STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**
SIXTH DIVISION

Michael Rhodes	:	
	:	
v.	:	**A.A. No. 16 - 045**
	:	
Town of Burrillville	:	
(RITT Appeals Panel)	:	

O R D E R

This matter is before the Court pursuant to § 8-8-8.1 of the General Laws for review of the Findings and Recommendations of the Magistrate.

After a de novo review of the record and the memoranda of counsel, the Court finds that the Findings & Recommendations of the Magistrate are supported by the record, and are an appropriate disposition of the facts and the law applicable thereto.

It is, therefore, ORDERED, ADJUDGED AND DECREED,

that the Findings and Recommendations of the Magistrate are adopted by reference as the Decision of the Court and the decision of the Appeals Panel is AFFIRMED IN PART and REVERSED IN PART. The case is hereby REMANDED to the Traffic Tribunal for further proceedings consistent with the attached opinion.

Entered as an Order of this Court at Providence on this 10th day of August, 2017.

By Order:

/s/
Stephen C. Waluk
Chief Clerk

Enter:

/s/
Jeanne E. LaFazia
Chief Judge

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
PROVIDENCE, Sc. **DISTRICT COURT**
SIXTH DIVISION

Michael Rhodes	:	
	:	
v.	:	**A.A. No. 2016-045**
	:	**(T13-0072)**
Town of Burrillville	:	**(13-416-501401)**
(RITT Appeals Panel)	:	

F I N D I N G S & R E C O M M E N D A T I O N S

Ippolito, M. When Officer Ryan Hughes of the Burrillville Police Department stopped Mr. Michael Rhodes for speeding and other civil traffic violations, he believed that he was in the midst of an especially dangerous encounter. And so, he ordered the motorist out of his vehicle at gunpoint, directed him down onto his knees, instructed him to lift his shirt, handcuffed him, patted him down, and placed him in the rear of his cruiser (while he searched the motorist's car).

Perceiving certain indicia of the consumption of alcohol on the person of Mr. Rhodes, the officer administered standard field sobriety tests (FST's), which, in the officer's estimation, he failed; he also failed a

preliminary breath test (PBT). As a result, Officer Hughes decided to formally arrest Mr. Rhodes for suspicion of driving under the influence. Later, Mr. Rhodes was cited for the civil offense of refusal to submit to a chemical test, in violation of Gen. Laws 1956 § 31-27-2.1, upon which he was convicted by a magistrate of the Rhode Island Traffic Tribunal (RITT). That conviction was affirmed by an RITT appeals panel.

Before this Court, Mr. Rhodes argues — as he did at trial and before the appeals panel — that when he did as Officer Hughes instructed, he was under arrest. He alleges that this arrest was illegal, under the Fourth Amendment to the United States Constitution and Article I, Section 6 of the Rhode Island Constitution, because the officer was not in possession of facts from which he could form probable cause to believe that Mr. Rhodes had committed an arrestable offense — drunk-driving or any other. And, since his arrest was unlawful, he urges that all evidence collected as a result of that arrest should have been suppressed pursuant to the exclusionary rule of the Fourth Amendment (made applicable to the states by the Fourteenth Amendment) and the corresponding Rhode Island provision, which is found in Gen. Laws 1956 9-19-25.

The members of the appeals panel unanimously agreed that Mr.

Rhodes had been subjected to an illegal arrest, but a majority declined to suppress the evidence which had been collected, for two reasons: *first*, they held that both the federal and Rhode Island exclusionary rules do not apply to the trial of civil traffic offenses, such as refusal to submit to a chemical test; and *second*, they held that the evidence obtained was in plain view and thereby not subject to suppression. The dissenting member concluded that the exclusionary rule *should* apply to refusal trials.

Jurisdiction for the instant appeal is vested in the District Court by Gen. Laws 1956 § 31-41.1-9; the applicable standard of review is found in Gen. Laws 1956 § 31-41.1-9(d). This matter has been referred to me for the making of findings and recommendations pursuant to Gen. Laws 1956 § 8-8-8.1.

For the reasons I will explain in this opinion, I shall recommend that this Court find that the appeals panel's substantive ruling — that Mr. Rhodes' detention constituted a *de facto* arrest not supported by probable cause and was illegal under both the Fourth Amendment and Article I, Section 6 of the Rhode Island Constitution — was not clearly erroneous. And while I agree with the appeals panel that the Fourth Amendment's exclusionary rule does not pertain to the trial of civil

traffic offenses, I have concluded that Rhode Island's statutory exclusionary rule is applicable to refusal trials. I shall therefore recommend to the Court that the decision rendered by the appeals panel in Mr. Rhodes' case be AFFIRMED in part and REVERSED in part and REMANDED to the Traffic Tribunal for further proceedings.

I
Facts and Travel of the Case

The facts of the incident which led to the charge of refusal to submit to a chemical test being lodged against Mr. Rhodes are fully and fairly stated in the decision of the appeals panel.

On October 5, 2013, at about 2:08 a.m., Officer Paul Hughes of the Burrillville Police Department was patrolling on South Main Street when he decided to stop a 1997 Saturn because it was speeding.[1] He activated the overhead lights on his marked police cruiser and reversed course to follow the Saturn.[2] But after he made the U-turn, he turned off his overhead lights, in order to see the target vehicle more clearly.[3] While in pursuit, the officer observed the Saturn commit additional

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[1] Decision of Appeals Panel, at 1 (*citing* Trial Transcript, at 6-7). According to his radar instrument, the vehicle was travelling at a speed of 51 miles per hour in a 25-mph zone. Trial Transcript, at 11.

[2] Decision of Appeals Panel, at 2 (*citing* Trial Transcript, at 12).

[3] Decision of Appeals Panel, at 2 (*citing* Trial Transcript, at 15).

traffic violations.[4] Then, about 30 seconds after he made his U-turn, Officer Hughes reactivated his overhead lights.[5] This prompted the Saturn, which took another right turn without displaying a turn signal, to halt.[6]

Based on the manner in which the Saturn was operating while he was attempting to stop it, Officer Hughes believed himself to be in danger.[7] He therefore decided to employ a "high risk protocol" — pursuant to which he trained his weapon on Mr. Rhodes, ordered him out of his vehicle and onto his knees; he also ordered him to lift up his shirt.[8] As Mr. Rhodes complied with these commands,[9] another cruiser

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[4] The officer saw the Saturn's tires cross over the street's painted lines, run a stop sign and take a right turn without signaling. Decision of Appeals Panel, at 2 (*citing* Trial Transcript, at 11, 14). The vehicle had also accelerated "to a speed far greater than 50 miles per hour." Trial Transcript, at 13-14.

[5] Decision of Appeals Panel, at 2 (*citing* Trial Transcript, at 12, 15).

[6] Decision of Appeals Panel, at 2 (*citing* Trial Transcript, at 17). Officer Hughes testified that the Saturn travelled 300-400 feet *after* he reengaged his overhead lights. Trial Transcript, at 17. But, the officer conceded that "[o]nce the lights came on, he appropriately pulled over." *Id.,* at 99.

[7] Decision of Appeals Panel, at 2 (*citing* Trial Transcript, at 18). Later, during redirect examination, the officer commented that he was unable to see inside the vehicle once it stopped. Trial Transcript, at 101.

[8] Decision of Appeals Panel, at 2 (*citing* Trial Transcript, at 18-21). The officer testified that they employ the high-risk protocol "[w]henever we feel potentially threatened." Trial Transcript, at 22.

[9] Decision of Appeals Panel, at 3 (*citing* Trial Transcript, at 20). Indeed, the officer described the motorist as being "very compliant." Trial

arrived, carrying a Burrillville Police sergeant — who took up a position with his gun unholstered.[10] With this support in place, Officer Hughes holstered his weapon, approached Mr. Rhodes, and handcuffed him — telling the motorist that he was being detained, but was not under arrest.[11] The officer then patted-down the motorist, but found no weapons.[12]

It is at this point that the accounts of Officer Hughes and Mr. Rhodes diverge.

According to Officer Hughes, he removed the handcuffs immediately after patting down Mr. Rhodes.[13] He then began to question Mr. Rhodes, first asking him why he was travelling outside the white painted line; the motorist responded he was text messaging.[14] In the course of this exchange, Officer Hughes detected that Mr. Rhodes' breath emitted "a moderate odor consistent with an alcoholic beverage, his eyes were bloodshot and watery, and his speech was normal."[15] Mr. Rhodes

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Transcript, at 20.

10 Decision of Appeals Panel, at 3 (*citing* Trial Transcript, at 21-22).

11 Decision of Appeals Panel, at 3 (*citing* Trial Transcript, at 21-23).

12 Decision of Appeals Panel, at 3 (*citing* Trial Transcript, at 23-24).

13 Decision of Appeals Panel, at 3 (*citing* Trial Transcript, at 28).

14 Decision of Appeals Panel, at 3 (*citing* Trial Transcript, at 27).

15 Decision of Appeals Panel, at 3 (*citing* Trial Transcript, at 29). *See also*

also provided his personal identification to the officer.[16]

At this point, Officer Hughes asked Mr. Rhodes if he had consumed any alcohol; he denied it.[17] Nevertheless, based on these observations, Officer Hughes asked Mr. Rhodes to perform certain field sobriety tests, which he did.[18] Believing that Mr. Rhodes failed the tests, Officer Hughes arrested him for suspicion of drunk driving.[19] The officer then handcuffed Mr. Rhodes again and placed him in the rear of his cruiser, where he read him the "Rights for Use at the Scene."[20] While in

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Trial Transcript, at 24 (odor of alcohol). In fact, the officer said the motorist's speech was "pretty good." Trial Transcript, at 29.

16 Trial Transcript, at 30. He later confirmed his age as being 20. *Id.,* at 41.

17 Trial Transcript, at 31-32.

18 Decision of Appeals Panel, at 3 (*citing* Trial Transcript, at 32-39). The panel synopsized the administration of the FST's thusly:

> Officer Hughes then testified that he asked Appellant to submit to field sobriety tests, the Horizontal Gaze Nystagmus test, the walk and turn, and the one-leg stand. (Tr. at 32.) While administering the tests, Officer Hughes noticed multiple clues which indicated to him that the Appellant was likely intoxicated. (Tr. at 36-38.) The Officer subsequently asked Appellant to take the Preliminary Breath Test (PBT), and the results indicated he was over the legal limit to drive. (Tr. at 39.)

Decision of Appeals Panel, at 3. In fact, the results of the PBT were not elicited by the State. Trial Transcript, at 39-40.

19 Decision of Appeals Panel, at 4 (*citing* Trial Transcript, at 39).

20 Decision of Appeals Panel, at 4 (*citing* Trial Transcript, at 39-45). It is noteworthy that the Rights for Use at the Scene includes *Miranda* warnings. *See* a photocopy of Officer Hughes' personal copy of the Rights,

the cruiser, Mr. Rhodes told the officer that he had five or six beers that evening.[21] A search of the Saturn revealed a marijuana pipe containing some partially smoked marijuana and a beer bottle — which apparently had been "recently consumed."[22]

But Mr. Rhodes challenged this testimony. He testified that Officer Hughes did not remove his cuffs immediately after the pat-down. Instead, he swore that, after the pat-down, the officer said "I smell alcohol on you" and told Mr. Rhodes that he was going to search his car.[23] Mr. Rhodes testified that, still cuffed, he was placed in the rear of the cruiser while Officer Hughes searched his vehicle.[24] When the officer returned, he stated that they were going to do the field sobriety tests, which, Mr. Rhodes conceded, he failed.[25] He was then formally arrested.

