No.

In the Supreme Court of the United States

STEVEN EDWARD STRUVE, PETITIONER,

v.

STATE OF IOWA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

More than 20 states have laws that prohibit sending text messages on a cellphone while driving, but allow drivers to use their cellphones for other purposes, such as navigation or playing music.

The question presented is:

Whether police officers in those states have reasonable suspicion under the Fourth Amendment to initiate an investigatory traffic stop, where they observe a driver briefly holding and manipulating a cellphone, in a manner that does not indicate whether the cellphone is being used for a lawful or prohibited purpose.

RELATED PROCEEDINGS

Supreme Court of Iowa:

State of Iowa v. *Struve*, No. 19-1614 (Feb. 19, 2021), rehearing denied, Apr. 6, 2021

Iowa District Court for the County of Clinton:

State of Iowa v. *Struve*, No. FECR076297 (June 5, 2019, order denying defendant's motion to suppress) (Aug. 12, 2019, verdict and order regarding plea agreement)

TABLE OF CONTENTS

Page

APPENDIX CONTENTS

Page

TABLE OF AUTHORITIES

Cases—Continued: **Page(s)**

Cases—Continued: **Page(s)**

Statutes:

Statutes—Continued: **Page(s)**

Other Authorities:

Constitutional Provisions:

PETITION FOR A WRIT OF CERTIORARI

Steven Struve respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Iowa.

OPINION BELOW

The opinion of the Supreme Court of Iowa, App., *infra*, 4a-48a, is reported at 956 N.W.2d 90.

JURISDICTION

The Supreme Court of Iowa issued its opinion on February 19, 2021. That Court denied a timely petition for rehearing on April 6, 2021. This Court's orders of March 19, 2020, and July 19, 2021, have the effect of extending the deadline for any certiorari petition to 150 days after the date of the lower court's judgment or order denying a timely petition for rehearing, where the lower court's judgment or rehearing order issued after March 19, 2020, and prior to July 19, 2021. In this case, this Court's orders extended the deadline for a certiorari petition to September 3, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the U.S. Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, 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."

INTRODUCTION

Cellphones "are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." *Riley* v. *California*, 573 U.S. 373, 385 (2014). Their ubiquity reflects the reality that such devices are used for far more than placing telephone calls; hundreds of millions of Americans use cellphones for other purposes each day, from texting, browsing the internet, or engaging with social media, to navigating, listening to music, or taking pictures. Some Americans use their cellphones while driving.

Legislatures in more than twenty States and territories have responded to concerns about distracted driving by enacting "texting-while-driving" laws that prohibit *some* cellphone uses when driving, while expressly permitting many other uses.[1] Iowa is one such State. See Iowa Code § 321.276(2)(a) (2021).

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[1] See, *e.g.*, Ala. Code § 32-5A-350 (2019); Alaska Stat. § 28.35.161 (2020); Ark. Code Ann. § 27-51-1504 (2019); Colo. Rev. Stat. § 42-4-239 (2019); Conn. Gen. Stat. § 14-296aa (2019) (as interpreted by *State* v. *Dunbar*, 138 A.3d 455, 458 (Conn. App. Ct. 2016)); Fla. Stat. § 316.305 (2021); Kan. Stat. Ann. § 8-15,111 (2020); Ky. Rev. Stat. Ann. § 189.292 (2021); La. Stat. Ann. § 32:300.5 (2020); Mich. Comp. Laws § 257.602b (2021); Miss. Code. Ann. § 63-33-1 (2019); Nev. Rev. Stat. § 484B.165 (2020); N.M. Stat. Ann. § 66-7-374 (2020); N.C. Gen. Stat. § 20-137.4A (2020); N.D. Cent. Code § 39-08-23 (2021); Okla. Stat. tit. 47, § 11-901d (2020); 75 Pa. Cons. Stat. § 3316 (2019); 31 R.I. Gen. Laws § 31-22-30 (2020); S.C. Code Ann. § 56-5-3890 (2020); Tex. Transp. Code Ann. § 545.4251 (2021); Utah Code Ann. § 41-6a-1716 (2021); Wis. Stat. § 346.89 (2020); Wyo. Stat. Ann. § 31-5-237 (2020); V.I. Code Ann. tit. 20, § 509a (2019). Other States prohibit *all* uses of a cellphone while driving. See *State Cellphone Use While Driving*

Courts in these jurisdictions have struggled with the question of when police officers may make a traffic stop to investigate a potential violation of a texting-while-driving law. In particular, federal and state courts have divided about whether officers may reasonably suspect a texting-while-driving violation based solely on observing a driver holding and manipulating a cellphone for a brief period of time—without any indication of whether the use is lawful or prohibited.

In this case, a sharply divided Iowa Supreme Court held that police reasonably suspected that Petitioner Steven Struve was violating Iowa's texting-while-driving statute, where an officer had observed him holding and manipulating a cellphone for approximately ten seconds while driving, albeit in a manner that did not indicate how he was using the device. App., *infra*, at 23a-31a. In so holding, the Iowa Supreme Court split from the North Dakota Supreme Court and the Seventh Circuit, *id.* at 19a-22a, which have reached the opposite conclusion with respect to similar texting-while-driving laws.

The Iowa Supreme Court's decision is exceptionally important and exceptionally wrong. Its ruling invites "police to stop a substantial portion of the lawfully driving public" in Iowa, *United States* v. *Paniagua-Garcia*, 813 F.3d 1013, 1014-1015 (7th Cir. 2016) (Posner, J.) (quoting *United States* v. *Flores*, 789 F.3d 645,

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Laws, Nat'l Conf. of State Legislatures (Oct. 5, 2020), https://perma.cc/S435-EMVM (select "State Charts") (noting that 25 States, D.C., Puerto Rico, Guam and the U.S. Virgin Islands have adopted "hands free" laws that ban all phone use while driving).

649 (7th Cir. 2015) (per curiam)), based on observed conduct entirely consistent with lawful behavior. The Iowa Supreme Court upheld the investigatory stop while conceding that the conduct in question (brief manipulation of a cellphone) was fully consistent with either proper or unlawful use. App., *infra*, at 28a-29a. Rather than requiring affirmative indications of misconduct, the Court invoked "common sense" and some generic statistics about nationwide cellphone use to support a finding of reasonable suspicion. *Id.* at 24a-26a. But whether a given driver is using his cellphone illegally or innocently cannot be determined by "common sense." In reality, the Court authorized stops where police have no affirmative indication that a driver is using his cellphone to send text messages, as opposed to any of the myriad other purposes (such as accessing a navigation application) that state law permits. Or, in the words of the lead dissent below: "Under the majority's holding today, the legislature might as well have said the following: 'Drivers: go ahead and use your phones for the uses we've permitted you. Police: pull them over and interrogate them if they do.'" See *id.* at 33a (McDermott, J., dissenting).

The question presented implicates the Fourth Amendment right of millions of cellphone-owning American drivers to go about their business without being stopped or investigated absent a reasonable suspicion of unlawful activity. This Court's review is urgently warranted to ensure uniformity in this important area of the law, and to provide clarity both to officers charged with enforcing texting-while-driving laws and the scores of drivers who are subject to them.

STATEMENT

1. Legal Background

"[T]he Fourth Amendment permits an officer to initiate a brief investigative traffic stop when he has 'a particularized and objective basis for suspecting the particular person stopped of criminal activity.'" *Kansas* v. *Glover*, 140 S. Ct. 1183, 1187 (2020) (quoting *United States* v. *Cortez*, 449 U.S. 411, 417-418 (1981)). This "particularized and objective basis" is known as "reasonable suspicion." *Ibid.*

In a line of cases beginning with *Terry* v. *Ohio*, 392 U.S. 1, 21-22 (1968), this Court has refined what "reasonable suspicion" demands. While that standard does not require rigid 51% certainty that the suspect is breaking the law, an officer must have more than a "mere hunch" of criminality. *Glover*, 140 S. Ct. at 1187 (internal quotation marks omitted). Key to this inquiry is the requirement that an officer weigh the likelihood that particular observed conduct is lawful or unlawful. See *Cortez*, 449 U.S. at 418.

Over 20 States and territories have enacted laws that prohibit some, but not all, uses of a cellphone while driving. See *supra* note 1. For example, many States—including Iowa—permit a driver to use a cellphone for navigation or to activate "touch-free" or Bluetooth devices, but prohibit the use of a cellphone to read or send written messages such as texts or emails. In these jurisdictions, the simple act of holding and manipulating a cellphone while driving could be lawful or unlawful, depending on the particular use at issue.

Section 321.276(2) of the Iowa Code provides that "[a] person shall not use a hand-held electronic communication device to write, send, or view an electronic message." The term "'[*e*]*lectronic message*' includes images visible on the screen of a hand-held electronic communication device including a text-based message, an instant message, a portion of electronic mail, an internet site, a social media application, or a game." Iowa Code § 321.276(1)(a) (2021). However, the Code lists other cellphone uses that are expressly permitted while driving, including (1) "using a global positioning system or navigation system"; (2) "select[ing] or enter[ing] a telephone number or name in a hand-held mobile telephone" for "the purpose of engaging in a call"; and (3) "activat[ing], deactivat[ing], or initiat[ing] a function of a hand-held mobile telephone." *Id.* § 321.276(2)(a). As the Iowa Supreme Court has explained, the legislature's decision to implement a narrower "texting-while-driving" ban—as opposed a broader "hands free" law that prohibits all uses of a cellphone while driving—represented a deliberate choice to allow certain phone uses while driving. App., *infra*, at 20a, 30a-31a; accord *id.* at 36a (McDermott, J., dissenting). A violation of Iowa's statute is a misdemeanor carrying a $45 fine. Iowa Code § 321.276(4)(a); § 805.8A(14)(*l*).

2. Factual Background

The facts of this case, as recounted by the Iowa Supreme Court, are "not seriously dispute[d]." App., *infra*, at 8a. On the evening of October 2, 2018, Petitioner was driving with a passenger in Clinton, Iowa when two officers in a police cruiser observed him appear to use a cellphone. *Id.* at 6a. From their vantage

point in a car traveling alongside Petitioner's vehicle, they could see the glow of a cellphone and his "manipulati[on]" of the device. *Ibid.* The officers could not, however, discern the nature of the finger motion—whether "up-and-down" in a typing motion or "side-to-side" in a swiping motion—but rather, could see only that a finger was moving in front of the screen. *Id.* at 73a. After observing this manipulation of a cellphone for approximately ten seconds, the officers initiated a traffic stop. *Id.* at 6a.

An officer approached the vehicle and informed Petitioner that he had been stopped for texting while driving. App., *infra*, at 6a. He responded that he had, in fact, "been showing his passenger photos from his phone's gallery." *Ibid.* Petitioner was never charged with violating Iowa's texting-while-driving law. *Id.* at 5a.

While one officer was speaking with Petitioner, the second officer saw what he thought was drug paraphernalia in the backseat of the car. App., *infra*, at 6a. A search led officers to locate a pipe of the type used to smoke illegal narcotics and a baggie containing a substance later verified to be methamphetamine. *Ibid.* Petitioner was arrested and charged with two felonies related to the possession of a controlled substance. *Id.* at 6a-7a.

Petitioner moved to suppress the evidence found in the traffic stop. App., *infra*, at 7a. He argued that the officers' mere observation of cellphone use did not provide the requisite reasonable suspicion of criminality; thus, any evidence gathered was the fruit of an illegal seizure under both the Fourth Amendment to the U.S. Constitution and Article 1, Section 8 of the Iowa

Constitution. Pet. D. Ct. Mot. to Suppress 1-2. In seeking to justify the traffic stop, the State relied entirely on the officers' perceived violation of the texting-while-driving statute; the State did not point to any other supposed violations. The district court denied Mr. Struve's motion to suppress, concluding that officers had reasonable suspicion under Iowa's texting-while-driving law necessary to satisfy the federal and state Constitutions. App., *infra*, at 57a-60a.[2]

After reaching and then withdrawing a plea agreement,[3] Petitioner proceeded to a bench trial on a single possession charge. App., *infra*, at 7a. The district court found him guilty and sentenced him to a prison term of up to 20 years for the possession charge and a resulting probation violation charge.

Petitioner appealed the suppression ruling to the Iowa Supreme Court. Invoking *Terry*, 392 U.S. at 21-22, and other federal Fourth Amendment cases, Petitioner argued that, because Iowa's texting-while-driving statute only prohibits certain uses of a cellphone while driving, the officers' mere observation of him holding and manipulating a cellphone in an indeterminate manner could not give rise to the reasonable suspicion of criminality necessary to justify the stop. Pet. Iowa S. Ct. Appellant's Br. 27-34. Petitioner cited decisions of the Seventh Circuit and North Dakota Supreme Court, which had sustained Fourth

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[2] The search-and-seizure protections under Iowa's Constitution are coextensive with those under the federal Constitution. See *State* v. *Christopher*, 757 N.W.2d 247, 249 (Iowa 2008).

[3] The parties withdrew the plea agreement so that Mr. Struve could challenge the suppression ruling on appeal. See App., *infra*, at 7a, 49a.

Amendment challenges to traffic stops under similar laws and in similar circumstances. See *ibid.*

The Iowa Supreme Court upheld the stop in a 4-to-3 decision. After acknowledging its disagreement with the Seventh Circuit and North Dakota Supreme Court, the majority held that observing a driver manipulating a cellphone for ten seconds while driving provided the reasonable suspicion necessary to justify the traffic stop under the Fourth Amendment to the U.S. Constitution. App., *infra*, at 19a-23a, 31a. Adopting an expansive interpretation of this Court's decision in *Glover*, the majority held that the officers' "commonsense understanding about human behavior," bolstered by empirical evidence, justified the stop. *Id.* at 24a-26a. Veering outside the record and considering data never mentioned or advanced by the state, the majority cited statistics indicating that a large percentage of drivers nationwide admit to texting while driving. *Ibid.* The majority held that the legislature's decision to carve out numerous permissible cellphone uses did not undermine the "common sense" inference that Mr. Struve had been using his cellphone unlawfully. *Id.* at 21a, 24a-26a.

Three Justices dissented. See App., *infra*, at 32a-47a. In their view, the relevant inquiry was not how often people text while driving in the abstract, but rather the likelihood that Petitioner's observed cellphone use was unlawful rather than lawful. As the dissent explained, the State had provided—and the Court's decision required—no evidence whatsoever to meet its burden on the relative likelihood that people who use their cellphone while driving are doing so unlawfully. *Id.* at 33a, 40a (McDermott, J., dissenting). The

dissenters reasoned that the only evidence in the record particular to Petitioner—i.e., that police observed him manipulating the cellphone in an indeterminate manner for approximately ten seconds—did not give rise to reasonable suspicion, because the evidence was not probative of whether Mr. Struve was doing something unlawful (like texting), or lawful (like using a navigation application). *Id.* at 41a-42a. The dissent would have adopted the approach of the majority of courts to have addressed the issue and held the stop unlawful. *Id.* at 43a.

The Iowa Supreme Court denied a timely rehearing petition. App., *infra*, at 3a.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Deepens An Entrenched Split Of Authority.

A. The Iowa Supreme Court Adopted The Minority Position.

The Iowa Supreme Court held that Petitioner's conduct created reasonable suspicion to initiate an investigatory stop, despite the officers' inability to ascertain whether he was engaging in lawful or unlawful conduct under Iowa law. App., *infra*, at 23a-31a. The Court's holding that merely observing a driver using a cellphone could constitute reasonable suspicion of a texting-while-driving violation represents the minority view. See *id.* at 43a (McDermott, J., dissenting) ("The majority concedes that today's opinion aligns us with the *minority* of courts * * * . ").

Consulting this Court's Fourth Amendment precedents and surveying relevant caselaw from other jurisdictions, the Iowa Supreme Court concluded that

the conduct at issue supported a "commonsense inference" that Petitioner was "quite likely" engaging in "impermissibl[e]" use of a cellphone. App., *infra*, at 26a (citing *State* v. *Kreps,* 650 N.W.2d 636, 642 (Iowa 2002)). In support of that conclusion, however, the Court cited only generic "empirical data" showing that "a large percentage of drivers admit to reading or writing texts while driving." *Id.* at 24a; but cf. *id.* at 40a-41a (McDermott, J., dissenting) ("survey data the majority cites" was "uncited by any party and absent from the record"). The majority, moreover, did not require (or consider) any data or other information that might have shed light on the relative frequency at which drivers using cellphones engage in permissible, as opposed to impermissible, use. Nor did the Court explain how "common sense" supported a conclusion that Petitioner's conduct here indicated unlawful, as compared with innocent, activity. Although the majority nominally agreed that "not every driver seen using a cell phone in any manner may be presumed to be violating [state law]," its holding created that exact presumption in practical effect—upholding a stop based on an officer's mere observation of a driver "holding the phone in front of his face" for 10 seconds "while manipulating it." *Id.* at 28a-29a.

The dissenting Justices highlighted the breadth of the majority's rule, emphasizing that the officer's assumption that Petitioner was using a cellphone impermissibly was just "guesswork" that did not rely on "actual articulable observations." App., *infra*, at 40a (McDermott, J., dissenting). "[N]othing" in the record of this case—including the facts on which the majority relied, such as "holding up the alighted phone

at shoulder level for about ten seconds and swiping"—indicated whether Mr. Struve's conduct was "a forbidden or permitted use." *Id.* at 41a; accord *id.* at 33a (McDermott, J., dissenting) ("In this case, there's only one circumstance [supporting reasonable suspicion]: police officers saw a driver for about ten seconds holding up and touching his phone. That's it."). As the dissent explained, the majority's decision grants police a blank check to "pull over and interrogate any driver" whenever they like, including for cellphone uses the Iowa legislature expressly permitted. *Id.* at 33a.

In so holding, the Iowa Supreme Court aligned itself with just a handful of other courts which have upheld investigatory stops based on an officer's observation of a driver holding and manipulating a device, even where state law permits a range of cellphone use. See *People* v. *Corrales*, 213 Cal. App. 4th 696, 698-699 (2013); *United States* v. *Mayo*, No. 2:13-CR-48, 2013 WL 5945802, at *1, *3 (D. Vt. Nov. 6, 2013); *Williams* v. *State*, 778 S.E.2d 820, 823 (Ga. Ct. App. 2015).

For example, *State* v. *Dalton* reached the same conclusion as the Iowa Supreme Court in *Struve*, on very similar facts. 850 S.E.2d 560 (N.C. Ct. App. 2020). In *Dalton*, officers stopped the defendant for holding a cellphone "in the air toward the center of the car." *Id.* at 565. North Carolina law—like Iowa's—prohibits texting, but allows use of a cellphone for navigation or to engage voice-operated technology. *Id.* at 564-565; N.C. Gen. Stat. § 20-137.4A(b)(1)-(4). The *Dalton* court conceded it was unlikely that an officer, observing "a person using a mobile device from afar," could "determine the specific use of the device in hand." 850 S.E.2d at 566. However, the court still found

reasonable suspicion. As in *Struve*, the *Dalton* court effectively inverted the normal burden of proof, holding that

> just because a person may be using a wireless telephone while operating a motor vehicle for a valid purpose does not, *ipso facto*, negate the reasonable suspicion that the person is using the device for a prohibited use. * * * [I]t is as probable that a driver using a cell phone is doing so to send or receive prohibited text messages as it is that the device is being used for one of many lawful purposes, perhaps more so.

