because there were no adverse weather conditions, road construction or obstacles. Suppress Tr. 31:3-9. The deputy initiated a traffic stop and based on his knowledge that the vehicle was a rental, the deputy had already decided that he would be investigating other things aside from the alleged traffic violation. Suppress Tr. 54:25 – 55:4.

Salcedo pulled over his vehicle without incident. Suppress Tr. 11:22-23. Mins Test; App. Vol II P. 4. The passenger in the vehicle was named Jairo Rodriguez.

Suppress 12:1-3. Mins Test; App. Vol II P. 4. The deputy asked Salcedo for his driver's license and rental car contract and ordered Salcedo out of the vehicle Suppress Tr. 12:20-21:2 Mins Test. App. Vol II P. 4. Prior to requesting license, registration and insurance and ordering Salcedo out of the vehicle, the deputy told Salcedo and Rodriguez, "You're going under the speed limit in the fast lane. You were going like 60 mile an hour in the speed lane….yeah, so that's the fast lane, that's the passing lane; unless there's a reason like the weather or something like that, you can't be under the speed limit because that's the passing lane, okay?" Exhibit 1 (21:06:34 - 21:06:59).

After ordering Salcedo out of the vehicle, the deputy patted down Salcedo and did not discover any weapons. Suppress Tr. 37:1-6; Exhibit 1 (21:07:22 – 21:07:53 Mins Test; App. Vol II P. 4). The deputy ordered Salcedo to sit in his patrol vehicle. Suppress Tr. 12:25-13:2. Mins Test; App. Vol II P. 4. When the deputy ordered Salcedo out of his vehicle and commanded him to sit in the deputy's patrol vehicle, the deputy testified that Salcedo was not free to leave. Suppress Tr. 32:22-25. The deputy testified that he made it a common practice to have individuals go back to his patrol vehicle to speak with him so that he can separate the parties and get their individual stories so he can compare the stories, and to get information, to see where the individuals are coming from, and if the deputy needs to "further any investigation into whether they're under the influence or doing some other illegal activity" Suppress Tr. 13:3-10; 26:14-25; 27:4. The deputy admitted that in the scope of a traffic

investigation, it is not necessary to "compare stories" as it relates to the traffic stop violation. Suppress Tr. 29:4-6. The deputy testified that he did not ask Salcedo questions relating to the traffic violation. Suppress Tr. 29:11-15. The deputy testified that through his interdiction training, the deputy was trained to engage motorists in conversations to try to develop other further investigations such as narcotics investigations. Suppress Tr. 29:21-24. The deputy testified that he did not observe any signs of impairment on either Salcedo or the passenger, Rodriguez. Suppress Tr. 14:10-12; 18:2-3.

At approximately 9:06 p.m., the deputy engaged Mr. Salcedo in a long line of questioning relating to the rental car, questions relating to Salcedo's girlfriend who had rented the rental car in which Salcedo was traveling, and questions relating to Salcedo's travels to and from California. Suppress Tr. 14:21 – 15:22. Exhibit 1(Dash Cam 21:08:00-21:14:17); Mins Test; App. Vol II P. 4. The deputy learned that Salcedo and passenger Rodriguez, who was Salcedo's cousin, were both from New York and had traveled via plane to Florida to visit a friend who had just had a baby. Suppress Tr. 15:16-18. Exhibit 1 (Dash Cam 21:08:00–21:11:40). The deputy learned that the two then flew from Florida to Acadia, California, where Salcedo's girlfriend lived, where they spent four days. Suppress Tr. 15:18-22. Salcedo and Rodriguez then drove from California to New York via the rental car which was in his girlfriend's name. Suppress Tr. P. 16:6-11. Salcedo explained that it was cheaper for his girlfriend to rent the rental vehicle in her name since Salcedo was not yet 25 years old. Exhibit 1 (Dash

Cam 21:18:10–21:18:36). The deputy testified that he felt the story was a red flag for someone "who could possibly be transporting drugs". Suppress Tr. 16:16-17.

At approximately 9:09 p.m., Deputy O'Hare radioed for assistance to the traffic stop. Suppress Tr. 33:5-11. Mins Test. At approximately 9:13 p.m., a second deputy, Deputy Jesse Lenz, arrived to the traffic stop. Mins Test. App. Vol II P.4. Deputy O'Hare testified that the purpose in radioing for assistance is common practice "any time that you are going to either further your investigation or think that you have problems or search a vehicle that you need a second. It's policy". Suppress Tr. 33:12-17. The deputy testified that at that point in the traffic stop, when he radioed for a second deputy to arrive on scene, he believed there was a chance that he would be searching Salcedo's vehicle based upon it being a rental vehicle, having observed three phones in the vehicle but only two individuals, having observed luggage in the back seat of the vehicle, and the vehicle being a third-party rental. Suppress Tr. 33:18-25. Deputy O'Hare had previously testified that he did not see the three cell phones and luggage in the back seat until later on in the detention after he had questioned Salcedo at length and then subsequently spoken with the passenger, Rodriguez. Suppress Tr. 18: 10-20; 34: 2-7.

When the second deputy, Deputy Lenz, arrived within minutes after Deputy O'Hare had radioed for assistance, Deputy O'Hare exited his patrol vehicle and spoke with Deputy Lenz, expressing disdain that Deputy Lenz couldn't have a drug sniffing K-9 unit dog arrive to the scene for a drug sniff. Suppress Tr. 48:5-16. Mins Test.

App. Vol II P. 4. Deputy O'Hare told Deputy Lenz, "Why can't you have a dog yet? [Indecipherable] we'll have a sniff on this…" as well as "so we got zero [K-9s] in the frickin' county. Awesome." Exhibit 1 (Dash cam 21:14:17 – 21:14:39). Deputy O'Hare then described what information he had gleaned from Salcedo during the earlier seven minute detention of Salcedo and told Deputy Lenz that he was going to speak with the passenger, Rodriguez, then ask for consent to search the vehicle Suppress Tr. 50:3-8. Exhibit 1 (Dash Cam 21:14:39 – 21:15:33); Mins Test. App. Vol II P.4. Deputy O'Hare admitted that he omitted any mention of his conversation with Deputy Lenz from his investigative report including his desire that a K-9 unit be present at the traffic stop in order to perform a sniff around the vehicle as well as his intention to search the vehicle. Motion Tr. 34:24 – 25:20.

At approximately 9:15 p.m., Deputy O'Hare spoke with the passenger, Rodriguez, and asked Rodriguez a series of questions similar to those that he had asked Salcedo relating to their trip from New York to Florida to California. Exhibit 1 (Dash Cam 21:15:40 – 21:17:52).