At this point, their narratives reunite. Mr. Rhodes was transported to the Burrillville Police Station, where he was given his

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which was admitted into evidence as State's Exhibit No. 1, in the electronic record of the case, at 111.

21 Decision of Appeals Panel, at 4 (*citing* Trial Transcript, at 45).

22 Decision of Appeals Panel, at 4 (*citing* Trial Transcript, at 46-47).

23 Decision of Appeals Panel, at 4 (*citing* Trial Transcript, at 130).

24 Decision of Appeals Panel, at 4 (*citing* Trial Transcript, at 130).

25 Decision of Appeals Panel, at 4 (*citing* Trial Transcript, at 135, 151-52).

"Rights For Use at Station."[26] Then, when asked to consent to a chemical test of his breath for the presence of alcohol, he declined.[27] He was cited for (1) refusal to submit to a chemical test, (2) speeding, and (3) the presence of alcohol while operating a motor vehicle, in citation number 13-416-501401.[28]

At his RITT arraignment on October 17, 2013, Mr. Rhodes entered pleas of not guilty to all three civil offenses; the Court ordered a preliminary suspension of his operator's license.[29] His trial was conducted on October 25, 2013. The first (and only) witness for the State was the arresting officer, Patrolman Ryan Hughes, who gave testimony consistent with the narrative presented *ante*.[30] The State then rested;[31] following which counsel presented arguments regarding the Defendant's motion to dismiss.[32] But, the motion was denied.[33] Then, the Court heard

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26 Decision of Appeals Panel, at 4 (*citing* Trial Transcript, at 49).

27 Decision of Appeals Panel, at 4 (*citing* Trial Transcript, at 51).

28 *See* Summons No. 13-416-501401, in electronic record, at 90 and 126.

29 *See* the Docket Sheet, Summons No. 13-416-501401, in the electronic record at 88, and the Suspension Order, in the electronic record at 104 and 122. The Tribunal's authority to issue preliminary suspensions in refusal cases may be found in Gen. Laws 1956 § 31-27-2.1(b).

30 Trial Transcript, at 4-111.

31 Trial Transcript, at 111.

32 Trial Transcript, at 112-23.

33 Trial Transcript, at 123-24.

from Mr. Rhodes,[34] whose testimony was related *ante*.

After closing arguments were made,[35] the Court recounted the testimony and evidence which had been presented.[36] With regard to the (disputed) sequence of events after the initial stop, the Court made clear findings:

> He [Mr. Rhodes] heard an announcement through the PA system over the police vehicle, indicating for Mr. Rhodes to get out of the vehicle and get on his knees and place his hands behind his head. He got out of the car, after subsequently lowering his window and asking what was going on. He got out of the vehicle subsequent to that, got on his knees, saw the officer had a gun at him — pointed at him, and out of the corner of his eye, he saw another cruiser approaching the scene. As soon as Mr. Rhodes was handcuffed, the gun was holstered. He was put in a police vehicle. And as soon as the search of the vehicle that Mr. Rhodes was operating that evening was done, he was taken out of the vehicle, unhandcuffed and the investigation of DUI continued. That was all of Mr. Rhodes' testimony.[37]

Nevertheless, the trial magistrate found Mr. Rhodes guilty of refusal and the open container charge.[38] The Court dismissed the speeding charge in

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[34] *See* Appellant's testimony, in Trial Transcript, at 124-58.

[35] Trial Transcript, at 159-60 (defense) and 160-64 (prosecution).

[36] Trial Transcript, at 164-172.

[37] Trial Transcript, at 171. Later, the trial magistrate reiterated his finding that the cuffs were not removed until after the vehicle was searched. *See* Trial Transcript, at 173-174.

[38] Trial Transcript, at 174-75.

the exercise of its discretion.[39]

Mr. Rhodes appealed and the matter was heard by an RITT appeals panel composed of Magistrate Goulart (Chair), Judge Parker, and Administrative Magistrate DiSandro on January 29, 2014. Before the panel, Appellant asserted that the actions of Officer Hughes constituted his *de facto* arrest and that the officer acted in the absence of probable cause; and that, as a result, the evidence obtained by the officer should be excluded as the fruit of the poisonous tree.[40]

The appeals panel responded to this argument in three ways. *First*, the panel held that the exclusionary rule should not apply to trials of refusal cases, since the charge is civil in nature.[41] *Second*, it posited that, even if the exclusionary rule were to be deemed applicable in refusal cases, it still would not be pertinent in Mr. Rhodes' case, *if* he had *not* been subjected to a *de facto* arrest.[42] And so, in order to resolve this contingency, the appeals panel analyzed the facts of the instant case through the prism of the three factors for determining whether a person is under arrest which our Supreme Court had enumerated in *State v.*

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39 Trial Transcript, at 175.

40 Decision of Appeals Panel, at 8.

41 Decision of Appeals Panel, at 8-11.

42 Decision of Appeals Panel, at 11.

Bailey;[43] doing so, it concluded that Mr. Rhodes indeed had been subjected to a *de facto* arrest by Officer Hughes.[44] *Third*, the appeals panel concluded that the observations made by Officer Hughes would not need to be suppressed — even if the exclusionary rule was applicable in refusal cases — because Mr. Rhodes was in his plain view pursuant to the undeniably valid traffic stop.[45]

Finally, on April 6, 2016, Mr. Rhodes filed an appeal of this decision in the Sixth Division District Court. Conferences were held before the undersigned on May 10, 2016 and June 14, 2016; on the latter occasion, a briefing schedule was set. Both parties have submitted memoranda which relate their respective viewpoints.

II
Positions of the Parties
A
Of Appellant Rhodes

Before this Court, Mr. Rhodes asserts that the evidence gathered by Officer Hughes should have been suppressed pursuant to the

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[43] Decision of Appeals Panel, at 11-16 (*citing State v. Bailey,* 417 A.2d 915 (R.I.1980)).

[44] Decision of Appeals Panel, at 16.

[45] Decision of Appeals Panel, at 16-18 (*citing Coolidge v. New Hampshire,* 403 U.S. 443, 465 (1971) *and United States v. Janis,* 428 U.S. 433, 447 (1976)).

exclusionary rule because he had been subjected to an arrest not supported by probable cause, in violation of the Fourth Amendment of the United States Constitution and Article I, Section 6 of the Rhode Island Constitution.[46] And, in his Memorandum, after relating the facts of the case,[47] Mr. Rhodes explains this position in greater detail.

First, applying the *Bailey* test, he urges that, by ordering him out of the vehicle and handcuffing him at gunpoint, Officer Hughes arrested him.[48] *Second*, asserting that the verdict against him was dependent on illegally obtained evidence, he argues that such evidence should have been suppressed because: (a) its admission was violative of Gen. Laws 1956 § 9-19-25; [49] (b) its introduction was contrary to the exclusionary rule of the Fourth Amendment, which should have been applied, since a refusal trial is a quasi-criminal proceeding;[50] in this regard, Mr. Rhodes urges that, if the exclusionary rule is not applied to refusal charges, its effectiveness in deterring police illegality in the realm of drunk-driving

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46 Appellant's Memorandum, at 1-2.

47 Appellant's Memorandum, at 2-5.

48 Appellant's Memorandum, at 5-7.

49 Appellant's Memorandum, at 8-9.

50 Appellant's Memorandum, at 9 (*citing Board of License Commissioners of the Town of Tiverton v. Pastore,* 463 A.2d 161 (R.I. 1983).

enforcement will be gravely diminished;[51] and, (c) the facts of his arrest by Officer Hughes trigger the exclusionary rule exception which mandates the suppression of evidence in non-criminal proceedings for conduct which "shocks the conscience" of the Court.[52]

B

Position of the State of Rhode Island — Appellee

The State begins the Memorandum which it submitted to this Court by arguing that the detention of Mr. Rhodes was legal,[53] though it concedes the appeals panel found otherwise.[54] It then embraces the appeals panel's determination that the exclusionary rule should not be applied in civil trials — and its alternative finding that the evidence the officer obtained was admissible under the "plain view" doctrine.[55]

After presenting a summary of the facts of the case,[56] the State begins the "Argument" portion of its Memorandum by asserting that the Appellant's reliance on the *Bailey* case, in determining whether there

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51 Appellant's Memorandum, at 9-10.

52 Appellant's Memorandum, at 10-11 (*citing State v. Spratt,* 120 R.I. 192, 386 A.2d 1094 (1978)).

53 Appellee's Memorandum, at 1.

54 *Id.*

55 *Id.*

56 Appellee's Memorandum, at 2-4.

had been a *de facto* arrest, to the exclusion of all others, is misplaced.[57] The State also reiterates its position that no *de facto* arrest occurred.[58]

Next, the State discusses a series of traffic stop cases. It begins with *State v. Quinlan,*[59] which it cites for the proposition that a traffic stop constitutes a seizure of the operator under the Fourth Amendment — which may be deemed lawful if the officer conducting the stop has probable cause to believe the motorist has committed a traffic offense.[60] Here the State observes that the legitimacy of Officer Hughes' initial stop of Mr. Rhodes (which was predicated on speeding and other traffic offenses) is not in dispute.[61]

Then, citing *State v. Soares,* the State invokes the rule that an officer who has stopped a vehicle may order the operator to exit the

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[57] Appellee's Memorandum, at 4. The State cites three traffic stop cases as being of the type which should be consulted in cases of the type currently before the Court: *State v. Soares,* 648 A.2d 804 (R.I.1994); *State v. Casas,* 900 A.2d 1120 (R.I.2006); *and, State v. Parra,* 941 A.2d 799 (R.I.2007). Appellee's Memorandum, at 4, n.7.

[58] Appellee's Memorandum, at 4. However, the State never asserts that, at the initial moment of detention, Officer Hughes was aware of facts sufficient to constitute probable cause to arrest Mr. Rhodes (on any charge).

[59] 921 A.2d 96 (R.I.2007).

[60] Appellee's Memorandum, at 4 (*citing Quinlan, ante,* 921 A.2d at 105).

[61] Appellee's Memorandum, at 4-5.

vehicle.[62] On this basis, the State argues that Officer Hughes' order to Mr. Rhodes to exit his vehicle was proper.[63]

The State also cites *State v. Parra* for the principle that the Fourth Amendment only prohibits *unreasonable* searches and seizures;[64] and, the State reminds us that the test to determine whether a traffic stop has blossomed into a *de facto* arrest is governed by whether the stop was reasonable both as to its duration and its intrusiveness.[65]

Finally, the State calls to our attention to our Supreme Court's decision in *State v. Santos,*[66] which, the State urges, teaches us that an officer making a traffic stop "may employ the force reasonably necessary to effect the goals of the detention, which could include investigation, maintenance of the status quo, and officer safety."[67] In *Santos,* this principle of law was used to find no *de facto* arrest despite the fact that the defendant was handcuffed and placed in the rear of a police cruiser.[68]

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62 Appellee's Memorandum, at 5 (*citing Soares, ante,* 648 A.2d at 806 (*quoting Michigan v. Long,* 463 U.S. 1032, 1047-48 (1983))).

