ELECTRONICALLY FILED JUL 10, 2020 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	S.CT. NO. 19-1857
	)	
KHALEN RICHARD PRICE WILLIAMS,	)	
	)	
Defendant-Appellant.	)	

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
HONORABLE LAWRENCE P. MCLELLAN (SUPPRESSION)
AND HONORABLE SAMANTHA GRONEWALD
(TRIAL & SENTENCING), JUDGES

APPELLANT'S BRIEF AND REQUEST FOR ORAL ARGUMENT

MARTHA J. LUCEY
State Appellate Defender

THERESA R. WILSON
Assistant Appellate Defender
twilson@spd.state.ia.us
appellatedefender@spd.state.ia.us

STATE APPELLATE DEFENDER'S OFFICE
Fourth Floor Lucas Building
Des Moines, Iowa 50319
(515) 281-8841 / (515) 281-7281 FAX
ATTORNEYS FOR DEFENDANT-APPELLANT FINAL

CERTIFICATE OF SERVICE

On the 10th day of July, 2020, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Khalen Williams, 925 Sherrylynn Blvd., Apt. 1, Pleasant Hill. IA 50327.

APPELLATE DEFENDER'S OFFICE

Theresa R. Wilson

____

THERESA R. WILSON
Assistant Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
twilson@spd.state.ia.us
appellatedefender@spd.state.ia.us

TRW/lr/4/20
TRW/ls/07/20

TABLE OF CONTENTS

Page

Certificate of Service 2

Table of Authorities 4

Statement of the Issue Presented for Review.................. 8

Routing Statement 14

Statement of the Case 14

Argument

Williams was a passenger in a Lyft vehicle stopped for traffic violations. He provided his name when asked and engaged in no furtive movements. Another officer ordered Williams out of the vehicle and conducted a Terry pat-down for weapons despite the lack of any current indication Williams was engaged in criminal activity or both armed and dangerous. Did the District Court err in denying Williams' motion to suppress?..................... 18

Conclusion 82

Request for Oral Argument.. 83

Attorney's Cost Certificate 83

Certificate of Compliance.. 84

TABLE OF AUTHORITIES

Cases: Page:

Arizona v. Johnson, 555 U.S. 323 (2009) 36

Berkemer v. McCarty, 468 U.S. 420 (1984) 77, 80

Brendlin v. California, 551 U.S. 249 (2007) 33, 57-59

Commonwealth v. Almeida, 366 N.E.2d 756 (1977) 52

Commonwealth v. Gonsalves, 711 N.E.2d 108
(Mass. 1999) 52-55

Commonwealth v. Santana,
649 N.E.2d 717 (Mass. 1995) 52

Commonwealth v. Silva, 318 N.E.2d 895 (1974) 52, 54

Delaware v. Prouse, 440 U.S. 648 (1979) 32-34

District of Columbia v. Heller, 554 U.S. 570 (2007) 66

King v. State, 797 N.W.2d 565 (Iowa 2011) 44

Knowles v. Iowa, 525 U.S. 113 (1998) 37, 61

Maryland v. Wilson, 519 U.S. 408 (1997) 35, 43, 55

McDonald v. City of Chicago, 561 U.S. 742 (2010) 66

Miranda v. Arizona, 384 U.S. 436 (1966) 76-7

Pennsylvania v. Mimms, 434 U.S. 106 (1977) 34-35, 54

Reifsnyder v. Lee, 44 Iowa 101 (1876) 45

Rhode Island v. Innis, 446 U.S. 291 (1980) 79

Stansbury v. California, 511 U.S. 318 (1994) 77

State v. Bacome, 154 A.2d 1253 (N.J. 2017)....................... 50

State v. Becker, 458 N.W.2d 604 (Iowa 1990) 37, 61

State v. Bergmann, 633 N.W.2d 328 (Iowa 2001)............. 39-41

State v. Bogan, 774 N.W.2d 676 (Iowa 2009) 77-78, 80-82

State v. Cline, 617 N.W.2d 277 (Iowa 2000)...................... 44-45

State v. Coleman 890 N.W.2d 284 (Iowa 2017) 42, 44, 60

State v. Countryman, 572 N.W.2d 553 (Iowa 1997) 77

State v. Fort, 660 N.W.2d 415 (Minn. 2003) 59-60

State v. Gaskins, 866 N.W.2d 1 (Iowa 2015) 19, 44, 46

State v. Height, 117 Iowa 650, 91 N.W. 935 (1902).... 44-45, 76

State v. Ingram, 914 N.W.2d 794 (Iowa 2018)..................... 48

State v. Iowa Dist. Ct., 801 N.W.2d 513 (Iowa 2011)........... 76

State v. Jackson, 878 N.W.2d 422 (Iowa 2016)................ 46-47

State v. Kim, 711 P.2d 1291 (Haw. 1985) 56

State v. Lowe, 812 N.W.2d 554 (Iowa 2012)........................ 81

State v. Mendez, 970 P.2d 722 (Wash. 1999) 57

State v. Miranda, 672 N.W.2d 753 (Iowa 2003)............... 19, 77

State v. Mortley, 532 N.W.2d 498 (Iowa 1995) 78

State v. Najouks, 637 N.W.2d 101 (Iowa 2001) 82

State v. Niehaus, 452 N.W.2d 184 (Iowa 1990) 18

State v. Ochoa, 792 N.W.2d 260 (Iowa 2010) 46

State v. Pals, 805 N.W.2d 767 (Iowa 2011) 45

State v. Peterson, 663 N.W.2d 417 (Iowa 2003) 79

State v. Riley, 501 N.W.2d 487 (Iowa 1993) 37-39, 42

State v. Short, 851 N.W.2d 474 (Iowa 2014) 46

State v. Smith, 637 A.2d 158 (N.J. 1994)......................... 48-49

State v. Smith, 683 N.W.2d 542 (Iowa 2004) 38-39, 62

State v. Sprague, 824 A.2d 539 (Vt. 2003)........................ 50-51

State v. Turner, 630 N.W.2d 601 (Iowa 2001) 45

State v. Vance, 790 N.W.2d 775 (Iowa 2010) 19

State v. Wyatt, 687 P.2d 544 (Haw. 1984)........................... 56

Terry v. Ohio, 392 U.S. 1 (1968) 32, 35, 49, 55

United States v. Brignoni-Ponce, 422 U.S. 873 (1975) 32-33

U.S. v. Griffin, 922 F.2d 1343 (8th Cir. 1990) 78

Weeks v. United States, 232 U.S. 383,
34 S.Ct. 341 (1914) 45

<u>Constitutional Provisions</u>:

Iowa Const. Art. I § 8 43

U.S. Const. amend. IV 32, 43

<u>Other Authorities</u>:

2017 Iowa Acts, ch. 69 66

Royce de R. Barondes, Automatic Authorization of Frisks
in Terry Stops for Suspicion of Firearm Possession,
43 S. Ill. Univ. L.J. 1, 2 (Fall 2018) 65-66

Shawn E. Fields, Stop and Frisk in a Concealed Carry
World, 93 Wash. L. Rev. 1675 (Dec. 2018) 65, 67-68

Jordan Blair Woods, Policing, Danger Narratives and
Routing Traffic Stops, 117 Mich. L. Rev. 635
(Feb. 2019) 62-65

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Williams was a passenger in a Lyft vehicle stopped for traffic violations. He provided his name when asked and engaged in no furtive movements. Another officer ordered Williams out of the vehicle and conducted a Terry pat-down for weapons despite the lack of any current indication Williams was engaged in criminal activity or both armed and dangerous. Did the District Court err in denying Williams' motion to suppress?

Authorities

State v. Niehaus, 452 N.W.2d 184, 186 (Iowa 1990)

State v. Gaskins, 866 N.W.2d 1, 5 (Iowa 2015)

State v. Vance, 790 N.W.2d 775, 780 (Iowa 2010)

State v. Miranda, 672 N.W.2d 753, 758 (Iowa 2003)

A. The United States Supreme Court has held the Fourth Amendment allows officers to issue exit orders for passengers involved in traffic stops and to conduct a pat-down search based on a reasonable and articulable suspicion that the occupants are engaged in criminal activity or are armed and presently dangerous.

U.S. Const. amend. IV

Terry v. Ohio, 392 U.S. 1, 8-9 (1968)

Delaware v. Prouse, 440 U.S. 648, 654 (1979)

United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975)

Brendlin v. California, 551 U.S. 249, 255 (2007)

Pennsylvania v. Mimms, 434 U.S. 106, 111 n. 6 (1977)

Maryland v. Wilson, 519 U.S. 408, 414-15 (1997)

Arizona v. Johnson, 555 U.S. 323, 330-31 (2009)

B. The Iowa Supreme Court initially distinguished between drivers and passengers in its Fourth Amendment analysis. More recently, it has tended to follow Mimms while also suggesting reasonable suspicion is still necessary to order passengers out of a vehicle and to justify a pat-down search.

State v. Becker, 458 N.W.2d 604 (Iowa 1990) (abrogated on other grounds by Knowles v. Iowa, 525 U.S. 113, 117–118 (1998)

State v. Riley, 501 N.W.2d 487, 488–89 (Iowa 1993)

State v. Smith, 683 N.W.2d 542, 543 (Iowa 2004)

State v. Bergmann, 633 N.W.2d 328, 332-33 (Iowa 2001)

State v. Coleman 890 N.W.2d 284, 300-01 (Iowa 2017)

C. Under article I section 8 of the Iowa Constitution, a reasonable suspicion that criminal activity is afoot or that a passenger is armed and dangerous should be required before an officer can order a passenger out of a vehicle.