At approximately 9:18 p.m., Deputy O'Hare returned to his patrol car to again speak with Salcedo. Exhibit 1 (Dash Cam 21:18:00 – 21:18-10). Deputy O'Hare, as well as the second deputy, Deputy Lenz, again asked Salcedo a series of various questions. Exhibit 1 (Dash Cam 21:18-00 – 21:19:45). At approximately 9:19 p.m., Deputy O'Hare asked Salcedo if he was transporting any weapons of mass destruction or rocket launchers or "anything like that" in his vehicle. Suppress Tr. 19: 24 – 20:1;

36:18-21. Exhibit (Dash Cam 21:19:45 – 21:19:52). Mins Test. App. Vol II P .4. The deputy admitted that he had previously patted down Salcedo and had not discovered any offensive weapons on Salcedo's person, did not have any concern or indication that Salcedo or the passenger were actually in possession of offensive weapons on their person, and admitted that he utilized that line of questioning relating to weapons of mass destruction, rocket launchers, and grenades in order to "kind of lighten the mood." Suppress Tr. 37:1-17. The deputy stated that after asking questions about weapons of mass destruction and rocket launchers and grenades, the deputy then immediately jumps in to the main question regarding gaining consent to search the vehicle. Suppress Tr. 37:18-23. Thus, after asking Salcedo about weapons of mass destruction, rocket launchers and "anything like that", the deputy immediately asked Salcedo if he was transporting marijuana, if he had heroin, if he had methamphetamines, if he had any large amounts of cash, and whether he could search the vehicle. Exhibit 1 (Dash Cam 21:19:53 – 21:20:10); Mins Test. App P. 4. Salcedo told the deputy that he could "do what he needs to do" Suppress Tr. 20:7-21; Exhibit 1 (Dash Cam 21:20:10 – 21:20:20); Mins Test. App. Vol II P. 4. At no time did Deputy O'Hare advise Salcedo that he had the right to refuse consent to search or refuse to consent to search. Suppress Tr. 21:18-20.; Mins Test; App. Vol II P. 4. At no point during the detention did the deputy attempt to undergo issuance of a traffic citation or traffic warning to Salcedo or attempt to input Salcedo's information into the deputy's computer to commence issuance of a citation or warning. Suppress Tr.

23:.22-25; 38: 24-25 – 39:1-7. Exhibit 1, Dash Cam and Body Cam; Mins Test. App. Vol II P. 4.

At approximately 9:21 p.m., Deputy O'Hare commenced searching the vehicle wherein approximately eighty-two (82) pounds of marijuana was discovered in the trunk of the vehicle. Suppress Tr. 23:20-21. Exhibit 1 (Dash Cam 21:20:33 – 21:46). Mins Test. App. Vol II P. 4.

ARGUMENT

I. THE DISTRICT COURT ERRED BY DENYING THE DEFENDANT'S MOTION TO SUPPRESS

A. Preservation of Error:

Error was preserved by Salcedo's motion to suppress arguing that the stop and subsequent detention and search were improper and that that the consent to search was invalid, and by the district court's denial of Salcedo's motion. Mot. Suppress; App. P. 8; Suppress. Ruling; App. P. 32. See State v. Wright, 441 N.W.2d 364, 366 (Iowa 1989) (quoting State v. Hilpipre, 242 N.W.2d 306, 309 (Iowa 1976)) ("The rule is well settled that 'an adverse ruling on pretrial suppression motion will suffice to preserve error for appellate review […]".

The preservation rule requires that issues must be presented to and passed upon by the district court before they can be raised and decided on appeal. The issues presented before this Court on this appeal were presented to and were ruled upon by

the district court in its Ruling. Mot. Suppress; App. P. 8; Suppress Ruling; App. P. 32. Consequently, error has been preserved on these issues.

B. Standard of Review:

The Court reviews alleged violations of constitutional rights de novo. State v. Hoskins, 711 N.W.2d 720, 725 (Iowa 2006) (citing State v. Freeman, 705 N.W.2d 293, 297 (Iowa 2005)). The Court makes "'a independent evaluation of the totality of the circumstances as shown by the entire record.'" State v. Turner, 630 N.W.2d 601, 606 (Iowa 2001) (quoting State v. Howard, 509 N.W.2d 764, 767 (Iowa 1993)). The Court also considers "both the evidence presented during the suppression hearing and that introduced at trial." State v. Breuer, 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).

The Court reviews the constitutionality of a statute de novo. State v. Groves, 742 N.W.2d 90, 92 (Iowa 2007) (citing State v. Seering, 701 N.W.2d 655, 661 (Iowa 2005). The Court "presume[s] statutes are constitutional and the challenger bears the burden to prove the unconstitutionality beyond a reasonable doubt." Id.

C. Discussion:

The Fourth Amendment to the U.S. Constitution and article I, section 8 of the Iowa Constitution both protect individuals, their homes, papers, and effects from unreasonable searches and seizures. U.S. Const. amend. IV; Iowa Const. art. I, Sec. 8. The Fourth Amendment of the U.S. Constitution applies to the states through incorporation by the Fourteenth Amendment. State v. Wilkes, 756 N.W.2d 838, 842 (Iowa 2008) (citation omitted). Salcedo challenged the seizure and search of his vehicle under both federal and state constitutional provisions. Mot. Suppress. App. P. 8. Evidence that is obtained in violation of either of these constitutional provisions "is inadmissible, no matter how relevant or probative the evidence may be." State v. Manna, 534 N.W.2d 462, 643-44 (Iowa 1995) (citing State v. Schrier, 283 N.W.2d 338, 342 (Iowa 1979)).

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) (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 Fourteenth Amendment to the Constitution of the United States provides: "No state shall….deprive any person of life, liberty, or property, without due process of law…" U.S. Const. amend XIV, Section 1. Likewise, Article I, section 9 of the

Iowa Constitution states that "no person shall be deprived of life, liberty, or property, without due process of law." Iowa Const. Art. I, Section 9. The Iowa Supreme Court has generally found "the federal and state due process clauses to be identical in scope, import, and purpose." Bruns v. State, 503 N.W.2d 607, 611 (Iowa 1993) (citing Harden v. State, 434 N.W.2d 881, 886 (Iowa 1989)). "Due process is designed to ensure fundamental fairness in interactions between individuals and the state." State v. Nail, 743 N.W.2d 535, 539 (Iowa 2007).

Salcedo asserts that the stop of his vehicle was without probable cause, that Iowa Code Section 321.298 is unconstitutionally void for vagueness, that law enforcement illegally detained Salcedo for a prolonged period of time without attempting to complete the mission of the stop and without reasonable suspicion, and that any consent gained from Salcedo was not valid. Salcedo asks the Court to reject the federal courts' use of the totality of the circumstances test and apply a more stringent standard and bright-line rule that valid consent must be knowing and voluntary, which requires law enforcement to advise individuals of their right to decline consent to search.