63 Appellee's Memorandum, at 5.

64 Appellee's Memorandum, at 5 (*citing Parra,* 941 A.2d at 804).

65 *Id.* (*citing Casas,* 900 A.2d at 1133).

66 *Id.* (*citing State v. Santos,* 64 A.3d 314, 322 (R.I.2013)).

67 *Id.* (*quoting Santos,* 64 A.3d at 322).

68 *Id.* (*citing Santos,* 64 A.3d at 322).

In sum, the State urges that if we look to the precedents which it presents, and not merely *State v. Bailey,* we will find that Officer Hughes' concerns were justified, his actions were lawful, and his stop of Mr. Rhodes never ripened into a *de facto* arrest.[69]

III
Standard of Review

The standard of review which must be employed in this case is enumerated in Gen. Laws 1956 § 31-41.1.-9(d), which states as follows:

> (d) *Standard of review*. The judge of the district court shall not substitute his or her judgment for that of the appeals panel as to the weight of the evidence on questions of fact. The district court judge may affirm the decision of the appeals panel, or may remand the case for further proceedings or reverse or modify the decision if the substantial rights of the appellant have been prejudicial because the appeals panel's findings, inferences, conclusions or decisions are:
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the appeals panel;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

This provision is a mirror-image of the standard of review found in Gen. Laws 1956 § 42-35-15(g) — a provision of the Rhode Island

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[69] Appellee's Memorandum, at 6.

Administrative Procedures Act (APA). Accordingly, we are able to rely on cases interpreting the APA standard as guideposts in this process. Under the APA standard, the District Court " … may not substitute its judgment for that of the agency and must affirm the decision of the agency unless its findings are 'clearly erroneous.'"[70] And our Supreme Court has reminded us that, when handling refusal cases, reviewing courts lack "the authority to assess witness credibility or to substitute its judgment for that of the hearing judge concerning the weight of the evidence on questions of fact."[71] This Court's review "… is confined to a reading of the record to determine whether the judge's decision is supported by legally competent evidence or is affected by an error of law."[72]

IV
Applicable Law — The Refusal Statute

Although the resolution of the instant case will turn on search-and-seizure questions, a few comments may properly be presented here

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[70] *Guarino v. Department of Social Welfare,* 122 R.I. 583, 584, 410 A.2d 425 (1980)(*citing* Gen. Laws 1956 § 42-35-15(g)(5)). *See also Link v. State,* 633 A.2d 1345, 1348 (R.I. 1993).

[71] *Link, ante,* 633 A.2d at 1348 (*citing Liberty Mutual Insurance Co. v. Janes,* 586 A.2d 536, 537 (R.I. 1991)).

[72] *Link,* 633 A.2d at 1348 (*citing Environmental Scientific Corporation v. Durfee,* 621 A.2d 200, 208 (R.I. 1993)).

regarding the charge brought against Mr. Rhodes — refusal to submit to a chemical test, as enumerated in Gen. Laws 1956 § 31-27-2.1.

The civil charge of "refusal to submit to a chemical test," is set forth in § 31-27-2.1(c) of the General Laws.[73] It has its origins in the implied-consent law — which provides that, by operating motor vehicles in Rhode Island, motorists promise to submit to a chemical test designed to measure their blood-alcohol content, whenever a police officer has reasonable grounds to believe they have driven while under the influence of liquor.[74] And motorists who renege on that promise may be

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[73] The charge of refusal to submit to a chemical test is stated in subsection 31-27-2.1(c):

> … If the traffic tribunal judge finds after the hearing that: (1) the law enforcement officer making the sworn report had reasonable grounds to believe that the arrested person had been driving a motor vehicle within this state while under the influence of intoxicating liquor, toluene, or any controlled substance, as defined in chapter 28 of title 21, or any combination of these; (2) the person while under arrest refused to submit to the tests upon the request of a law enforcement officer; (3) the person had been informed of his or her rights in accordance with § 31-27-3; and (4) the person had been informed of the penalties incurred as a result of noncompliance with this section; the traffic tribunal judge shall sustain the violation. The traffic tribunal judge shall then impose the penalties set forth in subsection (b) of this section.

[74] *State v. Pacheco,* — A.3d —, 2017 WL 2622780, at *6 (R.I.6/16/2017). The implied-consent law is stated in § 31-27-2.1(a):

charged with the civil offense of refusal and suffer the suspension of their operator's licenses, among other penalties.[75] Thus, at its essence, a refusal charge is an offense against our state's regulatory scheme for identifying drunk and unsafe drivers on our highways.

The charge of refusal contains four statutory elements. They are: *one,* that the officer had reasonable grounds to believe that the motorist had driven while intoxicated;[76] *two,* that the motorist, having been placed in custody, refused to submit to a chemical test; *three,* that the motorist was advised of his rights to an independent test; *and four,* that the motorist was advised of the penalties that are incurred for a refusal.[77] The State must also prove that the initial stop was legal (*i.e.,* supported by

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> (a) Any person who operates a motor vehicle within this state shall be deemed to have given his or her consent to chemical tests of his or her breath, blood, and/or urine for the purpose of determining the chemical content of his or her body fluids or breath. …

[75] In *State v. Locke,* 418 A.2d 843 (R.I.1980), our Supreme Court called such suspensions "critical to attainment of the goal of making the highways safe by removing drivers who are under the influence." *Locke,* 418 A.2d at 850 (*citing People v. Brown,* 174 Colo. 513, 523, 485 P.2d 500, 505 (1971)).

[76] "Reasonable grounds" is the equivalent of "reasonable-suspicion" standard, which is well-known in Fourth Amendment jurisprudence as the standard for making an investigatory stop. *State v. Jenkins,* 673 A.2d 1094, 1097 (R.I.1996) (*citing Terry v. Ohio,* 392 U.S. 1 (1968)).

[77] Gen. Laws 1956 § 31-27-2.1(c), *ante* at 18, n.71.

reasonable suspicion),[78] and that the motorist was notified of his or her right to make a phone call for the purposes of securing bail as provided in Gen. Laws 1956 § 12-7-20.[79] But, the State need not show that the motorist was operating under the influence[80] — or that the officer had probable cause to arrest for such a charge.[81]

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[78] *State v. Bruno,* 709 A.2d 1048, 1050 (R.I.1998) *and Jenkins, ante,* 673 A.2d at 1097. *See also Pacheco, ante,* 2017 WL 2622780, at *5.

[79] *State v. Quattrucci,* 39 A.3d 1036, 1040-42 (R.I.2012).

[80] *State v. Bruno,* 709 A.2d 1048, 1050 (R.I. 1998); *State v. Hart,* 694 A.2d 681, 682 (R.I.1997).

[81] *Jenkins, ante,* 673 A.2d at 1097 (addressing the Appellant's collateral estoppel claim, Supreme Court finds the District Court's determination of no probable cause "unrelated to and irrelevant in the [refusal] trial ...."); *and see State v. Pacheco, ante*, at *5 (*citing Jenkins* approvingly on point described in this note and declaring that evidence obtained post-arrest is admissible in support of officer's possession of reasonable belief that defendant operated under the influence, if obtained prior to the officer's request that detainee submit to a chemical test). Note – before this Court, Appellant Rhodes is not arguing that the *de facto* arrest in the absence of probable cause requires dismissal; he is only urging that evidence should have been suppressed. Appellant's Memorandum, *passim*.

V

Analysis — The Facts of Record and the Approach Adopted

A

The Facts of Record

I believe that, for the purposes of this opinion, the narrative presented *ante* is a sufficient exposition of the operative facts of record. As we noted previously, the trial magistrate found that the incident unfolded in the manner described by Mr. Rhodes: that he was brought out of the vehicle, put onto his knees, handcuffed, patted down, and, while still handcuffed, placed in the rear of the cruiser while the officer searched his vehicle. Since this finding was supported by competent evidence of record — *i.e.,* Mr. Rhodes testimony — it must be accepted by this Court.[82] In any event, we must keep in mind the fact that the officer's version of events and that of Mr. Rhodes are essentially identical up to the point of the pat-down.

B

Approach to Be Followed

Appellant Rhodes' argument (that evidence gathered after his *de facto* arrest should have been suppressed) gives rise to two additional issues: whether Mr. Rhodes' Fourth Amendment privacy right was truly

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[82] *See* Gen. Laws 1956 § 31-41.1.-9(d)(5).

violated; and, if it was, whether the exclusionary rule should apply to refusal trials conducted by the Traffic Tribunal.

Of course, we could put the Fourth Amendment issue to one side and consider the applicability question first, for, if we were to agree with the appeals panel that the exclusionary rule does not apply to refusal cases, our work would end. However, I do not believe we should do so. It is a tradition of American jurisprudence that courts generally refrain from deciding questions of constitutional dimension unless necessary.[83] This policy is fully accepted in Rhode Island.[84] And so, like the appeals panel, we shall begin by analyzing Mr. Rhodes' Fourth Amendment argument before addressing, if necessary, the question of the exclusionary rule's applicability to refusal cases.[85]

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[83] *See Elk Grove Unified School District v. Newdow,* 542 U.S. 1, 11 (2004) *and Spector Motor Service, Inc. v. McLaughlin,* 323 U.S. 101, 105 (1944)("'If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality … unless such adjudication is unavoidable.' ")).

[84] *See State v. Morin,* 68 A.3d 61, 68 (R.I.2013)(*citing In re Brown,* 903 A.2d 147, 151 (R.I.2006)("Neither this Court nor the Superior Court should decide constitutional issues unless it is absolutely necessary to do so."). *Also, State of Rhode Island v. Lead Industries Association, Inc.,* 898 A.2d 1234, 1238 (R.I.2006).

[85] It is true that the question of the legality of Mr. Rhodes' detention is also a question of constitutional dimension, but narrowly so, affecting only Mr. Rhodes; the exclusionary rule issue will potentially touch the hundreds of persons who are charged each year with refusal to submit to a chemical test.

VI

Appellant's Claim of a Fourth Amendment Violation

A

Summary of the Law — The Fourth Amendment

The Fourth Amendment to the United States Constitution protects Americans from unreasonable searches and seizures.[86] Of course, not all interactions between citizens and their law enforcement officers trigger these protections — only those where the person has been "seized."[87] The Supreme Court of the United States has declared that "… a person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained."[88] We determine whether a person has been seized by asking whether "… a reasonable person would have believed that he was not free to leave."[89] The Fourth

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[86] The Fourth Amendment guarantees — "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONSTITUTION, amend. IV. The Fourth Amendment is made applicable to the states through the Due Process Clause of the Fourteenth Amendment. *See Wolf v. Colorado,* 338 U.S. 25, 27-28 (1949)(finding Fourth Amendment's protection of privacy interests implicit in "the concept of ordered liberty" and thus, binding on the states).

[87] 3 W. LAFAVE, SEARCH AND SEIZURE, § 5.1(a), *What Constitutes an Arrest* (5th ed., Oct.2016 Update).

[88] *United States v. Mendenhall,* 446 U.S. 544, 553 (1980)(Opinion of Stewart, J.).