Ibid.

B. In Other Jurisdictions With Similar Laws, Reasonable Suspicion Requires More Than Observing A Driver Using A Cellphone.

In clear contrast to the Iowa Supreme Court, the Seventh Circuit has held that, when state law allows for some but not all uses of a cellphone while driving, merely observing a driver holding and manipulating a cellphone does not, without more, create reasonable suspicion for an investigatory stop. See *Paniagua-Garcia*, 813 F.3d at 1014-1015 (Posner, J.).

In *Paniagua-Garcia*, an officer observed a driver holding a cellphone in his right hand, bending his head down towards it, and manipulating the device. *Id.* at 1014. Based on these facts alone, the officer suspected that the driver had violated an Indiana law which prohibited sending, typing, or reading a text message while driving, and initiated an investigatory stop.

Ibid.; see Ind. Code § 9-21-8-59 (subsequently amended). A Seventh Circuit panel unanimously held that the officer lacked reasonable suspicion because the observed behavior was equally consistent with other cellphone uses authorized by state law. Critically, the officer could not "explain[] what created the appearance of texting as distinct from any one of the multiple other—lawful—uses of a cellphone." *Id.* at 1014-1015.

In so holding, the Seventh Circuit rejected the government's claim that the "mere possibility of unlawful" behavior is sufficient to "create a reasonable suspicion of a criminal act," where observed conduct is substantially consistent with innocent activity. 813 F.3d at 1014. The government's position, the court held, would prove too much, permitting, for example, a police officer to stop any driver drinking from an opaque cup, given that coffee could conceivably be spiked with alcohol. *Id.* at 1014-1015. "A suspicion so broad that [it] would permit the police to stop a substantial portion of the lawfully driving public," the court concluded, "is not reasonable." *Ibid.* (quoting *Flores*, 789 F.3d at 649).

For its part, the *Struve* majority was "not persuaded by *Paniagua-Garcia*." App., *infra*, at 20a.[4]

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[4] The *Struve* majority attempted to distinguish *Paniagua-Garcia* by observing that Indiana's law had a slightly different scope than Iowa's. See App., *infra*, at 20a (noting that Iowa's texting-while-driving law bans playing games and browsing social media, whereas the Indiana law at issue in *Paniagua-Garcia* did not). But the fact that the Indiana law was marginally less restrictive than Iowa's does not change the central proposition that, under both statutes, many uses of cellphones are expressly permitted,

Conversely, Justice McDermott's dissent below agreed with the Seventh Circuit's rationale and result, and expressed concern that the majority's decision in *Struve* would allow police to stop any driver drinking from an opaque cup on "the possibility it might [contain] beer and not pop." *Id.* at 47a (McDermott, J., dissenting).

Other courts align with the Seventh Circuit. The District of Massachusetts, for instance, has expressly endorsed *Paniagua-Garcia*, finding that "the reasoning of the Seventh Circuit" in that case "was sound." *United States* v. *Wilkins*, 451 F. Supp. 3d 222, 225, 228-229 (D. Mass. 2020). See also *Crigger* v. *McIntosh*, 254 F. Supp. 3d 891, 898-899 (E.D. Ky. 2017) (agreeing that the mere observation of a driver "'[u]sing' or 'doing something' with a cell phone" does not itself create a "particularized and objective basis for suspecting that a violation * * * has occurred").[5]

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such as, e.g., using a navigation application, selecting or entering a telephone number to call, or activating or deactivating a function of a cellphone such as Bluetooth capability or other "pairing" technologies. Moreover, various uses of a cellphone would be allowed under Iowa law despite not being included on the list of expressly permitted activities, because they do not involve an "[e]lectronic message" as defined by the statute, such as, e.g., checking the time or playing music. See Iowa Code § 321.276(1)(a) (2021); see also App., *infra*, at 37a-38a (McDermott, J., dissenting) (discussing the many permitted uses of a cellphone while driving under Iowa law). Thus, whatever differences in scope may exist between Iowa and Indiana law are immaterial for purposes of the Fourth Amendment analysis. See also *infra* at 30 and note 7.

[5] As the Iowa Supreme Court recognized, Oregon courts have also held that, under that State's probable-cause standard, the mere observation of conduct consistent with entirely lawful behavior

The North Dakota Supreme Court agreed with the Seventh Circuit in *State* v. *Morsette*, 924 N.W.2d 434 (N.D. 2019). As in *Struve*, the officer in *Morsette* claimed to have reasonable suspicion to stop the defendant after observing him "manipulating his cell phone" and "tapping the illuminated screen" while driving. *Id.* at 440. North Dakota's texting-while-driving statute, like Iowa's, only prohibits drivers from composing, reading, or sending an electronic message while driving, and expressly permits other uses of a cellphone, such as dialing a phone number. N.D. Cent. Code § 39-08-23 (2021).

According to the North Dakota Supreme Court, an officer's observation of "finger-to-phone tapping" did not bear on the relative likelihood that the driver's behavior was unlawful or innocent, because "both proscribed and permitted activities appear to encompass [such] actions." *Morsette*, 924 N.W.2d at 438. Unlike *Struve*, the *Morsette* court found this infirmity rendered the stop unlawful, explaining that an officer must be able to articulate specific facts that tend to show the observed cellphone use is sufficiently likely to be unlawful, to justify an investigatory stop. See *id.* at 440 ("Although [the officer] testified to observing the screen's illumination and finger-to-phone tapping, there is absent a link between those observations and

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cannot justify initiating an investigatory stop, unless the officer can also supply further specific facts that tend to show that the observed conduct was sufficiently indicative of criminal activity. See App., *infra*, at 22a-23a (citing *State* v. *Rabanales-Ramos*, 359 P.3d 250, 256 (Or. Ct. App. 2015)).

an objectively reasonable basis to suspect a violation.").[6]

The contrast between the approaches taken by the *Paniagua-Garcia, Morsette,* and *Struve* courts has been broadly recognized. The *Struve* majority expressly rejected *Morsette* and *Paniagua-Garcia.* App., *infra*, at 20a ("[W]e decline to follow the lead of the *Morsette* majority."). Indeed, the Iowa Supreme Court expressly embraced the *Morsette* dissent, reasoning that its "position is more in line" with Iowa caselaw. *Id.* at 22a. In contrast, the *Struve* dissent aligned itself with the *Paniagua-Garcia* and *Morsette* majorities. *Id.* at 43a-44a (McDermott, J., dissenting).

II. The Decision Below Is Wrong.

A. The Officers Failed To Observe Conduct That Indicates Impermissible Cellphone Use.

To initiate an investigatory traffic stop in compliance with the Fourth Amendment, an officer must have a reasonable suspicion of criminal activity. See *Glover*, 140 S. Ct. at 1187. Reasonable suspicion requires "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Cortez*, 449 U.S. at 417-418. A mere "hunch" will not suffice. *Terry*, 392 U.S. at 27. The State bears the burden to justify the stop. See *id.* at 21; *United*

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[6] Previewing the rationale later adopted by a majority of the Iowa Supreme Court, Chief Justice VandeWalle argued in dissent in *Morsette* that "the fact that a person may be using a * * * cell phone * * * for a valid purpose does not negate the reasonable suspicion that the person is using the cell phone for a prohibited purpose." 924 N.W.2d at 441 (VandeWalle, C.J., dissenting).

States v. *Brignoni-Ponce*, 422 U.S. 873, 884-886 (1975); App., *infra*, at 33a, 40a (McDermott, J., dissenting).

When a texting-while-driving statute prohibits some uses of cellphones while driving and permits many others, the mere observation of a driver holding and manipulating a cellphone does not, without more, provide the necessary "particularized and objective basis" for suspecting illegal cellphone use. A court cannot find reasonable suspicion where the officer involved "has never explained what created the appearance of [impermissible use] as distinct from any one of the multiple other—lawful—uses of a cellphone by a driver." *Paniagua-Garcia*, 813 F.3d at 1014.

While an officer "need not rule out the possibility of innocent conduct" before initiating a stop, *United States* v. *Arvizu*, 534 U.S. 266, 277 (2002), the officer's observations must nevertheless objectively indicate unlawful as opposed to lawful activity. But as the Seventh Circuit and other courts correctly acknowledge, merely holding and manipulating a cellphone is not only entirely *consistent* with permissible activity, it also provides *no indication* as to whether the use is permissible or impermissible. See *Paniagua-Garcia*, 813 F.3d at 1014 ("Almost all the lawful uses we've listed would create the same appearance—cellphone held in hand, head of driver bending toward it * * *, a finger or fingers touching an app on the cellphone's screen."); see also *Morsette*, 924 N.W.2d at 438, 440 (noting that "[b]oth proscribed and permitted activities appear to encompass actions that may require finger-to-phone tapping" such that "there is absent a link between [the observed finger-to-phone tapping] and an objectively reasonable basis to suspect a violation");

Crigger, 254 F. Supp. 3d at 898-899 ("[u]sing" or "doing something" with a cellphone while driving "does not constitute a particularized and objective basis for suspecting that a violation of the antitexting statute has occurred"); App., *infra*, at 42a (McDermott, J., dissenting) ("[B]oth forbidden uses and permitted uses where the driver swipes the screen appear identical to an observer who can't make out the screen.").

Because a driver can hold and manipulate a cellphone in the same way for many permissible and impermissible uses, merely observing a driver manipulating a cellphone is not sufficient to support reasonable suspicion for an investigatory stop. Instead, the officer must point to additional facts that suggest impermissible rather than permissible use.

The Iowa Supreme Court reasoned that, if the facts here "don't allow officers to stop a driver to investigate, it is hard to imagine what facts would." App., *infra*, at 30a. But it is hardly difficult to imagine facts that would create reasonable suspicion. For instance, an officer might observe a driver immediately putting his cellphone down after noticing a police vehicle, suggesting consciousness of guilt, indicating criminal activity. See *State* v. *Nguyen Ngoc Pham*, 433 P.3d 745, 747 (Or. Ct. App. 2018). Or, an officer might describe a driver manipulating a cellphone in a recognizable or particularly incriminating way. Certain cellphone uses might give rise to distinctive bases for suspecting prohibited activity. For example, the Iowa statute explicitly bans playing games or viewing videos. Iowa Code § 321.276(1)(a). Using a phone for these purposes would create a distinctive glow and the perception of moving images, and—at least as to games—would

require a constant level of active interaction from the user. An officer positioned a good distance from a driver might nonetheless be able to reasonably suspect that the driver was playing a game or watching a video, as opposed to engaging in a permitted cellphone use.

Such indications of illegality were entirely absent on the record here. See App., *infra*, at 6a (describing Petitioner's continued use of his cellphone as the officers traveled alongside his vehicle and as they approached his vehicle); see also *id.* at 71a-73a, 88a. Instead, the officers stopped Petitioner after merely observing him holding and manipulating his cellphone for approximately 10 seconds. To bolster these minimal observations, the Iowa Supreme Court emphasized incidental characteristics of Petitioner's cellphone use that did nothing to strengthen an inference of unlawful activity—for instance, the he held the cellphone "in front of his face." *Id.* at 5a. But, as the dissenters observed, "[t]here's nothing about the height level at which [Petitioner] held the phone that makes [his] use somehow more indicative of any forbidden use (e.g., viewing a text message) than any permitted use (e.g., viewing driving directions)." *Id.* at 41a (McDermott, J., dissenting).

The majority also found it probative that Petitioner manipulated his cellphone "for at least ten seconds." See App., *infra*, at 5a. But again, the use of a cellphone for ten seconds does not connote any illegal activity. Other permitted uses of a cellphone under Iowa law—such as typing directions into a navigation application or scrolling through a list of contacts to select a person to call—could also easily take ten seconds or longer.

Id. at 41a-42a (McDermott, J., dissenting) ("[T]here's nothing revealed about the type of use from holding the phone for ten seconds * * * . One could easily spend an equal amount of time scrolling through posts on a social media app (forbidden) as scrolling through a list of songs titles on a music app (permitted), or typing a text (forbidden) as typing an address for driving directions (permitted).").

B. The Iowa Supreme Court's Flawed Probabilistic Analysis Did Not Establish Reasonable Suspicion.

Implicitly acknowledging the shortcomings of the officers' observations, the Iowa Supreme Court resorted to a flawed probabilistic analysis in attempt to justify its finding of reasonable suspicion.

Like probable cause, reasonable suspicion involves an assessment of the probability that an individual is engaged in criminal activity. *Cortez*, 449 U.S. at 418; *Brinegar* v. *United States*, 338 U.S. 160, 175 (1949). The requisite probability is not precisely quantified under either standard. But reasonable suspicion requires at least a "moderate chance." See Wayne R. LaFave, 4 *Search and Seizure* § 9.5(b) (6th ed. 2020) (quoting *Safford Unified Sch. Dist. No. 1* v. *Redding*, 557 U.S. 364, 371 (2009)).

Under this Court's reasonable suspicion precedents, a court must assess whether the observed facts and circumstances create a sufficient probability of criminal activity. See *Brignoni-Ponce*, 422 U.S. at 886-87; cf. *United States* v. *Sokolow*, 490 U.S. 1, 9-10 (1989) (relevant inquiry is "degree of suspicion that attaches to particular types of noncriminal acts" (citation

omitted)). This requires the court to consider the likelihood that a suspect is engaged in unlawful activity, rather than innocent activity. When "the observed conduct is consistent with innocent activity" and "there are no facts that would make the conduct observed by the officers anything but innocuous," there is no reasonable suspicion because "there does not even exist a significant possibility (or even a moderate chance) that the person observed is engaged in criminal conduct." LaFave, *supra*, § 9.5(b) (internal quotation marks and citations omitted). While an officer "need not rule out the possibility of innocent conduct," *Arvizu*, 534 U.S. at 277, courts must nevertheless consider the likelihood of innocent conduct. Reasonable suspicion is absent if there is a high enough probability of innocent activity given the observed facts and circumstances.

The Iowa Supreme Court misunderstood and misapplied these principles when it asked only whether the observed conduct was consistent with illegal activity, without considering how likely it was that the observed conduct reflected *innocent* activity. App., *infra*, at 28a-29a. The Court conceded that "merely observing a cell phone in a driver's hand reflects innocuous behavior," and therefore does not give rise to reasonable suspicion. *Ibid.* But according to the Court, a driver "holding the phone in front of his face for a significant period of time while manipulating it" did provide reasonable suspicion because those actions are "consistent with improper use of his phone." *Id.* at 29a.

The Court reached the wrong answer by asking the wrong question. Given that holding and manipulating

a cellphone is entirely consistent with both criminal activity and innocent activity—as the Iowa Supreme Court itself recognized, App., *infra*, at 28a—the Court erred by not assessing the likelihood that a driver holding and manipulating his cellphone is doing so legally. This error is manifest in the Court's two stated bases for finding reasonable suspicion based on the officer's ambiguous observations alone: "common sense" and empirical evidence.

First, the Iowa Supreme Court relied on the conclusory and unsubstantiated "commonsense suspicion that [Petitioner] was illegally using his cell phone." App., *infra*, at 24a. But this Court's precedents show that "common sense" can only support reasonable suspicion where it informs the *likelihood* of unlawful activity given the observed facts. It is not enough to note that the observed facts are consistent with criminal activity or that criminal activity is fairly common among the population. For example, in this Court's recent decision in *Glover*, common sense supported the inferences that "the registered owner was *likely* the primary driver of the vehicle" and that "the owner will *likely* disregard [the order revoking his driver's license] and continue to drive." 140 S. Ct. at 1187 (emphasis added) (citation omitted).

But "common sense" does not sustain the conclusion that a driver observed holding and manipulating his cellphone is using it illegally. See *United States* v. *Feliciana*, 974 F.3d 519, 524 (4th Cir. 2020) (finding no reasonable suspicion to stop a commercial vehicle on a parkway open to commercial vehicles only by permit, because "unlike the inference in *Glover*, the incidence of permitted and unpermitted commercial vehicles on

the Parkway is not a matter of common sense"). Because the statute prohibits only some uses of cellphones while driving but permits many others, finding reasonable suspicion requires at least some understanding of how frequently drivers who use cellphones while driving engage in permissible versus impermissible cellphone uses—a question that the Court below did not even think to ask, let alone attempt to answer. As Justice McDermott noted in his dissent below, the majority's repeated reliance on "common sense"—a phrase invoked 19 times in the majority's opinion—amounted to little more than "flimsy scaffolding" and "smoky incantation[]." See App., *infra*, at 40a (McDermott, J., dissenting).

Moreover, "common sense" conclusions about the probability of criminal activity cannot be based on "the extent of conduct prohibited by the statute" alone. App., *infra*, at 23a. Put differently, the likelihood that a particular driver is unlawfully using their cellphone does not depend on the number or extent of prohibited uses under state law. Rather, courts must consider the probability that a particular driver observed using a cellphone is engaging in a particular use. For instance, Iowa law expressly allows use of cellphones for navigation while driving. Iowa Code § 321.276(2)(a). And because navigation inherently facilitates the task of driving, it may well be *more* probable that a driver using his cellphone is doing so for navigation, as opposed to engaging in any number of impermissible uses. See *Paniagua-Garcia*, 813 F.3d at 1013-1014 (finding that "a driver is more likely to engage in one or more of [the permissible uses] than in texting"). The bare fact that a statute prohibits more cellphone uses

than it permits cannot, without more, establish reasonable suspicion.

Second, the Iowa Supreme Court claimed that the "commonsense suspicion" that Petitioner's cellphone use was illegal was "supported by empirical data reflecting that a large percentage of drivers admit to reading or writing texts while driving." App., *infra*, at 24a-25a. Putting aside the Court's questionable reliance on data "uncited by any party and absent from the record," *id.* at 40a-41a (McDermott, J., dissenting), while empirical evidence can in some instances support a "common sense" suspicion, see *Glover*, 140 S. Ct. at 1188, the Court here continued to ask (and answer) the wrong questions. The percentage of the overall (U.S.) driving population that ever engages in a particular cellphone use (here, texting) cannot by itself reveal the likelihood that a particular driver observed using his cellphone is doing so illegally. To support the latter inference—the key task in the particularized reasonable suspicion analysis—a court must consider the percentage of drivers who engage in *permissible* cellphone uses, as well as the frequency with which drivers engage in permissible versus impermissible cellphone uses.

This Court should clarify that the reasonable suspicion inquiry requires a court to consider whether observed facts and circumstances indicate unlawful, as opposed to innocent, activity. Otherwise, the decision here invites courts to find reasonable suspicion where observed conduct is consistent with illegal and legal activity, based on a bare conclusion that some percentage of the general population engages in the illegal activity at least some of the time. That same approach

would invite officers to stop a man for walking down an alley, even though nothing shows that he is a drug trafficker rather than an innocent pedestrian, merely because some percentage of the population in that neighborhood uses illegal drugs. But cf. *Brown* v. *Texas*, 443 U.S. 47, 52-53 (1979) (finding no reasonable suspicion).