State v. Riley, 501 N.W.2d 487, 488–89 (Iowa 1993)

Maryland v. Wilson, 519 U.S. 408, 413-15 (1997)

Iowa Const. Art. I § 8

State v. Gaskins, 866 N.W.2d 1, 6 (Iowa 2015)

King v. State, 797 N.W.2d 565, 571 (Iowa 2011)

State v. Coleman, 890 N.W.2d 284, 286 (Iowa 2017)

State v. Height, 91 N.W. 935, 937 (Iowa 1902)

Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341 (1914)

State v. Cline, 617 N.W.2d 277, 285 (Iowa 2000), abrogated on other grounds by State v. Turner, 630 N.W.2d 601, 606 n.2 (Iowa 2001)

Reifsnyder v. Lee, 44 Iowa 101 (1876)

State v. Pals, 805 N.W.2d 767, 777-83 (Iowa 2011)

State v. Ochoa, 792 N.W.2d 260, 287-91 (Iowa 2010)

State v. Short, 851 N.W.2d 474, 496-506 (Iowa 2014)

State v. Jackson, 878 N.W.2d 422, 443-44 (Iowa 2016)

State v. Ingram, 914 N.W.2d 794, 804 (Iowa 2018)

State v. Smith, 637 A.2d 158, 167 (N.J. 1994)

Terry v. Ohio, 392 U.S. 1, 8-9 (1968)

State v. Bacome, 154 A.2d 1253, 1258-60 (N.J. 2017)

State v. Sprague, 824 A.2d 539, 544-45 (Vt. 2003)

Commonwealth v. Santana, 649 N.E.2d 717, 722 (Mass. 1995)

Commonwealth v. Almeida, 366 N.E.2d 756 (1977)

Commonwealth v. Silva, 318 N.E.2d 895 (1974)

Commonwealth v. Gonsalves, 711 N.E.2d 108, 110-11 (Mass. 1999)

Pennsylvania v. Mimms, 434 U.S. 106, 120–121 (1977)

State v. Wyatt, 687 P.2d 544 (Haw. 1984)

State v. Kim, 711 P.2d 1291, 1294 (Haw. 1985)

State v. Mendez, 970 P.2d 722, 726 (Wash. 1999) abrogated on other grounds by Brendlin v. California, 551 U.S. 249, 259 n.5 (2007)

State v. Fort, 660 N.W.2d 415 (Minn. 2003)

State v. Coleman, 890 N.W.2d 284, 299 (Iowa 2017)

State v. Becker, 458 N.W.2d 604 (Iowa 1990) (abrogated on other grounds by Knowles v. Iowa, 525 U.S. 113, 117–118 (1998)

State v. Smith, 683 N.W.2d 542, 543 (Iowa 2004)

Jordan Blair Woods, Policing, Danger Narratives and Routing Traffic Stops, 117 Mich. L. Rev. 635, 637 (Feb. 2019)

Shawn E. Fields, Stop and Frisk in a Concealed Carry World, 93 Wash. L. Rev. 1675, 1688 (Dec. 2018)

Royce de R. Barondes, Automatic Authorization of Frisks in Terry Stops for Suspicion of Firearm Possession, 43 S. Ill. Univ. L.J. 1, 2 (Fall 2018)

2017 Iowa Acts, ch. 69

District of Columbia v. Heller, 554 U.S. 570, 582 (2007)

McDonald v. City of Chicago, 561 U.S. 742, 767 (2010)

D. Officers lacked reasonable suspicion that Williams was armed and dangerous to either order him out of the vehicle or justify a pat-down search.

No Authorities

E. Williams' eventual admission to possessing a firearm cannot be considered. His statement came after he was forcible seized by officers and subjected to questioning that would incriminate him.

Miranda v. Arizona, 384 U.S. 436, 473 (1966)

State v. Iowa Dist. Ct., 801 N.W.2d 513, 518 n. 2 (Iowa 2011)

State v. Height, 117 Iowa 650, 659, 91 N.W. 935, 938 (1902)

State v. Miranda, 672 N.W.2d 753, 758-59 (Iowa 2003)

State v. Bogan, 774 N.W.2d 676, 680 (Iowa 2009)

Berkemer v. McCarty, 468 U.S. 420, 440 (1984)

Stansbury v. California, 511 U.S. 318, 323 (1994)

State v. Countryman, 572 N.W.2d 553, 558 (Iowa 1997)

State v. Mortley, 532 N.W.2d 498, 501 (Iowa 1995)

U.S. v. Griffin, 922 F.2d 1343, 1349 (8th Cir. 1990)

State v. Peterson, 663 N.W.2d 417, 424 (Iowa 2003)

Rhode Island v. Innis, 446 U.S. 291, 300–01 (1980)

State v. Lowe, 812 N.W.2d 554, 579 (Iowa 2012)

F. Summary

State v. Najouks, 637 N.W.2d 101, 111 (Iowa 2001)

State v. Bogan, 774 N.W.2d 676, 682 (Iowa 2009)

ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court to address whether the Iowa Constitution requires reasonable and articulable suspicion to believe criminal activity is afoot or a person is armed and presently dangerous before an officer can require a passenger in a vehicle stopped for minor traffic violations to exit the vehicle. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(c) (2020). Compare Maryland v. Wilson, 519 U.S. 408, 414-15 (1997)(permitting exit orders on passengers without requiring reasonable suspicion under the Fourth Amendment).

STATEMENT OF THE CASE

Nature of the Case: This is an appeal by Defendant-Appellant Khalen Williams from his conviction, sentence, and judgment for Felon in Possession of a Firearm, a class D felony in violation of Iowa Code section 724.26 (2017), entered following a bench trial on a stipulated record. The Honorable Lawrence P. McLellan (motion to suppress) and the Honorable

Sharon Gronewald (trial and sentencing) presided over all relevant proceedings.

Course of Proceedings: On March 26, 2019, the State filed a trial information in Polk County District Court charging Defendant-Appellant Khalen Williams with Felon in Possession of a Firearm, a class D felony in violation of Iowa Code section 724.26 (2017) (Count I) and Possession of a Controlled Substance (Marijuana), a serious misdemeanor in violation of Iowa Code section 124.401(5) (2017) (Count II). (Information) (App. pp. 4-5). Williams pleaded not guilty and waived his right to a speedy trial. (Arraignment Following Trial Information; Waiver of Speedy Trial)(App. pp. 6-9).

Williams filed a motion to suppress on May 10, 2019, challenging his warrantless search and seizure following a traffic stop. (Motion to Suppress)(App. pp. 10-14). The State filed a resistance. (State's Resistance to Motion to Suppress)(App. pp. 15-18).

The District Court held a hearing on the motion to suppress on July 22, 2019. (Supp. Tr. p. 1 L.1-25). In a written ruling issued August 18, 2019, the District Court granted the motion to suppress as to the search of Williams' backpack but denied the motion as to the search of his person and discovery of his handgun. (Order re: Motion to Suppress) (App. pp. 19-28).

On August 26, 2019, Williams filed a written waiver of his right to a jury trial and a stipulation to a trial on the minutes of testimony. (Waiver of Jury Trial; Stipulation)(App. pp. 29-30). The District Court accepted both the jury waiver and the stipulation following a hearing. (8/26/19 Tr. p. 8 L.23-p. 9 L.2, p. 16 L.11-p. 17 L.22). The State agreed to dismiss Count II. (8/26/19 Tr. p. 10 L.22-p. 11 L.7).

The District Court issued its findings of fact, conclusions of law, and verdict on September 6, 2019. (Findings of Fact)(App. pp. 31-34). The court found Williams guilty as charged under Count I. (Findings of Fact p. 2)(App. p. 32).

The District Court held a sentencing hearing on November 1, 2019. (Sent. Tr. p. 1 L.1-25). The court sentenced Williams to 14 years in prison – five years on Count I with the remainder related to probation violations not the subject of this appeal. (Sent. Tr. p. 21 L.7-16; Plea/Sent. Order pp. 1-2)(App. pp. 35-36). The court imposed but suspended a fine of $750 on Count I, but found Williams had no reasonable ability to pay any category 2 restitution. (Sent. Tr. p. 21 L.17-p. 22 L.1; Plea/Sent. Order pp. 3-4)(App. pp. 37-38). The court dismissed Count II. (11/6/19 Order)(App. p. 41).

Williams filed a timely notice of appeal on November 6, 2019. (Notice)(App. p. 43).

Facts: The District Court found the following n its written findings of fact:

> On February 14, 2019 Defendant was a passenger in a vehicle being driven by a Lyft driver. The Des Moines police stopped the vehicle because the Lyft driver failed to stop for a stop sign, was speeding, had one nonfunctioning brake light and a dirty license plate making it impossible for the

> officer to read the license plate. During the course of the stop, Defendant was removed from the vehicle for a pat-down. A 9mm semiautomatic pistol was removed from the left breast pocket of Defendant's outer coat. Having previously been convicted of Eluding, a Class D Felony, in Polk County Case No. FECR311978, Defendant was then charged with Felon in Possession of a Firearm in violation of Iowa Code section 724.26.2.

(Findings of Fact pp. 1-2)(App. pp. 31-32)(footnotes omitted).

ARGUMENT

Williams was a passenger in a Lyft vehicle stopped for traffic violations. He provided his identification information when asked and engaged in no furtive movements. Another officer ordered Williams out of the vehicle and conducted a Terry pat-down for weapons despite the lack of any current indication Williams was engaged in criminal activity or both armed and dangerous. The District Court erred in denying Williams' motion to suppress.

Preservation of Error: Error was preserved by the District Court's denial of Williams' motion to suppress. (Motion to Suppress; Order re: Motion to Suppress)(App. pp. 10-14, 19-28). State v. Niehaus, 452 N.W.2d 184, 186 (Iowa 1990). Williams argued that the warrantless seizure and search of his person violated the state and federal

constitutions, and that his constitutional right against self-incrimination was also violated. (Motion to Suppress pp. 3-4)(App. pp. 12-13).

Standard of Review: The Court reviews claims of unconstitutional searches and seizures de novo. State v. Gaskins, 866 N.W.2d 1, 5 (Iowa 2015). "We independently evaluate the totality of the circumstances found in the record, including the evidence introduced at both the suppression hearing and at trial." State v. Vance, 790 N.W.2d 775, 780 (Iowa 2010). When a defendant claims his right against self-incrimination was infringed, review is also de novo. State v. Miranda, 672 N.W.2d 753, 758 (Iowa 2003).

Merits: The District Court erred in denying Defendant-Appellant Khelan Williams' motion to suppress evidence obtained from the warrantless search and seizure of his person. A Terry pat-down requires reasonable suspicion that criminal activity is afoot or that a person is armed and presently dangerous. The officers involved in the stop of the

Lyft vehicle in which Williams was a passenger did not suspect him of being engaged in criminal activity. The record did not support the officers' assertion that Williams was armed and presently dangerous. Furthermore, officers subjected Williams to custodial interrogation without first providing Miranda warnings. All evidence obtained from the seizure and search of Williams, including his statements, should be suppressed.