[89] *Mendenhall, ante,* 446 U.S. at 554; *Florida v. Royer,* 460 U.S. 491, 501-02 (1983); *State v. Griffith,* 612 A.2d 21, 23 (R.I.1992).

Amendment governs even brief seizures, if nonconsensual.[90]

Of course, our Fourth Amendment jurisprudence does not recognize an infinite hierarchy of seizures. For the most part, police seizures of citizens are divisible into three categories: arrests, investigatory stops, and routine traffic stops — each of which must be justified by a different quantum of inculpatory evidence. And if the requisite level of evidence is not held by the officer, the detention will be deemed unjustified and unconstitutional.

However, such determinations would be relegated to the realm of civil litigation, if it not were for a doctrine which requires that any evidence obtained as a result of such illegality be barred from admission in criminal trials — the exclusionary rule, about which we will offer a more detailed discussion, *post*, in Parts VIII (Fourth Amendment) and IX (section 9-19-25) of this opinion. But for now, we shall focus on determining whether Mr. Rhodes was subjected to an illegal arrest.

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[90] *Mendenhall,* 446 U.S. at 551-52. If the officer's intrusion into the liberty of the citizen was the result of consent given voluntarily, then the Fourth Amendment is not impacted. *See Mendenhall,* 446 U.S. at 555-60. *See also State ex rel. Town of Little Compton v. Simmons,* 87 A.3d 412, 416-17 (R.I. 2014); *State v. Aponte,* 800 A.2d 420, 426 (R.I. 2002); *State v. Kennedy,* 569 A.2d 4, 8 (R.I. 1990).

B

Arrest: Justified by Probable Cause

In *State v. Bailey,*[91] our Supreme Court concisely stated the factors to be considered in determining whether a citizen was under arrest, at a given point in time, including — the extent to which defendant's movement was curtailed, the degree of force used, whether a reasonable person would believe he was under arrest in the same circumstances, and whether defendant had the choice of not going with the police.[92]

And what is probable cause? In *State v. Berker*[93] the Rhode Island Supreme Court quoted the following definition of probable cause given by the United States Supreme Court in *Draper v. United States*[94] —

> … probable cause … to arrest within the meaning of the Fourth Amendment exists where the facts and circumstances within the knowledge of the arresting officer are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed by the person arrested …[95]

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91 417 A.2d 915 (R.I. 1980).

92 *Bailey, ante,* 417 A.2d at 917-18; *Griffith, ante,* 612 A.2d at 23-24. As stated *ante,* the *Bailey* test was used by the appeals panel to decide that Mr. Rhodes was in fact arrested. Decision of Appeals Panel, at 11-16.

93 120 R.I. 849, 391 A.2d 107 (1978).

94 358 U.S. 307 (1959).

95 *Berker,* 120 R.I. at 855, 391 A.2d at 111 (*citing Draper,* 358 U.S. at 313,

We employ a three-step protocol to determine if an officer has probable cause: *first,* the Court must determine the moment when the defendant was arrested, for it is at that point that the officer must have possessed the requisite quantum of information;[96] *second,* when marshaling the facts being proffered in support of an assertion that an officer acted armed with probable cause, the Court may consider hearsay, so long as there is a "substantial basis" for relying on such information;[97] and *third,* a Court reviewing whether the probable cause standard was satisfied in a particular case must consider the totality of the circumstances, giving deference to the perceptions of experienced law enforcement officers.[98]

C

Investigatory Stops: Justified by Reasonable Suspicion

1

Generally

A finding of a "seizure" does not, *per se,* indicate that an "arrest" has occurred. Professor LaFave, in his Fourth Amendment treatise,

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(*quoting Carroll v. United States,* 267 U.S. 132, 162, (1924))). *See also Brinegar v. United States, 338* U.S. 160, 175-76 (1949).

[96] *See State v. Guzman,* 752 A.2d 1, 4 (R.I. 2000)(*citing State v. Firth,* 418 A.2d 827, 829 (R.I. 1980)). *Accord, Burns,* 431 A.2d at 1203 (*citing State v. Frazier,* 421 A.2d 546, 550 (R.I. 1980)). *See also Devenpeck v. Alford,* 543 U.S. 146, 153 (2004)(*citing Maryland v. Pringle,* 540 U.S. 366, 371 (2003)).

[97] *See Burns, ante,* 431 A.2d at 1204.

[98] *See Illinois v. Gates,* 462 U.S. 213, 230-31 (1983).

explains the relationship between the two concepts thusly:

> … it remains to be asked whether the seizure constitutes an "arrest." For many years courts (including the Supreme Court) acted as if no such distinct issues existed. As a consequence, even the mere stopping of a moving motor vehicle might be assumed to be an arrest; if probable cause could be established only by consideration of facts obtained subsequent to the stopping, the arrest would thus be deemed illegal. But at least since *Terry v. Ohio,* it has become clear that this approach is inappropriate and unnecessary … (footnotes omitted).[99]

In other words, prior to the publication of the U.S. Supreme Court's opinion in *Terry v. Ohio,*[100] it could have been assumed (and often was) that a Fourth Amendment "seizure" was synonymous with an "arrest," and therefore probable cause was necessary to justify all seizures.[101]

But *Terry* altered our Fourth Amendment jurisprudential landscape radically. Although the Supreme Court conceded that even brief, investigatory car stops constitute Fourth Amendment "seizures" of the person or persons within the vehicle,[102] it held that lesser restraints

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99 3 W. LAFAVE, SEARCH AND SEIZURE, § 5.1(a), *What Constitutes an Arrest* (5th ed., Oct.2016 Update).

100 392 U.S. 1 (1968).

101 *See Henry v. United States,* 361 U.S. 98, 103 (1959)(Court held the arrest occurred when the officers stopped the vehicle). *See also Terry,* 392 U.S. at 35 (Dissent of Justice Douglas).

102 *Terry,* 392 U.S. at 16-19. *See also United States v. Whren,* 517 U.S. 806, 809-10 (1996)("Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited

or intrusions (*i.e.,* those not constituting an arrest) would no longer require probable cause.[103] Henceforth, investigative stops would pass Fourth Amendment muster if the officer possessed "reasonable suspicion based on specific and articulable facts that the person detained is engaged in criminal activity."[104] In applying this standard, the trial court must evaluate the totality of the circumstances.[105]

2

Duration and Scope of the Stop — *De Facto* Arrest

But, even if an initial stop is justified, the detainee's Fourth Amendment protections do not vanish. The encounter must be reasonable not only at its start but continually until its end.[106] Accordingly, the officer's authority to satisfy his investigatory impulses during the stop is not unbridled — "[t]he ensuing investigation must be reasonably related

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purpose, constitutes a 'seizure' of 'persons' within the meaning of the [Fourth Amendment]."). *Also, State v. Casas,* 900 A.2d 1120, 1131 (R.I. 2006)(*citing United States v. Cortez,* 449 U.S. 411, 417 (1981)).

[103] *Terry,* 392 U.S. at 27.

[104] *State v. Casas,* 900 A.2d 1120, 1131 (R.I.2006)(*quoting State v. Keohane,* 814 A.2d 327, 330 (R.I.2003)(*quoting State v. Abdallah,* 730 A.2d 1074, 1077 (R.I.1999))). *Also, State v. Taveras,* 39 A.3d 638, 642 n.6 (R.I.2012).

[105] *Casas,* 900 A.2d at 1131-32 (*citing Dunaway v. New York,* 442 U.S. 200, 212 (1979). The circumstances must be weighed "as understood by those versed in the field of law enforcement." *United States v. Cortez,* 449 U.S. 411, 418 (1981).

[106] *Casas,* 900 A.2d at 1133 (*citing Whren, ante,* 517 U.S. at 810).

in scope or duration to the circumstances that justified the stop in the first instance, so as to be minimally intrusive of the individual's Fourth Amendment interests."[107] If not, "… a stop that was lawful at its inception may be of such nature or duration as to become a *de facto* arrest for which probable cause must be established."[108]

Unfortunately, "[t]here is no bright line that distinguishes a valid *Terry* stop from its invalid counterpart (commonly known as a *de facto* arrest)."[109] And, this question is decided by evaluating the totality of the circumstances — just as the issues of probable-cause-for-arrest and reasonable-suspicion-for-a-stop are.[110] Therefore, we must not consider "individual factors and facts" in isolation from each other.[111] As we shall see in the next section, the limits which are placed upon the officer's investigatory efforts are also applicable to any safety measures which are

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[107] *Casas, ante,* 900 A.2d at 1133 (*quoting United States v. Glover,* 957 F.2d 1004, 1011 (2d Cir.1992)). *See also Parra, ante,* 941 A.2d at 804.

[108] *Casas,* 900 A.2d at 1131 (*quoting Keohane,* 814 A.2d at 330 (*citing Cortez,* 449 U.S. at 417)). *And, United States v. Acosta-Colon,* 157 F.3d 9, 14 (1st Cir.1998).

[109] *United States v. Pontoo,* 666 F.3d 20, 30 (1st Cir. 2011)(*citing Florida v. Royer,* 460 U.S. 491, 506-07 (1983)).

[110] *Casas,* 900 A.2d at 1133 (*citing United States v. Zapata,* 18 F.3d 971, 975 (1st Cir.1994)). Or, as the Supreme Court has also phrased it — we must examine "the whole picture." *Cortez, ante,* 449 U.S. at 417.

[111] *See also United States v. Dapolito,* 713 F.3d 141, 148-49 (1st Cir.2013) (*citing United States v. Arvizu, 534* U.S. 266, 274 (2002))(rejecting a "divide-and-conquer" approach).

taken.

D

Frisks and Other Procedures Used for Officer Safety

1

General Considerations

Police work carries certain inherent dangers; and, roadside encounters can be "especially hazardous."[112] As a result, the wisdom of the following declaration from the First Circuit Court of Appeals cannot be debated:

> In a world fraught with peril, officer safety must have a place at the forefront of police work.[113]

And so, during a *Terry* stop, in addition to performing their investigatory tasks, officers may take steps *reasonably necessary* to insure their own safety.[114] But, if an officer takes actions beyond those which are reasonably necessary to insure his safety, legal consequences will follow:

> If the force employed exceeds what is reasonably necessary to effect the goal of the stop, such force may transform an investigative detention into a full-blown arrest.[115]

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[112] *Michigan v. Long,* 463 U.S. 1032, 1049 (1983).

[113] *Pontoo, ante,* 666 F.3d at 30 (Selya, J.).

[114] Santos, ante, 64 A.3d at 322. *See also Flowers v. Fiore,* 359 F.3d 24, 30 (1st Cir.2004)("[W]e have repeatedly stressed that officers may take necessary steps to protect themselves if the circumstances reasonably warrant such measures."). *See generally,* 4 W. LAFAVE, SEARCH AND SEIZURE, § 9.2(d), *Use of Force; Show of Force,* (5th ed., Oct.2016 Update).