C. Enforcement Concerns Do Not Justify Weakening Core Fourth Amendment Protections.

The Iowa Supreme Court sought to shore up its flawed Fourth Amendment analysis with misplaced policy concerns. In particular, the Court expressed concern that requiring additional information before officers initiate a traffic stop would "place[] too heavy a burden on the police." App., *infra*, at 22a (citation omitted). That policy concern cannot justify the Court's flawed Fourth Amendment analysis.

As this Court has long explained, "standardless and unconstrained discretion is the evil the Court has discerned" when encountering traffic stops unsupported by reasonable suspicion. *Delaware* v. *Prouse*, 440 U.S. 648, 661 (1979). Precisely because so many drivers use their cellphones while driving, allowing police to stop any motorist upon the mere observation of cellphone use, absent additional facts tending to show that a particular use is unlawful, invites arbitrary enforcement. "A suspicion so broad that [it] would permit the police to stop a substantial portion of the lawfully driving public . . . is not reasonable." *Paniagua-Garcia*, 813 F.3d at 1014-1015 (quoting *Flores*, 798 F.3d at 649); see *Reid* v. *Georgia*, 448 U.S. 438, 440-441 (1980) (per curiam); accord App., *infra*, at 32a

(Appel, J., dissenting) (under majority opinion, the "potential of arbitrary and capricious enforcement is front and center").

The Iowa Supreme Court's inchoate concerns about effective enforcement do not justify relaxing core Fourth Amendment principles and protections. The Fourth Amendment requires that an investigatory stop be based on particularized observations indicating impermissible cellphone use. In enforcing Fourth Amendment protections, courts must focus on the likelihood that a given driver using his cellphone is doing so illegally. The Iowa legislature made a deliberate choice to prohibit some uses of cellphones while driving but to allow others. The necessary consequence of that legislative choice is that officers do not have reasonable suspicion when a driver is merely observed holding and manipulating a cellphone.

III. This Case Is An Ideal Vehicle To Address This Important And Frequently Recurring Question

1. The question presented here often arises in the twenty-plus States and territories that have enacted "texting-while-driving" bans that are materially similar to Iowa law. In these jurisdictions, investigatory stops for suspected violations of texting-while-driving statutes are routine. One study found that 35 percent of all traffic violations reported by Massachusetts police officers involved such conduct. See U.S. Dep't of Transp., Nat'l Highway Traffic Safety Admin., *Evaluating the Enforceability of Texting Laws: Strategies Tested in Connecticut and Massachusetts* 10 (2017). Put differently, police reported, on average, roughly six texting violations for every eight hours dedicated

to detecting traffic infractions, the highest reporting rate of any traffic violation in the study. *Id.* at 11. Given the prevalence of enforcement, it is no exaggeration to say that tens of millions of drivers nationwide risk being stopped for suspected violations of texting-while-driving statutes each year.

Yet among these twenty-plus jurisdictions, there persists a sharp and enduring conflict of authority over what conduct can create a reasonable suspicion that a driver has violated a law that allows some, but not all, uses of a cellphone while driving.

2. This case presents a clean and attractive vehicle to address the question presented. As the Iowa Supreme Court noted, the facts here are "not seriously dispute[d]." App., *infra*, at 8a. Petitioner was stopped for the sole reason that officers observed him manipulating a cellphone. The Iowa Supreme Court held that this conduct was sufficient to create reasonable suspicion. In so holding, it expressly departed from decisions from other jurisdictions. And there is no doubt that this disagreement was outcome-determinative: Had Petitioner been driving in North Dakota instead of Iowa, the stop would have been unlawful. See *Morsette*, 924 N.W.2d at 441.

3. Nor is there any doubt that the question dividing the lower courts, despite arising in the context of particular state laws that ban texting while driving, implicates a federal question. Indeed, the Iowa Supreme Court's decision was expressly grounded in the Fourth Amendment. See App., *infra*, at 7a, 19a, 31a; see also *supra* note 2. *Morsette* and *Paniagua-Garcia* were likewise decided on Fourth Amendment grounds.

Morsette, 924 N.W.2d at 440; *Paniagua-Garcia*, 813 F.3d. at 1014-1015.

4. The Iowa Supreme Court suggested in passing that the authorities with which it disagreed were "distinguishable based on differences between the [state] statutory prohibitions." App., *infra*, at 23a. But there is no dispute that more than 20 States and territories have enacted laws that ban some but not all uses of a cellphone while driving. Many of those statutes are materially indistinguishable for Fourth Amendment purposes. For example, the North Dakota statute at issue in *Morsette* closely resembles the Iowa statute at issue here: Both ban drivers from sending or receiving an "electronic message"; then define the term "electronic message"; and then list certain uses that are expressly permitted, including—in both cases—use of a cellphone for navigation, to dial a phone number, and to interface with a wireless communication device. Compare N.D. Cent. Code § 39-08-23(1), (2)(a), with Iowa Code § 321.276(1)(a), (2)(a).

When States have adopted similar laws or programs designed to achieve the same goal but that use slightly different language in achieving their ends, this Court has not hesitated to grant certiorari to resolve a conflict of authority about whether those laws or programs comply with the federal Constitution.[7] The

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[7] See, *e.g.*, *Mitchell* v. *Wisconsin*, 139 S. Ct. 915 (2019) (certiorari granted to resolve conflict among courts in the 29 States which permit warrantless blood draws from intoxicated-driving suspects concerning whether such searches comply with the Fourth Amendment); *Sveen* v. *Melin*, 138 S. Ct. 542 (2017) (certiorari granted to resolve conflict among courts in the 28 States with revocation-upon-divorce statutes concerning whether such statutes

fact that the relevant state statutes do not match verbatim is no obstacle to this Court's review when, as here, the statutes are closely similar and give rise to the same federal question.

In any event, the conflict at issue here turns not on any differences in state law, but rather on different courts' approaches to the underlying federal question: whether the mere observation of a driver manipulating a cellphone, in a State that bans some but not all uses of cellphones while driving, creates reasonable suspicion for an investigatory stop. Notably, the Iowa Supreme Court did not even attempt to distinguish *Morsette* based on any purported differences between Iowa and North Dakota law. Instead, the Iowa Supreme Court "decline[d] to follow" *Morsette* because, in its view, the North Dakota Supreme Court had misapplied this Court's Fourth Amendment precedents. App., *infra*, at 20a-21a.

* * *

The decision below gives "the State the authority to pull over and interrogate any driver seen glancing at a phone despite the State having *no idea* whether the driver is actually breaking the law." App., *infra*, at 33a (McDermott, J., dissenting). That holding breaks sharply from decisions of other courts and stretches past the breaking point this Court's Fourth Amendment precedents. Review is urgently warranted.

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violated the Contracts Clause); *Espinoza v. Montana Dep't of Revenue*, 139 S. Ct. 2777 (2019) (certiorari granted to resolve conflict of authority concerning whether similar tax-credit scholarship programs in 18 states violated the First Amendment).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2021

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF IOWA

No. 19-1614

Clinton County No. FECR076297

PROCEDENDO

STATE OF IOWA,	)
Plaintiff-Appellee,	)
	)
v.	)
	)
STEVEN EDWARD STRUVE,	)
Defendant-Appellant.	)
	)

To the Iowa District Court for the County of Clinton:

Whereas, there was an appeal from the district court in the above-captioned case to the supreme court. The appeal is now concluded.

Therefore, you are hereby directed to proceed in the manner required by law and consistent with the opinion of the court.

In witness whereof, I have hereunto set my hand and affixed the seal of the supreme court.

State of Iowa Courts

Case Number	**Case Title**
19-1614	State v. Struve

So ordered

_____
Christina A. Mayberry, Deputy Clerk

Electronically signed on 2021-04-06 11:55:59

APPENDIX B

IN THE SUPREME COURT OF IOWA

No. 19-1614

Clinton County No. FECR076297

PETITION FOR REHEARING DENIED

STATE OF IOWA,
Plaintiff-Appellee,

v.

STEVEN EDWARD STRUVE,
Defendant-Appellant.

After consideration by this court, the petition for rehearing in the above-captioned case is hereby overruled and denied.

State of Iowa Courts

Case Number	**Case Title**
19-1614	State v. Struve

So ordered

Susan Larson Christensen, Chief Justice

Electronically signed on 2021-04-06 11:07:21

APPENDIX C

IN THE SUPREME COURT OF IOWA

No. 19-1614

Submitted September 16, 2020–

Filed February 19, 2021

STATE OF IOWA,

Appellee,

vs.

STEVEN EDWARD STRUVE,

Appellant.

Appeal from the Iowa District Court for Clinton County, Marlita A. Greve, Judge.

The defendant appeals denial of his motion to suppress, arguing officers lacked reasonable suspicion he was illegally using his cell phone to support a traffic stop. **AFFIRMED.**

Oxley, J., delivered the opinion of the court, in which Waterman, Mansfield, and McDonald, JJ., joined. McDermott, J., filed a dissenting opinion in which Christensen, C.J., and Appel, J., joined. Appel, J., filed a separate dissenting opinion.

Martha J. Lucey, State Appellate Defender, and Vidhya K. Reddy (argued), Assistant Appellate Defendant, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson (argued), Assistant Attorney General, Mike Wolf, County Attorney, and James M. McHugh, Assistant County Attorney, for appellee.

OXLEY, Justice.

Iowa is not a "hands-free" driving state. The Iowa legislature recently expanded Iowa's texting-while-driving[1] statute but stopped short of prohibiting all hands-on use of a cell phone. Instead, Iowa Code section 321.276 allows drivers to use cell phones for some limited purposes while prohibiting most others.

We do not decide today what uses of a cell phone are permitted and what uses are prohibited by section 321.276. The driver here was not charged with violating the statute. He was, however, stopped when officers believed he might be violating it. Thus, this case requires us to determine when a police officer's observations of a driver using a cell phone move from only a "hunch" the driver is using the cell phone in a prohibited manner to providing the "specific and articulable facts" required to permit an officer to stop a driver and investigate whether the use violates Iowa law. For the reasons explained below, we hold that observations of a driver holding a phone in front of his face and actively manipulating the screen for at least ten seconds as involved in this case justified

[1] We use this term as a colloquial shorthand for the statute with the understanding that it addresses more than texting.

stopping the driver to resolve any ambiguity about whether the driver was violating section 321.276.

I. Factual Background and Proceedings.

Around 9 p.m. on October 2, 2018, Clinton police officers Curtis Blake and Roger Schumacher were driving next to a vehicle when they observed the driver holding a phone in front of his face. They could see the glow of the phone from their car and that the driver was "manipulating" the screen with his finger. The officers' dash camera recorded the incident. After travelling alongside the car for approximately ten seconds, during which time the driver continued using the phone, the officers made a traffic stop.

After they pulled him over, the officers recognized the driver of the car as Steven Struve. Struve continued using the cell phone as the officers approached his vehicle. Officer Schumacher spoke to Struve, telling him he was not allowed to text while driving, while Officer Blake spoke to Struve's passenger. Struve responded he thought it was only illegal to text and drive in Illinois and explained he had been showing his passenger photos from his phone's gallery. As Officer Schumacher spoke to Struve, Officer Blake noticed what appeared to be a drug pipe protruding from a bag in the car's backseat. Officer Blake notified Officer Schumacher about the pipe, and they searched the vehicle.

The officers confirmed the pipe was the type used to smoke methamphetamine and ultimately discovered a baggie of over twenty grams of a substance that appeared to be methamphetamine under the center console. The officers arrested Struve

and charged him with possession with intent to distribute methamphetamine in excess of five grams, a class "B" felony, and failure to affix a drug stamp. Struve filed a motion to suppress the items discovered during the traffic stop, arguing the officers lacked reasonable suspicion Struve was committing a traffic violation. Without reasonable suspicion, the traffic stop would amount to an unconstitutional seizure, and the fruits of that seizure would be suppressed. The district court denied the motion, concluding the officers had reasonable suspicion to stop Struve under Iowa Code section 321.276.

After a plea agreement was reached, and then withdrawn, the State withdrew the class "B" felony charge and charged Struve with possession with intent to deliver methamphetamine in violation of Iowa Code section 124.401(1)(*c*)(6), a class "C" felony. Struve proceeded to a bench trial on the minutes of testimony, and the district court found him guilty. Struve appeals the denial of his motion to suppress. On appeal, Struve challenges only the initial stop; he does not challenge the officers' subsequent search of the car after they observed the pipe in the back seat, conducted under the plain-view exception to the warrant requirement.

II. Standard of Review.

Struve claims the officer's stop amounted to an unreasonable seizure in violation of the Fourth Amendment of the United States Constitution and article I, section 8 of the Iowa Constitution. Given the constitutional basis of his challenge, we review the denial of his motion to suppress de novo. *State v. Tyler*, 830 N.W.2d 288, 291 (Iowa 2013). "We

independently evaluate the totality of the circumstances found in the record . . . ." *State v. Vance*, 790 N.W.2d 775, 780 (Iowa 2010). We give deference to the factual findings of the trial court but we are not bound by them. *Id.*; *Tyler*, 830 N.W.2d at 291. The parties do not seriously dispute the underlying facts; rather, they disagree about whether the officers' observations supported the stop.

III. Analysis.

A. *Reasonable Suspicion to Support an Investigatory Stop*. Struve challenges the officers' stop as an unreasonable warrantless seizure. *See State v. Kreps*, 650 N.W.2d 636, 641 (Iowa 2002). Our focus is on reasonableness, as our jurisprudence—and both constitutions— prohibit only "unreasonable" seizures. *See* U.S. Const. amend. IV; Iowa Const. art. I, § 8. These constitutional protections generally require a warrant before an officer may seize a person, with noted exceptions.

One exception allows an officer to briefly detain a driver to investigate whether a traffic violation has been, or is being, committed, but only if the officer can establish reasonable suspicion for the stop. *Kreps*, 650 N.W.2d at 641. "The purpose of an investigatory stop is to allow a police officer to confirm or dispel suspicions of criminal activity through reasonable questioning." *Id.* Reasonable suspicion to support an investigatory stop requires that the officer identify "specific and articulable facts, which taken together with rational inferences from those facts, to reasonably believe criminal activity may have occurred." *State v. Tague*, 676 N.W.2d 197, 204 (Iowa

2004). "Mere suspicion, curiosity, or hunch of criminal activity is not enough." *Id.*

Yet, police officers need not rule out all possibility of innocent behavior before briefly detaining a driver. *Kreps*, 650 N.W.2d at 641–42. Even if it is equally probable that a driver is innocent, "police officers must be permitted to act *before* their reasonable belief is verified by escape or fruition of the harm it was their duty to prevent." *Id.* at 642 (quoting *United States v. Holland*, 510 F.2d 453, 455 (9th Cir. 1975)). Thus, "reasonable cause may exist to investigate conduct which is subject to a legitimate explanation and turns out to be wholly lawful." *Id.* (quoting *State v. Richardson*, 501 N.W.2d 495, 497 (Iowa 1993) (per curiam)). We "judge[] the facts against an objective standard: 'would the facts available to the officer at the moment of the seizure . . . "warrant a man of reasonable caution in the belief" that the action taken was appropriate?' " *Id.* at 641 (quoting *State v. Heminover*, 619 N.W.2d 353, 357 (Iowa 2000) (en banc), *abrogated on other grounds by State v. Turner*, 630 N.W.2d 601, 606 n.2 (Iowa 2001)).

The United States Supreme Court recently addressed reasonable suspicion in *Kansas v. Glover*, where it held an officer had reasonable suspicion to stop a driver after the officer ran the vehicle's plates and learned the owner's license was revoked. *See* 589 U.S. __, __, 140 S. Ct. 1183, 1188 (2020). That fact, coupled with "the commonsense inference that [the owner] was likely the driver of the vehicle . . . provided more than reasonable suspicion to initiate the stop." *Id.*

In distinguishing between a "mere hunch" that does not create reasonable suspicion and articulable and particularized facts that do, the Court recognized that officers in the field must be allowed to rely on "commonsense judgments and inferences about human behavior" in determining whether the particular facts known to the officer indicate criminal activity sufficient to warrant investigation. *Id.* at __, 140 S. Ct at 1187–88 (quoting *Illinois v. Wardlow*, 528 U.S. 119, 125, 120 S. Ct. 673, 676 (2000)).

Justice Kagan concurred, agreeing that the officer could reasonably infer that the driver of a vehicle is likely the owner even if the owner's license has been revoked based on the additional fact that "revocations in Kansas nearly always stem from serious or repeated driving violations," giving additional support to the officer's inference that motorists with revoked licenses continue to drive. *Id.* at __, 140 S. Ct at 1194 (Kagan, J., concurring). The majority recognized the Kansas licensing scheme reinforced the reasonableness of the officer's inference, but it was not needed to support the stop; "common sense suffice[d] to justify [the] inference." *Id.* at __, 140 S. Ct at 1188–89.

We reached the same conclusion on similar facts ten years earlier. *See Vance*, 790 N.W.2d at 781. An officer had reasonable suspicion to initiate an investigatory stop where the officer knew the registered owner of the vehicle had a suspended license and the officer was "unaware of any evidence or circumstances indicating the registered owner [was] not the driver of the vehicle." *Id.* (addressing a challenge under the Fourth Amendment).

Recognizing that an inference that the owner of a vehicle does most of the driving "may be fallible," we nonetheless concluded it was "sufficiently reasonable to generate reasonable suspicion for an investigatory stop to resolve the ambiguity as to whether criminal activity is afoot." *Id.* at 781–82. Forbidding officers from relying on the commonsense inference that the driver of a vehicle is usually its owner "would seriously limit an officer's ability to investigate suspension violations because there are few, if any, additional steps the officer can utilize to establish the driver of a vehicle is its registered owner." *Id.* at 782.

We rejected the argument that the officer should do more to investigate whether the driver is the suspended owner because it "place[d] too heavy a burden on the police." *Id.* ("It would be impossible for an officer to verify that a driver of a vehicle fits the description of the registered owner in heavy traffic, if the vehicle has darkly tinted windows, or if the stop occurs at night . . . ."). Allowing the officer to rely on the inference without engaging in further investigation "adequately protect[ed] against suspicionless investigatory stops because" if the officer is or becomes aware of facts that invalidate the assumption, such as evidence that the driver appears to be a different age or gender than the registered owner, "reasonable suspicion would, of course, dissipate." *Id.* (second quoting *State v. Newer*, 742 N.W.2d 923, 926 (Wis. Ct. App. 2007)). Our position is consistent with that taken by the Supreme Court in *Glover*. While an officer is not required to look for corroborating facts, "the presence of additional facts

might dispel reasonable suspicion." *Glover*, 589 U.S. at ___, 140 S. Ct. at 1191.