On May 10, 2019, Williams moved to suppress the evidence obtained from his warrantless seizure and search under both the state and federal constitutions. (Motion to Suppress)(App. pp. 10-14). Williams argued the seizure and search of his person did not fall under any warrant exception, was conducted without any reasonable suspicion he was engaged in criminal activity, and extended the duration of the traffic stop. (Motion to Suppress pp. 3-4)(App. pp. 12-14). He also claimed police obtained an incriminating statement

from him in violation of his Miranda rights. (Motion to Suppress p. 4)(App. p. 14).

The State filed a resistance on May 15, 2019. (State's Resistance to Motion to Suppress)(App. pp. 15-18). The State referred to case law permitting an officer at the scene of a traffic stop to order both the driver and any passenger out of the vehicle for officer safety. (State's Resistance to Motion to Suppress p. 2)(App. p. 16). With the passenger out of the vehicle, according to the State, the officer could conduct a pat-down of the driver or passenger based upon a reasonable suspicion that the person could be armed and "presently dangerous." (State's Resistance to Motion to Suppress p. 2)(App. p. 16). The State argued that Williams' demeanor and an officer's past experience with him justified the pat-down search that discovered the firearm on Williams' person. (State's Resistance to Motion to Suppress pp. 2-3)(App. pp. 16-17).

The District Court held a hearing on the motion on July 22, 2019. (Supp. Tr. p. 1 L.1-25). Des Moines police officer Brian Buck testified that he was on midnight patrol on February 14, 2019 when he conducted a traffic stop on a car that failed to stop at a stop sign. (Supp. Tr. p. 4 L.9-p. 5 L. 20). The vehicle also had a nonfunctioning brake light, was travelling at 43 miles per hour, and had a dirty license plate that was not visible from 50 feet away. (Supp. Tr. p. 5 L.21-25).

Buck obtained the driver's license and proof of insurance from the driver and then asked the backseat passenger for his name and date of birth. (Supp. Tr. p. 6 L.4-14). He admitted he had no concerns about drug activity or weapons activity when he stopped the vehicle. (Supp. Tr. p. 13 L.3-8). He was aware the vehicle he had stopped was a Lyft vehicle, which served as a type of private taxi service. (Supp. Tr. p. 13 L.9-p. 14 L.15).

While Buck gathered information from the passenger, Des Moines police officer Brandon Holtan arrived on the scene. (Supp. Tr. p. 16 L.5-14, p. 20 L.16-p. 21 L.3). Holtan approached the passenger side of the vehicle. (Supp. Tr. p. 16 L.15-24, p. 22 L.15-18). The passenger identified himself as Khalen Williams, and Holtan recognized him as Khalen Price Williams. (Supp. Tr. p. 11 L.17-p. 12 L.15, p. 22 L.15-23).

Buck returned to his vehicle to perform a "wants and warrant" check through his mobile database. (Supp. Tr. p. 6 L.15-25). He had no concerns regarding the backseat passenger at that time – not for safety, drugs, firearms, or criminal activity. (Supp. Tr. p. 17 L.6-18). The check would take anywhere from one to five minutes and eventually revealed Williams did not have any outstanding warrants. (Supp. Tr. p. 7 L.3-6, p. 18 L.3-9). Before Buck could obtain that result, however, he noticed Holtan with his firearm

unholstered waving him back to the car. (Supp. Tr. p. 7 L.7-p. 8 L.19).

According to Holtan, he recognized Williams from an incident on December 10, 2017 – 14 months before Buck's stop – when he conducted a traffic stop with Williams as the driver. (Supp. Tr. p. 22 L.15-23, p. 24 L.12-15). Williams ran from the vehicle while holding a firearm. (Supp. Tr. p. 22 L.24-25). When Williams was taken into custody, the gun was located near him. (Supp. Tr. p. 23 L.1-2). Williams was ultimately convicted of carrying weapons. (Supp. Tr. p. 24 L.20-p. 25 L.6). In addition, Holtan testified he learned from another officer that the other officer had arrested Williams for eluding after the first incident. (Supp. Tr. p. 23 L.3-6, p. 25 L.7-17).

Holtan said he spoke to Williams about the past incidents and then asked him if he had a firearm. (Supp. Tr. p. 23 L.7-8). According to Holtan, Williams broke eye contact and "started to overexplain how he was a passenger in a

vehicle and tried to distance himself from the vehicle." (Supp. Tr. p. 23 L.9-15). Holtan asked Williams to step out of the vehicle with the intention of conducting a Terry pat-down. (Supp. Tr. p. 23 L.16-17). Holtan described his perception of Williams' response:

> and at that time his demeanor, which was friendly to this point, I observed his fight or flight response to be activated. And it wasn't the fight or flight response, it was the freezing in time where he was attempting to decide what was going to happen next or figure out what was going to happen next.

(Supp. Tr. p. 23 L.17-22). Concerned that Williams might be armed, Holtan advised Williams not to reach and drew his own firearm. (Supp. Tr. p. 23 L.23-25, p. 25 L.14-p. 26 L.17).

When Buck returned to the car, Holtan informed him that he had arrested Williams for carrying a gun in the past. (Supp. Tr. p. 8 L.20-24). Buck grabbed Williams' right arm and asked Williams if he had a firearm on him. (Supp. Tr. p. 8 L.20-p. 9 L.1, p. 27 L.2-22). Williams responded that he did, and told Buck where it was. (Supp. Tr. p. 9 L.2-3, p. 27 L.2-24). Holtan was in the process of patting down Williams

at the time. (Supp. Tr. p. 9 L.4-6). They seized a loaded Taurus 9mm handgun from the inside left breast pocket of Williams' coat. (Supp. Tr. p. 9 L.12-p. 10 L.1, p. 24 L.1-3, p. 27 L.2-10, L.25-p. 28 L.17).

On cross-examination, Holtan testified that at the time he did not find asking Williams if he was armed or having information from another officer about a separate incident "relevant" enough to put in his report. (Supp. Tr. p. 31 L.15-p. 32 L.16). Holtan admitted he had already made the decision to pat down Williams when he asked him out of the vehicle. (Supp. Tr. p. 34 L. 4-16). He testified that he believed Williams was armed based upon his breaking of eye contact, his hands being up and away from his body, and his constant argument that he was "just a passenger." (Supp. Tr. p. 34 L.17-p. 35 L.4, p. 39 L.22-p. 40 L.11). The change in demeanor, the eluding incident from 14 months before, and another eluding incident reported by another officer were the

only bases for Holtan's belief Williams was armed. (Supp. Tr. p. 40 L.12-18).

Holtan acknowledged that passengers might be confused as to why they are under investigation if their Lyft driver gets pulled over. (Supp. Tr. p. 37 L.2-5). He also acknowledged that Williams was a passenger in this case, as opposed to being the driver who was stopped in Holtan's initial eluding case with him. (Supp. Tr. p 38 L.14-p. 39 L.16).

The State argued that Buck conducted a valid traffic stop and that U.S. Supreme Court case law permitted officers to ask both the driver and any passengers out of stopped vehicles for purposes of officer safety. (Supp. Tr. p. 43 L.20-p. 44 L.21). An officer who has a reasonable belief that a passenger is armed and dangerous may then conduct a pat-down search for weapons. (Supp. Tr. p. 44 L.22-p. 45 L.6). The State argued that Holtan had such a reasonable belief based on Williams' demeanor and based upon Holtan's prior experience with him. (Supp. Tr. p. 45 L.7-14).

Williams argued the established case law really did not address the context of ordering a passenger out of a bus, taxi, or Lyft. (Supp. Tr. p. 47 L.5-13). He urged that the privacy expectations of a passenger – and the officer's expectations regarding his or her own safety -- in that situation were greater because of the more significant regulations placed upon drivers in those contexts. (Supp. Tr. p. 47 L.14-p. 50 L.2). Accordingly, Williams contended Buck's request for Williams' identification was improper. (Supp. Tr. p. 50 L.2-9).

As for Holtan's conduct, Williams argued that Holtan's presence as the second officer on the scene provided the necessary safety and that ordering Williams out of the car was nothing more than a fishing expedition. (Supp. Tr. p. 51 L.6-17). While Williams agreed officers could conduct Terry pat-downs when they had a reasonable belief the person they were dealing with was armed and dangerous, he disagreed that the facts rose to that level. (Supp. Tr. p. 51 L.18-p. 52 L.3). Williams argued he was upfront as to who he was and where

he was going and kept his hands where officers could see them. (Supp. Tr. p. 52 L.17-21). He pointed out that an incident that happened 14 months before that was factually different from the current situation did not provide reasonable suspicion he would be armed and dangerous. (Supp. Tr. p. 52 L.22-p. 53 L.11). Williams argued that criminal history, standing alone, did not provide such a basis. (Supp. Tr. p. 53 L.12-17).

According to Williams, the video of the stop revealed no change in his demeanor until Holtan asked him out of the vehicle and that Holtan only asked him out of the vehicle so he could conduct a pat-down search. (Supp. Tr. p. 53 L.18-p. 54 L.4). Williams pointed to Holtan's admission that his instincts told him Williams was armed, and asserted that mere hunches were inadequate to provide reasonable suspicion someone is armed and dangerous. (Supp. Tr. p. 54 L.5-18, 25-p. 55 L.5).

Finally, Williams argued Holtan's actions prolonged the stop and were not related to the original reason for the stop. (Supp. Tr. p. 54 L.19-24).

The State reiterated that "it isn't the driver we're concerned about here. It's a passenger who is known to the officer to have an extremely dangerous recent history, including the carrying of a loaded firearm." (Supp. Tr. p. 56 L.7-13).

The District Court issued its ruling on the motion to suppress on August 18, 2019. (Order re: Motion to Suppress) (App. pp. 19-28). The court determined there was no dispute between the parties that the traffic stop was valid. (Order re: Motion to Suppress p. 5)(App. p. 23). Accordingly, the court held case law permitted the officer to order Williams out of the vehicle. (Order re: Motion to Suppress p. 5)(App. p. 23).