[115] *Santos, ante,* 64 A.3d at 322 (*citing State v. Apalakis,* 797 A.2d 440, 446

To repeat — if the detention exceeds (in its intrusiveness or length) that which is *reasonably necessary,* the stop will be regarded as a "full-blown" or *de facto* arrest — which, to be constitutional, must be supported by probable cause.[116]

And, in order to justify an action on the basis of officer safety, it is not enough to say that a particular measure which was implemented was likely to make the officer safer. No, the validation of a safety measure requires a more compelling justification, as was well-explained by the First Circuit Court of Appeals in *United States v. Acosta-Colon.*[117] In considering Mr. Acosta's argument that his removal from an airport jetway by federal officers into a nearby room for questioning constituted a *de facto* arrest, the Court acknowledged that moving him might well have been safer — for the officer and for the public; but, the Court then added:

> In this sense, there will *always* exist "security reasons" to move the subject of a *Terry*-type stop to a confined area

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(R.I.2002).

[116] 68 AM.JUR.2D *Searches and Seizures,* § 90 (May, 2017 Update)(*citing Flowers v. Fiore,* 239 F.Supp.2d 173, 177 (D.R.I.2003)(*citing United States v. Richardson, 949* F.2d 851, 856 (6th Cir.1991), *affirmed Flowers v. Fiore, 359* F.3d at 29 (*citing United States v. Quinn,* 815 F.2d 153, 156 (1st Cir.1987) (local cites not in original)).

[117] 157 F.3d 9 (1st Cir.1998).

> pending investigation. But if this kind of incremental increase in security were sufficient to warrant the involuntary movement of a suspect to an official holding area, then such a measure would be justified in *every Terry*-type investigatory stop. That result surely is not within the contemplation of *[Florida v.] Royer*. *See LaFave, supra,* § 9.2(g), at 75–76.
>
> Whatever might qualify as "reasons of safety and security" sufficient to "justify moving a suspect from one location to another during an investigatory detention" (such as from the place of the initial stop to an interrogation room), *Royer,* 460 U.S. at 504, 103 S.Ct. 1319 (plurality), the requisite justification cannot rest upon bald assertions, such as those offered by the government here, that law enforcement officers were in fact prompted to act on such reasons. The government must point to *some* specific fact or circumstance that could have permitted law enforcement officers reasonably to believe that relocating the suspect to a detention room was necessary to effectuate a safe investigation. *See Royer,* 460 U.S. at 505–06, 103 S.Ct. 1319 (plurality). It has failed to do so.[118]

And so, when the prosecution attempts to justify the use of a particular safety measure, it is not sufficient to show that the officer's actions enhanced his or her safety; there must be an additional showing that the actions taken were, from a safety standpoint, reasonably necessary.[119]

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[118] *Acosta-Colon, ante,* 157 F.3d at 17 (emphasis in original)(clarification added).

[119] And if the information known to the officer, viewed in its entirety, meets the reasonably-necessary standard, it is immaterial that the officer's goal, in employing the safety procedure, could have been satisfied by using a less intrusive procedure. *See Illinois v. Lafayette*, 462 U.S. 640, 647-48 (1983)(principle declared in context of search incident to arrest) *and Taveras*, *ante,* 39 A.3d at 649-50.

2

Particular Safety Measures

Next, in order to equip ourselves to determine whether Officer Hughes' actions, viewed as a whole, transcended the constitutional bounds of a traffic stop detention, we shall review a range of safety measures, noting how each affects the determination of whether a detainee becomes a (*de facto*) arrestee. It should be noted that, oft-times, appellate courts, even when approving the utilization of specific techniques, particularly the most intrusive, have said that the use of such techniques should not become routine, but they should be available to be utilized only in special situations.[120]

a

Removing the Motorist From His or Her Vehicle

We begin with the most fundamental safety procedure used by officers when conducting vehicle stops: removing the driver (and any passengers) from the vehicle. We know, as a matter of law, that "… an officer can order the driver and passenger out of a lawfully stopped vehicle without violating the Fourth Amendment's prohibition against

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[120] *See* 4 W. LAFAVE, SEARCH AND SEIZURE, § 9.2(d), *Use of Force; Show of Force,* at nn.124, 132-38 (5th ed., Oct.2016 Update).

unreasonable searches and seizures."[121] And this may be done in any valid vehicle stop — "as a matter of course" — without the need for proof that the officer had a valid reason to suspect that the person was armed and dangerous.[122] But this is the only physical protection technique which requires no justification.[123]

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[121] *Parra, ante,* 941 A.2d at 804 (*quoting State v. Quinlan,* 921 A.2d 96, 108 (R.I.2007)(*citing Pennsylvania v. Mimms,* 434 U.S. 106, 111 n.6 (1977) (driver) *and Maryland v. Wilson,* 519 U.S. 408, 415 (1997)(passengers))). *See also State v. Milette,* 727 A.2d 1236, 1239 (R.I.1999).

[122] *State v. Collodo,* 661 A.2d 62, 64 (R.I.1995)(*citing Mimms, ante,* 434 U.S. at 109-11, *and State v. Soares,* 648 A.2d 804 (R.I.1994)(per curiam)).

[123] In fact, there is one other thing that officers may do routinely, but it does not involve an intrusion into the detainee's physical person: running a license/warrant check. *See Rodriguez v. United States,* — U.S. —, 135 S.Ct. 1609 (2015). In *Rodriguez,* the Court noted that, when issuing citations:

> … an officer's mission includes "ordinary inquiries incident to [the traffic] stop." [*Illinois v.*] *Caballes,* 534 U.S [405] 408, 125 S.Ct. [834] [(2005)]. Typically, such inquiries involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance. *Delaware v. Prouse,* 440 U.S. 648, 658-60, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). *See also* 4 W. LaFave, Search and Seizure, § 9.3(c), pp. 507-17 (5th ed., Oct.2016 Update).

Rodriguez, 135 S.Ct. at 1615. The *Rodriguez* Court also cited *United States v. Holt,* 264 F.3d 1215, 1221-22 (10th Cir.2001)(permitting a computer inquiry into the motorist's criminal history).

In the instant case, the zeal which Officer Hughes showed in carrying out safety measures makes it all the more bewildering that he did not avail himself of the opportunity to discover whether Mr. Rhodes had a criminal history prior to removing him from the vehicle. *See also Bjerke,* 673 A.2d at 1073 (finding no expectation of privacy in the results of a computer check of a license plate). When asked why he failed to do so, he said he did not have

b

Frisks or Pat-downs

Second, we shall consider the procedure known as a frisk or a pat-down.[124] Our Supreme Court has noted that, under *Terry*, officers are authorized to conduct pat-downs only in limited circumstances:

> In *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the United States Supreme Court promulgated the principle that a police officer, when confronted with suspicion of criminal activity not rising to the level of probable cause, may engage in an investigative stop of a person, and if his suspicions are not dispelled by this stop and accompanying inquiry, *he may perform a limited "pat-down" search of a suspect's outer clothing for weapons if he has reason to believe the person may be armed and dangerous.*[125]

Thus, officers may only pat-down a vehicle's driver or passengers if the officer has reason to believe he or she may be in danger, not abstractly, but because the officer has reason to believe the person may be armed and dangerous. [126] Indeed, our Supreme Court has stressed that a pat down is " 'an intrusion on the integrity of the person' and not to be taken

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time to run the plate. Trial Transcript, at 82-83.

[124] In Massachusetts, the procedure has often been called a "pat frisk." *See United States v. McKoy,* 428 F.3d 38, 39 (1st Cir.2005); *Commonwealth v. Helme,* 399 Mass. 298, 299, 503 N.E.2d 1287, 1288 (1987); *Commonwealth v. Abdul-Alim,* 91 Mass.App.Ct. 165, 168-69, 72 N.E.3d 1059, 1063 (2017).

[125] *State v. Tavarez,* 572 A.2d 276, 277-78 (R.I.1990)(Emphasis added). *See also Terry,* 392 U.S. at 23-27 *and Arizona v. Johnson,* 555 U.S. 323, 331 (2009); *Collodo, ante,* 661 A.2d at 65 *and Quinlan, ante,* 921 A.2d at 108).

[126] 68 AM.JUR.2D *Searches and Seizures,* § 93 (May, 2017 Update).

lightly."[127] The *Collodo* Court specifically declared that it was not issuing a *carte blanche* permit authorizing officers to pat down all individuals whom they stop on the highways.[128]

Pat-down cases recognize that a multitude of factors may constitute indicia of dangerousness, such as: the nature of the charge for which the stop is made,[129] the time of day or night when the stop occurred, and the location where the stop is made, a great many cases which have found frisks to have been warranted seem to focus primarily on the behavior of the detainee. Indeed, in his treatise, a representative sample of such cases is apportioned by Professor LaFave into more than a dozen sub-categories of detainee behaviors which have been found to justify (in whole or in part) pat-down frisks.[130]

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127 *Collodo, ante,* 661 A.2d at 66 (*quoting Terry,* 392 U.S. at 17).

128 *Collodo, ante,* 661 A.2d at 66.

129 4 W. LAFAVE, SEARCH AND SEIZURE, § 9.6(a), *Basis for Initiating a "Frisk,"* text at nn.55-61, (5th ed., Oct.2016 Update).

130 They are:

> … the suspect's admission he is armed; a characteristic bulge in the suspect's clothing; observation of an object in the pocket which might be a weapon; an otherwise inexplicable sudden movement toward a pocket or other place where a weapon could be concealed; movement under a jacket or shirt "consistent with the adjustment of a concealed firearm;" an otherwise inexplicable failure to remove a hand from a pocket; awkward movements manifesting an apparent effort to conceal something under his jacket; backing away by the suspect under

The Rhode Island cases seem to follow this pattern. A sampling of the pertinent Rhode Island cases reveals that pat-downs were deemed reasonable and did *not* trigger findings of *de facto* arrest in situations where: the driver of a speeding vehicle had no registration and made furtive gestures,[131] the passenger of a speeding vehicle (whose driver had neither a license nor a registration) who was fidgeting and not making eye contact,[132] the occupants of a vehicle who had exhibited furtive and suspicious behavior and who had repeatedly ignored orders to keep their hands where they could be seen,[133] and the driver of a vehicle in which

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> circumstances suggesting he was moving back to give himself time and space to draw a weapon; awareness that the suspect had previously been engaged in serious criminal conduct (but not more ambiguous "record" information); awareness that the suspect had previously been armed; awareness of recent erratic and aggressive conduct by the suspect; discovery of a weapon in the suspect's possession; discovery that the suspect is wearing a bullet proof vest as to which he makes evasive denials; and awareness of circumstances which might prompt the suspect to take defensive action because of a misunderstanding of the officer's authority or purpose, as well as other "characteristics of an armed gunman."

4 W. LAFAVE, SEARCH AND SEIZURE, § 9.6(a), text at nn.80-95.50, *Basis for Initiating a "Frisk,"* (5th ed., Oct.2016 Update)(footnotes omitted).

131 *Tavarez, ante,* 572 A.2d at 277-78.

132 *Collodo, ante,* 661 A.2d at 66.

133 *State v. Quinlan,* 921 A.2d 96, 108 (R.I.2007).

the officer had seen (in plain view) loose bullets in his car and whose hands the officer could not see.[134]

c

Handcuffing the Detainee

The handcuffing of detainees is another procedure which has prompted a great deal of discussion.[135] It has been said that "… the use of handcuffs, being one of the most recognizable indicia of a traditional arrest, 'substantially aggravates the intrusiveness' of a putative *Terry* stop."[136] While, at the same time, "the use of handcuffs does not necessarily turn an encounter into an arrest for which probable cause is required."[137] And as our leading Fourth Amendment commentator has

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[134] *Santos, ante,* 64 A.3d at 321.