We also recognized that allowing an officer to rely on commonsense inferences, "absent any evidence to the contrary, ensures the safety of the roadways and of law enforcement." *Vance*, 790 N.W.2d at 782. Requiring the officer to verify that the driver met the registered owner's description would endanger both the officer and the traveling public if he had to attempt to maneuver himself into a position to clearly observe the driver. *Id.*

Last year, we applied *Vance* to a challenge under the Iowa constitution and upheld a traffic stop after officers observed a woman and two men leave a residence, ran the vehicle's license plate, and discovered the registered owner was a woman with a suspended license who "appeared to be" the defendant. *See State v. Haas*, 930 N.W.2d 699, 702 (Iowa 2019) (per curiam). The fact that three people got into the car did "not invalidate the officers' assumption that [the registered owner] was driving her own vehicle" where the officers did not see who was driving. *Id.* As in *Glover*, we did not require additional corroboration for the officer's commonsense inference that the owner of a vehicle is likely the driver, even when the owner's license is suspended.

Relying on an officer's common sense is not new to our reasonable suspicion jurisprudence. An officer is expected to make "commonsense judgments and inferences about human behavior" when stopping a motorist engaged in suspicious behavior. *See Kreps*, 650 N.W.2d at 640, 645 (quoting *Wardlow*, 528 U.S.

at 124–25, 120 S. Ct. at 676) (concluding stop was supported by reasonable suspicion despite no indication of criminal activity based on defendant's actions of attempting to elude officer without violating any traffic laws, coupled with passenger's jump from vehicle); *see also State v. Lindsey*, 881 N.W.2d 411, 426 (Iowa 2016) (concluding "school officials were operating on a 'common-sense conclusio[n] about human behavior' upon which 'practical people'—including government officials—are entitled to rely" in searching student athlete's bag with history of gun and drug possession after he expressed unprompted and unusual concern about the bag while lying injured on the football field) (alteration in original) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 346, 105 S. Ct. 733, 745 (1985)). Nor does an officer's common sense need to be based on specific training or law enforcement experience. *Glover*, 589 U.S. at __, 140 S Ct. at 1189 ("The inference that the driver of a car is its registered owner does not require any specialized training; rather, it is a reasonable inference made by ordinary people on a daily basis."). As the Supreme Court explained, "the 'common sense' understanding of common sense, [is that it refers to] information that is accessible to people generally, not just some specialized subset of society." *Id.* at __, 140 S. Ct. at 1189–90. Thus, officers are expected to "draw[] factual inferences based on the commonly held knowledge they have acquired in their everyday lives." *Id.* at __, 140 S. Ct. at 1190.

The following propositions emerge from these cases. First, an officer is expected to rely on their

common sense and understanding of human behavior in determining whether observed activity raises their suspicions above a "mere hunch" of criminal activity. The officer's understanding comes not only from their training and experience as an officer but also their understanding from everyday life. Second, the officer's suspicion need not be infallible or even rise to a fifty-fifty chance the individual is engaged in criminal activity to be reasonable. Third, an officer is not required to engage in additional investigation to confirm their suspicions as long as the initial suspicions are in fact reasonable. But if they become aware of additional facts that make their suspicions of illegal activity unreasonable, the reasonableness of the initial suspicion dissipates and they cannot make the stop.

With this framework, we consider the Iowa texting-while-driving statute to put in context whether Struve's use of his cell phone as observed by the officers gave rise to a reasonable suspicion that he was using it in an illegal manner.

B. *Iowa Code Section 321.276's Prohibition on Using Cell Phones While Driving*.

Prior to July 1, 2017, section 321.276 prohibited a driver from using a cell phone "to write, send, or read a text message while driving a motor vehicle unless the motor vehicle [was] at a complete stop off the traveled portion of the roadway." Iowa Code § 321.276(2) (2017). The prohibition extended to text-based messages, instant messages, and email messages. *Id.* § 321.276(1)(*c*). The statute expressly allowed other uses of a cell phone, including using the cell phone's global position system (GPS) or

navigation system, selecting a name or entering a number to make a voice call, and "activate[ing], deactivate[ing], or initiate[ing] a function of a hand-held mobile telephone." *Id.* § 321.276(2)(*a*). It also allowed use of cell phones in specific safety-related circumstances. *Id.* § 321.276(2)(*b*). Section 321.276 was a secondary offense, which means an officer could not stop a driver for violating it but could only cite a driver if lawfully stopped for another traffic violation. *See id.* § 321.276(5) ("A peace officer shall not stop or detain a person solely for a suspected violation of this section. This section is enforceable by a peace officer only as a secondary action when the driver of a motor vehicle has been stopped or detained for a suspected violation of another provision of this chapter, a local ordinance equivalent to a provision of this chapter, or other law.").

On April 17, 2017, the legislature passed Senate File 234, titled "An Act relating to the use of electronic communication devices to write, send, or view electronic messages while driving as a primary offense, and making penalties applicable." 2017 Iowa Acts ch. 75 (codified at Iowa Code § 321.276 (2018)). While the legislature did not enact a "hands-free" law, as some states have done, it did place additional limitations on the use of cell phones while driving. The Act broadened the statute's coverage from "text messages" to "electronic messages," changed its prohibition of "reading" such messages to "viewing" them, redefined relevant terms, and made violations a primary offense so that officers could stop drivers for violating the revised statute. *Id.* §§ 1, 5.

Iowa Code section 321.276 now declares, "A person shall not use a hand-held electronic communication device to write, send, or view an electronic message while driving a motor vehicle unless the motor vehicle is at a complete stop off the traveled portion of the roadway." Iowa Code § 321.276(2) (2018). An "electronic message" expressly "includes images visible on the screen of a hand-held electronic communication device including a text-based message, an instant message, a portion of electronic mail, an internet site, a social media application, or a game." *Id.* § 321.276(1)(*a*). Additionally, the revisions defined "[t]he terms 'write', 'send', and 'view', with respect to an electronic message, [to] mean the manual entry, transmission, or retrieval of an electronic message, and include playing, browsing, or accessing an electronic message." *Id.* § 321.276(1)(*d*). The statute continues to expressly allow use of a cell phone for navigation; to conduct voice calls; to activate, deactivate, or initiate other functions of a cell phone; and in specific safety-related circumstances. *Id.* § 321.276(2)(*a*), (*b*).

The revised statute now broadly prohibits not only texting and emailing but also browsing internet sites, accessing social media apps, and playing games while driving. At oral argument, Struve conceded the statute prohibits a motorist from using a cell phone for any purpose other than the express exceptions identified in section 321.276(2)(*a*) and subsection (*b*). Struve also concedes that his actions of scrolling through his phone's photo gallery and showing pictures to his passenger violated the statute. The

State does not disagree with Struve's interpretation of the statute.

We need not decide the specific contours of the revised statute for purposes of this appeal.[2] It is

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[2] The dissent's impassioned plea rests on the premise that the legislative revisions did little to change the prohibited uses of a cell phone. The dissent's position is not advanced by either party; indeed, it is at odds with the interpretation actually advanced by both parties. "[O]ur system 'is designed around the premise that [parties represented by competent counsel] know what is best for them, and are responsible for advancing the facts and argument entitling them to relief.' " *United States v. Sineneng-Smith*, 590 U.S. ___, ___, 140 S. Ct. 1575, 1579 (2020) (alteration in original) (quoting *Castro v. United States*, 540 U.S. 375, 386, 124 S. Ct. 786, 794 (2003) (Scalia, J., concurring in part and concurring in judgment)). " '[C]ourts are essentially passive instruments of government.' They 'do not, or should not, sally forth each day looking for wrongs to right. [They] wait for cases to come to [them], and when [cases arise, courts] normally decide only questions presented by the parties.' " *Id.* (alteration in original) (citation omitted) (quoting *United States v. Samuels*, 808 F.2d 1298, 1301 (8th Cir. 1987) (Arnold, J., concurring in denial of reh'g en banc)).

One danger of relying on a position not advocated by either party is that the position remains untested by our adversarial system and its logic may not be thoroughly scrutinized before making its way into an opinion. According to the dissent's research, use of forty of the forty-four preloaded apps on an iPhone is not prohibited by the dissent's reading of section 321.276. From this, the dissent concludes that when a person is using a phone, they are much more likely than not using it for a permissible purpose. This conclusion is based on unsound reasoning. The relevant question is not what percentage of apps can be used without violating the statute. The relevant question is what percentage of time people spend using apps prohibited by the statute. The dissent's analysis assumes all apps are used equally. If a person has only two apps on a phone—a weather app and a text messaging app—there would be a fifty-fifty

sufficient for our purposes to recognize that the legislature greatly expanded the conduct prohibited by section 321.276. Our resolution of Struve's appeal turns on whether Officer Blake and Officer Schroeder observed activity that justified stopping Struve for the purpose of investigating whether he was engaged in illegal activity.

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chance the person is using the weather app or the text messaging app. Of course we know this is not true. This example simply demonstrates the dissent's failure to account for a critical variable in its own analysis.

Relying on positions not advocated by the parties also results in the loss of vetting through consideration of contrary arguments. The dissent surmises that a driver may permissibly use apps on an iPhone to order food, trade stocks, shop for books, and check in for a flight, among others. An argument to the contrary could be made (and might have been made by the State had it been given the opportunity). The dissent points out that the statute provides a nonexhaustive list of examples of what constitutes an "electronic message." The question remains whether an app that allows the cell phone user to communicate with the app's provider is sufficiently similar to communicating through an internet site (expressly listed), such that using the app would also be prohibited. A cell phone user who downloads and uses Amazon's app to order books communicates with Amazon in virtually the same way as if they used their phone's web browser to access Amazon's website. We make no judgment as to whether browsing or accessing an app instead of an internet site while driving violates section 321.276. We leave that question for another day where the issue is more directly presented through the adversarial process. For this case, it is enough to recognize that the legislature greatly expanded the statute's coverage from its prior limited prohibitions. *Cf. State v. Coleman*, 907 N.W.2d 124, 135–36 (Iowa 2018) ("[A]lthough we adhere to the rule of lenity in criminal cases, criminal statutes still 'must be construed reasonably and in such a way as to not defeat their plain purpose.' " (quoting *State v. Hagen*, 840 N.W.2d 140, 146 (Iowa 2013))).

Before determining whether the officers had reasonable suspicion for the stop, we review cases addressing texting-while-driving statutes from other jurisdictions.

C. *How Other Jurisdictions Have Handled Traffic Stops for Cell Phone Use While Driving*. A handful of courts have addressed Fourth Amendment challenges (or analogous state constitutional challenges) to traffic stops for cell phone use under other states' laws. The different language used in various state statutes limits our ability to apply other cases to Iowa's statute, but a review of their reasoning supports our ultimate conclusion that the officers had reasonable suspicion to stop Struve.

In *United States v. Paniagua-Garcia*, an officer observed a driver holding a cell phone in his right hand with his head bent toward the phone, who "appeared to be texting." 813 F.3d 1013, 1013–14 (7th Cir. 2016). The United States Court of Appeals for the Seventh Circuit focused on the quantity of prohibited and allowed uses to conclude the officer's suspicion the driver was violating Indiana law was not reasonable. *Id.* at 1014–15. It turned out the driver was searching for music on his phone, not texting. *Id.* at 1014. Where Indiana's texting-and-driving law prohibited only texting and emailing but allowed "*[a]ll* other uses," including "making and receiving phone calls, inputting addresses, reading driving directions and maps with GPS applications, reading news and weather programs, retrieving and playing music or audio books, surfing the Internet, playing video games—even watching movies or television," the court concluded it was not reasonable to stop

someone seen using a cell phone without evidence that the officers saw texting as opposed to activity that is "consistent with any one of a number of lawful uses of cellphones." *Id.* The officer never "explained what created the appearance of texting as distinct from any one of the multiple other—lawful—uses of a cellphone by a driver." *Id.*

We are not persuaded by *Paniagua-Garcia*, which considered a statute prohibiting only texting, much like the prior Iowa statute. When the Iowa legislature changed section 321.276 from a secondary offense to a primary offense, it also greatly expanded the scope of its coverage to prohibit not only writing, sending, or reading text or email messages but also playing games, browsing social media apps, and accessing internet sites. Thus, the revised Iowa statute prohibits much of the activity allowed under the Indiana statute that supported the Seventh Circuit's conclusion.

In *State v. Morsette*, the North Dakota Supreme Court held reasonable suspicion did not support a traffic stop where a police officer "observed a driver in the adjacent lane manipulating his touchscreen cell phone for approximately two seconds" while stopped at a red light. 924 N.W.2d 434, 436 (N.D. 2019). While the North Dakota statute prohibits more conduct than did the Indiana statute at issue in *Paniagua-Garcia*, we decline to follow the lead of the *Morsette* majority because it is contrary to the Supreme Court's discussion of reasonable suspicion in *Glover*. *Morsette* focused on the lack of evidence about the stopping officer's "past success rate at identifying violations" of the texting-while-driving statute or "any unique

training he received" that would enable him to identify allowed use compared to prohibited use while travelling next to a moving vehicle. 924 N.W.2d at 440. But under *Glover*, reasonable suspicion includes common sense derived from everyday life, not only from specialized training or success rates. *See Glover*, 589 U.S. at ___, 140 S. Ct. at 1189–90 ("Nothing in our Fourth Amendment precedent supports the notion that, in determining whether reasonable suspicion exists, an officer can draw inferences based on knowledge gained only through law enforcement training and experience. We have repeatedly recognized the opposite."). As the Supreme Court explained in *Glover*, requiring an officer to identify specific training to support his suspicions "would also impose on police the burden of pointing to specific training materials or field experiences justifying reasonable suspicion for the myriad infractions in municipal criminal codes." *Id.* at ___, 140 S. Ct. at 1190.

The chief justice disagreed with the majority in *Morsette*. "[T]hat a person may be using a wireless communications device . . . for a valid purpose does not negate the reasonable suspicion that the person is using the cell phone for a prohibited purpose." *Morsette*, 924 N.W.2d at 441 (VandeWalle, C.J., dissenting). Considering the extent of conduct prohibited by the North Dakota statute, the chief justice concluded "it is as probable that the cell phone is used to send or receive prohibited electronic messages as it is that the device is being used for one of the lawful purposes, perhaps more so." *Id.*

Further, that the statute may be difficult to apply does not preclude officers from stopping drivers when the officer has articulable and objective facts to support the stop. *See id.* ("It seems to me that the majority opinion substantially reduces, if not eliminates, the effective enforcement of the statute."). The *Morsette* dissent's position is more in line with the concern we identified in *Vance* that requiring an officer to further investigate whether the driver is the suspended owner before making a stop "place[d] too heavy a burden on the police." *Vance*, 790 N.W.2d at 782.

Oregon courts have considered the issue in two cases, finding probable cause[3] in one but not the other. In the first case, the officer observed " 'light coming up to [defendant's] face' that he believed was coming 'from a device that was in her hand that she was looking down at' . . . for approximately 10 seconds." *State v. Rabanales-Ramos*, 359 P.3d 250, 251–52 (Or. Ct. App. 2015) (alteration in original). "The trooper did not see defendant put the device up to her ear, move her lips as if she were talking, or push any buttons." *Id.* Interpreting the statutory text to prohibit only use of a cell phone for communication, but not any other uses, the court concluded the trooper's "belief that defendant had 'use[d]' that device was not objectively reasonable under the circumstances." *Id.* at 256 (alteration in original).

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[3] Oregon jurisprudence requires the higher probable cause standard to justify a traffic stop. *State v. Rabanales-Ramos*, 359 P.3d 250, 253 (Or. Ct. App. 2015). This in itself makes the Oregon cases of limited value to our reasonable suspicion analysis.

The Oregon Court of Appeals reached the opposite conclusion in *State v. Nguyen Ngoc Pham*, where police officers observed the defendant holding a cell phone in his hand, "saw the screen was lit up . . . and . . . could see [defendant] pushing something on the screen." 433 P.3d 745, 746 (Or. Ct. App. 2018) (alteration in original). The officer could not identify exactly what the driver was doing. *Id.* When the driver looked up and saw a police car next to him, he put his cell phone down. *Id.* The court concluded probable cause existed from the officer's observation of the defendant pushing on the screen and promptly lowering his phone when he saw the officer, distinguishing *Rabanales-Ramos*. *Id.* at 747. The officer's observation of the driver manipulating the phone was the primary difference between *Nguyen Ngoc Pham* and *Rabanales-Ramos*.

While these cases are distinguishable based on differences between the statutory prohibitions, it seems that the extent of conduct prohibited by the statute as well as the actual conduct observed by the officers are both critical to the reasonable suspicion analysis.

D. *Did the Officers Have Reasonable Suspicion Struve Was Violating Iowa Code Section 321.276 to Support an Investigatory Stop*? We turn then to the facts articulated by the officers to support the stop. Officer Blake was in the passenger seat of the patrol vehicle, and as the officers moved alongside the driver's side of Struve's car, Officer Blake observed the driver holding a cell phone in front of his face for at least ten seconds, which lit up the interior of the dark car, and saw the driver "manipulating the screen

with his thumb as he was driving." The patrol car was beside and just behind the driver, which allowed Officer Blake "to view [Struve's] hands and the fact that his hand was up in front of his face with the cell phone and that he was manipulating the screen." Officer Blake testified the phone was "[u]p in front of the steering wheel, pretty much directly in front of [Struve's] face." The screen was "very bright," which allowed Officer Blake "to see [Struve's] thumb moving back and forth in front of it." Officer Schumacher, who was driving the patrol vehicle, likewise observed Struve holding the lit phone in front of his face and manipulating it in his hand. The thirty-second dashcam video introduced into evidence confirms that the cell phone was lit up during the entire approximate ten-second period during which the officers followed Struve and assessed whether he appeared to be improperly using his cell phone. The officers suspected Struve was texting and stopped him to investigate.

The officers' commonsense suspicion that Struve was illegally using his cell phone is supported by empirical data reflecting that a large percentage of drivers admit to reading or writing texts while driving, even while recognizing such activity as dangerous. *See Glover*, 589 U.S. at __, 140 S. Ct. at 1188 (citing statistics from the National Cooperative Highway Research Program and the National Highway and Traffic Safety Administration and concluding "[e]mpirical studies demonstrate what common experience readily reveals"). AAA Foundation for Traffic Safety, which conducts an annual survey concerning distracted driving,

conducted its 2018 survey between August 21 and September 11, 2018, around the time of Struve's traffic stop. AAA Found. for Traffic Safety, 2018 Traffic Safety Culture Index 7 (2019) [hereinafter AAA 2018 Traffic Safety Index], https://aaafoundation.org/wp-content/uploads/2019/06/2018-TSCI-FINAL-061819_updated.pdf. While 96% of respondents considered reading or typing texts or emails while driving to be very or extremely dangerous, 41% of respondents admitted reading messages while driving and 32% admitted typing such messages within the last thirty days. *Id.* at 5. Of respondents aged 19–39, over 50% reported reading or writing a text while driving in the prior thirty days. *Id.* at 20.[4] The AAA Foundation observed the "survey again highlights the discordance between drivers' attitudes and their behaviors," recognizing similar responses in prior years' surveys. *Id.* at 4.[5]

Glover reinforces the importance of considering the commonsense understanding about human behavior

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[4] Respondents aged 25–39 were the worst offenders, with 60% admittedly reading a text and 54% typing a text while driving, even though 96% of that age group viewed such activity as very or extremely dangerous. AAA 2018 Traffic Safety Index at 18, 20.