Additionally, Salcedo's due process rights were violated because Iowa Code Section 321.397 is unconstitutionally vague. The statute is so vague that it does not give persons of ordinary understanding fair notice that certain conduct is prohibited and because it leads to arbitrary and discriminatory enforcement. Not even the

stopping officer in Salcedo's case understood the law. A person of ordinary understanding would not have adequate or fair notice what particular speed was prohibited under the statute for the "conditions then existing" if there is little to no other traffic on the road. Additionally, Iowa Code Section 321.297(2) conflicts with Iowa Code Section 321.285 to the extent that there is discussion of minimum and maximum speeds and a person of ordinary understanding is not sufficiently put on notice to understand which conduct is prohibited. Finally, Salcedo asserts that he did not violate Iowa Code Section 321.397(2) and there was no probable cause to stop his vehicle.

1. General law regarding challenges under the Iowa Constitution

Even where a party has not advanced a different standard for interpreting a state constitutional provision, the Court may apply the standard more stringently than federal case law. State v. Bruegger, 773 N.W.2d 862, 883 (Iowa 2009). When a defendant raises both federal and state constitutional claims, the Court has discretion to consider either claim first or consider the claims simultaneously. State v. Ochoa, 792 N.W.2d 260, 267 (Iowa 2010).

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 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 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." Ochoa, 792 N.W.2d at 273. "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.2d 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 effects.'" 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 at 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 that 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 N.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. The expansion of the traffic stop and request for a consent search under article I, section 8 of the Iowa Constitution

To be constitutionally valid, seizures must be limited both in scope and duration. Florida v. Royer, 460 U.S. 491, 500, 103 S.Ct. 1319, 1325-26 (1983) (plurality opinion). The scope of a seizure "must be carefully tailored to its underlying justification," and the government bears the burden to "demonstrate that the seizure it seeks to justify…was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." Id. 460 U.S. at 500, 103 S.Ct. at 1326.

"The scope of search and seizure limitations frequently arises where law enforcement has no reasonable suspicion to believe that criminal activity unrelated to the purposes of the underlying stop is afoot but the police expand their inquiries into unrelated subjects." State v. Pals, 805 N.W.2d 767, 775 (Iowa 2011)In the context of traffic stops, our Supreme Court has stated that "[o]nce a lawful stop is made, an officer may conduct an investigation reasonably related in scope to the circumstances which justified the interference in the first place." State v. Aderholdt, 545 N.W.2d 559, 563 (Iowa 1996). Reasonable investigation of the traffic stop includes a request for driver's license and registration documents and questions relating to the traffic offense. Id. at 563-64; State v. Campbell, 898 N.W.2d 204 (Table) (Iowa App. 2017)

But if a police officer seeks to pursue investigation into a matter outside the scope of the traffic stop, he must possess reasonable suspicion. Aderholdt, 545 N.W.2d at 563 ("If… the detainees' responses or actions raise suspicions unrelated to the traffic offense, the officer's inquiry may be broadened to satisfy those suspicions."); State v. Bergmann, 633 N.W.2d 328, 335 (Iowa 2001) ("If, upon reasonable investigation surrounding the stop, the officer has a valid suspicion of other wrongdoing not the purpose of the stop, he can broaden the scope of detention.").

Iowa courts have long recognized "the independent nature of the duration and scope tests of constitutional reasonableness." Campbell, 898 N.W.2d 204 (Table) (Iowa App. 2017) (citing Coleman, 890 N.W.2d at 299; State v. McCoy, 692 N.W.2d 6, 18 (Iowa 2005); Aderholdt, 545 N.W.2d at 563; State v. Armstrong, No. 11-1615, 2012 WL 4513886, at *2 (Iowa Ct. App. Oct. 3, 2012). But the United States Supreme Court has recently "collapsed the investigative-scope inquiry into the duration inquiry" under the federal constitution. Campbell, 2017 WL 706208, at *7. In Arizona v. Johnson, the United States Supreme Court determined that expansion of the scope of questioning to matters unrelated to the justification for the investigative stop is permissible under the Fourth Amendment "so long as those inquiries do not measurably extend the *duration* of the stop." Arizona v. Johnson, 555 U.S. 323, 333 (2009) (emphasis added). Thus, "[u]nder the most recent [U.S. Supreme Court] case law, there is no subject matter limitation on the scope of allowable investigation so

long as the unrelated investigation does not prolong the duration of the stop beyond that necessary to complete the mission of the stop." Campbell, 2017 WL 706208, at *7.

However, "[t]he cases from a substantial number of state courts support the proposition that a seizure pursuant to a traffic stop must be limited in scope and that any effort to obtain consent for a search unrelated to the purpose of the stop requires at least reasonable suspicion of criminal activity." Pals, 805 N.W.2d at 776 (citations omitted). See, e.g., Brown v. State, 182 P.3d 624, 626 (Alaska Ct. App. 2008) (finding Alaska Constitution prohibited an officer from asking permission to search the driver's person and vehicle for drugs during a routine traffic stop); State v. Elders, 927 A.2d 1250, 1266 (N.J. 2007) ("Under our State Constitution, law enforcement cannot request consent to search…unless they have reasonable and articulable suspicion to believe evidence of criminal wrongdoing will be discovered…."); State v. Fort, 660 N.W.2d 415, 419 (Minn. 2003) ("[U]nder Article I, section 10, of the Minnesota Constitution any expansion of the scope or duration of a traffic stop must be justified by a reasonable articulable suspicion of other criminal activity."); State v. Estabillio, 218 P.3d 749, 761-62 (Hawaii 2009) (finding the investigation for drug involvement was a separate, distinct investigation from the initial traffic stop and therefore had to be supported by independent reasonable suspicion to be constitutional under the Hawaii state constitution); Commonwealth v. Torres, 674 N.E.2d 638, 642 (Mass. 1997) (citation omitted) ("It is well settled that a police inquiry in a routine traffic

stop must end on the production of a valid license and registration unless the police have grounds for inferring that 'either the operator or his passengers were involved in the commission of a crime…or engaged in other suspicious conduct.'").

This proposition is derived from the idea that a routine traffic stop is "a species of investigative stop rather than a formal arrest. For this reason, traffic stops are governed by the principles expounded in Terry v. Ohio limiting the scope and duration of investigative stops." Brown, 182 P.3d at 625 (internal citations omitted). As such, a "traffic stop 'must be temporary and [must] last no longer than is necessary to effectuate the purpose of the stop.'" Id. (quoting Florida v. Royer, 460 U.S. 491, 500 (1983)). In addition, the conduct of the law enforcement officer must also be "'reasonably related in scope' to the circumstances that justified the stop in the first place." Id. (citations omitted). Therefore, a traffic stop becomes unconstitutional if the "duration, manner, or scope of the investigation exceeds these boundaries." Id. (citation omitted).