The District Court determined Holtan had reasonable suspicion to believe that Williams was armed and dangerous to justify the search of Williams. (Order re: Motion to

Suppress p. 6)(App. p. 24). The court recognized Holtan had apprehended Williams in December 2017 following a chase and that Williams had a gun at that time, and that Holtan had heard Williams eluded another officer in November 2018. (Order re: Motion to Suppress p. 6)(App. p. 24). Given Holtan's previous knowledge of Williams and Williams' movement of his hand to his pocket to place his cell phone there, the District Court determined Holtan had reasonable suspicion to justify a pat-down search. (Order re: Motion to Suppress p. 6)(App. p. 24). The court also noted Williams admitted having a gun on him after he exited the vehicle but before Holtan conducted his search. (Order re: Motion to Suppress p. 6)(App. p. 24). Accordingly, the court denied the motion to suppress as to the firearm and William's statements regarding it. (Order re: Motion to Suppress p. 9)(App. p. 27). The District Court erred.

A. The United States Supreme Court has held the Fourth Amendment allows officers to issue exit orders for passengers involved in traffic stops and to conduct a pat-down search based on a reasonable and articulable suspicion that the occupants are engaged in criminal activity or are armed and presently dangerous.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. "This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs." Terry v. Ohio, 392 U.S. 1, 8-9 (1968).

The Fourth Amendment requires reasonableness in balancing the intrusion of the officer's action on an individual's privacy and security interests against legitimate government interests. Delaware v. Prouse, 440 U.S. 648, 654 (1979); United States v. Brignoni-Ponce, 422 U.S. 873, 878

(1975). Objective standards are used so that a person's reasonable expectation of privacy is not "'subject to the discretion of the official in the field.'" Delaware v. Prouse, 440 U.S. at 655.

"The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest." United States v. Brignoni-Ponce, 422 U.S. at 878. When an officer stops an automobile and detains its occupants, the actions of the officer constitute a seizure. Delaware v. Prouse, 440 U.S. at 653. The officer effectively seizes "everyone in the vehicle" including the driver and all of the passengers. Brendlin v. California, 551 U.S. 249, 255 (2007).

Officers may stop vehicles only if they are aware of "specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion" that the vehicle's occupants are in violation of the law. United States v. Brignoni-Ponce, 422 U.S. at 884. An observed violation of

the traffic laws may render a seizure of the vehicle reasonable under the Fourth Amendment. Delaware v. Prouse, 440 U.S. at 663.

In this case, there is no dispute that the traffic stop performed upon the Lyft rideshare vehicle in which Williams was a passenger was a valid stop based upon observed violations of the traffic laws. (Supp. Tr. p. 5 L.9-25).

"[O]nce a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures." Pennsylvania v. Mimms, 434 U.S. 106, 111 n. 6 (1977). The Mimms Court determined the government's "legitimate and weighty" interest in officer safety – whether the risk came from a violent driver or passing traffic -- outweighed the minimal intrusion of requiring a driver, already lawfully stopped, to exit the vehicle. Id. at 110–11. Consistent with Terry v. Ohio, the Court then held that a driver, once outside the stopped

vehicle, may be patted down for weapons if the officer reasonably concludes that the driver "might be armed and presently dangerous." Id. at 111-12 (citing Terry v. Ohio, 392 U.S. 1 (1968).

In Maryland v. Wilson, the United States Supreme Court extended the Mimms rule to passengers in a stopped vehicle. Maryland v. Wilson, 519 U.S. 408, 414-15 (1997). The Court referred to the number of assault on officers conducting traffic stops, and added "the fact that there is more than one occupant of the vehicle increases the possible sources of harm to the officer." Id. at 413. The Court admitted the privacy concerns of passengers might be stronger than for drivers, but "as a practical matter, the passengers are already stopped by virtue of the stop of the vehicle." Id. at 413-14. By making the minimal intrusion of moving passengers outside, officers could ensure they would not be able to access any weapons that could be inside the vehicle. Id. at 414.

> "[M]ost traffic stops," this Court has observed, "resemble, in duration and atmosphere, the kind of

> brief detention authorized in Terry." Berkemer v. McCarty, 468 U.S. 420, 439, n. 29, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984). Furthermore, the Court has recognized that traffic stops are "especially fraught with danger to police officers." Michigan v. Long, 463 U.S. 1032, 1047, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). "'The risk of harm to both the police and the occupants [of a stopped vehicle] is minimized,'" we have stressed, "'if the officers routinely exercise unquestioned command of the situation.'" Maryland v. Wilson, 519 U.S. 408, 414, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997) (quoting Michigan v. Summers, 452 U.S. 692, 702–703, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981)); see Brendlin, 551 U.S., at 258, 127 S.Ct. 2400.

Arizona v. Johnson, 555 U.S. 323, 330-31 (2009).

B. The Iowa Supreme Court initially distinguished between drivers and passengers in its Fourth Amendment analysis. More recently, it has tended to follow Mimms while also suggesting reasonable suspicion is still necessary to order passengers out of a vehicle and to justify a pat-down search.

In State v. Becker, the Iowa Supreme Court relied upon Mimms to distinguish between the driver and the passenger for Fourth Amendment purposes:

> The fact that the driver was speeding authorizes the officer to stop the vehicle in which the passenger is riding. The resulting intrusion on the passenger which flows from the initial stop is an unavoidable consequence of action justifiably taken against the

> driver. Further intrusion on the passenger is not justified, however, 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.

State v. Becker, 458 N.W.2d 604 (Iowa 1990) (abrogated on other grounds by Knowles v. Iowa, 525 U.S. 113, 117–118 (1998)).

Three years after Becker, the Iowa Supreme Court held that police were not prohibited from approaching and speaking with a passenger in a vehicle stopped for a traffic violation despite the lack of reasonable suspicion about the passenger. State v. Riley, 501 N.W.2d 487, 488–89 (Iowa 1993). The problem in Becker, according to the Court, was the immediate removal of the passenger from the vehicle. Id. at 489. The Riley Court held that speaking to a passenger or asking for identification was not the sort of "additional intrusion" contemplated by Becker. Id.

Riley also addressed whether the officer had reasonable suspicion to believe Riley was a danger to justify removing

Riley from the vehicle and conducting a search under Riley's seat. Id. Citing case law referring to the dangers to police posed by traffic stops, the Court found Riley's furtive movement toward the area under his seat, coupled with his failure to provide identification when asked, justified the Terry search for weapons. Id. at 490.

In State v. Smith, an officer stopped a vehicle in which Smith was a passenger for a minor traffic violation. State v. Smith, 683 N.W.2d 542, 543 (Iowa 2004). The officer gave the driver a citation and asked Smith for his ID, which Smith provided. Id. Upon learning Smith had an active warrant for his arrest, the officer took Smith into custody and methamphetamine fell out of Smith's pocket. Id. Relying on Becker, the District Court determined the Fourth Amendment required an officer to have reasonable suspicion of criminal activity before asking a passenger in a vehicle for their identification. Id. at 544.

The Iowa Supreme Court began by recognizing that Becker was effectively overruled by the U.S. Supreme Court's ruling in Wilson. Id. at 545. Furthermore, the Court had previously ruled in Riley that Becker did not prohibit officers from approaching or talking to passengers, which was significantly less of an intrusion that ordering a passenger out of the car. Id. at 545-46 (citing State v. Riley, 501 N.W.2d 487, 488–89 (Iowa 1993)).

Finally, State v. Bergmann addressed the ability of officers to pat down a driver stopped for a traffic violation. State v. Bergmann, 633 N.W.2d 328, 332-33 (Iowa 2001). An officer saw Bergmann in a vehicle that was parked in an area known for drug activity. Id. at 330. A known drug dealer was standing next to Bergmann's car and walked away when he saw the officer. Id. Bergmann drove off fairly quickly. Id. The officer stopped Bergmann's vehicle for an unlit license plate. Id. Upon stopping the vehicle, the officer recognized Bergmann from an arrest the officer made several years before

involving drugs and the possession of a handgun. Id. There were also two other passengers in the vehicle. Id. Bergmann was not truthful when asked if he had stopped anywhere recently. Id. The officer asked Bergmann to step out of the vehicle and noticed Bergmann appeared anxious and impatient. Id. The officer conducted a pat-down search for weapons, but found none. Id.

The Bergmann Court reviewed the relevant case law on pat-down searches of suspects:

> Police are allowed to pat down a suspect if they have reasonable suspicion that a crime is being or is about to be committed. Terry v. Ohio, 392 U.S. 1, 30–31, 88 S.Ct. 1868, 1884–85, 20 L.Ed.2d 889, 911 (1968). They may also do a pat down if there is a reasonable suspicion that the person is armed and the officer's safety is in danger. Id. at 27, 88 S.Ct. at 1883, 20 L.Ed.2d at 909. Two cases are instructive here given our facts. Illinois v. Wardlow, 528 U.S. 119, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000); State v. Cline, 617 N.W.2d 277 (Iowa 2000). Both cases hold that mere presence in a known narcotics-dealing area does not give police reasonable suspicion of wrongdoing to conduct a pat down. However, when coupled with other factors like flight upon seeing police, nervousness, evasiveness or lying, past experience with the suspect, etc., reasonable suspicion may be justified.

> See Wardlow, 528 U.S. at 124–25, 120 S.Ct. at 676, 145 L.Ed.2d at 576; Cline, 617 N.W.2d at 282–83.

State v. Bergmann, 633 N.W.2d 328, 332-33 (Iowa 2001).

The Iowa Supreme Court rejected Bergmann's challenge to the pat-down search:

> Here, Bergmann was spotted in a known drug area alongside a nefarious drug dealer. When the drug dealer saw police, he immediately retreated from Bergmann's car, and Bergmann drove away quickly. Dill recognized Bergmann from a past weapon and drug arrest. Dill felt concern for his safety. Bergmann lied to Dill about where he had been recently. Bergmann acted nervous while outside the car. Given all of these factors, Dill had reasonable suspicion to pat down Bergmann for weapons. Moreover, once Dill concluded that further investigation was reasonably necessary, he was warranted to assure his protection by ensuring that those in his presence were not armed.

Id. at 333.