[5] An article cited by the dissent provides further support for the general knowledge that a significant number of drivers engage in prohibited conduct, noting that "a [2007] study of adults from New York, New Jersey, and Connecticut revealed that eighty-six percent of drivers ignore cell phone bans in their respective states." Alan Lazerow, *Near Impossible to Enforce at Best, Unconstitutional at Worst: The Consequences of Maryland's Text Messaging Ban on Drivers*, 17 Rich. J.L. & Tech. 1, 31 n.105 (2010).

and use of cell phones in assessing whether the officers had an objectively reasonable suspicion that Struve was engaged in a prohibited use of his cell phone. That commonsense observation, supported by empirical evidence that a significant number of drivers continue to read and write text messages while driving despite recognizing the serious dangers of doing so, also distinguishes the officers' observations of Struve's use of his phone from the hypothetical relied on to support the court's position in *Paniagua-Garcia*, 813 F.3d at 1015 ("Suppose the officer had observed Paniagua drinking from a cup that appeared to contain just coffee. Were the coffee spiked with liquor in however small a quantity, Paniagua would be violating a state law forbidding drinking an alcoholic beverage while driving, and that possibility, however remote, would on the reasoning advanced by the government and adopted by the district judge justify stopping the driver."). That there is only a remote possibility that a driver has Kahlua in his coffee does not negate the entirely different inferences to be drawn from a driver using his cell phone. The likelihood that a driver—observed holding a cell phone in front of his face for a prolonged period while manipulating the screen—is using the phone for a prohibited rather than a permitted use is more than a remote possibility. The empirical evidence supports the commonsense inference that it is quite likely a driver is impermissibly using his phone—for some age groups of drivers even more likely than not. *See Kreps*, 650 N.W.2d at 642 ("An officer may make an investigatory stop with 'considerably less than proof of wrongdoing by a preponderance of the

evidence.' " (quoting *Richardson*, 501 N.W.2d at 496–97)).

Our holding does not mean that an officer may stop any driver seen using a cell phone. For this point, we look to our cases involving observations that support stopping a driver on suspicion of impaired or drunk driving. In *Tague*, we held that observing a driver's "tires barely cross[ing] the edge line once for a very brief period" did not provide reasonable suspicion that the driver was impaired. 676 N.W.2d at 205. By contrast, observations of weaving within the driver's lane "several times," *id.* at 204 (discussing *State v. Tompkins*, 507 N.W.2d 736, 740 (Iowa Ct. App. 1993) (en banc)), or erratic speed changes and "veering . . . at sharp angles," *id.* at 204–05 (discussing *State v. Otto*, 566 N.W.2d 509, 510–11 (Iowa 1997) (per curiam)), provided reasonable suspicion that the driver may have been intoxicated. We reasoned that "any vehicle could be subject to an isolated incident of briefly crossing an edge line of a divided roadway without giving rise to the suspicion of intoxication." *Id.* at 205. We agreed with the district court that "it happens all too often" and described a number of innocuous activities that could have caused the isolated incident. *Id.*

Yet the cases where we found reasonable suspicion of impaired driving to support a stop did not involve activity consistent only with illegal conduct. Weaving within one's own lane and changing speeds without exceeding the speed limit do not violate any statute, but they do provide evidence of impairment. The difference between Tague's isolated and limited action and the repeated and more dramatic actions in

Tompkins and *Otto* did not turn on whether the observed conduct was consistent only with illegal conduct to the exclusion of legal conduct, but whether it provided an objective indication of illegality.

Applying that reasoning here, not every driver seen using a cell phone in any manner may be presumed to be violating section 321.276. Iowa drivers legally use their cell phones every day. But at the same time, reasonable suspicion does not require an officer to rule out all innocent explanations. "The need to resolve ambiguous factual situations—ambiguous because the observed conduct could be either lawful or unlawful—is a core reason the Constitution permits investigative stops . . . ." *United States v. Miranda-Sotolongo*, 827 F.3d 663, 669 (7th Cir. 2016) (citing *Wardlow*, 528 U.S. at 125, 120 S. Ct. at 677). "Accordingly, reasonable suspicion may support an investigatory stop that ultimately reveals wholly lawful conduct." *Vance*, 790 N.W.2d at 780.

In the impaired driving context, observing a vehicle barely cross an edge line once does not rise to a reasonable suspicion of wrongdoing because a single incident could be caused by a number of innocuous reasons. Even though repeated swerving or crossing the lane lines is not itself illegal and could be explained by the same innocuous behavior as a single lane crossing, it still raises reasonable suspicion based on the commonsense understanding that such repeated actions can reflect impaired driving.

Likewise, merely observing a cell phone in a driver's hand reflects innocuous behavior. But additional observations can raise an officer's suspicions sufficient to justify an investigatory stop,

even if the observations do not necessarily reveal prohibited as opposed to allowed activity. Here, the officers observed more than mere use of a cell phone. The officers followed alongside Struve and observed him holding the phone in front of his face for a significant period of time while manipulating it, actions consistent with improper use of his phone. That these actions may be consistent with proper use of a phone does not make the stop per se unreasonable. Our caselaw makes clear the officers were not required to rule out permitted activity before making an investigatory stop. Indeed, a "tie" in the reasonable inferences to be drawn from the officer's observations lands the evidence on the reasonable side of the equation since "[t]he reasonable suspicion inquiry 'falls considerably short' of 51% accuracy." *Glover*, 589 U.S. at __, 140 S. Ct. at 1188 (quoting *United States v. Arvizu*, 534 U.S. 266, 274, 122 S. Ct. 744, 751 (2002)) (explaining that "[t]o be reasonable is not to be perfect" (alternation in original) (quoting *Heien v. North Carolina*, 574 U.S. 54, 60, 135 S. Ct. 530, 536 (2014)).

Struve's position that the officers were required to articulate observations consistent with illegal conduct to the exclusion of legal conduct clouds the distinction between a probable cause basis for a stop and a reasonable suspicion basis for a stop. *See Glover*, 589 U.S. at __, 140 S. Ct. at 1188 (explaining information needed to establish reasonable suspicion differs "in quantity [and] content than that required to establish probable cause" (quoting *Alabama v. White*, 496 U.S. 325, 330, 110 S. Ct. 2412, 2416 (1990))). If an officer could actually see that the driver was viewing a social

media app as opposed to a GPS screen, the officer would likely have probable cause to stop the vehicle based on the officer's observation of a traffic violation.[6] *See Tyler*, 830 N.W.2d at 293 (holding that an officer who observes a traffic violation, however minor, has probable cause to stop the motorist). The whole point of allowing officers to briefly detain motorists based on reasonable suspicion is to allow the officer to clear up any ambiguity about whether the observed behavior was illegal or not. *See Vance*, 790 N.W.2d at 780 (recognizing purpose of "an investigatory stop is to resolve the ambiguity as to whether criminal activity is afoot" (quoting *Richardson*, 501 N.W.2d at 497)).

We conclude that the officers' observations of Struve holding the lit cell phone in front of his face for at least ten seconds while manipulating the screen allowed them to briefly stop Struve and clear up the ambiguity created by his actions, particularly in light of the expanded coverage of activity prohibited by section 321.276. If these facts don't allow officers to stop a driver to investigate, it is hard to imagine what facts would. The legislature expanded the scope of section 321.276 and made it a primary offense to address the significant public safety issues associated with distracted driving caused by cell phones. To hold

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[6] The dissent likewise confuses probable cause and reasonable suspicion when it suggests an officer could only stop a driver if he could "make out the contents of the phone's screen" and "come to a conclusion about the phone function employed." If the officer could see a text message or Facebook page visible on the screen, the officer would have probable cause to stop the driver. Reasonable suspicion requires a lesser showing. *See Wardlow*, 528 U.S. at 123, 120 S. Ct. at 675–76.

otherwise on the facts of this case would run the risk of "substantially reduc[ing], if not eliminat[ing], the effective enforcement of" section 321.276. *Morsette*, 924 N.W.2d at 441 (VandeWalle, C.J., dissenting); *see also Vance*, 790 N.W.2d at 782 ("[T]o forbid the police from relying on such an inference to form reasonable suspicion for an investigatory stop would seriously limit an officer's ability to investigate suspension violations because there are few, if any, additional steps the officer can utilize to establish the driver of a vehicle is its registered owner.").

Simply stated, the Fourth Amendment and article I, section 8 allow investigatory stops based on reasonable suspicion. This means there will be some circumstances when the individual will turn out not to have engaged in the unlawful conduct. This is true whether the stop involves investigating wrongful use of a cell phone or some other suspected misconduct as in *Glover*, *Vance*, and *Haas*. The circumstances and inferences involved here are simply indistinguishable from the circumstances and inferences involved in those cases.

IV. Conclusion.

Struve's constitutional rights were not violated, and we affirm the denial of his motion to suppress.

AFFIRMED.

Waterman, Mansfield, and McDonald, JJ., join this opinion. McDermott, J., files a dissenting opinion in which Christensen, C.J., and Appel, J., join. Appel, J. files a separate dissenting opinion.

APPEL, Justice (dissenting).

I join in Justice McDermott's dissent. I write to emphasize that one of the central purposes of constitutional provisions related to search and seizure is to prevent arbitrary and capricious actions by law enforcement authorities. *See* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 417 (1974). When law enforcement has broad sweeping powers that permit widespread searches or seizures, the potential of arbitrary and capricious enforcement is front and center. A warrantless search and seizure with substantial risks of arbitrary and capricious enforcement is, at a minimum, constitutionally suspect. In my view, for the reasons expressed by Justice McDermott, the warrantless search crosses the line in this case.

It is no answer to say that officers should use an unarticulated "common sense" to circumscribe their broad discretion. No one advocates senseless law enforcement activity. But unarticulated "common sense" may be a cover for other motives, and even under the best of circumstances, may be a fertile ground for implicit bias to operate.

In my view, for the above reasons and the reasons expressed by Justice McDermott, the warrantless search under this statute cannot be sustained. I therefore respectfully dissent.

McDERMOTT, Justice (dissenting).

Under the majority's holding today, the legislature might as well have said the following: "Drivers: go ahead and use your phones for the uses we've permitted you. Police: pull them over and interrogate them if they do." As unjust as that sounds—as unjust as that *is*—it's now the status of the law in Iowa after today's ruling.

When a defendant challenges the reasonableness of a stop, the State must satisfy its burden with evidence. Not assumptions, nor guesswork, nor hunches. Whether a particular stop of a citizen is reasonable depends on the totality of the circumstances. In this case, there's only one circumstance: police officers saw a driver for about ten seconds holding up and touching his phone. That's it. No swerving, no speeding, no other basis for the stop. And on that fact alone, the court today holds as a constitutional matter that it's reasonable for law enforcement to assume a driver is engaging in one of a handful of prohibited uses of the phone—and not one of the innumerable permitted uses—and thus that it's reasonable to stop and interrogate the driver.

Stopping a vehicle and detaining its occupants unquestionably constitutes a seizure under both the Federal and Iowa Constitutions. *State v. Tyler*, 830 N.W.2d 288, 292 (Iowa 2013). It goes without saying that private citizens following the law generally should be free from government harassment. Yet today's ruling gives the State the authority to pull over and interrogate any driver seen glancing at a phone despite the State having *no idea* whether the driver is actually breaking the law. We can't excuse

the State's failure to establish reasonable suspicion with evidence by accepting instead an *assumption* of illegal conduct. The unconstitutional police power sanctioned today should alarm anyone concerned about the government's reach into citizens' private, lawful activities.

The law at issue in this case, Iowa Code section 321.276, permits drivers far more lawful uses of their phones than the majority acknowledges. Here's the text of the statute:

> A person shall not use a hand-held electronic communication device to write, send, or view an electronic message while driving a motor vehicle unless the motor vehicle is at a complete stop off the traveled portion of the roadway.

Iowa Code § 321.276(2) (2019).

The statute defines electronic message this way:

> "Electronic message" includes images visible on the screen of a hand-held electronic communication device including a text-based message, an instant message, a portion of electronic mail, an internet site, a social media application, or a game.

Id. § 321.276(1)(*a*). With its use of the word "includes," the statute describes "electronic message" not with a statement of its exact meaning but rather with nonexclusive examples. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 132 (2012) (stating that the verb *to*

include "introduces examples"). And here, somewhat awkwardly, the legislature's phrasing provides examples of an example: " 'Electronic message' *includes* images . . . *including* a text-based message." Iowa Code § 321.276(1)(*a*) (emphasis added).

The reference to "images" must be read in the context of the examples that illustrate it. This is because, unless the operation is voice activated or merely involves the volume buttons on the side of the phone, every operation of a smart phone involves images visible on the screen. Interpreting the term "electronic message" so broadly as to prohibit every smart phone operation that produces an image on the display expands the statute far beyond the manner it was written. If the legislature really intended such a sweeping ban on phone use, it easily could have done so. The simplest and most obvious way for the legislature to create such a clear and all-encompassing prohibition is by exclusion: "All uses are forbidden except *x*." But it didn't. Instead, the legislature carved the forbidden boundaries with specific examples.

As a result, "images" must be interpreted in the context of the six "electronic message" examples set forth in the statute: text messages, instant messages, email, internet sites, social media applications, and games. Iowa Code § 321.276(1)(*a*). Those examples generally bear some logical connection to the term actually used in the statute: "electronic *message*." *See Porter v. Harden*, 891 N.W.2d 420, 427 (Iowa 2017) ("The legislature is . . . entitled to act as its own lexicographer," but "when the legislative definition of a term itself contains ambiguity, we should hesitate

before veering too far from the common meaning of that term."). The word "message" connotes *communication* with another party. *See Message*, *Black's Law Dictionary*, at 1186 (11th ed. 2019) (defining *message* as "[a] written or oral communication, often sent through a messenger or other agent, or electronically (e.g., through e-mail or voicemail)"). And this communication focus comports with federal law too. Congress in the Federal Records Act defines "electronic messages" as "electronic mail and other electronic messaging systems that are used for purposes of communicating between individuals." 44 U.S.C. § 2911(c)(1).

Section 321.276, from its inception, has explicitly permitted drivers to make various lawful uses of their smart phones, including for GPS and navigation; calls, including entering a name or dialing a phone number; activating, deactivating, or initiating a smart phone function; and receiving safety-related information, including emergency, traffic, or weather alerts. *Compare* Iowa Code § 321.276(2)(*a*), (*b*)(3) (2010), *with* § 321.276(2)(*a*), (*b*)(3) (2020). But by omission from the list of forbidden uses, the statute permits far more.

When interpreting criminal statutes, "we have repeatedly stated that provisions establishing the scope of criminal liability are to be strictly construed." *State v. Hearn*, 797 N.W.2d 577, 583 (Iowa 2011). "Blurred signposts to criminality will not suffice to create it." *United States v. C.I.O.*, 335 U.S. 106, 142, 68 S. Ct. 1349, 1367 (1948) (Rutledge, J., concurring). Doubts in penal statutes are resolved in favor of the accused. *State v. Conley*, 222 N.W.2d 501, 502 (Iowa

1974). The universe of phone uses left unstated and unaddressed in the statute are all permitted uses.

A look at the smart phone applications ("apps," colloquially) that come preloaded on every iPhone (the iPhone being the most popular smart phone in the country based on market share) gives a sense of the scope of the permitted uses. Out of the box, the iPhone currently comes with forty-four preloaded apps. Under the examples of forbidden uses stated in the statute, drivers would be forbidden from using just four: *Messages* ("text-based message"), *Mail* ("a portion of electronic mail"), *Safari* ("internet site" web browser), and *Game Center* (a "game"). Drivers are thus permitted to use the other forty preloaded apps, including *Calculator*, *Calendar*, *Camera*, *Clock*, *Compass*, and *Contacts*—and those are just the preloaded apps starting with *C*.

A driver may make unlimited use of a smart phone's alarm clock, flashlight, stopwatch, timer, and magnifying glass features. A driver may check the weather on the *Weather* app, download podcasts on the *Podcast* app, set reminders on the *Reminders* app, and create a grocery list on the *Notes* app. We're far from done with even the preloaded apps on the iPhone that are permitted uses, and we haven't touched on the apps available for download from third parties. At present, there are 1.85 million other apps available for download on an iPhone through its *App Store*. Users of Google's Android phones have even more options, with 2.56 million apps available through the *Google Play* app. (And yes, searching and downloading smart phone apps is itself a permitted use while driving.)

A driver may lawfully use the phone to play streaming music or to select downloaded songs from a music app. A driver may also use a phone app to order food, trade stocks, shop for a book, check sports scores, measure heart rate, turn on a home security alarm, check in for a flight, read a newspaper article, diagnose car troubles, transfer funds between bank accounts, make a dinner reservation, pair a Bluetooth accessory, calendar an appointment, view traffic congestion reports, deposit a check, pull up digital concert tickets, track calories . . . and on, and on.

One might well complain that all these permitted uses under the statute could contribute to distracted driving and its associated dangers. Yet we must remember that it's the province of the legislature, not the courts, to make such policy choices and to establish acceptable levels of risk on our roadways. In exercising restraint against expanding the statute to make criminal the thousands of uses its text does not forbid, the judiciary upholds the constitutional separation of powers "by ensuring that crimes are created by the legislature, not the courts." *Matter of Bo Li*, 911 N.W.2d 423, 429 (Iowa 2018) (*quoting State v. Hearn*, 797 N.W.2d 577, 585 (Iowa 2011)); *see also United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.) ("It is the legislature, not the Court, which is to define a crime, and ordain its punishment."). A court's own views about the consequences that might result from the proper interpretation of this or any other statute cannot weaken our resolve. Particularly where the legislature has spoken, "consequences cannot change our understanding of the law." *United States v. Davis*,

588 U.S. __, __, 139 S. Ct. 2319, 2335 (2019). Courts must avoid the temptation of "reading the law to satisfy their policy goals." *Id.*

The majority opinion doesn't suggest any disagreement with an interpretation of the statute granting such a wide assortment of permitted uses. Instead, the majority's analysis runs aground in its *assumption* that most phone use while driving is one of the few enumerated prohibited uses. Police officers of course must rely on reasonable inferences grounded in their experience and training as law enforcement officers, but today's holding doesn't rest on any evidence or assertion that the stop of this defendant's car was grounded in the officers' experience or training.

An officer positioned any normal distance from a moving vehicle can't see what particular phone function a driver is using. Was the driver looking at an email (a forbidden use) or a GPS map (a permitted use)? Tapping the screen to hit send on a text (forbidden) or to hit play on a song or a podcast (permitted)? Swiping the screen to scroll comments on a social media app (forbidden) or to scroll down a list of driving directions (permitted)? In every instance, the driver's actions look exactly the same. Lacking some extraordinary visual acuity to make out the small screen on a moving vehicle, the officer is left to guess. And guesswork, we have repeatedly said, can never establish "reasonable suspicion" for a stop under the constitution. *See, e.g.*, *State v. Tague*, 676 N.W.2d 197, 204 (Iowa 2004); *State v. Kreps*, 650 N.W.2d 636, 641 (Iowa 2002); *see also United States v. Arvizu*, 534 U.S. 266, 273, 122 S. Ct. 744, 750 (2002)

(requiring law enforcement to have a "particularized and objective basis for suspecting legal wrongdoing" to establish reasonable suspicion for a stop).