States that have adopted stricter rules for when an officer can ask an individual who has been seized during a traffic stop for consent to search his or her person or vehicle "reject the notion that…the nature of the stop remains unaltered…" Brown, 182 P.3d at 626. Concerns include the potential risk for abuse, the arbitrary and potentially discriminatory manner in which consent searches are requested, and the "potential risk that law enforcement officers will compromise the privacy of many

citizens." Brown, 182 P.3d at 626; State v. Carty, 790 A.2d 903, 908-909 (N.J. 2002); Pals, 805 NW.2d at 776 (These cases cite the fear of potential abuse of traffic stops as nearly all vehicles, if followed for any substantial time, commit minor traffic offenses that could serve as a springboard to intrusive consent searches."); Coleman, 890 N.W.2d at 287 ("The use of minor traffic violations as a springboard into consent searches has prompted charges of abuse and racial profiling."); State v. Lyon, 862 N.W.2d 391, 397 (Iowa 2015) ("Unlimited discretion to stop vehicles on the open road may give rise to allegations of racial discrimination, characterized by the descriptive phrase "driving while black." *This is particularly true when an ordinary traffic stop morphs into a larger criminal investigation without reasonable suspicion beyond that provided by the original offense.*" (emphasis added)). Courts requiring reasonable suspicion to request a consent search have noted Courts the sheer amount and frequency of traffic stops and the ignorance of individuals of their rights. Brown, 182 P.3d at 626. See also State v. Lowe, 812 N.W.2d 554, 592 (Iowa 2012) (Appel, J., concurring in part and dissenting in part) ("[T]he notion that effective law enforcement rests upon citizen ignorance is not a principle that should be relied upon in a democratic state based on the rule of law.").

Moreover, because of the psychological pressures inherent in traffic stops, studies have shown that "the vast majority of motorists who are subjected to this type of request will accede to the officer and allow the search." Brown, 182 P.3d at 630;

Carty, 790 A.2d at 910 ("[M]any persons, perhaps most, would view the request of a police officer to make a search as having the force of the law."). Drivers "have a strong interest in catering to the officer's wishes until the officer announces their decision whether to issue a citation nor only a warning." Brown, 182 P.3d at 630. Many motorists are not aware when a traffic stop is concluded until the officer tells them that they are free to leave. Moreover, many may expect that if they cooperate the officer will cut them any break he or she can.

In the present case, Salcedo urges it was improper for the deputy to detain Salcedo and ask Salcedo questions unrelated to the purpose of the initial detention (which was related to the officer's belief that Salcedo had committed a traffic violation) absent reasonable suspicion of other criminal activity. Salcedo contends that the duration and scope of the stop was impermissibly extended by such questioning. The deputy did nothing to further his investigation relating to the alleged traffic violation. The deputy made no attempts to enter Salcedo's information into his computer in order to issue a traffic citation or warning. The deputy did not question Salcedo about the alleged traffic violation or why he was traveling slower than the posted speed limit while in the left lane. The deputy radioed dispatch for a second deputy to arrive within minutes of the traffic stop, and had his mind made up that he would request consent to search the vehicle from the very beginning of the traffic stop. The deputy expressed disappointment and disdain that he could not get a K-9

unit to the scene to perform a dog sniff around the vehicle. The deputy engaged Salcedo in a line of questioning to include whether Salcedo had any "weapons of mass destruction, rocket launchers, grenades" in order to soften the real question which he intended to ask, which was consent to search the vehicle.

A number of state courts have held that questions unrelated to the purpose of the stop must be supported by reasonable suspicion; absent reasonable suspicion to expand the scope of questioning, such unrelated questions violate the scope limitation even if the duration of the stop is not extended thereby. See e.g., State v. Jimenez, 353 P.3d 1227, 419 (Or. 2015) (Oregon Constitution does not permit officer to ask subject to stop whether he has any weapons as matter of routine absent reasonable circumstance-specific safety concerns); State v. Smith, 814 N.W.2d 346, 350-51 (Minn. 2012) (Minnesota Constitution requires that expansion of scope of questioning to inquire into whether person stopped has "anything illegal" must be supported by reasonable articulable suspicion); State v. Carty, 790 A.2d 903, 904 (N.J. 2002) (New Jersey Constitution requires police must have reasonable articulable suspicion of criminal wrongdoing prior to asking for consent to search lawfully stopped motor vehicle; routine traffic stops may not be converted into "fishing expedition for criminal activity unrelated to the lawful stop."); State v. McKinnon-Andrews, 846 A.2d 1198, 25 (N.H. 2004) (holding, under state constitution, that questioning not reasonably related to initial justification for stop is unconstitutional if (1) law

enforcement lacks reasonable articulable suspicion that would justify the question and (2) the question either impermissibly prolongs the detention or changes its fundamental nature); State v. Robbins, 2017 WL 4182839 (N.H. Sept. 21, 2017) (noting McKinnon-Andrews continues to prove the governing legal standard absent any request to overrule). See also Pals, 805 N.W.2d at 776 (recognizing "[t]he cases from a substantial number of state courts support the proposition that a seizure pursuant to a traffic stop must be limited in scope and that any effort to obtain consent for a search unrelated to the purpose of the stop requires at least reasonable suspicion of criminal activity"; citing supportive case law).

The Iowa Supreme Court should likewise find a request for a consent search, completely unconnected to any reasonable articulable concerns that the motorist is involved in the commission of a crime, to be a violation of article I, section 8 of the Iowa Constitution. This determination is consistent with Iowa law; as noted above, in Coleman, the Supreme Court noted common themes in recent traffic-stop cases that cabined "official discretion to conduct searches" and emphasized that "even *de minimus* extension of traffic stops are not acceptable." Id. At 299. The Court then pointed to "our recent traffic-stop cases [which] have evinced an awareness of the potential for arbitrary government action on the state's roads and highways." Id. While recognizing that officer safety can be a legitimate issue in relation to traffic stops, the Court expressed a need for a specific, substantiated claim as to officer

safety to justify the extension of a traffic stop. Id at 301. The rationale of Coleman is just as applicable to this case. In addition, while not controlling, the Iowa Court of Appeals has also expressed support for the continued existence of an investigative-scope limitation, independent of the duration limitation of the federal constitution, under the Iowa Constitution. See State v. Gogel, No. 11-0817, 2013 WL 2637673, *2 (Iowa Ct. App. June 12, 2013 (unpublished table decision) ("[W]e believe the better line of authority holds that any effort to obtain consent for a search unrelated to the purposes of the traffic stop requires at least reasonable suspicion of criminal activity."; State v. Campbell, 15-1772, 2017 WL 706208 at *5-11 (Iowa Ct. App. Feb. 22, 2017 (Where defendant argued officer improperly asked "questions wholly unrelated to the purpose of the stop"; "If this were a case of first impression, we would agree and hold the investigative scope of a roadside detention must be reasonably related to the 'mission of the stop'" but Arizona v. Johnson controls under federal constitution and state constitutional claim was not raised).