[135] *See Santos, ante,* 64 A.3d at 322; *See also Pontoo, ante,* 666 F.3d at 30 (finding use of handcuffs was reasonable in detention of subject for murder, *citing United States v. Perdue,* 8 F.3d 1455, 1463 (10th Cir.1993)(collecting cases)) *and Acosta-Colon, ante,* 157 F.3d at 18-20 (finding prosecution failed to justify use of handcuffs by specific circumstances of the stop).

[136] *Acosta-Colon, ante,* 157 F.3d at 18 (*citing United States v. Glenna,* 878 F.2d 967, 972 (7th Cir.1989)).

[137] *Santos, ante,* 64 A.3d at 322 (*quoting Apalakis,* 797 A.2d 445-46 (*quoting United States v. Fountain,* 2 F.3d 656, 666 (6th Cir.1993))). The First Circuit expressed this same thought in a slightly different way:

> … [To] say that the use of physical restraints is not *necessarily* inconsistent with a *Terry*-type stop does not imply that law enforcement authorities, acting on less than probable cause, may handcuff suspects as a matter of routine. *See Washington* [*v. Lambert*], 98 F.3d [1181,] at 1187 [(9th Cir.1996)].

said — "… handcuffing of the suspect is not ordinarily proper, but yet may be resorted to in special circumstances …."[138] In 1998, the First Circuit Court of Appeals noted that —

> … when the government seeks to prove that an investigatory detention involving the use of handcuffs did not exceed the limits of a Terry stop, it must be able point to some specific fact or circumstance that could have supported a reasonable belief that the use of such restraints was necessary to carry out the legitimate purpose of the stop without exposing law enforcement officers, the public, or the suspect himself to an undue risk of harm.[139]

It was the prosecution's duty to satisfy the requirement of reasonableness.

Acosta-Colon, ante, 157 F.3d at 18. Of course, this logic applies with equal force to cases permitting all kinds of safety measures. At this point, the *Acosta-Leon* Court also cited *United States v. Smith,* 3 F.3d 1088, 1094 (7th Cir.1993) that the use of handcuffs will not transform a *Terry* stop into a *de facto* arrest only in "rare" cases where the detaining officer reasonably believes that the stop in which he or she is engaged could only be carried out safely through the use of handcuffs.

[138] 4 LaFave, SEARCH AND SEIZURE, § 9.2(d), *Use of Force; Show of Force,* (5th ed., Oct.2016 Update). *See also United States v. Mohamed, 630* F.3d 1, 6-7 (1st Cir.2010) *cert den.* 131 S.Ct. 2127 (2011) *and United States v. Carrigan,* 724 F.3d 39, 47-48 (1st Cir.2013).

[139] *Acosta-Colon, ante,* 157 F.3d at 18-19; *Glenna, ante,* 878 F.2d at 972-73; LaFave, *ante,* § 9.2(d), at 40-42 (illustrating "special circumstances" in which use of handcuffs might not exceed the limits of a *Terry* stop)).

d

Placing the Detainee in the Police Cruiser

The placing of detainees in the police cruiser has also been approved within the confines of a *Terry*-stop.[140]

e

Drawing a Weapon

Drawing a weapon on the detainee has also been deemed reasonable in certain cases.[141]

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[140] *See Santos, ante,* 64 A.3d at 322. *Also, United States v. Stewart,* 388 F.3d 1079, 1085 (7th Cir.2004)(justified where detainee, who was suspected of crime of violence involving use of firearm, was handcuffed and placed in cruiser by patrolman, awaiting arrival of detectives).

[141] *See Pontoo, ante,* 666 F.3d at 30-31 (detention of subject for murder)(*citing United States v. Jackson,* 918 F.2d 236, 238 (1st Cir.1990)) *and Flowers, ante,* 359 F.3d at 30. *Also, State v. Storey,* 713 A.2d 331, 334 (Me.1998)(drawing weapon was reasonable in light of defendant's possession of gun at prior arrest and defendant's efforts to coerce undercover agent to travel to another location); *Commonwealth v. Lopes,* 455 Mass. 147, 159, 914 N.E.2d 78, 89 (2009)(officer's reasonable suspicion that subjects committed a homicide with a handgun earlier the same day made pointing a weapon permissible)(*citing Commonwealth v. Willis,* 415 Mass. 814, 821, 616 N.E. 2d 62 (1993)).

Cf. Santos, ante, 64 A.3d at 317 (officer's removal of her service weapon from its holster as she commanded the driver to put his hands where she could see them, was not discussed in the Court's analysis of the legality of the safety measures the officer employed).

f
Searching the Passenger Compartment of the Defendant's Vehicle

And finally, officers may also take an action not directly involving the detainee's person: an officer who has a reasonable belief that the operator of a vehicle which has been stopped could be armed and dangerous may perform a search for weapons in the passenger compartment of the detainee's vehicle.[142] The leading case regarding the safety measure of searching the passenger compartment of the Defendant's vehicle is the decision handed-down by the United States Supreme Court in *Michigan v. Long,*[143] in which the Court declared that:

> [o]ur past cases indicate then that protection of police and others can justify protective searches when police have a reasonable belief that the suspect poses a danger, that roadside encounters between police and suspects are especially hazardous, and that danger may arise from the possible presence of weapons in the area surrounding a suspect. These principles compel our conclusion that the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant" the officers in believing that the suspect is dangerous and the suspect may gain

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142 *See Milette, ante,* 727 A.2d at 1239-40 (*citing Michigan v. Long,* 463 U.S. 1032, 1051 (1983)). *Also, Santos, ante,* 64 A.3d at 320.

143 463 U.S. 1032 (1983).

> immediate control of weapons.[] See *Terry,* 392 U.S. at 21, 88 S.Ct. at 1880.[144]

And so, passenger compartment searches, like pat-downs, must be predicated on reasonable suspicion that the detainee may be armed and dangerous.

g

Summary of Protective Search Law

After enumerating the various modes of protective action, I believe we may draw a few conclusions. Above all, and as we stated *ante*, the officer's actions must be reasonably necessary; indeed, "[t]he lynchpin of any Fourth Amendment analysis is reasonableness."[145] And so, it is no surprise that most of the tactics just enumerated are lawful on a finding that they were reasonably necessary to achieve one of the ends of the detention.

But two of these procedures require more. In order to perform a pat-down or a protective sweep of the passenger compartment of the stopped vehicle, an officer must demonstrate a reasonable suspicion that the detainee was armed and dangerous.

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144 *Long, ante,* 463 U.S. at 1049 (footnote omitted — in which the Court "stressed" that its ruling "does not mean that the police may conduct automobile searches whenever they conduct an investigative stop," as they may in conjunction with a custodial arrest. *Id.,* at n.14).

145 *Taveras, ante,* 39 A.3d at 648.

E

Routine Traffic Stops — Based on Probable Cause of a Traffic Violation

Routine traffic stops[146] have been declared categorically reasonable under the Fourth Amendment if the police officer has probable cause to believe the motorist has committed a traffic violation — even a civil traffic offense.[147] And, an officer may arrest a motorist for a very minor criminal traffic offense, even those punishable by fines.[148]

It is important to remember that, in Fourth Amendment theory, *routine traffic stops* are distinct from *Terry* investigative stops, although the real-world similarity between the two categories of seizures has been recognized from time to time. For instance, it was said in *Berkemer v. McCarty,*[149] that "the usual traffic stop is more analogous to so-called '*Terry* stop,' … than to a formal arrest.").[150] And this correlation has

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146 The term "routine traffic stop" was first employed by the United States Supreme Court in a footnote in *United States v. Robinson,* 414 U.S. 218, 236 at n.6, (1973). It made its first appearance in the body of a majority opinion in *Berkemer v. McCarty,* 104 U.S. 420, 435, (1984). It has now used ubiquitously.

147 *Whren, ante,* 517 U.S. at 809-10.

148 *Atwater v. City of Lago Vista,* 532 U.S. 318, 354 (2000).

149 *Berkemer v. McCarty,* 104 U.S. 420 (1984).

150 *Berkemer, ante,* 104 U.S. at 438-39 (Basing the correlation on the fact that the detention is usually "temporary and brief," and because such a stop is less "police dominated."). The analogy was echoed in *Knowles v. Iowa,* 525

proven useful, because it allows the Supreme Court, when reviewing the legality of a traffic stop, to invoke that line of cases pursuant to which *Terry* stops are limited temporally and with regard to their investigative techniques.[151] The Court stated in 2015:

> Like a *Terry* stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's "mission" — to address the traffic violation that warranted the stop, *Caballes,* 543 U.S., at 407, 125 S.Ct. 834 and attend to related safety concerns, *infra,* at 1619-1620. *See also United States v. Sharpe,* 470 U.S. 675, 685, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985); *Florida v. Royer,* 460 U.S. 491, 500, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983)(plurality opinion)("The scope of the detention must be carefully tailored to its underlying justification."). Because addressing the infraction is the purpose of the stop, it may "last no longer than is necessary to effectuate th[at] purpose." *Ibid. See also Caballes,* 543 U.S., at 407, 125 S.Ct. 834. Authority for the seizure thus ends when tasks tied to the traffic infraction are — or reasonably should have been — completed. *See Sharpe,* 470 U.S. at 686, 105 S.Ct. 1568 (in determining the reasonable duration of a stop, "it [is] appropriate to examine whether the police diligently pursued [the] investigation").[152]

We shall, by necessity, return to this standard in our analysis.

U.S. 113, 117 (1988) *and Rodriguez v. United States,* — U.S. —, 135 S.Ct. 1609, 1614 (2015).

[151] 4 LaFave, SEARCH AND SEIZURE, § 9.3(b), *Applicability of the Terry Limitations,* (5th ed., Oct.2016 Update).

[152] *Rodriguez, ante,* 135 S.Ct. at 1614.

F
Resolution: Appellant's Search and Seizure Argument

As we have seen, the core of Mr. Rhodes' argument before this Court is that the officer's actions — *i.e.,* taking him out of the car at gunpoint, putting him onto his knees, handcuffing him, and placing him in the rear of the police cruiser — constituted a *de facto* arrest. He further asserts that this arrest was not supported by probable cause. He therefore argues that the evidence subsequently gathered by Officer Hughes should have been suppressed under the Fourth Amendment's exclusionary rule — which he urges, should apply to trials for refusal to submit to a chemical test conducted by the Traffic Tribunal.

1
The Officer's Justification for His Actions

In his testimony, Officer Hughes explained that his conduct toward Mr. Rhodes during the stop was prompted by concern for his personal safety. He presented no additional justifications for his actions.

When asked, the officer explained the reasons why he felt his life was in danger during the stop of Mr. Rhodes:

> Time of day, after 2:00 in the morning. I'm one police officer. I have no idea how many people are in the vehicle. We cover about 60 square miles of terrain. Sometimes my closest backup is ten minutes away. Again, in the use of force segment of my training and experience really, again, action is quicker than reaction, so rather than wait to get

> shot at and potentially killed in the line of duty, which obviously, I want to avoid at all costs, we remove our firearm, because action is quicker than reaction.[153]

Clearly, none of these reasons pertains particularly to the stop of Mr. Rhodes.[154] They are generalities, applicable to the stop of any person in the early morning hours in Burrillville, which ignore the fact that he was joined by his sergeant *before* he handcuffed and patted him down.