The majority seeks to clothe its naked guesswork about drivers' unlawful phone use not with observed or articulable facts but instead with a claim that such a conclusion can be drawn from "common sense." To appreciate just how much of a load the term "common sense" is required to carry, one need only count the number of times the majority repeats the term in its opinion: by my count, nineteen times. Having repeated its claim that "common sense" permits the conclusion that any ambiguous phone use while driving can be reasonably assumed the illegal kind, the majority conjures "reasonable suspicion" for such police stops into existence.

This heavy conclusion collapses on the flimsy scaffolding that the premise supporting it provides. What the majority considers "common sense" tells us more about the justices' own beliefs about drivers' phone use than it does any actual activity supporting the stop. We must require more than smoky incantations of "common sense" to give rise to such a sweeping right for government intrusion. Reliance on some sixth sense about the driver's phone use—as opposed to the officer's actual articulable observations—sets the reasonable suspicion bar on the floor and, in my view, invites widespread abuse of citizens' constitutional rights.

What proportion of the many thousands of uses of a smart phone by drivers are the forbidden variety? I don't know—and neither does the majority. The survey data the majority cites (uncited by any party

and absent from the record) certainly doesn't answer the question. The burden in proving a factual, articulable basis to support reasonable suspicion for a stop rests—as it always does, and always must—with the State. *State v. Tague*, 676 N.W.2d at 204. Cloaking a gut feeling with the words "common sense" isn't enough. "What it calls reasonable suspicion we call suspicion." *United States v. Paniagua-Garcia*, 813 F.3d 1013, 1015 (7th Cir. 2016) (Posner, J.). And mere suspicion is insufficient for the State to infringe the rights of law-abiding citizens under the constitution. *See, e.g.*, *Tague*, 676 N.W.2d at 204; *see also* Radley Balko, *There's No Way to Enforce a Texting While Driving Ban*, CATO Institute: Commentary (Oct. 13, 2009), www.cato.org/publications/commentary/theres-no-way-enforce-texting-while-driving-ban [https://perma.cc/2SLA-QFD5].

The facts of this case illustrate the absence of reasonable suspicion for the defendant's stop. The police officers observed Struve holding up the alighted phone at shoulder level for about ten seconds and swiping a few times at the screen with his finger. There's nothing about the height level at which he held the phone that makes Struve's use somehow more indicative of any forbidden use (e.g., viewing a text message) than any permitted use (e.g., viewing driving directions). Likewise, there's nothing revealed about the type of use from holding the phone for ten seconds; some shorter or longer duration (if it had been, say, five seconds or fifteen seconds) tells us nothing about whether it's a forbidden or permitted use. One could easily spend an equal amount of time

scrolling through posts on a social media app (forbidden) as scrolling through a list of songs titles on a music app (permitted), or typing a text (forbidden) as typing an address for driving directions (permitted). The same goes for swiping the screen with his finger; both forbidden uses and permitted uses where the driver swipes the screen appear identical to an observer who can't make out the screen. "No *fact* perceptible to a police officer glancing into a moving car and observing the driver using a cellphone would enable the officer to determine whether it was a permitted or a forbidden use." *Paniagua-Garcia*, 813 F.3d at 1014 (emphasis in original).[7]

For section 321.276 to be enforced as written, the observed driver would need to be moving slowly enough for an officer to see inside the vehicle, to make out the contents of the phone's screen, and to come to a conclusion about the phone function being employed. That's no easy task, but it's conceivable in some circumstances that an officer might be able to accomplish it. It didn't happen in this case, where the officers instead admitted to being unable to make out

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[7] Although irrelevant for purposes of the reasonable suspicion analysis upon which this case turns, Struve's counsel conceded at oral argument that his own claimed use of the phone while driving—to scroll through photographs—was a forbidden use under the statute. Not so. A driver viewing photos, without more, is not violating section 321.276. The majority twice references counsel's admission but—correctly—doesn't assert anywhere in its opinion that viewing photos while driving actually violates section 321.276. Struve never committed (nor even was charged with) any violation of section 321.276 that the police officers were investigating when they stopped his car.

the contents of the phone's screen. To conduct a stop, the State must both have an articulable basis for their suspicion of criminal activity and that articulable basis must be objectively reasonable. *State v. Salcedo*, 935 N.W.2d 572, 579 (Iowa 2019). The stop in this case, based on an observation only that the driver was viewing and touching a screen, fails that test.

The majority concedes that today's opinion aligns us with the *minority* of courts that have addressed this issue. Admittedly, cases from other jurisdictions are of limited help in our analysis because each state without a hands-free law has a slightly different statute with varying permitted or forbidden uses. But there's a common thread in the case law running directly counter to our court's holding today. All but one of the cases from other jurisdictions found "reasonable suspicion" lacking where the police couldn't articulate a basis for the stop that suggested the driver actually engaged in forbidden (as opposed to permitted) use of the phone. *See Paniagua-Garcia*, 813 F.3d at 1014 (finding no reasonable suspicion under Indiana's statute); *State v. Morsette*, 924 N.W.2d 434, 438–40 (N.D. 2019) (finding no reasonable suspicion under North Dakota's statute); *Rabanalas-Ramos*, 359 P.3d 250, 256 (Or. Ct. App. 2015) (finding no reasonable suspicion under Oregon's statute). The only phone case supporting today's holding is a court of appeals ruling from Oregon—and it conflicts with the holding of another Oregon court of appeals case. *Compare Nguyen Ngoc Pham*, 433 P.3d 745, 747 (Or. Ct. App. 2018), *with Rabanalas-Ramos*, 359 P.3d at 256.

Lacking support from the more analogous phone cases, the majority relies instead on vehicle registration cases. But those cases addressed reasonable suspicion for police stops involving unique vehicle registration issues, not use of smart phones while driving, and thus involve a completely different basis for articulating the reasonableness of a stop. The reasoning in those cases doesn't apply equally to the issues informing reasonable suspicion in this case, and thus they're of minimal value to us.

While reasonable suspicion doesn't require law enforcement to rule out the possibility of innocent conduct, *Kreps*, 650 N.W.2d at 642, the majority treats an unsupported hunch—that most phone use is the unlawful kind—as good enough to support a stop. And that's the real shortcoming of the majority's disposition in this case, which now authorizes that police here and henceforth may rely on speculation that a driver's use is one of the illegal varieties without any evidence that it really is. The assumption that every driver's ambiguous phone use is one of the handful of forbidden uses is contrary to our precedent, in which we've said that criminality "is never presumed." *Kutchera v. Graft*, 191 Iowa 1200, 1209, 184 N.W. 297, 301 (1921). Now, apparently, we can assume criminality whenever a driver glances at or touches a phone screen without knowing anything more.

The majority complains that requiring the police to possess specific and articulable grounds that a driver's phone use is one of the unlawful uses will hamper enforcement of this statute. But this is *as it must be* under our constitutional search and seizure

protections. The constitution is "the supreme law" in our State. Iowa Const. art. XII, § 1. Constitutional protections are not held in abeyance or demoted to second-class status simply because a legislative enactment is difficult to enforce as written. Enforcing a law like this one—with permitted phone uses and forbidden phone uses that appear absolutely identical to an observer—creates significant constitutional challenges. *See, e.g.*, Alan Lazerow, *Near Impossible to Enforce at Best, Unconstitutional at Worst: The Consequences of Maryland's Text Messaging Ban on Drivers*, 17 Rich. J.L. & Tech 1, 31– 38 (2010). But it can never be the court's job to expand the text of criminal statutes to secure for the State greater ease of some particular method of enforcement.

The statute itself severely restricts an officer's ability to investigate whether any offense occurred. Subsection 3 of the statute states: "Nothing in this section shall be construed to authorize a peace officer to confiscate a hand-held electronic communication device from the driver or occupant of a motor vehicle." Iowa Code § 321.276(3) (2019). By its terms, the statute prevents the police from taking possession of the phone to determine whether the type of use the driver had been engaging in violated the law. So where, as here, an officer has no idea whether the driver's use of a phone is one of the forbidden types, the statute's own enforcement restriction means that the only way an investigatory stop could result in a ticket is if the officer gets the driver *to admit* to engaging in one of the forbidden uses. The roadside stop and seizure of the driver in these situations, with its seemingly complete reliance on self-incrimination,

thus promotes little meaningful enforcement of this statute while imposing significant incursions on citizens' liberty interests.

A prior version of the statute explicitly addressed enforcement considerations by affirmatively *barring* the police from making stops based solely on a violation of this statute. When the legislature passed Iowa's first phone-related distracted driving law in 2010, the statute commanded that the police "shall not stop or detain a person solely for a suspected violation of this section." Iowa Code § 321.276(5)(*a*) (2011). Instead the statute could be enforced "only as a secondary action when the driver of a motor vehicle has been stopped or detained for a suspected violation of another . . . law." *Id.* The prior version thus prevented the constitutional infringement at issue in this case. But the Legislature revised the statute in 2017 and eliminated this language. *See* Iowa Code § 321.276 (2018).

Many states have passed laws taking a clearer, more categorical, approach that forbids all phone use while driving except for voice-activated or "hands-free" operation. Hands-free laws (as the name implies) prohibit all drivers from using hand-held phones while driving. With hands-free laws, reasonable suspicion *does* exist for police stops based on drivers looking at their phone screens because all uses that involve looking at the screen while driving are unlawful. Such laws help address the enforcement problem section 321.276 presents with its few restricted uses and broad universe of permitted uses.

The willingness to engage in unfounded assumptions that ambiguous conduct is criminal

conduct opens the door to many other unlawful stops being upheld. Say, for instance, an officer sees a driver take a drink from a can with the can's label obscured by the driver's hand. Is it a can of beer or a can of pop? As with the driver's cell phone use in this case, the officer is left to guess whether the conduct is the forbidden type. Under the reasoning adopted today, the possibility it might be beer and not pop, however remote, would justify stopping the driver. *See Paniagua-Garcia*, 813 F.3d at 1015 (describing a similar hypothetical). Citizens concerned with protection of their basic civil liberties might justifiably wonder how, and where, the court draws these lines moving forward.

Smart phones "are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." *Riley v. California*, 573 U.S. 373, 385, 134 S. Ct. 2473, 2484 (2014) (Roberts, C.J.). It is not hyperbole to say that *millions* of law-abiding Iowans risk suffering the inconvenience, humiliation, and violation of their rights that comes with the sweeping stop-and-interrogate right granted today to the government. Distracted driving is a serious matter, "but so is the loss of our freedom to come and go as we please without police interference." *Navarette v. California*, 572 U.S. 393, 414, 134 S. Ct. 1683, 1697 (2014) (Scalia, J., dissenting). Today's majority opinion risks infringing the constitutional freedoms of law-abiding drivers based on nothing more than suspicion. I respectfully dissent.

Christensen, C.J., and Appel, J., join this dissent.

State of Iowa Courts

Case Number	**Case Title**
19-1614	*State v. Struve*

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APPENDIX D

IN THE IOWA DISTRICT COURT IN AND FOR CLINTON COUNTY

STATE OF IOWA, Plaintiff, vs. STEVEN EDWARD STRUVE, Defendant.	No. FECR076297 **VERDICT AND ORDER REGARDING PLEA AGREEMENT**

This matter came on for trial on 10/12/19. The Defendant appeared in person and with attorney Harold DeLange. The State appeared by Assistant Clinton County Attorney James McHugh.

At the outset of trial, the Defendant withdrew his guilty plea and plea agreement filed 8/7/2019 without objection from the State. The Court ORDERS that said withdrawal of plea and plea agreement is GRANTED.

Pursuant to the amended trial information herein, Struve is charge in a two count trial information with Count 1, POSSESSION OF A CONTROLLED SUBSTANCE WITH THE INTENT TO DELIVER, NAMELY METHAMPHETAMINE in violation of 124.401(1)(c)(6) of the Code of Iowa, a Class C Felony,

and Count 2, FAILURE TO AFFIX IOWA DRUG TAX STAMP, a Class D Felony, a violation of 453B.12, Code of Iowa.

Struve moved to proceed to trial on the minutes of evidence and attachments thereto. After engaging in a colloquy with the him regarding the rights waived by such an election, the Court granted the motion.

The minutes of evidence and attachments were filed on 10/11/18 with additional minutes filed 4/2/19.

As to Count 1, the State must prove all of the following elements of Possession Of A Controlled Substance With Intent To Deliver, Methamphetamine:

1. On or about October 2, 2018, the defendant knowingly possessed METHAMPHETAMINE, a Schedule II controlled substance.
2. The defendant knew that the substance he possessed was METHAMPHETAMINE, a controlled substance.
3. The defendant possessed the substance with the intent to deliver a controlled substance.

As to Count 2, The State must prove each of the following elements of Drug Stamp Tax Violation:

1. On or about October 2, 2018, the defendant knowingly possessed, distributed, or offered to sell METHAMPHETAMINE, a Chapter 453B taxable substance.
2. The METHAMPHETAMINE that defendant possessed, distributed, or offered to sell did not have permanently affixed to it a stamp, label or

other official indication of payment of the state tax imposed on the substance.

A reading of the minutes, additional minutes and attachments discloses the following allegations, which are taken as factual in this instance:

On October 2, 2018, Sturve [sic] was stopped for texting while driving in the city of Clinton, Clinton County, Iowa by city police officers. During the stop, officers observed in plain view, a clear glass pipe connected to a bong. The contents of the bong plus a clear crystal substance found in a large baggie were determined to be methamphetamine in an amount of 25.5 grams. No drug tax stamps were observed to be located on the baggie. Laboratory testing confirmed that the white powder found, was methamphetamine. All of these events took place in Clinton County, Iowa.

Based on the above facts, the Court FINDS Struve is GUILTY as charged in Amended Count 1 and Count 2.

Sentencing is set for August 29, 2019 at 10:00 a.m.

State of Iowa Courts

Type:	OTHER ORDER
Case Number	**Case Title**
FECR076297	STATE OF IOWA VS STRUVE, STEVEN EDWARD

So Ordered

/s/

Stuart P. Werling, District Court Judge, Seventh Judicial District of Iowa

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APPENDIX E

IN THE IOWA DISTRICT COURT IN AND FOR CLINTON COUNTY

STATE OF IOWA,	)	
	)	
Plaintiff,	)	**Case No. FECR076297**
	)	
v.	)	**RULING ON**
	)	**DEFENDANT'S**
STEVEN EDWARD	)	**MOTION TO**
STRUVE,	)	**SUPPRESS**
	)	
Defendant	)	

A contested hearing on Defendant's Motion to Suppress was held on June 5, 2019. The State was represented by Assistant Clinton County Attorney James M. McHugh. Defendant was personally present and was represented by attorney Harold J. DeLange, II.

Defendant is charged as by Trial Information with two counts: Count 1, Possession of a Controlled Substance with Intent to Deliver, namely Methamphetamine, in violation of Iowa Code § 124.401(1)(b)(7) and § 124.413 and has been convicted of two prior felony drug offenses under § 124.411. Count 2 charges Defendant as an habitual offender under Failure to Affix Iowa Drug Tax Stamp on Taxable Substance, in violation of Iowa Code § 453B.3 and § 453B.12, and has been convicted of two

prior felony offenses in this state or any other state under Iowa Code § 902.8 and § 902.9

Defendant filed a Motion to Suppress claiming a violation of the Constitution of the State of Iowa, Article I, Section 8, as well as a violation of the United States Constitution, 4th Amendment.

Specifically, Defendant argues he was stopped without sufficient probable cause and the subsequent warrantless search of his vehicle was without his consent in violation of his rights to be free from unreasonable search and seizure under the Iowa State Constitution and the United States Constitution as set forth above. As a result, Defendant requests that all evidence obtained as a result of the stop be suppressed. The State resists, contending Defendant's rights were not violated.

The court has now heard the arguments of counsel and reviewed the court file, including State's Exhibit 1, which is Officer Schumacher's body camera video; State's Exhibit 2, which is Officer Blake's body camera video; and State's Exhibit 3, which is the squad car video. The court heard testimony from Officers Shumacher [sic] and Blake. The court finds the following facts and conclusions of law.

FINDINGS OF FACT

Around 9:00 p.m. on October 2, 2018, Clinton Police Officers Schumacher and Blake were driving west bound on Camanche Avenue. It was dark at this time of the evening. This portion of the roadway is three lanes. The unmarked squad car was slightly behind and to the left of Defendant's vehicle at this time. Defendant's vehicle was traveling within the speed

limit and had all lights functioning. Both officers observed there was light in the front seat compartment of Defendant's vehicle coming from the cell phone Defendant was holding in front of his face as he drove. Both officers testified they saw him manipulating the cell phone. Officer Blake explained this meant he could see Defendant's thumb traveling about the screen of the cell phone. He told Officer Schumacher it was illegal to text and drive so they determined to initiate a traffic stop. Defendant pulled his car over.

Officer Schumacher approached the driver's side of the vehicle and Officer Blake approached the passenger side of the vehicle. Neither officer recognized the vehicle or the driver before pulling it over; but once Officer Schumacher got to the driver's side and saw Defendant, he recognized Defendant. In the car with Defendant was a female in the front passenger seat and a dog in the rear seat. Officer Schumacher explained to Defendant he was pulled over because it was illegal to text on the cell phone while driving. Defendant responded he did not know it was illegal and he was searching his photo gallery showing photos to his passenger.

Both officers were using their flashlights to illuminate the interior of Defendant's vehicle. Officer Blake observed what he thought was a meth pipe in the back seat in plain view. He alerted Officer Schumacher he saw a meth pipe. Officer Schumacher looked and thought he saw the neck and top of a bong. Both items are considered drug paraphernalia.

Once this drug paraphernalia was observed, the officers decided to have the passengers exit the

vehicle and then conduct what they called a probable cause search of the vehicle. The passenger was removed first and was told to sit on the curb slightly behind the vehicle. Defendant was removed next and sat next to the female passenger. Defendant asked if he could retrieve the dog. The officers agreed and Defendant returned to the car and began reaching in the seats to find a leash. The dog was secured on the leash and removed from the car to sit with the Defendant and passenger. By this time, Sergeant Lorenzen had arrived in a squad car.

Once the occupants of the vehicle were out of it, the officers determined they had probable cause to search because of the illegal paraphernalia they observed in plain view in the back seat of Defendant's vehicle. Officer Schumacher searched the front compartment and Officer Blake searched the rear compartment. Officer Schumacher had trouble lifting the console lid and discovered some screws were missing. It was finally opened and underneath the tray of the console, a quantity of methamphetamine and a digital scale were found. Officer Blake's search revealed the meth pipe he saw was attached to the bong Officer Schumacher had seen. Nothing else of evidentiary value was discovered in the back compartment of the vehicle.

The officers' interactions were captured on their body cameras and on the squad car camera, all of which were admitted as exhibits without objection. These videos all corroborated what the police officers said took place. It is obvious when Defendant was pulled over, he had the cell phone in his hand in front of him. The screen was lit indicated it was in use.