A rule requiring reasonable, articulable suspicion would help protect the sanctity of individual rights, which Iowa has long protected, particularly with regards to warrantless searches and seizures. "It also serves as the prophylactic purpose of preventing the police from turning a routine traffic stop into a fishing expedition for criminal activity unrelated to the stop." Carty, 790 A.2d at 912. It would ensure that

the law is equally applied to everyone and cabin officer discretion on who is targeted for a consent search.

Salcedo contends article I, section 8 of the Iowa Constitution does not permit the deputy to engaged Salcedo in a prolonged detention without reasonable suspicion. The questions in which the deputy engaged Salcedo during the time in which he detained Salcedo in his patrol vehicle, asked without any reasonable suspicion that Salcedo was a threat to officers' safety or involved in criminal activity unrelated to the purpose of the traffic stop, amounted to a seizure in and of itself, and an unlawful extension of a routine traffic stop.

The deputy lacked "specific and articulable facts" supporting a "reasonable belief" that Salcedo was involved in a crime unrelated to the purpose of the traffic stop. As discussed above, the deputy had no information that Salcedo was currently involved in any criminal activity. The deputy had no information that Salcedo's passenger was involved in any criminal activity. His only information regarding Salcedo, in particular, was that Salcedo was driving a rental car from the state of California which was rented by Salcedo's girlfriend. At some point after speaking with passenger Rodriguez, the deputy observed three cell phones and thought that this was suspicious due to only two individuals being in the vehicle. The deputy also thought the presence of the luggage in the backseat of the vehicle was suspicious. After engaging Salcedo in a long line of questioning, the deputy was of the opinion that Salcedo's story was suspect relating to his travels.

The deputy's testimony at the evidentiary hearing made it clear that he wished to search the vehicle from the moment he discovered it was a rental out of the state of California. There was no reasonable suspicion to support the deputy's expansion of the scope of questioning to gain information from Salcedo about his travels or to eventually request consent to search the vehicle. There was also not reasonable suspicion to support the deputy's expansion of the scope of questioning to whether Salcedo had any weapons of mass destruction, rocket launchers, or "anything of the sort" in the vehicle. See Jimenez, 353 P.3d at 429 (was improper to inquire into weapons). The questions relating to whether Salcedo had any illegal drugs in the vehicle and the subsequent request to search the vehicle were improper and unsupported by reasonable suspicion. See e.g. Smith, 814 N.W.2d at 350 and 354 (inquiry of whether driver had any illegal drugs must be supported by reasonable suspicion). Because the deputy lacked any reasonable suspicion that Salcedo was involved in criminal activity unrelated to the purpose of the traffic stop, this Court should find the deputy violated Salcedo's state constitutional rights and unlawfully expanded the stop by engaging him in questioning and asking for consent to search the vehicle. Therefore, any evidence resulting from the search must be suppressed.

3. Valid consent to search under Iowa Constitution

An established exception to the warrant requirement is a search conducted by consent. State v. Naujoks, 637 N.W.2d at 107. However, the consent to search is valid

only if it is voluntary. Pals, 805. N.W.2d at 777-82. 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. Schneckloth v. Bustamonte, 412 U.S. 218, 247-28 (1973). Under that test, a waiver of Fourth Amendment rights does not necessarily require that the consenting party have knowledge of the right being waived. Id. at 235-48 (discussing knowing and intelligent waiver under Johnson v. Zerbst, 304 U.S. 458 (1938)). Rather, knowledge of the right to refuse consent is simply one factor to consider under the totality of the circumstances. Id. at 248-49.

In State v. Pals, the Iowa Supreme Court discussed the criticism to the federal approach. It referred the dissenting opinions in Schneckloth and Ohio v. Robinette, 519 U.S. 33 (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. See also State v. Brown, 156 S.W.3d 722, 731-32 (Ark. 2004) (finding the Arkansas Constitution required notification of the right to refuse a search before consent was valid); Penick v. State, 440 So.2d 547, 551 (Miss. 1983) ("[U]nder Section 23 of the Mississippi Constitution…the state failed to prove beyond a reasonable doubt or by clear and convincing evidence that there was a knowledgeable waiver by [the defendant] of his

state constitutional right not to be searched."); State v. Johnson, 346 A.2d 66, 68 (N.J. 1978) ("[U]nder Art I, par. 7 of our State Constitution the validity of a consent to a search, even in a non-custodial situation, must be measured in terms of waiver; I.e. where the State seeks to justify a search on the basis of consent it has the burden of showing that the consent was voluntary, an essential element of which is knowledge of the right to refuse consent."); State v. Ferrier, 960 P.2d 927, 932-33 (Wash. 1998) ("[A]rticle I, section 7 is violated whenever the authorities fail to inform [individuals] of their right to refuse consent to a warrantless search.").

Additionally, the Pals Court noted the "academic commentary on Schneckloth has been generally unfavorable." Id. at 780-81. A number of commentators agree with the dissent in Schneckloth that consent cannot be voluntary without the individual knowing he or she can refuse the search, while others criticize the totality of the circumstances test as lacking in predictability. Id. at 781. See e.g., Wayne R. LaFave, Factors bearing upon validity of consent, 4 Search and Seizure: A Treatise on the Fourth Amendment Section 8.2 (5th ed. Oct. 2017) ("Because voluntariness provided to be an 'elusive, measureless standard' by which to test confessions, its utility as to consent searches is to be doubted..But, it can seldom be said with confidence that a particular combination of factors will inevitably ensure a finding of either consent or no consent."). 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. See Lowe, 812 N.W.2d at 592 ("[T]he available empirical evidence is that requiring the knowledge of the right to refuse consent does not dramatically reduce the number of consent searches.").