The Iowa Supreme Court has "evinced an awareness of the potential for arbitrary government action on the state's roads and highways" along with acknowledging Mimms' concern for officer safety during traffic stops:

> Yet, as the Supreme Court stated in Knowles, the safety concerns arising out of a potential traffic

> citation are “a good deal less than in the case of a custodial arrest.” 525 U.S. at 117, 119 S.Ct. at 487, 142 L.Ed.2d at 498. Nonetheless, in Mimms, the Supreme Court held that an officer can direct a driver to get out of the car to ensure the officer's safety. 434 U.S. at 110–11, 98 S.Ct. at 333, 54 L.Ed.2d at 337.
>
> Yet, for a more intrusive Terry-type stop, reasonable suspicion is constitutionally required before the officers may engage in a pat-down search. United States v. Clark, 24 F.3d 299, 303 (D.C. Cir. 1994); United States v. Coley, 974 F.Supp. 41, 44 (D.C. Dist. 1997). There is no categorical approach to pat-down searches. The validity of a pat-down search, an important part of ensuring officer safety, depends upon the facts of each case. See Ramirez v. City of Buena Park, 560 F.3d 1012, 1022 (9th Cir. 2009) (rejecting Terry-type pat-down based on “conclusory references to ‘officer safety’”).

State v. Coleman 890 N.W.2d 284, 300-01 (Iowa 2017).

C. Under article I section 8 of the Iowa Constitution, a reasonable suspicion that criminal activity is afoot or that a passenger is armed and dangerous should be required before an officer can order a passenger out of a vehicle.

Williams did not dispute the validity of the traffic stop before the District Court. This permitted officers to speak to Williams and ask for his identification. State v. Riley, 501 N.W.2d 487, 488–89 (Iowa 1993). Under Fourth Amendment

case law, this also permitted Holtan to order Williams out of the vehicle as a matter of course. Maryland v. Wilson, 519 U.S. 408, 413-15 (1997).

Williams asks this Court to determine whether Iowa should follow Wilson's bright-line under article I section 8 of the Iowa Constitution. Although the Iowa Supreme Court has applied Wilson in cases where a Fourth Amendment violation was claimed, as it must, whether the Iowa Constitution might provide more protection is an open question.

Article I Section 8 of the Iowa Constitution protects Iowans from unreasonable searches and seizures:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized.

Iowa Const. Art. I § 8. This provision is nearly identical to the language of the Fourth Amendment. U.S. Const. amend. IV. Yet "[e]ven 'in ... cases in which no substantive distinction

[appears] between state and federal constitutional provisions, we reserve the right to apply the principles differently under the state constitution compared to its federal counterpart.'" State v. Gaskins, 866 N.W.2d 1, 6 (Iowa 2015)(quoting King v. State, 797 N.W.2d 565, 571 (Iowa 2011). The Court will construe Article I Section 8 "in a broad and liberal spirit" and strongly favors the warrant requirement. State v. Coleman, 890 N.W.2d 284, 286 (Iowa 2017).

In recent years, Iowa has broadened the protections from warrantless searches and seizures provided to citizens under article I section 8. This Court has recognized it should apply Article I, section 8, "in a broad and liberal spirit." State v. Height, 91 N.W. 935, 937 (Iowa 1902); State v. Cline, 617 N.W.2d 277, 285-86 (Iowa 2000). Its protections "are not meant to benefit the public generally. They are meant to protect individual citizens and their reasonable expectations of privacy." State v. Gaskins, 866 N.W.2d 1, 16 (Iowa 2015).

As an example of the broad and liberal interpretation of Article I Section 8, the Cline Court referred to the fact that Iowa was one of the first states to adopt the exclusionary rule as a remedy for unreasonable searches and seizures and did so years before the U.S. Supreme Court's decision in Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341 (1914). State v. Cline, 617 N.W.2d 277, 285 (Iowa 2000), abrogated on other grounds by State v. Turner, 630 N.W.2d 601, 606 n.2 (Iowa 2001)(scope of review). Although Iowa's initial adoption of the rule was in a civil case from 1876, the Court later adopted it for criminal proceedings in 1902. Id. (citing Reifsnyder v. Lee, 44 Iowa 101 (1876) and State v. Height, 117 Iowa 650, 665, 91 N.W. 935, 940 (1902)).

More recently, the Iowa Supreme Court has interpreted the Iowa Constitution as providing more protections for Iowans in the realm of searches and seizures. See e.g., id. at 283-93 (rejecting good-faith exception to exclusionary rule); State v. Pals, 805 N.W.2d 767, 777-83 (Iowa 2011)(finding consent to

search vehicle was involuntary); State v. Ochoa, 792 N.W.2d 260, 287-91 (Iowa 2010)(invalidating warrantless search of parolee); State v. Short, 851 N.W.2d 474, 496-506 (Iowa 2014) (invalidating warrantless search of probationer); State v. Gaskins, 866 N.W.2d 1, 7-14 (Iowa 2015)(rejecting "evidence-gathering" rationale for warrantless searches incident to arrest).

A warrantless search is presumed unreasonable unless an exception applies. State v. Gaskins, 866 N.W.2d at 7. Justice Appel recently addressed the primacy of the warrant requirement of Article I, Section 8, in a special concurrence in State v. Jackson:

> The constitutional focus of Article I, Section 8, is on protecting *personal, inalienable rights* at the very heart of freedom, the right to be secure in one's home and personal effects from unwarranted government invasions. See State v. Young, 863 N.W.2d 249, 278 (Iowa 2015) ("The bill of rights of the Iowa Constitution embraces the notion of 'inalienable rights' . . . ."); State v. Short, 851 N.W.2d 474, 484 (Iowa 2014) (noting the role of Article I, Section 1 in the Iowa Supreme Court's decision in Coger v. NW. Union Packet Co., 37 Iowa 145 (1873), which rejected the notion that African Americans could be subjected to different treatment in public transportation);

> Joseph R. Grodin, Rediscovering the State Constitutional Right to Happiness and Safety, 25 Hastings Const. L. Q. 1, 22 (1997) ("[M]ost courts have assumed that the inalienable rights clauses have some judicially enforceable content.").
> ***
>
> [W]hile the United States Supreme Court in Rodriguez and other later cases has sought to shrink the warrant requirement through radiations emanating from a highly pliable reasonableness clause, the Court has declined to adopt this additional revision of traditional search and seizure law under Article I, Section 8 of the Iowa Constitution. Instead, the courts have reaffirmed the primacy of the warrant requirement. See State v. Ochoa, 792 N.W.2d 260, 269 (Iowa 2010).
>
> [The Iowa Supreme Court] examined these developments at length in State v. Short, 851 N.W.2d 474. As noted in Short, Iowa's constitutional jurisprudence has long emphasized the primacy of the warrant requirement. Id. at 503. In short, the Court reiterated the traditional view that the constitutional workhorse of the search and seizure protections under Article I, Section 8, is the warrant requirement. Id. at 506.

State v. Jackson, 878 N.W.2d 422, 443-44 (Iowa 2016) (Appel, J., concurring specially).

In one of the few state constitutional decisions mentioning Wilson in any fashion, the Iowa Supreme Court lamented the U.S. Supreme Court's case law as a "a free-floating and open-ended concept of "reasonableness" that is

unhinged from the warrant requirement expressly contained in the Fourth Amendment." State v. Ingram, 914 N.W.2d 794, 804 (Iowa 2018).

Iowa does not appear to have directly addressed the applicability of Wilson under the Iowa Constitution. Other states, however, have flatly declined to follow Wilson under their state constitutions.

Three years prior to Wilson, the New Jersey Supreme Court determined that an officer could order a passenger out of a stopped vehicle if the officer could "point to specific and articulable facts that would warrant heightened caution to justify ordering the occupants to step out of a vehicle detained for a traffic violation." State v. Smith, 637 A.2d 158, 167 (N.J. 1994). According to the Smith Court:

> Ordering a passenger to leave the vehicle is distinguishable from ordering the driver to get out of the vehicle because the passenger has not engaged in the culpable conduct that resulted in the vehicle's stop. Although the State's interest in safety remains the same whether the driver or the passenger is involved, requiring a passenger to alight from a car in the course of a routine traffic

> stop represents a greater intrusion on a passenger's liberty than the same requirement does on a driver's liberty. With respect to the passenger, the only justification for the intrusion on the passenger's privacy is the untimely association with the driver on the day the driver is observed committing a traffic violation. Because the passenger has not engaged in culpable conduct, the passenger has a legitimate expectation that no further inconvenience will be occasioned by any intrusions beyond the delay caused by the lawful stop. The intrusion on the passenger's privacy, therefore, is greater than it is on the driver's privacy.

Id. at 166. The Smith Court cited Terry for the proposition that courts "have long held that some quantum of individualized suspicion is a prerequisite to a constitutional search and seizure." Id. at 166 (citing Terry v. Ohio, 392 U.S. at 21 n. 18). While acknowledging that a passenger being asked as a matter of routine to step out of a lawfully detained vehicle does not suffer a "major intrusion," the Smith Court nevertheless found the request to exit was an unreasonable intrusion. Id.

The New Jersey Supreme Court recently reaffirmed its heightened caution standard for ordering a passenger out of a

vehicle post-Wilson. See State v. Bacome, 154 A.2d 1253, 1258-60 (N.J. 2017).

In State v. Sprague, the Vermont Supreme Court explicitly recognized that ordering a passenger out of a vehicle was a separate intrusion from the original stop of the vehicle and therefore a separate seizure under Chapter I Article 11 of the Vermont Constitution. State v. Sprague, 824 A.2d 539, 544-45 (Vt. 2003).

> Thus, we have consistently, albeit implicitly, adhered to the rule—well after it was rejected in Mimms—that the test to determine whether an exit order was justified under Article 11 is whether the objective facts and circumstances would support a reasonable suspicion that the safety of the officer, or of others, was at risk or that a crime has been committed. What was implicit in Jewett and Caron we now determine to make explicit. As explained more fully below, a rule requiring a minimal level of objective justification for a police officer to order a driver from his or her vehicle strikes the proper balance, in our view, between the need to ensure the officer's safety and the constitutional imperative of requiring individualized, accountable decision making for every governmental intrusion upon personal liberties.

Id. at 545.

The <u>Sprague</u> Court acknowledged it had "long held that the police may stop and temporarily detain a vehicle based on little more than a reasonable and articulable suspicion of wrongdoing" but that "implicit in this rule, however, is the corollary requirement that the police intrusion proceed no further than necessary to effectuate the purpose of the stop." <u>Id.</u> The Court expressed concern that a bright-line rule permitting exit orders would subject most citizens to such intrusions without significant benefit to the public or police, and would invite "arbitrary, if not discriminatory, enforcement." <u>Id.</u> at 545-46. Officer safety would still be protected by allowing exit orders where "an objective circumstance […] would cause a reasonable officer to believe it was necessary to protect the officer's, or another's, safety or to investigate a suspected crime." <u>Id.</u> at 546.