When asked by the prosecutor to relate the reasons for invoking the protocol relating to *this particular stop*, he offered the following:

> The abrupt stop. I wasn't able to – – I don't know if there was tint on the windows or if there was clutter in the backseat. I couldn't see into the vehicle at all, so I couldn't see if there was additional passengers. I couldn't see the motorist, if he was making furtive movements. I couldn't see any of that.[155]

Thus, Officer Hughes' rationale was precautionary, not evidence-based.

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[153] Trial Transcript, at 77-78.

[154] Later, during redirect, Officer Hughes reiterated his general safety concerns:

> Given the time of day, again, 60 square miles of Burrillville. I've had motorists jump out of the vehicle on me, and advance, before I can even get out of my cruiser. We've uncovered weapons out of vehicles before. Again, given the time of day, the fact that my closest backup is ten minutes away, our number one rule about us going home safely to our families at night.

Trial Transcript, at 100-101.

[155] Trial Transcript, at 101.

2
***Methodology*: The Test to Be Applied**

As we have noted *ante,* there are two paths by which we may determine whether Mr. Rhodes was subjected to a *de facto* arrest by Officer Hughes *prior to* his formal arrest. The first path, the more direct, is the one taken by the appeals panel: the application of the *Bailey* test, which is a determination, at a given point in time, of the defendant's seizure status (*i.e.,* detainee or arrestee); the second is that which was suggested by the State in its Memorandum — an evaluation of whether the defendant's seizure, from beginning to end, was reasonable or whether the officer subjected Mr. Rhodes to an excessively intrusive invasion of his privacy.[156] As we know, if the officer took actions which were not reasonably necessary, his detention is transformed, as a matter of law, into a *de facto* arrest. I shall term this the *degree of intrusion test,* or, for brevity's sake, simply the *intrusion test.*

In my view, this second methodology is particularly well-suited to analyzing assertions of a *de facto* arrest in a car stop setting, because, in that scenario, officers tend to use escalating protective measures. The degree of intrusion test does not require us to posit, in advance of the analysis, the exact moment of arrest, as the *Bailey* test does; which, can

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[156] Appellee's Memorandum, at 5, (*quoting Santos,* 64 A.3d at 322).

necessitate multiple arrest analyses in a single case; instead, we can work through the scenario at our own pace.[157] Most significantly, this is the approach taken by our Supreme Court in its review of other traffic stop cases, such as the *Santos* case.

And so, we shall work through the intrusion test; but, since the appeals panel employed the *Bailey* test, which is perfectly good law — we shall double-check our work with the *Bailey* test as well.

3

Applying the Test — The Legality of the Detention of Mr. Rhodes

The incident began when Officer Hughes stopped Mr. Rhodes' vehicle based on his commission of certain civil traffic violations. As we have seen, such "routine traffic stops" constitute "seizures" of the operator and any passengers within the meaning of the Fourth Amendment.[158] But, since the officer had observed Mr. Rhodes commit several civil traffic offenses — and therefore possessed probable cause to believe Mr. Rhodes committed these offenses — the initial stop was

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[157] This intrusion test is particularly valuable in the instant case because the appeals panel did not, to my reading, specify the exact moment of arrest. Now, this did not pose a great problem for the panel, because it found that the exclusionary rule did not apply; consequently, it was not required to determine what items of evidence had to be suppressed.

[158] *Quinlan, ante,* 921 A.2d at 106 (*citing Whren, ante,* 517 U.S. at 809).

certainly reasonable under the Fourth Amendment.[159] In any event, Mr. Rhodes has not challenged the legality of the initial stop to which he was subjected by Officer Hughes.

a

Overview

We may now begin to evaluate the extent of Officer Hughes' detention of Mr. Rhodes. Like many things, vehicle stops may be measured in two dimensions — not by their length and breadth, but by their duration and nature. Of course, Mr. Rhodes has not challenged the duration of the stop, focusing instead on its level of intrusiveness.

As set forth *ante,* the State urges that Officer Hughes' actions were necessary to insure his safety. But while it is perhaps true that each of the actions taken by Officer Hughes with regard to Mr. Rhodes tended to increase his safety incrementally, that fact, even if true, does not justify their use. Actions taken by the officer must be more than beneficial; they must be shown to have been *reasonably necessary*.

But Officer Hughes reversed this burden, indicating he acted on a *presumption* of dangerousness:

> He was being detained until my officer safety awareness was satisfied that he didn't have a knife, a weapon, edge

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159 *Quinlan, ante,* 921 A.2d at 106 (*citing Whren, ante,* 517 U.S. at 810).

weapon, gun, the gamut.[160]

This statement is, quite simply, inconsistent with our Fourth Amendment jurisprudence. The officer can only take those actions which are justified by the particular circumstances of the detention he is executing; in sum, the officer cannot *presume* dangerousness; he must *justify* such a belief. In this case, the appeals panel determined that no sufficient justification for the officer's actions had been provided.

And so, we must examine the actions taken by the officer and decide whether the panel's determination — that the officer exceeded the level of intrusion justified by the circumstances of the traffic stop — was clearly erroneous. But, in doing so, we may not, under the guidance of *Arvizu, ante,* consider each act in isolation. Instead, we must, to the extent possible, evaluate them in a holistic manner. Of course, we must respect the sequence of events as it actually unfolded, otherwise we shall be trying to evaluate a jumble.

Applying these principles, I believe we can distinguish at least three points in time, representing three incidents of intrusion, which we may evaluate to see if the bounds of a proper traffic/*Terry* stop were transcended. They are: (1) the moment when Mr. Rhodes was ordered, at

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[160] Trial Transcript, at 86.

gunpoint, to exit his vehicle with his hands raised, to drop to his knees, and to lift up his shirt; (2) the moment when Mr. Rhodes was patted-down while handcuffed, and (3) the point at which, while still handcuffed, Mr. Rhodes was seated in the rear of the police cruiser while the officer conducted a protective search of the passenger compartment of his automobile. However, I have concluded that we shall not need to analyze all three.

Since no inculpatory evidence (or information) was acquired by the officer between the moment when he ordered the motorist to exit his vehicle and the instant when he began to pat-down Mr. Rhodes — other than the fact that Mr. Rhodes was not hiding any weapons under his shirt — the legality, *vel non,* of Mr. Rhodes' initial exit from the vehicle is not a question whose answer will affect the admissibility of evidence in this case. It is therefore not a *material* issue which we need decide. Therefore, we can consider these two incidents as one. And this is what the appeals panel seemed to do.

In addition, we shall not address the third incident because it does not seem to have been discussed by the panel in its *Bailey* arrest analysis. As I read its *Bailey* analysis, the panel weighed the data items of the exit and the pat-down together, but did not discuss the features of

the third scenario at all. Therefore, considering this third incident might well draw us into fact-finding, however inadvertently — which this Court may not do under our limited review of RITT appeals.[161] It is also advantageous to focus on the first and second incidents of intrusion because they occurred *before* the parties' stories diverge; our analysis will therefore be sheltered from any limitations, explicit or implicit, in the fact-finding below.

b

The Legality of Mr. Rhodes' Detention – The Pat-down

i

Applying the Extent of Intrusion Test

We shall now consider whether the appeals panel's finding that Officer Hughes invasion of his privacy exceeded that which would have been proportionate to the circumstances of the traffic stop of Mr. Rhodes — focusing on the moment when the officer began to pat him down.[162]

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[161] *See Beagan v. Department of Labor and Training, Board of Review,* — A.3d —, 2017 WL 2656483, at *4 (R.I.6/19/2017).

[162] By identifying the first level of intrusion in this way, we do not mean to suggest that the initial post-stop actions of the officer were beyond reproach. Undoubtedly, one could plausibly argue that Officer Hughes exceeded the proper bounds of a traffic stop and triggered a *de facto* arrest, when, with his gun pointed at Mr. Rhodes, he ordered the motorist out of his vehicle, onto his knees, and directed him to lift up his shirt. While the order to exit the vehicle needs no validation, these circumstances would require justification. Indeed, the order to lift the shirt presents an issue which

The appeals panel found that the prosecution failed to identify any facts from which the officer could properly discern the existence of a particular danger which would justify the intrusions which the officer visited upon Mr. Rhodes' liberty.[163] This is, of course, an under-statement, for the officer knew nothing about Mr. Rhodes' status, his criminal record (if any), or his conduct.[164] Indeed, the officer had not yet received any information about the motorist's identity.[165] As a result, the panel's finding that the officer's actions exceeded that which was reasonable is well-supported in the record and not clearly erroneous.

Indeed, the only "fact" to which Officer Hughes was able to point — in his attempt to justify his use of the "high-risk" protocol — was the vehicle's failure to stop within a normal timeframe. But, the probative value of even this single item could well have been determined to be vitiated by the fact that the officer turned off his flashing lights during most of his pursuit, thereby giving an ambiguous signal to Mr. Rhodes as to whether he was, in fact, being stopped — a point the officer essentially

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would itself be worthy of substantial discussion. *See Taveras, ante,* 39 A.2d at 648-50 (*citing United States v. Reyes,* 349 F.3d 219, 225 (5th Cir.2003), *United States v. Baker,* 78 F.3d 135, 137-38 (7th Cir.1996), *and United States v. Hill,* 545 F.2d 1191, 1193 (9th Cir.1976)).

163 Decision of Appeals Panel, at 14-15.

164 Decision of Appeals Panel, at 14.

165 Decision of Appeals Panel, at 14 (*citing* Trial Transcript, at 18-20).

conceded during his testimony.[166]

In addition, the instant case is factually distinguishable from cases in which a pat-down was deemed justified, and therefore constitutional, based upon particular observations made by the officer conducting the stop. For instance, in *Quinlan,* a pat-down was justified by — "… furtive and suspicious behavior and after the occupants repeatedly ignored orders to keep their hands where [the officer] could see them."[167] Similarly, in *Tavarez,* a pat-down was deemed legal where the defendant had made "furtive movements" not explainable by reaching for license or registration.[168] And likewise, in *Collodo,* a pat-down was justified by the defendant's:

> "fidgeting [and] looking straight forward, looking down" and did not make eye contact. After exiting the vehicle, defendant "shied away from [the trooper] on one side."[169]

To reiterate, none of these behaviors were exhibited by Mr. Rhodes prior to his pat-down by Officer Hughes.

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[166] When defense counsel asked Officer Hughes — "… [W]ould a reasonable motorist not think you're coming after him? Would a reasonable motorist say, if he was coming after me, he would have kept his lights on and kept coming?" — the officer responded, "It's arguable." Trial Transcript, at 84-85.

[167] *Quinlan, ante,* 921 A.2d at 108.

[168] *Tavarez, ante,* 572 A.2d at 278.

[169] *Collodo, ante,* 661 A.2d at 66.

This rule regarding pat-downs seems to have been applied most recently by our Supreme Court in *State v. Santos,* a 2013 decision which presented a rather extreme set of facts.[170] In *Santos,* the Court found that a pat-down search — conducted by an officer who had seen, in plain view, bullets on the floor of the vehicle, and who observed the operator looking around the car and away from her, and who placed his hands where she could not see them[171] — was justified and therefore lawful.[172] But, in the instant case, Officer Hughes found no bullets; he found no weapon. No information was known to Officer Hughes which tended to show that Mr. Rhodes might be armed and dangerous.