Still others have criticized Schneckloth as essentially ignoring human nature. See Adrian J. Barrio, Rethinking Schneckloth v. Bustamonte: Incorporating Obedience Theory into the Supreme Court's Conception of Voluntary Consent 216, 222, 231 U. Ill. L. Rev. (1997). "A number of experiments have conclusively shown that obedience depends primarily on the perceived legitimacy of the authority figure, not on archaic notions of punishment and compliance." Id. "Because these searches are bound by the laws of probability to plague the innocent as well as the guilty, a substantial amount of suspicionless searches inevitably target innocent suspects." Id. at 217-18. A rule mandating informing an individual of their ability to decline the search protects their legitimate privacy interests and, unlike the current standard, does not require them to defy police authority, which is "fundamentally inconsistence with human nature." Id. at 217-18.

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. Salcedo now asks the Court to resolve this question left

open in Pals and adopt a "knowing and voluntary" standard for consent searches and seizures under article I, section 8 of the Iowa Constitution.

Requiring a rule to advise the right to decline would "provide a much clearer rule for law enforcement," citizens, and courts alike. Lowe, 812 N.W.2d at 593 (citation omitted); Alexandra L. Pratt, The Need for "Knowing": Why the Iowa Supreme Court Should Reject Schneckloth v. Bustamonte, 100 Iowa L. Rev. 1327, 1350 (Mar. 2015). It would also "limit the ability of law enforcement to gain an advantage due to a person's ignorance of his rights." Id. Moreover, it is consistent with Iowa's "proud tradition of concern for individual rights." Ochoa, 791 N.W.2d at 267 (citation omitted).

For the reasons discussed above, this Court should adopt a Zerbst knowing and intelligent waiver standard for consent searches and seizures under the Iowa Constitution. Applying such a standard, Salcedo's purported consent was not knowing and voluntary because he was not advised of his right to decline consent.

However, even if this Court declines to adopt such a "knowing and voluntary" standard for consent, it should nevertheless conclude Salcedo'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. 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.

Salcedo's consent was not voluntary under the Iowa version of the "totality of the circumstances" test applied in Pals. In this case, Salcedo was clearly detained at the time of the consent because he was subjected to a traffic stop; it was not a "voluntary encounter in a public area or an encounter on the familiar surroundings of the threshold of one's home." Pals, 805 N.W.2d at 782. "[T]he setting of a traffic stop on a public road [is] inherently coercive." Id. at 783. The deputy testified that Salcedo was not free to leave in the traffic stop setting. Moreover, Salcedo was also subjected to projected authority of the deputy. The deputy approached the vehicle, ordered Salcedo out of the vehicle, and subsequently patted Salcedo down. The deputy subjected Salcedo to a long line of questioning, called for a second deputy, questioned passenger Rodriguez, returned to the patrol car where he continued to question Salcedo, and finally asked Salcedo if he had any weapons of mass destruction, rocket launchers, or anything of the sort in the vehicle immediately prior to asking if he had any illegal drugs in the vehicle and if he could search the vehicle. The deputy admitted that he asked about the weapons of mass destruction and rocket launchers immediately prior to asking about contraband and consent to search in order to

"lighten the mood" just prior to asking for consent. The deputy acknowledged that he never advised Salcedo that he had the right to refuse consent and there was no written request for consent to search. During this time, the deputy made no attempt to further the issuance of a traffic warning or traffic citation. The deputy did not once enter Salcedo's information into his computer in order to commence issuance of a traffic citation or warning. The detention centered solely around Salcedo's travels and concluded with the deputy's desire to search Salcedo's vehicle for narcotics. There was no discussion or furtherance to attempt to issue a warning or citation for the alleged traffic violation. There were no attempts to complete the supposed mission of the stop, which was allegedly for a traffic violation. There was no closure regarding the traffic stop, and the entire detention was focused upon the deputy's intent to get inside Salcedo's vehicle to search it.

It is clear that under these circumstances, a reasonable person in Salcedo's position would not have felt free to decline the deputy's requests. "In this setting, police plainly have the upper hand and are exerting authority in a fashion that makes it likely 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." Pals, 805 N.W.2d at 783. "[T]he potential for coercion exists even in seemingly innocuous circumstances involving seizures." State v. Pettijohn, 899 N.W.2d 1, 22 (Iowa 2017). "In other words, coercion can easily find its way into human interactions when detention is involved." Id. (quoting Baldon, 829 N.W.2d at 798).

Further, the deputy never advised Salcedo "that he was free to leave or that he could voluntarily refuse consent without any retaliation by police." Pals, 805 N.W.2d at 782-83. At a minimum, the Iowa Supreme Court has noted the absence of a statement informing an individual of his right to decline a search is "a strong factor cutting against the voluntariness of the search." Id. at 783. Finally, "[t]he lack of closure of the original purpose of the stop makes the request for consent more threatening." Id. The deputy was still investigating and conducting the traffic stop with regards to Salcedo's alleged traffic violation, although he did nothing to further issuance of a citation or warning. He had not, however, closed out the traffic stop with issuance of a citation nor warning, so the lack of closure of the original purpose of the stop made the request for consent from Salcedo even more threatening. It was clear that Salcedo was not free to go at the time of the request to search. By failing to advise Salcedo that Salcedo was not required to consent and that he had the right to refuse consent, the deputy impliedly conveyed the impression that Salcedo may receive more favorable treatment if he consented.

Therefore, under the circumstances of this case, any consent given by Salcedo to search his vehicle was not voluntary. As a result, the evidence stemming from Salcedo's invalid consent, including all contraband and illegal controlled substances, and including any incriminating statements subsequently elicited from Salcedo, should

have been suppressed because there was no break between the illegal action and this evidence. See id. at 784 (citations omitted).

4. The unconstitutionality of Iowa Code Section 321.297 for being void for vagueness

One of the evils the due process clauses protect individuals against is the enforcement of vague statutes. Nail, 743 N.W.2d at 539. The Court has recognized there "are three generally cited underpinnings of the void-for-vagueness doctrine." Id.

> First, a statute cannot be so vague that is does not give persons of ordinary understanding fair notice that certain conduct is prohibited. Second, due process requires that statutes provide those clothed with authority guidance to prevent the exercise of power in an arbitrary or discriminatory fashion. Third, a statute cannot sweep so broadly as to prohibit substantial amounts of constitutionally-protected activities, such as speech protected under the First Amendment.

Id. (citations omitted).

Iowa Code Section 321.297(2) is so vague that it does not give persons of ordinary understanding fair notice that certain conduct is prohibited. It also allows the exercise of power in an arbitrary or discriminatory fashion.