When told it was illegal to use the cell phone in Iowa while driving, he said he did not know that and thought it was just illegal in Illinois. He admitted to using the cell phone while driving.

CONCLUSIONS OF LAW

The Fourth Amendment to the United States Constitution and the Iowa Constitution both protect individuals against unreasonable searches and seizures. *See Mapp v. Ohio,* 367 U.S. 643, 655 (1961). The State must prove by a preponderance of the evidence that Officers Schumacher and Blake had probable cause to make the stop. *State v. Tague,* 676 N.W.2d 197, 201 (Iowa 2004). "[I]t is well settled that a traffic violation, however minor, gives an officer probable cause to stop a motorist." *State v. Aderholdt,* 545 N.W.2d 559, 563 (Iowa 1996). Once a lawful stop is made, an officer may conduct an investigation reasonably related in scope to the circumstances which justified the stop. *Id.*

Here, the officers saw Defendant holding a cell phone in front of his face and using his thumb on the cell phone as if he were texting or searching. The phone's back light made the interior of the vehicle visible to the officers. The officers believed Defendant's usage of the cell phone while he was driving was a violation of Iowa Code § 321.276. Iowa Code § 321.276(2) provides: A person shall not use a hand-held electronic communication device to write, send, or view an electronic message while driving a motor vehicle unless the motor vehicle is at a complete stop off the traveled portion of the roadway. Here, it is undisputed Defendant was not stopped, but was driving on the roadway.

Section (a) of 321.276(2) further provides: A person does not violate this section by using a global positioning system or navigation system or when, for the purpose of engaging in a call, the person selects or enters a telephone number or name in a hand-held mobile telephone or activates, deactivates, or initiates a function of a hand-held mobile telephone. According to the squad car video, Defendant told Officer Schumacher he did not know his actions were illegal and he was surfing his photo gallery showing photos to his female passenger. This is not one of the exceptions under Iowa Code § 321.276(2)(a).

The court finds the stop of Defendant's car was lawful. Officer Schumacher and Officer Blake had a reasonable suspicion and belief that Defendant was texting or improperly operating his cell phone when they observed him manipulating the screen while driving on a roadway. Iowa Code § 321.276 is a primary violation giving officers the authority to pull Defendant over under the belief Defendant violated that statute. The statute does not provide an exception for surfing a photo gallery as it does for placing a telephone call, using GPS or a navigation system, or deactivating a telephone call. Thus, the officers stopped Defendant for a reasonable belief Defendant violated Iowa Code § 321.276.

Once a lawful stop is made, a law enforcement officer can conduct an investigation "reasonably related in scope to the circumstances which justified the interference in the first place." *Aderholdt,* 545 N.W.2d at 563-64. In forming a basis for reasonable suspicion, an officer may draw on his own experiences and specialized training to make inferences from and

deductions about the cumulative information available to him that might elude an untrained person. *United States v. Ameling,* 328 F.3d 443, 447 (8th Cir. 2003). The State must prove by a preponderance of the evidence that the officer had specific and articulable facts, which taken together with rational inferences from those facts, led him to reasonably believe criminal activity may have occurred. *State v. Tague,* 676 N.W.2d at 204. Mere suspicion, curiosity, or hunch of criminal activity is not enough. *State v. Kreps,* 650 N.W.2d at 641.

Defendant elicited information from both officers that they did not personally know if the cell phone was checked to see what operation was being performed when Defendant was stopped. Based on Defendant's admission, it was not necessary for the officers to do this before stopping him as they had a reasonable suspicion his activity of moving his thumb back and forth across the lighted cell phone screen was operating the cell phone in an illegal manner upon a roadway.

More importantly to the issue in this motion to suppress, when officers approached the vehicle, they observed drug paraphernalia in plain view in the backseat of the vehicle. Since seeing this drug paraphernalia raised suspicions unrelated to the traffic offense, the officers' inquiry may be broadened to satisfy those suspicions. *See State v. Greene,* 709 N.W.2d 535, 536 (Iowa 2006). The officers' search of the vehicle's interior, including the center console, was authorized due to their plain view of illegal materials in the car and under the automobile exception to the warrant requirement.

Defendant argues the Iowa Supreme Court case of *State v. Ingram,* 914 N.W.2d 794 (Iowa 2018), supports his position that a warrant was required to search the vehicle. This court disagrees. *State v. Ingram* involved a warrantless search of a vehicle that had been impounded and was an inventory search. *Id.* at 820-21. An inventory search is a completely different situation than a search based on the plain view doctrine.

The case more on point based on these facts is *State v. Storm,* 898 N.W.2d 140, 156 (Iowa 2017). There, the Iowa Supreme Court held the automobile exception to the warrant requirement is a bright-line rule and held that exception allows automobile searches when there is reasonable suspicion or probable cause without obtaining a warrant.[1] Based on that holding, this court must find the officers' search of the interior of Defendant's vehicle after seeing drug paraphernalia in plain view as proper despite the lack of a warrant or Defendant's consent. Therefore, Defendant's

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[1] The Court may have come to a different conclusion had the search taken place after Defendant had been arrested. *See State v. Gaskins,* 866 N.W.2d 1, 14 (Iowa 2015). In *Gaskins,* the Iowa Supreme Court stated the automobile exception may not apply if a Defendant is under arrest and unable to access anything in the vehicle. *Id.* at 16. A search incident to arrest would give law enforcement ample time to get a warrant without any exigent circumstances arising from the fact it is a vehicle that is being searched. *Id.* A vehicle could easily be impounded by the police and then a warrant obtained before the search. The facts before this court indicate Defendant was outside of the vehicle; however, he was not arrested until after the additional evidence was found in the vehicle. While this may seem to be an inconsistent result, it is this court's opinion this is the current law.

subsequent arrest and seizure of items found in the vehicle, including the center console, were lawful.

For all of these reasons and the authority cited, Defendant's motion to suppress fails.

RULING

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant's Motion to Suppress is DENIED in its entirety.

State of Iowa Courts

Type:	OTHER ORDER
Case Number	**Case Title**
FECR076297	STATE OF IOWA VS STRUVE, STEVEN EDWARD

So Ordered

/s/

Marlita A. Greve, Chief District Judge, Seventh Judicial District of Iowa

Electronically signed on 2019-06-05 16:55:19

APPENDIX F

IN THE IOWA DISTRICT COURT FOR CLINTON COUNTY

STATE OF IOWA,	)	
Plaintiff,	)	
	)	
-vs-	)	Case No. FECR076297
	)	
STEVEN E. STRUVE,	)	
Defendant.	)	
	)	

TRANSCRIPT OF MOTION

The above-entitled matter came on before the Honorable Marlita A. Greve on the 5th day of June, 2019, at the Clinton County Courthouse in the city of Clinton, Iowa.

APPEARANCES

Plaintiff by: JAMES M. McHUGH
Assistant County Attorney 400
West Fourth Street
Davenport, IA 52801

Defendant by: HAROLD J. DeLANGE II
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Davenport, IA 52803

Jill R. Dankert
Certified Court Reporter
Scott County Courthouse
Davenport, Iowa 52801

INDEX - WITNESSES

State's Witnesses

INDEX-EXHIBITS

State's Exhibits		Offered	Received
1	Schumacher's body camera video	8	8
2	Blake's body camera video	25	25
3	In-car camera video	26	26

[1] **PROCEEDINGS**

(The following proceedings were held in open court with the Court, counsel, and the defendant present.)

THE COURT: We are here in the matter of the State of Iowa versus Steven Edward Struve. This is case FECR076297. Mr. Struve is here along with his attorney, Harry DeLange, and the State is present through Assistant County Attorney James McHugh.

We're here today on the defendant's motion to suppress evidence, which was filed on May 7th. I've also received and reviewed the State's resistance to the motion, which was filed on June 3rd.

Mr. McHugh.

MR. McHUGH: Thank you, Your Honor. The State will begin by calling Roger Schumacher to testify.

ROGER SCHUMACHER,

called as a witness by the State, being first duly sworn by the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. McHUGH:

Q Can you state your name for the record?

A Roger Schumacher.

Q And how are you employed?

A I work for the City of Clinton Police Department.

Q And can you briefly go over your background, [2] training, and experience in law enforcement?

A I've been with the Clinton Police Department for approximately 13 and a half years. I'm a graduate

of the Iowa Law Enforcement Academy. I'm currently assigned to the Street Crimes and Targeting Enforcement Team within the Department.

Q I want to turn your attention to October the 22nd of 2018. What role were you employed in at that time?

A Under my current assignment, member of the S.C.A.T.T. team.

Q Now, were you involved in a traffic stop of a vehicle driven by the defendant?

A Yes, I was.

Q How did that come about?

A We were driving on Camanche Avenue, and we observed the vehicle to our right, in which the driver was manipulating his cell phone while he was driving down the street.

Q Now, Camanche Avenue, is that a two-lane road, four-lane divided highway? What road is it?

A I want to say that portion has got three lanes, but I'm not exact.

Q Okay. So you were -- when you say on your right-hand side, they were driving in a different lane than you?

[3] **A** Correct.

Q And so were the vehicles side by side, or was one ahead of the other, or what was the --

A I believe the other vehicle was slightly ahead of us.

Q Did you have a clear view into the passenger compartment of that vehicle?

A I could just see the driver's -- the front seat was illuminated by the light from the cell phone. I could see that there were two occupants.

Q All right. What time of night was it?

A I believe it was just before 9 p.m.

Q Which would have been dark then?

A Yes, sir.

Q Okay. Were you able to -- so the lighted cell phone was illuminating the compartment?

A Correct.

Q And what did you observe the driver doing?

A It appeared as if he was manipulating the phone while it was in his hand.

MR. DeLANGE: I didn't hear the last part of that.

THE WITNESS: While it was in his hand.

BY MR. McHUGH:

Q Could you see the phone from your vantage point?

A I could not see what was on the screen, no.

[4] **Q** Could you see the phone itself?

A Yes.

Q Where was he holding it?

A It was held in front of his face.

Q Okay. And he was operating the vehicle; is that correct?

A Yes, sir.

Q What happened next?

A We initiated a traffic stop, and the vehicle, I believe, pulled into the 200 block of 22nd Place.

Q What happened upon stopping the vehicle?

A Upon making contact with the driver, who was identified as Steven Struve, he was still manipulating the cell phone in front of his person.

Q Did you have a conversation with him about the cell phone and the use of it?

A Yes. I explained to him that we had stopped him for that reason and that it was illegal to be texting while he was driving down the road. Mr. Struve indicated he did not know it was illegal in Iowa and proceeded to say that he was going through his gallery and showing photographs to his passenger.

Q What happened after that?

A I asked Mr. Struve for his license, registration, and proof of insurance. While he was collecting that stuff, [5] my partner, Officer Blake, who was on the passenger side of the vehicle, indicated that he could see in plain view what appeared to be a meth pipe in the back seat.

Q And I guess you testified to it, but you were not alone, then. You had a two-man unit?

A Correct.

Q Upon the statement by your colleague, what happened next?

A Officer Blake had the passenger step outside of the vehicle. Mr. Struve remained in the vehicle while

he was trying to retrieve insurance information from his cell phone.

Q So how many occupants were in the vehicle?

A There was two, and a dog.

Q And what size dog are we talking about?

A I believe it was a young dog. It wasn't a small puppy, but it was a young dog.

Q Was it restrained in any fashion?

A I believe it had a leash on, but I'm not certain.

Q Okay. Was it able to move about the compartment?

A In the passenger compartment, yes.

Q So what happened next?

A After Mr. Struve provided the insurance information, I asked him to exit the vehicle, and he stood by with Sergeant Lorenzen, who had arrived on scene.

[6] **THE COURT:** Okay. I couldn't hear the last part of it. He what?

THE WITNESS: He stood by with Sergeant Lorenzen, who had arrived on scene.

BY MR. McHUGH:

Q Now, at this point in time, you've testified that Officer Blake had seen the meth pipe. Had you looked for it at this point in time?

A Yes. When he initially indicated that he could see a meth pipe, I looked in the back seat. I could not see the meth pipe, but I could see what looked like the neck, or the top of what I believed to be a bong.

Q Now, moving forward, then. Once Mr. Struve was removed from the vehicle, what happened next?

A We conducted a probable cause search of the vehicle.

Q Was that conducted immediately, or was there a delay for any reason?

A There was a delay until everybody was removed and the dog was removed from the vehicle.

Q Once the dog was removed, what happened next?

A Then we began to check the vehicle.

Q And where were you looking?

A I checked the front seat -- or the front compartment of the vehicle.

[7] **Q** What did you observe upon doing that?

A I attempted to open the center console. The console would not open. It kept catching. I looked, and it appeared as if the inner tray was attached to the lid. After depressing the lever to release the lid, the compartment fell back into place. I observed that there was no factory screws in place with the inner compartment and they had all been removed. I lifted that tray, or inner compartment, and I observed two digital scales and a plastic bag containing suspected methamphetamine.

Q And that's the basis of the charge today, correct?

A Correct.

Q Did you complete your search of the vehicle?

A Yes.

Q Were you involved in the seizing of the meth pipe, bong item?

A Officer Blake removed that from a bag from the back seat.

Q Did have you a chance to see it in any detail?

A Yes. I believe it was -- the meth pipe was attached to the bong.

Q So the item that you saw and the item that Officer Blake saw, we're talking the same item?

A They were the same item. I just observed the opposite end of it.

[8] **Q** Different prospectives [sic]?

A Correct.

Q You have a body camera; is that correct?

A Correct.

Q Was it active on that day?

A Yes, sir.

Q Did you have video from your body camera phone on this traffic stop?

A Yes.

MR. McHUGH: Your Honor, by parties agreement, I'd offer into evidence State's Exhibit 1, the body camera.

THE COURT: Do you have any objection?

MR. DeLANGE: No objection, Your Honor.

THE COURT: Yes, you may.

MR. McHUGH: Thank you, Your Honor.

Now, I don't intend to play it. I'll leave it for the Court's discretion.

I have no further questions of this witness.

THE COURT: You may cross-examine.

CROSS-EXAMINATION

MR. DeLANGE: Thank you, Your Honor.

BY MR. DeLANGE:

Q This was about nine o'clock at night on the 2nd of October; is that correct?

A Correct.

[9] **Q** Was it completely dark or dusk; do you recall?

A Not specifically, but at around 9 o'clock it should be dark.

Q Did you have your headlights on?

A I believe so.

Q And the Bonneville, did it have its headlights on also?

A I would assume so, unless we would have -- it probably would have been part of the traffic stop.

Q Okay. Do you know if the Bonneville had tinted windows or not?

A I don't believe so. I want to say that the window was down.

Q Which window?

A I guess it would be October. I don't -- I don't recall there being tinted windows, sir.

Q And there's nothing in your report about a window being down, is there?

A No.

Q And you reviewed your report prior to testifying?

A Just my report, yes.

Q Okay. And you were behind and to the left of the vehicle; is that correct?

A Correct.

Q And give me an idea how far behind. I mean, where [10] was the front of your squad -- or was this an unmarked car?

A It was an unmarked car.

Q Where was the front of your vehicle in relation to the Bonneville?

A Exact distance I wouldn't know, but we were in a position that we were able to see into the driver's window through an angle.

Q Do you remember whether or not the front of your vehicle was even with any part of the Bonneville, or was it behind the Bonneville?

A That, I do not.

Q Okay. Is there squad video?

A Yes, there is, sir.

Q It's my understanding there will be squad video that will be entered later today. Would that actually give the position of the vehicles?

A Yes, sir.

Q All right. And did you -- you noticed, according to your testimony, that the driver had his cell phone up to his face; is that correct?

A Correct.

Q Was it right in front of his face, off to one side or the other?

A I could just see that he had a phone in front of him and it was illuminated.

[11] **Q** And it was illuminated. And could you see anything else relative to the phone before you made the traffic stop?

A Just that it appeared that he was manipulating it with his hand.

Q What do you mean "manipulating it"?

A Like, with his finger across the screen. I could not see what was on the screen.

Q Could you tell if it was an up-and-down motion or side-to-side motion --

A No, sir.

Q -- or what we would normally describe as a typing motion if you were texting? Could you tell whether any of those actions were going on?

A Not with certainty, no.

Q Did you observe any other traffic violations?

A No. Not at that time.

Q The vehicle was going the appropriate speed?

A I believe so.

Q The vehicle was not swerving in its lane or swerving across the line of traffic?

A Correct.

Q Okay. And nothing else illegal about the vehicle? It had the proper license plate and proper lighting and those types of things?

[12] **A** I believe so.

Q Were you familiar with this vehicle at all from any prior contacts?

A Not that vehicle, no.

Q Were you familiar with Mr. Struve from any prior contacts?

A Yes.

Q And when did you become aware that Mr. Struve was driving the vehicle?

A When I made contact with him at the door.

Q Did you know that Mr. Struve was driving the vehicle prior to your stopping?

A No, sir.

Q Now, you retrieved the cell phone that Mr. Struve was using; is that correct?

A I believe Officer Blake collected some cell phones, yes.

Q And would that have been one of the cell phones that's in evidence that was collected?

A I would assume so, yes.

Q And the traffic stop was approximately 8:52, it looks like, according to your police report. Did you

ever go through the cell phone to see if there were any texts sent at 8:52 from this cell phone or received approximately 8:52 from that cell phone?

[13] **A** I did not, no.

Q Do you know if anybody else did?

A No, I do not.

Q When you stopped the vehicle, was Mr. Struve cooperative?

A Yes.

Q Did he seem nervous at all?

A Not specifically.

Q Okay. Anything out of the ordinary from any other traffic stop that you deal with people?

A Other than the drug paraphernalia in the back seat, no.

Q Okay. All right. And that was, actually, first seen by Officer Blake and not yourself, correct?

A Correct.

Q And when you were at the -- and I take it you were at the driver's side window; is that correct?

A Yes, sir.

Q And Mr. Struve was seated in the driver's seat, correct?

A Yes.

Q Were the interior lights on in the car at all?

A No, I don't believe so.

Q Was there any other illumination in the car other than the cell phone?

[14] **A** At the time of the stop?

Q At the time you approached and were at the window of the driver of the vehicle.

A No. None other than, perhaps, our flashlights.

Q Were you using your flashlight at the time?

A Yes, because it was at nighttime.

Q And were you illuminating the inside of the vehicle with your flashlight?

A I'm sure I illuminated the back seat after Officer Blake notified me, but my focus was on Mr. Struve when I was talking to him.

Q Would you have your flashlight on also at the time you were talking to Mr. Struve?

A I believe so.

Q Would that be kind of standard procedure?

A Yes, sir.

Q All right. Now, you were alerted that Officer Blake had observed what he believed to be a meth pipe, correct?

A Correct.

Q And at that time it's my understanding that the passenger was taken from the vehicle; is that correct?

A Correct.

Q And was she -- what happened with her? Where did she go?

[15] **A** I believe she was asked to sit down on the curb along side the vehicle, just behind it.

Q Okay. So she was outside the vehicle and away from the vehicle?

A Yes, sir.

Q And was Mr. Struve still in the vehicle at that time?

A Yes.