Two years before <u>Wilson</u>, the Massachusetts Supreme Court, held that "[w]hen police are justified in stopping an automobile, they may, for their safety and the safety of the

public, order the occupants to exit the automobile," but only if "'a reasonably prudent man in the policeman's position would be warranted in the belief that the safety of the police or that of other persons was in danger.'" Commonwealth v. Santana, 649 N.E.2d 717, 722 (Mass. 1995). The decision in Santana was premised on other commonwealth cases applying Terry v. Ohio and the Fourth Amendment. Id. (citing Commonwealth v. Almeida, 366 N.E.2d 756 (1977), and Commonwealth v. Silva, 318 N.E.2d 895 (1974)).

Two years after Wilson was decided, the Massachusetts Supreme Court was asked to formally adopt the bright-line rules of Mimms and Wilson, but the Court declined to do so. Commonwealth v. Gonsalves, 711 N.E.2d 108, 110-11 (Mass. 1999). Recognizing its prior precedent had consistently departed from Mimms by requiring a reasonable suspicion standard, the Massachusetts Supreme Court held its standard was required under Part I Article 14 of the Massachusetts Constitution. Id.

The Court explained its position by noting it had "expressly granted other protections to drivers and occupants of motor vehicles under art. 14 in a variety of areas, and we have done so to guarantee protections that, in some cases, may not be recognized under the Fourth Amendment." Id. at 111-12. A routine traffic stop, the Court said, is a circumstance where the driver and any passengers would have a reasonable expectation that the officer complete the government's business quickly so the occupants could continue on their way. Id. at 112. "A passenger in the stopped vehicle may harbor a special concern about the officer's conduct because the passenger usually had nothing to do with the operation, or condition, of the vehicle which drew the officer's attention in the first place." Id. The Court held that the small percentage of traffic stops that may lead to the discovery of more serious crimes did not justify exit orders against the vast majority of citizens. Id.

The Court disputed that exit orders were "minimal" intrusions, pointing to the effect they may have on specific types of drivers and passengers as addressed in the dissent in Mimms. Id. (quoting Pennsylvania v. Mimms, 434 U.S. 106, 120–121 (1977) (Stevens, J., dissenting)). The Court likewise expressed concern regarding arbitrary police actions against minorities, who are arguably often the subject of pretextual stops. Id.

The Gonsalves Court did not dispute the concern regarding officer safety, but held:

> The safety of the police can be adequately protected. While a mere hunch is not enough, see Commonwealth v. Silva, 366 Mass. 402, 406, 318 N.E.2d 895 (1974), it does not take much for a police officer to establish a reasonable basis to justify an exit order or search based on safety concerns, and, if the basis is there, a court will uphold the order. It could be argued plausibly that automatic exit orders might increase the chance of confrontation when already upset citizens are compelled to stand outside a vehicle while a police officer disposes of the minor traffic violation, especially if circumstances indicate that the officer's conduct may be a pretext.

Id. (internal citations omitted).

The Court explained that its rule would ensure police asked in a reasoned way:

> Under Terry, a police officer is permitted to pat frisk a person stopped under suspicion of criminal activity where the police officer has reason to believe he is dealing with an armed and dangerous individual. See Terry v. Ohio, 392 U.S. 1, 24–25, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Under Mimms-Wilson, a police officer is permitted to issue exit orders to a person stopped for a traffic infraction when the officer has no reason to suspect anything. It is more consistent with the Terry rule, as well as with the circumstances in which we have been willing to create bright-line rules, to require some objective circumstances making it reasonable to issue an exit order to the driver or passengers in a stopped vehicle. We believe that "[i]t does no disservice to police officers ... to insist upon exercise of reasoned judgment" in this kind of case. Maryland v. Wilson, supra at 423, 117 S.Ct. 882 (Kennedy, J., dissenting).

Id. at 113-14. Balancing the interests of police with the liberty interests of citizens required prohibiting unjustified exits orders during routine traffic stops. Id. at 115.

Hawaii has also rejected Mimms under its state constitution, though without significant discussion. In State v. Wyatt, the Hawaii Supreme Court upheld under both the

state and federal constitutions an officer's exit order where the officer had reasonable and articulable suspicions to believe the driver was under the influence of alcohol. State v. Wyatt, 687 P.2d 544 (Haw. 1984). In a footnote, the Court acknowledged the State's reference to Mimms, but stated it was not prepared to hold that under the state constitution a valid traffic stop necessarily permitted an exit order. Id. at 552 n.9.

The Hawaii Supreme Court explicitly rejected Mimms under Article I Section 7 of the Hawaii Constitution in State v. Kim:

> Footnote nine is not dicta and clearly establishes that a police officer must have cause before ordering a driver out of a vehicle after a traffic stop. We decline to adopt the standard established in Mimms by the United States Supreme Court. We instead hold that, under article I, section 7 of the Hawaii Constitution, a police officer must have at least a reasonable basis of specific articulable facts to believe a crime has been committed to order a driver out of a car after a traffic stop.

State v. Kim, 711 P.2d 1291, 1294 (Haw. 1985).

In State v. Mendez the Washington Supreme Court acknowledged it had previously followed Mimms without any

consideration of Article I Section 7 of the Washington Constitution. State v. Mendez, 970 P.2d 722, 726 (Wash. 1999) abrogated on other grounds by Brendlin v. California, 551 U.S. 249, 259 n.5 (2007). The Court admitted it had never considered the corollary question of whether an officer could order a passenger in a vehicle stopped for a traffic infraction out of the vehicle or to remain in the vehicle, but noted "our prior cases have indicated that art. I, § 7 affords law enforcement officers more limited authority over vehicle passengers." Id.

The Court distinguished between the driver and any passengers:

> Where the officer has probable cause to stop a car for a traffic infraction, the officer may, incident to such stop, take whatever steps necessary to control the scene, including ordering the driver to stay in the vehicle or exit it, as circumstances warrant. This is a de minimis intrusion upon the driver's privacy under art. I, § 7. See Kennedy, 107 Wash.2d at 9, 726 P.2d 445.
>
> However, with regard to passengers, we decline to adopt such a bright line, categorical rule. A police officer should be able to control the scene and ensure his or her own safety, but this must be done

> with due regard to the privacy interests of the passenger, who was not stopped on the basis of probable cause by the police. An officer must therefore be able to articulate an objective rationale predicated specifically on safety concerns, for officers, vehicle occupants, or other citizens, for ordering a passenger to stay in the vehicle or to exit the vehicle to satisfy art. I, § 7. This articulated objective rationale prevents groundless police intrusions on passenger privacy. But to the extent such an objective rationale exists, the intrusion on the passenger is de minimis in light of the larger need to protect officers and to prevent the scene of a traffic stop from descending into a chaotic and dangerous situation for the officer, the vehicle occupants, and nearby citizens.

Id. at 728.

Nonetheless, the Mendez Court did not require officers to meet the reasonable and articulable suspicion standard of Terry v. Ohio, which the Court deemed to be more relevant to investigatory stops. Id. Rather:

> For purposes of controlling the scene of the traffic stop and to preserve safety there, we apply the standard of an objective rationale. Factors warranting an officer's direction to a passenger at a traffic stop may include the following: the number of officers, the number of vehicle occupants, the behavior of the occupants, the time of day, the location of the stop, traffic at the scene, affected citizens, or officer knowledge of the occupants.

> These factors are not meant to be exclusive; nor do we hold that any one factor, taken alone, automatically justifies an officer's direction to a passenger at a traffic stop. The inquiry into the presence or absence of an objective rationale requires consideration of the circumstances present at the scene of the traffic stop.

Id.

Although not directly addressing Wilson, the Minnesota Supreme Court case of State v. Fort is instructive. State v. Fort, 660 N.W.2d 415 (Minn. 2003). Fort was a passenger in a car stopped in a high-drug for speeding and having a cracked windshield. Id. at 416. Once officers discovered neither the driver nor Fort had valid driver's licenses, they had both men exit the vehicle so it could be towed. Id. at 417. One of the officers started questioning Fort as to whether he had any drugs or weapons on him, and conducted a pat-down search. Id. The officer would later testify "he noticed Fort was nervous and avoided eye contact." Id. The officer found suspected crack cocaine in Fort's pocket. Id.

The Fort Court found there was a particularized basis justifying the stop for investigation of the traffic offenses and that Fort was seized by police. Id. at 418. Article I Section 10 of the Minnesota Constitution required "any expansion of the scope or duration of a traffic stop must be justified by a reasonable articulable suspicion of other criminal activity." Id. at 419. The Court found no such justification, as the bases for the stop were simple traffic violations and the officer admitted he did not suspect any criminal activity other than traffic violations. Id.

Notably, the Minnesota Supreme Court's reference to limiting the expansion of either the scope or duration of the stop under the Minnesota Constitution has a parallel to case law under Article I Section 8 of the Iowa Constitution. See State v. Coleman, 890 N.W.2d 284, 299 (Iowa 2017)("Limiting both the scope and duration of warrantless stops on the highway provides important means of fulfilling the constitutional purpose behind article I, section 8, namely,

ensuring that government power is exercised in a carefully limited manner.”).

As noted by many of these cases, the bright-line rule created by Mimms and Wilson is devoid of any real balance between the interests of law enforcement and the liberty interests of citizens. The bright-line rule presumes citizens always present a threat to officer safety, and applies regardless of the technical justification for the stop. These assumptions are contrary to Iowa’s deference to the warrant requirement, and to Iowa’s initial case law regarding passengers.

As discussed in Section B above, the Iowa Supreme Court previously recognized a distinction between a driver stopped for a traffic violation and a passenger in such a vehicle. State v. Becker, 458 N.W.2d 604 (Iowa 1990) (abrogated on other grounds by Knowles v. Iowa, 525 U.S. 113, 117–118 (1998)). Becker acknowledged the passenger was seized by virtue of the stop itself, but the Court was unwilling to allow the additional intrusion of removal without

reasonable suspicion as to the passenger. Id. The Court would later concede that Becker – a Fourth Amendment case – was effectively overruled by Mimms, but it stands for the Court's respect for the different status of a passenger and the need to justify additional intrusions. See State v. Smith, 683 N.W.2d 542, 543 (Iowa 2004)(acknowledging abrogation of Becker). This is a position consistent with those states that have rejected Wilson under their state constitutions.