"[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so he may act accordingly." State v. Bower, 725 N.W.2d 435, 441 (Iowa 2006) (quoting Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972)). A statute may be unconstitutional on its face as impermissibly

vague if "it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests." City of Chicago v. Morales, 527 U.S. 41, 52 (1999) (citing Kolender v. Lawson, 461 U.S. 352, 358 (1983)). In this case, Iowa Code Section 321.297(2) is impermissibly vague because it fails to give individuals fair notice of when their conduct is prohibited and it leads to arbitrary or discriminatory enforcement. The third consideration is not relevant in as-applied challenges under the void-for-vagueness doctrine. State v. Heinrichs, 845 N.W.2d 450, 454-55 (Iowa Ct. App. 2013) (citing State v. Hunter, 550 N.W.2d 460, 463 (Iowa 1996) overruled on other grounds by State v. Robinson, 618 N.W.2d 306, 312 (Iowa 2000) (explaining void-for-vagueness doctrine requires a criminal statute to define the offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement). "A facial challenge would implicate the third foundation." Id. citing State v .Dalton, 674 N.W.2d 111 (Iowa 2004) (finding defendant lacked standing to mount facial challenge because reckless driving statute did not interfere with substantial amount of protected conduct).

Iowa Code Section 321.297(2) states:

> "Any vehicle proceeding at less than the normal speed of traffic at the time and place and under the conditions then existing shall be driven in the right-hand lane then available for traffic upon all roadways, or as close as practicable to the right-hand curb or edge of the roadway, except when overtaking and passing another vehicle proceeding in the same direction or when preparing for a left turn at an intersection, an alley, private road or driveway. "

In Salcedo's case, a person of ordinary understanding would not have adequate or fair notice what particular speed is considered "less than the normal speed of traffic" when there is little to no other traffic surrounding that person's vehicle. Additionally, a person of ordinary understanding would not have adequate or fair notice what particular speed was prohibited under the statute for the "conditions then existing" if there is little to no other traffic surrounding that person. There was little to no other traffic on the road where Salcedo's vehicle traveled. The "conditions then existing" included the dark of night on an Iowa interstate highway which was not well lighted.

Additionally, Iowa Code Section 321.297(2) conflicts with Iowa Code Section 321.285 to the extent that there is discussion of minimum and maximum speeds and a person of ordinary understanding is not sufficiently put on notice to understand which conduct is prohibited.

> Iowa Code Section 321.285(1) states
>
> > "Any person driving a motor vehicle on a highway shall drive the same at a careful and prudent speed not greater than nor less than is reasonable and proper, having due regard to the traffic, surface, and width of the highway and of any other conditions then existing, and no person shall drive any vehicle upon a highway at a speed greater than will permit the person to bring it to a stop within the assured clear distance ahead, such driver having the right to assume, however, that all persons using said highway will observe the law."

Iowa Code Sections 321.285(2) through 321.285(7) set forth speed restrictions in various settings and on various types of roadways. A person of ordinary intelligence would likely be aware that one should drive at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface, width of the highway, and of any other conditions then existing (as set forth in Iowa Code Section 321.285). A person of ordinary intelligence might find it prudent to drive at a speed lower than the speed limit in the dark of night, at 9:05 p.m., on a rural interstate highway.

It is apparent that even the deputy, himself, misunderstood the law, as he was mistaken in his explanation of the application of the law wherein he believed that a person must travel at least at the speed limit or faster than the speed limit, when traveling in the left lane, even when there is little to no other traffic around. Certainly traveling over the speed limit is a violation of the laws of the State including a violation of the speed restrictions set forth in Iowa Code Section 321.285.

Moreover, the statute is vague because it leads to arbitrary or discriminatory behavior by law enforcement. The deputy testified that he had recently completed a drug interdiction course where he learned that rental cars were often utilized in the transport of illegal drugs. Suppress Tr. 6:12-15. In this case, the deputy learned that Salcedo's vehicle was a rental car before he decided to stop it. Suppress Tr. 30: 8-10. The deputy radioed the plates into dispatch, observing it was from the state of California, and checked the ownership of the vehicle. Suppress Tr. 30: 3-22. The

deputy traveled along with Salcedo's vehicle for approximately three to a little over three miles, where both vehicles traveled at or below 60 miles per hour. Suppress Tr. 11: 8-18.

The deputy testified at the hearing that he activated his emergency lights based on his belief that the driver was violating Iowa Code Section 321.297 and because of "the indicators that there might be illegal drugs in the vehicle" Supp. Order; App. P. 32. Suppress Tr. 30:24-31:9. The deputy testified that writing a traffic citation was not the only reason he stopped Salcedo's vehicle:

> Q. And the only reason you're stopping the vehicle is to write a traffic citation?
> A. No.
> Q. Pardon?
> A. No. Traffic stops generally lead on to other things, if that's what you're asking. The violation was of –
> Q. At the time you were going to stop the vehicle, you were hoping that it would lead on to other violations?
> A. So the traffic stop, the violation is what gave me probable cause to pull the vehicle over. I know that traffic stops don't always just end in traffic stops.
> Q. So you're –
> A. They end in OWIs and –
> Q. So you were making a traffic stop, correct?
> A. I was.
> Q. And that's the only violation you saw?
> A. At that time.
> Q. When you initiated the stop?
> A. Correct.
> Q. And so you're saying that you made the traffic stop in order to look for criminal activity?
> A. I'm telling you that my training and experience and some of the things I saw prior to my traffic stop told me that there was a possibility that this could lead into further activity – that there was further criminal activity going on.

Q. There wasn't – What other criminal activity had you seen other than driving in the left-hand lane?
A. So – None. I didn't say that.
Q. And so when you made a stop, the only violation that had been committed in your judgment was failure to move from the left-hand lane to the right-hand lane?
A. Correct.
Q. And that is the sole legal basis for the stop –
A. Correct.
Q. – is the traffic citation?
A. Is the traffic violation.
Q. Correct.
A. Yes.
Q. Is – A stop is not to investigate, to look for possible other criminal activity, would you agree?
A. Can you state it again?
Q. Legally a stop is not being made for traffic to allow the officer to look for other criminal activity?
A. I would have to disregard – or disagree with you.
Q. Okay. So a purpose of a stop is to look for other criminal activity?
A. I would say a traffic stop can lead into further criminal activity.
Q. And that's what you were looking for in this case?
A. I thought based on some of my training and experience that this could lead to more, correct.
Q. And people who rent vehicles, they're rented by common families?
A. They can be, yes.
Q. They're rented by companies.
A. Correct.
Q. They're rented by people working on business?
A. Correct.
Q. They're rented by people traveling on vacation?
A. Yep.
Q. And there's nothing illegal about that?
A. renting a vehicle, no.
Q. And are you aware like for a flight from the East Coast to here for Memorial Day weekend would be over a thousand dollars?
A. I don't fly that often, so no, I don't know the cost of flying.
Q. So often it's cheaper to rent a vehicle than to fly?
A. I --.