Q And, then, when was he removed from the vehicle?

A I believe he was removed after he recovered his insurance information from his cell phone.

Q And as I understand it, from your report, his insurance information was in his phone.

A Yeah, I believe so.

Q And he had to manipulate with his phone to get to the insurance information?

A Correct.

Q And was his insurance current?

A Yes.

Q So then once he does that, you take him out of the vehicle; is that correct?

A Yes, sir.

Q And then what -- where does he go?

A With the passenger.

Q And are they standing or seated outside the [16] vehicle?

A I believe they were seated on the side of the curb.

Q Okay. And was this -- would this have been behind the vehicle?

A Yes.

Q Okay. And how far away from the vehicle were they seated on the curb?

A I believe it would have been between our unmarked squad and their vehicle.

Q Okay. And were there any other officers at the scene at that time?

A Sergeant Lorenzen had arrived on scene.

Q So now we have two squads and three officers on the scene?

A Correct.

Q Okay. And just out of curiosity, what happened with the dog?

A I believe Mr. Struve removed the dog from the vehicle.

Q Where did you put the dog?

A I believe he had it with him on a leash.

Q Okay. All right. And then you commenced to search the vehicle once Mr. Struve was removed from the vehicle?

[17] **A** Correct.

Q And did Mr. Struve ever give consent to search the vehicle?

A No, sir.

Q Did you ask him for consent?

A No.

Q Was there ever a warrant obtained to search the interior of the vehicle or any contents of the vehicle?

A No, sir.

Q And you searched the front seat, correct?

A Correct.

Q And you say the -- you searched kind of the middle container, the middle compartment, between the two seats; is that right?

A Yes. The center console.

Q These are bucket seats. This isn't a bench seat. These are two bucket seats with a console in the middle?

A I don't recall with that specific vehicle if there was a drop-down console or not, but there was a center console between the two front seats.

Q And as I understand it, you were having trouble getting the top of the console open because you had to hit a latch to open it up, correct?

A Correct.

Q And then it is my understanding, also, that when [18] you did that and you opened the console, the actual container itself came up with the lid; is that right?

A Yes. That's why it would not open, because when I was lifting the lid, the inner compartment was catching on the frame, per se.

Q Okay. And so then you retrieved the contraband, what appeared to be methamphetamine,

and scales. Were they underneath what would have been the compartment itself?

A Yes.

Q So they were, actually, in -- kind of more in the car frame. It would have been underneath the --

A It was underneath the plastic tray, yes.

Q Did you retrieve anything else other than those items?

A I don't believe so.

Q And at some point Mr. Struve was placed in handcuffs. Can you tell me when he was placed in handcuffs?

A I believe Officer Blake secured him in cuffs. Or he was secured in cuffs after the methamphetamine was located.

Q Okay. And was he arrested at that time?

A I believe he was advised that he was just detained at that time.

Q Okay. What was the status of the passenger at that time?

[19] **A** I don't recall. I believe Sergeant Lorenzen was speaking with her.

Q Do you know whether she was ever detained or arrested?

A She was not arrested. I don't recall if she was detained in cuffs or anything.

Q Okay. But she -- just for clarity sake, neither party had access to the vehicle at this time; is that correct?

A Correct.

Q And neither party had access to the vehicle when you began your search of the front seat; is that also correct?

A Correct.

MR. DeLANGE: I have no further questions. Thank you.

THE COURT: Any redirect?

MR. McHUGH: No, Your Honor.

THE COURT: You may step down. Thank you.

THE WITNESS: Thank you.

MR. McHUGH: The State calls Curtis Blake to testify, Your Honor.

[20] **CURTIS BLAKE,**

called as a witness by the State, being first duly sworn by the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. McHUGH:

Q Please state your name for the record.

A Curtis Blake.

Q And how are you employed?

A With the Clinton Police Department.

Q And can you briefly go over your background, training, and experience in law enforcement?

A I was hired for the City of Urbandale within the State of Iowa in October of 2012. While there, I completed the Iowa Law Enforcement Academy, went through a few months of the FTO process and

continued on with patrol until October of 2014, when I transferred to the City of Clinton. I continued in patrol capacity here until April of last year, when I was transferred into the Street Crimes and Targeting Enforcement Team.

Q And on October 2nd of 2018, would that have been your position within the police department?

A Yes, it was.

Q Were you riding with Officer Schumacher that night?

A Yes, I was.

[21] **Q** Were you involved in the traffic stop of the defendant?

A We were.

Q What did you observe at the outset of that incident?

A Just before making the stop, we were traveling westbound on Camanche Avenue. We were overtaking, or passing the vehicle. The vehicle was on the right-hand side. I was the passenger of our vehicle. As we began to pass the vehicle, I noticed a screen lighting up the inside of this vehicle. We continued alongside of the vehicle for another ten or so seconds. I was continuing to monitor the driver, who was on, what appeared to be, a cell phone, and it looked like he was manipulating the screen with his thumb as he was driving. I told Officer Schumacher the violation, and we conducted a traffic stop for the texting while driving.

Q And so during this process, did you have a clear view of the driver and what he was doing?

A I could not see his face. I didn't pull up right alongside of him. We were just behind him, so I wasn't able to see his face, but I was able to view his hands and the fact that his hand was up in front of his face with the cell phone and that he was manipulating the screen.

Q And then that was the basis of the traffic stop?

[22] **A** Yes, it was.

Q What happened next?

A We approached -- Officer Schumacher approached the driver. I approached the passenger side. There was a female passenger in the vehicle. I spoke with her as Officer Schumacher spoke with the driver, the defendant. Per what we usually do for officer safety concerns, I looked inside of the vehicle for any potential weapons or any contraband. I noticed in the back seat there was a bag. This bag had a methamphetamine pipe, that was later determined to be attached to a bong, protruding from this bag. I alerted Officer Schumacher to the observed pipe, at which point we determined that we were going to remove both subjects from the vehicle and conduct a probable cause search of the vehicle.

Q And were they the only two occupants of the vehicle?

A Yes, there were.

Q Was there any other creatures in the vehicle?

A There was a dog in the vehicle.

Q And where was that dog located at the time you were at the traffic stop?

A At the time it was in the back seat as well.

Q So after the humans were removed, what happened next?

[23] **A** I believe the defendant wanted to remove his dog from the vehicle, which I wasn't opposed to because I didn't want the door to be open and the animal to take off while we're also securing the scene. So he was granted permission to remove the dog from the vehicle in order for us to conduct the search.

Q Did he approach the vehicle again during this time period?

A Yes. He returned to the vehicle. We were looking for a leash, something to be able to hold on to the dog aside from just grabbing on to its collar. We were able to locate the leash. He was able to get the dog out of the vehicle while we were able to continue with the investigation.

Q All right. So once the passenger -- the occupants and the dog were removed, what happened next?

A A probable cause search was conducted of the vehicle. Officer Schumacher removed -- or attempted to remove the lid to the center console. It appeared that the interior tray was stuck to the lid. So when he was able to get the top removed, it fell back down in, making it appear that it was easily removed. He was able to remove said tray. Underneath, he located a bag of a substance consistent with ice methamphetamine.

Q And where were you while he was doing this?

[24] **A** I'm not 100 percent certain when he located that. I believe the majority of my search was in the rear of the vehicle, where I located the paraphernalia. He was toward the front of the vehicle, looking through where the driver could reach and such.

Q So while he's searching the front, you're searching the back?

A Yes. For the most part.

Q And so, then, you locate the drug paraphernalia that you had spotted earlier?

A Yes.

Q And you described it again before, but can you describe it again when he took it out of the bag?

A Yes. Once it was removed from the bag, I noticed -- when I first saw it, it looked like a methamphetamine pipe protruding from the bag. Once I was able to open the bag and look at it, there was also a large neck for, what appeared to be, a bong. The methamphetamine pipe was attached to that bong, making it a methamphetamine bong. Within that same bag, there was also a notebook with an email with the name "Steven Struve" on there, as well as other passwords -- or what appeared to be passwords within it, and an Xbox.

Q Did you continue on with your search after this point in time?

[25] **A** I believe we thoroughly searched the vehicle, even after finding the methamphetamine and the drug paraphernalia.

Q Now, you had a body camera during this time period?

A Yes.

Q And was that activated?

A Yes, it was.

Q And was there a video of your interactions with the defendant on that night?

A Yes, there is.

MR. McHUGH: Your Honor, by stipulation, I offer into evidence State's Exhibit 2, the body-worn camera of Officer Blake.

THE COURT: Any objection?

MR. DeLANGE: No objection, Your Honor.

THE COURT: Exhibit 2 is admitted.

BY MR. McHUGH:

Q Now, is your squad vehicle equipped with a squad camera?

A Yes, it is.

Q And was that squad camera functioning that night?

A Yes, it was.

Q Did that capture video from this interaction?

A It captured the 30 seconds prior to us engaging [26] our lights, which would also include, on that camera, observations of the defendant using his cell phone while driving.

MR. McHUGH: Your Honor, I'd offer into evidence State's Exhibit 3, the in-car camera from the traffic stop.

MR. DeLANGE: No objection, Your Honor.

THE COURT: Exhibit 3 is admitted.

MR. McHUGH: No further questions. Thank you.

THE COURT: You may cross-examine.

MR. DeLANGE: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. DeLANGE:

Q You were the passenger in the squad; is that correct?

A That's correct.

Q And as I understand it, this is an unmarked squad car, correct?

A That is correct.

Q And was your windows up or down?

A I do not recall. I believe they were up.

Q All right. Is there any tint on the windows?

A No. Not in ours.

Q Do you know if the Bonneville had any tint on its windows?

A Not perceivably at the front of the vehicle.

[27] **Q** And do you know whether the Bonneville's windows were up or down?

A I cannot recall.

Q And you were passing the vehicle -- the Bonneville, as I understand it, and kind of stayed side by side, or as close as you could, for about ten seconds before you activated your squad lights to pull the vehicle over; is that correct?

A Slightly longer. It's in the video. The video goes back 30 seconds, so you can actually see from the video where we move into the left lane; upper vehicle. So it's about 30 seconds of us beginning to pass the vehicle. But you can see about 10 or 15 seconds or so where we're alongside of the other vehicle.

Q Were you familiar with that vehicle at all prior to this accident?

A I was not. The license plate was not ran or anything prior to us conducting the stop.

Q Did you observe any other illegal activity or traffic violations committed by that vehicle?

A No, not at the time.

Q And you said that you could see that there was a cell phone that was held up around Mr. Struve's face; is that correct?

A Yes. It was up in front of his face.

[28] **Q** Straight in front, or just kind of face high?

A Up in front of the steering wheel, pretty much directly in front of his face.

Q Even though that was happening, was the vehicle swerving or driving recklessly at all?

A The vehicle was observed bouncing back and forth within its own lane. So he was maintaining his lane. Not, necessarily, any type of violation, but it was

noted that the vehicle was kind of bouncing around, back and forth.

Q And you said that you could tell that the cell phone was being manipulated. Can you tell -- be more specific with that?

A Yes. I believe it was in his left hand. And I was able to see his thumb moving back and forth in front of the screen. It was dark outside. It was a very bright light, being the screen. I was able to see his thumb moving back and forth in front of it.

Q Was it an up-and-down motion, side to side, or both?

A It was just moving back and forth. I can't say up or down or anything. You know, up and down, you know, from a distance is difficult to determine, but you could just see the thumbs moving.

Q Does the squad video give a good indication of that?

[29] **A** I do not recall if it does or not.

Q Did you retrieve the phone?

A That specific phone? We retrieved three phones from that stop. I believe we would have.

Q Did you check, or did anybody check, as to whether or not there was a text message sent at the time of the stop, or a text message received at the time of the stop?

A I do not recall the details of the phone itself. I remember obtaining search warrants. I do not remember if we were able to obtain anything specifically. I'd have to review.

Q So you don't -- as you sit here today, you can't say whether there were any text messages sent or received?

A As of today, I'm not able to say, no.

Q Okay. So you make the stop and you go up to the passenger side of the car; is that right?

A Yes, sir.

Q And are you using your flashlight?

A Yes.

Q Are you illuminating the inside of the vehicle?

A Yes, I am.

Q And you observe the passenger, correct?

A Yes, I do.

Q Do you have interactions with the passenger?

A Yes, I do.

[30] **Q** Question her and get some information from her?

A Yes, sir.

Q And then you see what you believe to be a meth pipe protruding from a bag in the back seat, correct?

A That is correct.

Q And you observed -- or you inform the other officer of that, Mr. Schumacher, correct?

A That's correct.

Q And then what do you do after that?

A Both subjects were removed from the vehicle. Prior to, or very shortly into conducting the search,

the dog is requested to be removed, and is removed, and then we continue with the search.

Q Okay. So when you initiate the search, are both of the individuals, the people, outside the vehicle, seated on the curb?

A Yes, they are.

Q Do they have any access to the vehicle?

A Yes. When he's allowed to return to retrieve his dog.

Q Other than that?

A Other than that, no.

Q And when he was allowed to retrieve the dog and get a leash for the dog, were you with Mr. Struve the entire time?

[31] **A** Yes. I think -- I recall telling him multiple times that after he begins searching around, between seats and underneath seats and stuff like that, that I will search for him for the leash because I do not know where he's reaching or anything.

Q You wouldn't want him trying to destroy evidence or anything like that.

A Well, essentially, at that point, pull out a weapon that I cannot see.

Q Okay. Do you know whether that would -- the retrieval of the dog and the leash, did that take place before the methamphetamine was found?

A Yes, it was.

Q All right. So he was already back out, sitting at the curb at that time?

A That is correct.

Q With his dog, from what I understand.

A Yes, sir.

Q Did Mr. Struve ever give consent to search the vehicle?

A He did not.

Q Did you ever ask him for consent?

A I do not recall. I believe I did not.

Q Did you ever get a warrant to search the vehicle?

A I did not.

[32] **Q** Do you know if anybody did?

A No, not for the vehicle.

MR. DeLANGE: I have no further questions, Your Honor.

THE COURT: Anything further?

MR. McHUGH: No, Your Honor.

THE COURT: You may step down. Thank you.

THE WITNESS: Thank you, Your Honor.

MR. McHUGH: The State has no additional witnesses, Your Honor.

MR. DeLANGE: We have no witnesses, Your Honor.

THE COURT: All right. Does either side want to make any arguments?

MR. McHUGH: Your Honor, I would rely upon my --

THE COURT: Brief?

MR. McHUGH: -- brief that I filed.

MR. DeLANGE: In response to the brief, Your Honor, I note that the case that Mr. McHugh attached to his resistance was a court of appeals case decided on June 20th of 2018, which was, approximately, nine days before the State -- supreme court decided Bion Ingram. And I don't have the specific Northwest cite on that. It's No. 16-0736.

THE COURT: What was the name of that one?

MR. DeLANGE: *State v. Bion Blake Ingram*.

I-n-g-r-a-m. And I believe it's our argument that that case [33] puts much greater strictures on the search of a motor vehicle when the participants are removed from the vehicle, and puts much greater strictures on the warrantless searches on vehicles, Your Honor, or items contained in the vehicle.

THE COURT: And that's a supreme court case?

MR. DeLANGE: Yes, Your Honor. It's decided June 29, 2018.

THE COURT: Okay. Anything else?

MR. DeLANGE: That's it.

THE COURT: All right. I'll take a look at all

this and I'll issue a written ruling as soon as I can.

MR. DeLANGE: Thank you, Your Honor.

THE COURT: When is your trial?

MR. DeLANGE: We don't have a trial date yet, Your Honor.

THE COURT: All right. Great. Thank you.

MR. McHUGH: Thank you.

(This matter concluded at 2:36 p.m.)

CERTIFICATE TO TRANSCRIPT

IN THE IOWA DISTRICT COURT
FOR CLINTON COUNTY

STATE OF IOWA, Plaintiff,	)	
	)	Case No. FECR076297
-vs-	)	
STEVEN E. STRUVE, Defendant	)	CERTIFICATE

The undersigned, one of the official shorthand reporters in and for the Seventh Judicial District of Iowa, which embraces the county of Clinton, hereby certifies:

That she acted as such reporter in the above-entitled cause in the District Court of Iowa in and for Clinton County, before the Judge stated in the title page attached to this transcript, and took down in shorthand the testimony and proceedings had on said hearing.

That the foregoing pages of typewritten matter are a full, true, and complete transcript of said shorthand notes so taken by her in said cause, and that said transcript contains all of the testimony offered and proceedings had on said matter at the times therein shown.

That said transcript was ordered by Attorney Melinda J. Nye on October 9, 2019, and that said transcript was signed and delivered on November 8, 2019.

/s/ Jill R. Dankert

Jill R. Dankert, CSR, RPR, RMR
Official Court Reporter
Seventh Judicial District of Iowa

APPENDIX G

IOWA CODE § 321.276 USE OF ELECTRONIC COMMUNICATION DEVICE WHILE DRIVING

1. For purposes of this section:

a. "*Electronic message*" includes images visible on the screen of a hand-held electronic communication device including a text-based message, an instant message, a portion of electronic mail, an internet site, a social media application, or a game.

b. "*Engage in a call*" means talking or listening on a mobile telephone or other portable electronic communication device.

c. "*Hand-held electronic communication device*" means a mobile telephone or other portable electronic communication device capable of being used to write, send, or view an electronic message. "*Hand-held electronic communication device*" does not include a voice-operated or hands-free device which allows the user to write, send, or view an electronic message without the use of either hand except to activate or deactivate a feature or function. "*Hand-held electronic communication device"* does not include a wireless communication device used to transmit or receive data as part of a digital dispatch system. "*Hand-held electronic communication device*" includes a device which is temporarily mounted inside the motor vehicle, unless the device is a voice-operated or hands-free device.

d. The terms "*write*", "*send*", and "*view*", with respect to an electronic message, mean the manual entry, transmission, or retrieval of an electronic

message, and include playing, browsing, or accessing an electronic message.

2. A person shall not use a hand-held electronic communication device to write, send, or view an electronic message while driving a motor vehicle unless the motor vehicle is at a complete stop off the traveled portion of the roadway.

a. A person does not violate this section by using a global positioning system or navigation system or when, for the purpose of engaging in a call, the person selects or enters a telephone number or name in a hand-held mobile telephone or activates, deactivates, or initiates a function of a hand-held mobile telephone.

b. The provisions of this subsection relating to writing, sending, or viewing an electronic message do not apply to the following persons:

(1) A member of a public safety agency, as defined in section 34.1, performing official duties.

(2) A health care professional in the course of an emergency situation.

(3) A person receiving safety-related information including emergency, traffic, or weather alerts.

3. Nothing in this section shall be construed to authorize a peace officer to confiscate a hand-held electronic communication device from the driver or occupant of a motor vehicle.

4. a. A person convicted of a violation of this section is guilty of a simple misdemeanor punishable as a scheduled violation under section 805.8A, subsection 14, paragraph *"l"*.

b. A violation of this section shall not be considered a moving violation for purposes of this chapter or rules adopted pursuant to this chapter.

5. The department, in cooperation with the department of public safety, shall establish educational programs to foster compliance with the requirements of this section.