Furthermore, the justification often given for permitting officers to issue exit orders to either drivers or passengers – officer safety – is not necessarily supported by statistics. Every year, law enforcement officers conduct tens of millions of traffic stops, with the dominant narrative in the case law being that "each one of these stops is not just highly dangerous but also potentially fatal." Jordan Blair Woods, Policing, Danger Narratives and Routing Traffic Stops, 117 Mich. L. Rev. 635, 637 (Feb. 2019).

In a recent study, Jordan Blair Woods "gathered and analyzed incident narratives from a comprehensive sample of over 4,200 cases of violence against officers during traffic stops across more than 220 law enforcement agencies in the state of Florida over a 10-year period." Id. at 639. His findings did not support the dominant narrative regarding the dangerousness of traffic stops. Id. at 640.

> Based on a conservative estimate, I found that the rate for a felonious killing of an officer during a routine traffic stop for a traffic violation was only 1 in every 6.5 million stops. The rate for an assault that results in serious injury to an officer was only 1 in every 361,111 stops. Finally, the rate for an assault (whether it results in officer injury or not) was only 1 in every 6,959 stops. Less conservative estimates suggest that these rates may be much lower.
>
> In addition, the vast majority (over 98%) of the evaluated cases in the study resulted in no or minor injuries to the officers. Further, only a very small percentage of cases (about 3%) involved violence against officers in which a gun or knife was used or found at the scene, and the overwhelming majority of those cases resulted in no or minor injuries to an officer. Less than 1% of the evaluated cases involved guns or knives and resulted in serious injury to or the felonious killing of an officer.
>
> The study also identified that routine traffic stops have a different risk profile than criminal

> enforcement stops: defined in this Article as stops initiated to investigate or enforce the criminal law beyond a traffic violation. The study is the first to systematically examine how violence against the police may differ within these stop categories. I found that the most common weapons used to assault officers during routine traffic stops were "personal weapons"--namely, a driver's or passenger's hands, fists, or feet. Conversely, the most common weapon used to assault officers during criminal enforcement stops was the motor vehicle itself (for instance, using the car to run over an officer).

Id. at 640-41.

Woods' article suggests that Mimms' bright-line rule permitting exit orders for drivers may actually *create* risks to officer safety. Id. at 708. The findings indicated exit orders may *escalate* the situation as drivers perceived the exit requests to be an illegitimate response to a minor traffic infraction. Id. As for passengers:

> The institutionalization of pretextual traffic stops and concentrated police surveillance in certain communities can lead not only drivers, but also passengers, who are innocent of non-traffic-based crime to resist officers with minor violence when officers invoke greater authority than necessary during the stops. That greater authority includes the routine ordering of drivers and passengers out

> of vehicles. For these reasons, the findings and typology prompt questions about whether the rule announced in Wilson is both empirically and theoretically unsound.

Id. at 710.

Nor should the mere presence of a firearm on a person be equated with inherent dangerousness. In 1988, 40 states either prohibited the public possession of firearms or tightly regulated such possession. Shawn E. Fields, Stop and Frisk in a Concealed Carry World, 93 Wash. L. Rev. 1675, 1688 (Dec. 2018). But as states have loosened restrictions on the ability to carry weapons, "[t]he number of adults in the U.S. holding concealed firearms permits has grown explosively in recent years--according to a recent study, from '2.7 million in 1999 to 4.6 million in 2007, 11 million in 2014, and 14.5 million in 2016.'" Royce de R. Barondes, Automatic Authorization of Frisks in Terry Stops for Suspicion of Firearm Possession, 43 S. Ill. Univ. L.J. 1, 2 (Fall 2018). An estimated 3 million adults in the United States carry firearms every day,

and 9 million carry them monthly. Id. The primary reason for doing so was protection. Id.

The Iowa legislature has made it significantly easier to for law-abiding citizens to carry concealed weapons in public. See generally 2017 Iowa Acts, ch. 69 (making various changes in carry permit requirements and duration).

The United States Supreme Court has contributed to the expansion of the right to carry firearms. In 2007 the Court invalidated a blanket prohibition on firearm ownership, holding the Second Amendment provided an individual right to bear arms. District of Columbia v. Heller, 554 U.S. 570, 582 (2007). See also McDonald v. City of Chicago, 561 U.S. 742, 767 (2010)(applying Heller to the states under the Due Process Clause).

> There was once "nearly unanimous agreement that to be armed was to be dangerous," giving officers the right to frisk armed individuals on the basis of this "blanket assumption of dangerousness." But in a post-Heller world, where more than forty states have little or no restrictions on the public concealed carry of firearms, courts

> can no longer assume that public handgun possession is unlawful.

Shawn E. Fields, Stop and Frisk in a Concealed Carry World, 93 Wash. L. Rev. 1675, 1679 (Dec. 2018).

Gun possession, standing alone, no longer reasonably indicates someone is engaging in criminal activity. Id. at 1694. Furthermore, to suggest that the mere possession of a firearm – without more – justifies a reasonable belief that the person is both armed *and* dangerous is to suggest that those who are legally carrying weapons for personal protection are inherently dangerous and therefore subject to a Terry frisk.

Courts are split on whether a person becomes inherently dangerous for Terry purposes simply because the person is armed:

> For example, in United States v. Robinson, the Fourth Circuit held that any individual who the police suspect possesses a firearm becomes a dangerous individual per se for Terry purposes. The Ninth and Tenth Circuits, in more limited discussions, similarly found that police had an automatic right to assume that an armed individual was necessarily dangerous. In contrast, in Northrup v. City of Toledo Police Department, the Sixth

> Circuit held that, "[c]learly established law require[s] [officers] to point to evidence" that suspects are both "armed and dangerous." Only in Robinson did the court discuss the dangerousness of the firearm, but the Court's holding ultimately rested on the risk the individual posed to the police.

Id. at 1705.

Williams asks this Court to follow those states that have rejected Wilson's bright-line rule permitting exit orders for passengers who are travelling in a vehicle stopped solely for traffic violations. Requiring a reasonable and articulable belief that the passenger is engaging in criminal activity or presently armed and dangerous is consistent with Iowa's respect for individual rights under article I Section 8 of the Iowa Constitution, consistent with the justification for Terry stop and frisks, consistent with the passenger's independent liberty interests and lack of control over the vehicle, and consistent with society's increasing acceptable of lawful possession of handguns. It is not much to ask an officer to have an additional basis to suspect the passenger is a danger

or is engaged in criminal activity before making the additional intrusion of asking the passenger to exit the vehicle.

D. Officers lacked reasonable suspicion that Williams was armed and dangerous to either order him out of the vehicle or justify a pat-down search.

Officers Holtan and Buck encountered Williams as the passenger of a Lyft rideshare vehicle that had been pulled over for minor traffic violations. (Supp. Tr. p. 5 L.9-25, p. 13 L.9-p. 14 L.15; Ex. 1 5:50-6:10).[1] After obtaining the driver's information, Buck asked Williams for his name, birth date, and social security number. (Supp. Tr. p. 6 L.4-14; Ex. 1 6:10-7:00). Williams readily provided the information, and Buck ultimately discovered he had no active warrants. (Supp. Tr. p. 18 L.3-9; Ex. 1 6:10-7:00).

Holtan testified that he recognized Williams from an incident on December 10, 2017 – 14 months before Buck's stop – when he conducted a traffic stop with Williams as the driver. (Supp. Tr. p. 22 L.15-23, p. 24 L.12-15). Williams

[1]. All references to times on DVD Exhibits 1 and 2 are approximate.

ran from the vehicle while holding a firearm. (Supp. Tr. p. 22 L.24-25). When Williams was taken into custody, the gun was located near him. (Supp. Tr. p. 23 L.1-2). Williams was ultimately convicted of carrying weapons. (Supp. Tr. p. 24 L.20-p. 25 L.6). Holtan also testified he learned from another officer that the other officer had arrested Williams for eluding after the first incident. (Supp. Tr. p. 23 L.3-6, p. 25 L.7-17).

Holtan said he spoke to Williams about the past incidents and then asked him if he had a firearm. (Supp. Tr. p. 23 L.7-8). Holtan's body cam footage does not contain the full extent of this conversation, as his audio did not record for the first minute. (Ex. 2 0:00-1:00). Once the audio starts, there is some discussion between Holtan and Williams regarding an eluding or speeding incident in November. (Ex 2 1:00-1:15). Williams, who is on his cell phone with his hands visible, explains he was going home to see his child and was "just a passenger." (Ex. 2 1:00-1:20).

At approximately 1:30 in the video, Holtan asks Williams to "Go ahead and step out for me," and when Williams responds "What?" Holtan says more directly "Go ahead and step out for me real quick." (Ex. 2 1:30-1:40).

According to Holtan, he asked Williams to step out of the vehicle with the intention of conducting a Terry pat-down after Williams broke eye contact and "started to overexplain how he was a passenger in a vehicle and tried to distance himself from the vehicle." (Supp. Tr. p. 23 L.9-17). Holtan described his perception of Williams' response:

> and at that time his demeanor, which was friendly to this point, I observed his fight or flight response to be activated. And it wasn't the fight or flight response, it was the freezing in time where he was attempting to decide what was going to happen next or figure out what was going to happen next.

(Supp. Tr. p. 23 L.17-22).

The video itself does not support Holtan's testimony. The video showed Williams was on his cell phone with his hands visible. (Ex. 2 1:00-1:40). He was speaking to the officers in a polite manner and accurately answering their

questions. (Ex. 2 1:00-1:20). He did state that he was "just a passenger" but there is no indication he was somehow "overexplaining" his status. (Ex. 2 1:00-1:40). It was entirely consistent with what one might expect from a taxi passenger asking why he was being questioned for the taxi driver's actions. Even Holtan had to acknowledge that passengers might be confused as to why they are under investigation if their Lyft driver gets pulled over. (Supp. Tr. p. 37 L.2-5). Moreover, there is no indication in the video that Williams froze or showed any signs of fight or flight. (Ex. 2 1:00-1:40).