Suppress Tr. 42:19-45:17. In this instance, it is clear from the deputy's own testimony that the fact that the vehicle was a rental car from the state of California factored heavily into his reason for the subsequent stop. The statute is so vague that not only did the deputy, himself, misunderstand the law, but once he learned that the vehicle was a rental car and was from the state of California, he also arbitrarily enforced the law in a discriminatory fashion.

The statute is void for vagueness and affronts the fundamental fairness notions inherent in the due process guarantees of the Iowa and Untied States Constitution. The Iowa Supreme Court has never interpreted Iowa Code Section 321.297(2). Both Iowa Code Section 321.297(1) and 321.297(3) have been interpreted in various cases, but not subsection (2). Iowa Code Section 321.297(2) offends due process by not giving fair notice of conduct which the statute prohibits or requires and because it leads to arbitrary or discriminatory enforcement.

5. Whether traveling slower than the posted speed limit in the "fast lane" is a violation of Iowa Code Section 321.297 and whether it provides probable cause to stop a vehicle.

In addition to Iowa Code Section 321.297(2) being unconstitutional due to it being void-for-vagueness, Salcedo did not, in fact, violate Iowa Code Section 321.297(2) and there was no probable cause for the deputy to stop his vehicle. The District Court correctly stated that the deputy had testified that Salcedo's vehicle and the deputy's car "may have been the only vehicles in proximity" and that Salcedo's vehicle was "clearly not violating the minimum speed requirement for interstate

traffic." Suppress. Order; App. P. 32. The District Court found, however, that Salcedo's vehicle "was moving more slowly than the officer's vehicle and when the officer approached from the rear, Salcedo had a duty to pull his vehicle over to the right. His failure to do that or speed up gave O'Hare reasonable suspicion that Salcedo was violating that statutory duty and thus, the stop was justified" Suppress. Order; App. P. 32.

The District Court failed to consider all elements of Iowa Code Section 321.297(2) as applied to Salcedo's case including that there was no "normal speed of traffic" at the time, because there was no one else on the road except for Salcedo and the deputy. The District Court failed to address the fact that that deputy traveled behind and alongside, in the right lane, Salcedo's vehicle which was traveling at or below 60 miles per hour in the left lane for over three miles. This means that the deputy was also traveling along with Mr. Salcedo's vehicle at or below 60 miles per hour for over three miles. If there were no other vehicles surrounding Mr. Salcedo's vehicle but the deputy's vehicle, then Mr. Salcedo's vehicle – which was traveling at or below 60 miles per hour, for three miles – and the deputy's vehicle – which was also traveling at or below 60 miles per hour, for three miles – were the two cars who constituted what the speed of traffic was. The facts of this case do not include the deputy riding up on Salcedo's vehicle, in an attempt to tail him which might give warning to Mr. Salcedo that the deputy thought Salcedo was driving too slowly in the

"fast lane". The facts of this case also do not include the deputy coming up on Salcedo's vehicle in a hurry and passing Salcedo from the right lane, which might also give a warning or notice to Salcedo that he was driving too slowly in the "fast lane." The facts *do* include the deputy traveling along with and slightly behind Salcedo for over three miles, at the same rate of speed, which was at or below 60 miles per hour. Certainly an ordinary person might not think he was traveling at less than the "normal speed of traffic" if another vehicle is traveling at the same speed for several miles alongside or behind him. Salcedo's vehicle was not proceeding at "less than the normal speed of traffic" because there was no other traffic, besides the deputy's vehicle, with which to compare its speed.

The District Court also failed to consider the "conditions then existing" which included that Salcedo and the deputy were traveling the highway around 9:05 p.m. in early November, which was in the dark of night – not ideal, day time and day light travel conditions where the road and any other vehicles on the road are at their best visibility.

Additionally, the District Court failed to address the significance of the deputy's misunderstanding of the law. In other words, the District Court failed to address Salcedo's additional argument that the deputy mistakenly believed that a vehicle could not travel less than the speed limit in the "fast lane." The deputy's misunderstanding of the law can be overheard on both the dash camera video and on the body camera video in this case, wherein the deputy stated multiple times: "you're

going under the speed limit in the fast lane" … "that's the fast lane, that's the passing lane…unless there's a reason like the weather or something like that, you can't be under the speed limit, because that's the passing lane." Exhibit 1, 21:06:34 -21:06:59. Later on, when Salcedo is seated in the deputy's patrol car, the deputy tells Salcedo, "…there's no reason for you to be over there [in the left lane]…there's no reason for you to be going 60 [miles per hour]…the Code in the State of Iowa says that if you're in the left lane, you need to be going the speed limit or actually faster to try and pass somebody….that's why I pulled you over." Exhibit 1 (Dash Cam 21:09:27 – 21:10:05). Iowa Code Section 321.297(2) does not require an individual to travel the speed limit or faster when in the left lane. Certainly traveling faster than the speed limit would be a violation of the speed restrictions set forth in Iowa Code Section 321.285. The deputy mistakenly believed that a vehicle could not travel less than the speed limit in the "fast lane." A mistake of fact can justify a traffic stop, but a mistake of law cannot. *See State v. Louwrens*, 792 N.W.2d 649, 653 (Iowa 2010) (finding no objective legal basis for a stop based on officer's mistake of law concerning a U-turn ordinance).

Not only was there no reasonable suspicion or probable cause to believe that Salcedo had violated Iowa Code Section 321.297(2), but furthermore, the deputy was mistaken in his understanding of the law when he stopped Salcedo for allegedly violating that statute.

Conclusion

Defendant-Appellant Juan Salcedo requests that this Court reverse the district court and direct that all evidence stemming from the illegal stop, seizure, detention, invalid consent, and subsequent search of Salcedo's vehicle be suppressed and declared inadmissible at his Trial.

REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $0.00 and that amount has been paid in full by undersigned counsel.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYP-VOLUME LIMITATION

This brief complies with typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because:

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RESPECTFULLY SUBMITTED:

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/s/ Sean P. Spellman
SEAN P. SPELLMAN (AT0007464)
SPELLMAN LAW, P.C.
4000 Westown Parkway, Suite 120
West Des Moines, IA 50266
Telephone: (515) 222-4330
Facsimile: (515) 222-9005
Email: sean@spellmanlawpc.com

/s/ Mary K. Spellman
MARY K. SPELLMAN (AT0010085)
SPELLMAN LAW, P.C.
4000 Westown Parkway, Suite 120
West Des Moines, IA 50266
Telephone: (515) 222-4330
Facsimile: (515) 222-9005
Email: molly@spellmanlawpc.com

ATTORNEYS FOR DEFENDANT-APPELLANT.