Holtan testified he advised Williams not to reach and drew his own firearm for safety purposes. (Supp. Tr. p. 23 L.23-25, p. 25 L.14-p. 26 L.17; Ex. 2). Williams explained he was not reaching and was simply putting his cell phone in his pocket, and held his empty hands up so Holtan could see them. (Ex. 2 1:40-1:50).

With his gun unholstered, Holtan told the driver to open the door. (Ex. 2 1:50-2:00). Williams held his hands up as

he cautiously exited the vehicle. (Ex. 2 1:50-2:00). Buck immediately grabbed Williams' wrist and turned him around to place him in handcuffs. (Ex. 1 8:50-9:00; Ex. 2 1:50-2:00). Holtan asked if he had a gun, but there was no response. (Ex. 1 9:00-9:05; Ex. 2 1:50-2:00).

Holtan explained to Buck that he had arrested Williams for a gun about a year before. (Ex. 2 2:00-2:05). Then he said "Turn into a Terry pat." (Ex. 2:00-2:05). While Williams was in handcuffs and being searched, Buck asked if Williams had any weapons on him. (Supp. Tr. p. 8 L.20-p. 9 L.6, p. 27 L.2-22; Ex. 1 9:08-9:10; Ex. 2 2:15-2:30). Williams explained he had a gun in his coat pocket. (Supp. Tr. p. 9 L.2-3, p. 27 L.2-24; Ex. 1 9:08-9:15; Ex. 2 2:15-2:30).

The officers had no reason to believe Williams was either engaged in criminal activity or armed and dangerous. Buck specifically admitted he had no concerns about drug activity or weapons activity when he stopped the vehicle. (Supp. Tr. p. 13 L.3-8). He had no concerns regarding the backseat

passenger at that time – not for safety, drugs, firearms, or criminal activity. (Supp. Tr. p. 17 L.6-18). There was no basis for believing Williams was engaged in criminal activity to justify either the exit order or the Terry frisk.

The officers also had no reason to believe Williams was both armed and dangerous. The only reason Holtan had to believe Williams might be armed was from an incident 14 months before. (Supp. Tr. p. 22 L.15-p. 23 L.2, p. 24 L.12-25; Ex. 2 2:00-2:05). Williams apparently had possession of a firearm at that time, but there was no allegation he pointed it at Holtan or used it to threaten Holtan in any way. (Supp. Tr. p. 22 L.15-p. 23 L.2, p. 24 L.12-25). Holtan also referred to a more recent incident between Williams and another officer, but it was labeled as an eluding with no indication a firearm was involved. (Supp. Tr. p. 25 L.3-6, p. 25 L.7-17).

Even assuming there was a reasonable basis for believing Williams was armed, there was no basis for believing he was dangerous. Holtan admitted he had already made the

decision to pat down Williams when he asked him out of the vehicle. (Supp. Tr. p. 34 L. 4-16). He testified that he believed Williams was armed based upon his breaking of eye contact, his hands being up and away from his body, and his constant argument that he was "just a passenger." (Supp. Tr. p. 34 L.17-p. 35 L.4, p. 39 L.22-p. 40 L.11). The change in demeanor, the eluding incident from 14 months before, and another eluding incident reported by another officer were the only bases for Holtan's belief Williams was armed. (Supp. Tr. p. 40 L.12-18).

As discussed above, nothing in the prior incidents indicated Williams was threatening or violent toward the officers even though he had possession of a gun in the first incident. During the current stop, Williams answered questions posed by the officers, engaged them in some discussion, and kept his hands "up and away from his body" so they would be visible. He placed his phone in his pocket but quickly held his open hands up when Holtan asked him

not to reach. He was compliant with all requests. The video from the stop gives no support to Holtan's claim Williams presented a present danger to officers. (Ex. 2 1:00-2:10). There was no valid basis to order Williams out of the vehicle or subject him to a Terry pat-down.

E. Williams' eventual admission to possessing a firearm cannot be considered. His statement came after he was forcible seized by officers and subjected to questioning that would incriminate him.

Both the Fifth and Fourteenth Amendments to the United States Constitution and Article I Section 9 of the Iowa Constitution protect citizens from compelled self-incrimination. Miranda v. Arizona, 384 U.S. 436, 473 (1966); State v. Iowa Dist. Ct., 801 N.W.2d 513, 518 n. 2 (Iowa 2011) (citing State v. Height, 117 Iowa 650, 659, 91 N.W. 935, 938 (1902)). The prosecution may not use statements stemming from a custodial interrogation of the defendant unless it follows procedural safeguards to secure the privilege against self-incrimination. Miranda v. Arizona, 384 U.S. at 444. Specifically, suspects subjected to "custodial interrogation"

must first be warned that they have "a right to remain silent, that any statement . . . used as evidence against [them], and that [they] have a right to the presence of an attorney, either retained or appointed." Id.; State v. Miranda, 672 N.W.2d 753, 758-59 (Iowa 2003).

A suspect is in custody if his "freedom of action is curtailed to a 'degree associated with formal arrest.'" State v. Bogan, 774 N.W.2d 676, 680 (Iowa 2009)(quoting Berkemer v. McCarty, 468 U.S. 420, 440 (1984)). Whether a person is in custody depends on the objective circumstances of the interrogation, not on subjective views harbored either by the officer or the person being questioned. Stansbury v. California, 511 U.S. 318, 323 (1994). The appropriate test is whether a reasonable person in the defendant's position would understand himself or herself to be in custody. State v. Countryman, 572 N.W.2d 553, 558 (Iowa 1997).

The Iowa Supreme Court has adopted a four-factor test as guidance in making a custody determination. State v.

Bogan, 774 N.W.2d 676, 680 (Iowa 2009). These factors include:

> (1) the language used to summon the individual;
> (2) the purpose, place, and manner of interrogation;
> (3) the extent to which the defendant is confronted with evidence of [his] guilt; and
> (4) whether the defendant is free to leave the place of questioning.

Id. Other factors the Court has identified include:

> (1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the subject was free to leave, or that he was not under arrest;
> (2) whether the suspect possessed unrestrained freedom of movement during questioning;
> (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond;
> (4) whether strong arm tactics or deceptive strategems were employed during questioning; or
> (5) whether the atmosphere was police dominated.

State v. Mortley, 532 N.W.2d 498, 501 (Iowa 1995)(citing U.S. v. Griffin, 922 F.2d 1343, 1349 (8th Cir. 1990)).

Interrogation, meanwhile, "refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." State v. Peterson, 663 N.W.2d 417, 424 (Iowa 2003) (quoting Rhode Island v. Innis, 446 U.S. 291, 300–01 (1980)).

At the time Williams admitted to possessing a handgun, he was in custody and subjected to question regarding his possession of a gun. As described above, Holtan unholstered his gun and told the driver to open Williams' door. (Ex. 2 1:50-2:00). As Williams exited the vehicle with his hands up, Buck immediately grabbed his wrist and turned him around to place him in handcuffs. (Ex. 1 8:50-9:00; Ex. 2 1:50-2:00). Holtan asked if he had a gun, but Williams did not respond at that time. (Ex. 1 9:00-9:05; Ex. 2 1:50-2:00). Williams later admitted he had a gun in his pocket when Buck asked him if he had any weapons as he was handcuffed and being searched

by Holtan. (Supp. Tr. p. 8 L.20-p. 9 L.6, p. 27 L.2-24; Ex. 1 9:08-9:10; Ex. 2 2:15-2:30).

Williams was in custody once he was forcibly removed from the car and placed into handcuffs. While the seizure created by an initial traffic stop does not rise to the level of custody for Fifth Amendment purposes, Williams was subjected to a separate seizure above and beyond the simple traffic stop. See Berkemer v. McCarty, 468 U.S. 420, 441 (1984)("we reject the contention that the initial stop of respondent's car, by itself, rendered him 'in custody.'). He was ordered out of the car and onto the side of the road, he was confronted by two uniformed police officers, one of the officers had unholstered his weapon, and he was both handcuffed and subjected to a search. Williams was in custody. See State v. Bogan, 774 N.W.2d 676, 680 (Iowa 2009)(listing custody factors).

Williams was also subjected to interrogation as to whether he had a weapon with him. Williams knew he had a

weapon and did not have a permit, and Holtan clearly suspected him of having a weapon. (Ex. 2 2:00-2:05). An admission by Williams that he possessed a weapon would have necessarily been incriminating. Furthermore, the public safety exception permitting officers to ask about missing weapons did not apply as there was no missing weapon posing a threat to the general public. See State v. Lowe, 812 N.W.2d 554, 579 (Iowa 2012).

Williams was subjected to custodial interrogation without the benefit of Miranda warnings. Williams' statements should have been suppressed. State v. Bogan, 774 N.W.2d 676, 682 (Iowa 2009).

F. Summary

Because Buck and Holtan had no reasonable belief that Williams was engaged in criminal activity or was armed and presently dangerous, their seizure of Williams by ordering him out of the vehicle and their pat-down search of his person were in violation of his rights under the Fourth and

Fourteenth Amendments to the United States Constitution and Article I Section 8 of the Iowa Constitution.

In addition, the officers subjected Williams to custodial interrogation regarding his gun without first providing Miranda warnings. Any statements he made are inadmissible under the Fifth and Fourteenth Amendments to the United States Constitution and Article I Section 9 of the Iowa Constitution.

All evidence obtained after Williams was removed from the vehicle – or at the very latest after pat-down search began – and any statements he provided should be suppressed. State v. Najouks, 637 N.W.2d 101, 111 (Iowa 2001); State v. Bogan, 774 N.W.2d 676, 682 (Iowa 2009).

CONCLUSION

For all of the reasons addressed above, Defendant-Appellant Khalen Williams respectfully asks this Court to hold that Article I Section 8 of the Iowa Constitution requires law enforcement to have a reasonable and articulable suspicion

that a passenger in a vehicle stopped for a traffic infraction is either engaged in criminal activity or armed and presently dangerous to justify ordering the passenger to exit the vehicle. He respectfully asks the Court to vacate the District Court's ruling denying his motion to suppress, vacate his conviction, sentence, and judgment and remand his case for further proceedings.

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 $3.76, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR BRIEFS

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

[X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 12,488 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Theresa R. Wilson

_________________________ Dated: 07/10/20_________

THERESA R. WILSON
Assistant Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
twilson@spd.state.ia.us
appellatedefender@spd.state.ia.us