In essence, Officer Hughes (and the State) are asking us to establish a bright-line rule allowing pat-downs in every early morning stop in a rural area. But the Fourth Amendment, with its focus on reasonableness, admits few bright-line rules.[173] Of course, bright-line rules (or *carte blanche* permits) are exactly what our Supreme Court

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170 *Santos, ante,* 64 A.3d 314 (R.I.2013).

171 *Santos, ante,* 64 A.3d at 316-17.

172 *Id.*

173 *Pontoo,* 666 F.3d 20 at 30 (*citing Royer,* 460 U.S. at 506-07). Of course, to salvage the instant case, that bright-line rule would also have to permit handcuffing all early morning motorists and placing them in the rear of a cruiser.

declared it would never countenance in *Collodo*.[174]

Similarly, the handcuffing of Mr. Rhodes is also problematic; for, the reasons given by Officer Hughes do not show, even facially, that handcuffing the motorist was necessary. Based on all the forgoing, I conclude that the State has not shown that the appeals panel's finding — that Mr. Rhodes was subjected to a *de facto* arrest when the pat-down began — was clearly erroneous.

ii

Applying the *Bailey* Test

After Mr. Rhodes was stopped, his *freedom of movement* was greatly curtailed — by being removed from his vehicle, forced onto his knees and required to lift up his shirt at gunpoint, handcuffed, and patted-down. (And this is before his "freedom of action" was wholly limited when he was seated in the rear of the police cruiser while still handcuffed.) As to the *degree of force used*, we must recall that he was threatened with deadly force. Finally, and viewing the question objectively, it is hard to see how Mr. Rhodes could have concluded that he was not under arrest and that he was *free to leave.* (Once again, this is before he was placed in the rear of a police cruiser while handcuffed).

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[174] *Collodo, ante,* 661 A.2d at 66.

Based on these factors, I believe the *Bailey* test leads ineluctably to the conclusion that the appeals panel's finding that Mr. Rhodes had been subjected to a *de facto* arrest at the moment his pat-down began was not clearly erroneous.

iii

The Presence of Probable Cause

The consequence of this finding of arrest (under either method) is simple — Mr. Rhodes' *de facto* arrest, like all arrests, needed to be supported by probable cause. But, the panel found that when he patted-down Mr. Rhodes, Officer Hughes did not possess probable cause to believe that the Mr. Rhodes had been driving under the influence, or any criminal offense. We would wish to elaborate upon this point, but there are simply no facts to chew upon, no grist for the mill. All that the officer knew when he began his pat-down of Mr. Rhodes was that the motorist had violated several rules of the road, which are punishable by civil fines; that he had not pulled over as quickly as the officer desired; that he had exited his vehicle as commanded, had fallen to his knees as directed, and that he had lifted up his shirt revealing no weapons. And so, the panel's finding that Officer Hughes did not possess probable cause to arrest Mr. Rhodes (for any arrestable offense) cannot be said to be clearly erroneous.

iv

Summary and Resolution

At the end of the day, it is clear that, during his detention of Mr. Rhodes, Officer Hughes employed several of the most intrusive officer-safety techniques known to America's investigatory/traffic stop jurisprudence. For the reasons discussed, I believe the record is clear that they were used here without justification, thereby causing Mr. Rhodes' detention to become a *de facto* arrest, as of the moment his pat-down began. Secondly, it is also clear from this record that Officer Hughes did not possess probable cause at the moment the pat-down began. As a result, I cannot state that the appeals panel's finding was clearly erroneous or contrary to law.

Now, at this point in the review of a criminal case, an appellate court, which reviews facts relating to constitutional questions *de novo,* would proceed to evaluate which, if any, items of evidence were tainted by what has been determined to be an illegal seizure.[175]

However, since this case comes to us for limited review, our

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[175] *See State v. Sabourin,* — A.3d. —, 2017 WL 2507853, at *4 (R.I. 6/9/2017), in which the Rhode Island Supreme Court reiterated that "[w]ith respect to questions of law and mixed questions of law and fact involving constitutional issues, however, this Court engages in a de novo review …." (*quoting State v. Jimenez,* 33 A.2d 724, 732 (R.I.2011)(*quoting State v. Linde,* 876 A.2d 1115, 1124 ((R.I.2005))).

protocol must be to remand the case for a retrial (or at least a redetermination of the evidence which is subject to suppression). However, we shall defer action on even this modest chore, as we may not be required to perform it at all — because, *if* the exclusionary rule does not apply in refusal trials at the RITT, no evidence will need to be suppressed.

VII
Legality of Mr. Rhodes' Detention Under Article I, Section 6 of the Rhode Island Constitution
A
Legal Background

In his Memorandum, Mr. Rhodes also asks us to find that his detention was illegal (as constituting a *de facto* arrest) not only under the Fourth Amendment, but under Article I, Section 6 of the Rhode Island Constitution,[176] which, in identical language, "protects the same interests" as the Fourth Amendment.[177]

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[176] Article 1, Section 6 of the Rhode Island Constitution provides:

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

[177] *State v. Castro,* 891 A.2d 8848, 853 (R.I.2006).

To understand the interplay between the federal and Rhode Island constitutional privacy provisions, we may profitably begin with the following statement from our Supreme Court's decision in *State v. Benoit*[178] —

> Our resolution of questions of federal constitutional law is controlled by decisions of the United States Supreme Court. *Oregon v. Hass,* 420 U.S. 714, 719, 95 S.Ct. 1215, 1219, 43 L.Ed.2d 570, 576 (1975). In matters dealing with the fundamental liberties guaranteed to all citizens, the Federal Constitution establishes a minimum level of protection; however, a state constitution may be interpreted to afford greater protection to citizens of that state. *Id.* at 719, 95 S.Ct. at 1219, 43 L.Ed.2d at 576.[179]

And this authority vested in state courts, " 'to impose higher standards on searches and seizures than required by the Federal Constitution,' " may be exercised "even if the state constitutional provision is similar to the Fourth Amendment."[180] However, the *Benoit* Court also recognized that the Fourth Amendment's role as:

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[178] 417 A.2d 895 (R.I.1980).

[179] *Benoit, ante,* 417 A.2d at 899. The *Benoit* Court recalled that it had exercised its prerogative to make Rhode Island's constitutional provisions more protective of citizens' rights in 1971, in *In re Advisory Opinion to the Senate, 108* R.I. 628, 278 A.2d 852 (R.I.1971), wherein it had decreed that Sections 10 and 15 of Article I require a twelve-person jury, despite the United States Supreme Court's decision in *Williams v. Florida,* 399 U.S. 78 (1971), which had declared that a six-person jury was sufficient to satisfy the demands of the Sixth Amendment. *Benoit, id.*

[180] *Benoit, ante,* 417 A.2d at 899 (*quoting Cooper v. California,* 386 U.S. 58, 62 (1967)).

> … an indispensable guardian of fundamental rights, which in most contexts provides ample protection against unreasonable searches and seizures, and the manner in which it has been interpreted by the Court should command respect by state courts. The decision to depart from minimum standards and to increase the level of protection should be made guardedly and should be supported by a principled rationale. *See generally* Howard, State Courts and Constitutional Rights in the Day of the Burger Court, 62 Va.L.Rev. 873 (1976).[181]

Nevertheless, our Court has exercised its authority to do so on a number of occasions, where it felt a particular need.[182] But it has never

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[181] *Benoit, ante,* 417 A.2d at 899.

[182] *See State v. Maloof,* 114 R.I. 380, 390, 333 A.2d 676, 681 (1975) (deciding that Article I, Section 6 required closer adherence to Rhode Island's wiretapping statute than is required by the Fourth Amendment with regard to its federal counterpart); *Pimental v. Department of Transportation,* 561 A.2d 1348, 1352-53 (R.I.1989)(Affirming decision of DeRobbio, C.J., that use of sobriety checkpoints, or "roadblocks," would violate Article I, Section 6).

The *Benoit* decision referenced in the text merits a more extended explanation. In *Benoit*, the Court decided that it could not endorse a warrantless search which was delayed until the car was taken to the police station. Acknowledging that the Supreme Court's rulings in *Chambers v. Maroney, 399* U.S. 42 (1970) and *Texas v. White,* 423 U.S. 67 (1975), had approved similarly delayed searches, the Court found that these decisions had stretched the automobile exception, which originated in *Carroll v. United States, 267* U.S. 132 (1925), beyond its original rationale, which was exigency, based upon the mobility of vehicles. 417 A.2d at 900-01. And so, it found that Article I, Section 6 did not permit such searches. *Id.*

However, twelve years later, in *State v. Werner,* 615 A.2d 1010 (R.I. 1992), our Supreme Court revisited its decision in *Benoit*. Stating that the *Benoit* case had been, in part, based on what it perceived to be uncertainty in the Supreme Court's automobile exception jurisprudence regarding the need to show exigency, *Werner, ante,* 615 A.2d at 1013 (*citing Benoit,* 417

interpreted the state provision to be less protective of privacy interests — at least as to core privacy rights.[183]

B

***Resolution*: Legality of Appellant's Detention Under Article I, Section 6**

Incorporating by reference our complete analysis of the legality, *vel non,* of Mr. Rhodes' detention under the Fourth Amendment, set forth in Part VI of this opinion, *ante*, we must conclude that Officer Hughes' actions also transgressed the norms imposed upon Rhode Island law enforcement officials by Article I, Section 6 of the Rhode Island Constitution. I know of no decisions of our Supreme Court drawing a significant difference between an arrest under the Fourth Amendment and an arrest under Article I, Section 6. In sum, since we have found that the panel's finding that the officer's actions constituted a *de facto* arrest under the Fourth Amendment must be affirmed, we are obliged to make the same finding under an application of Article I, Section 6.

A.2d at 900 n.1), the Court held that the Supreme Court had now clarified its position — *i.e.,* that an automobile and its contents may be searched without any showing of exigency. *Werner, ante,* 615 A.2d at 1013-14.

[183] The only exception to this statement would seem to be *State v. Olynik,* 83 R.I. 31, 113 A.2d 123 (1955), which related to the application of the exclusionary rule (pre-*Mapp,* pre-§ 9-19-25), not to Article I, Section 6's core privacy protections.

VIII
Analysis — The Fourth Amendment Exclusionary Rule
A
The Issue

Having addressed the fact-sensitive search and seizure issue in some detail, we now come to a pure issue of law: whether the exclusionary rule may be invoked to bar the introduction of evidence gathered in violation of the Fourth Amendment in trials of civil traffic violations conducted by the Rhode Island Traffic Tribunal?

The appeals panel, through a majority of its members, held that the exclusionary rule should be deemed inapplicable to refusal trials conducted by the Traffic Tribunal.[184] The dissenting magistrate expressed a contrary view.[185] Each of these opinions — although they adopt contrary conclusions — presents a cogent discussion of the same handful of case precedents which are germane to this question.

B
Development and Basic Principles of the Exclusionary Rule
1
Generally

In 1914, in order to make the Fourth Amendment's prohibition on

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184 Decision of Appeals Panel, at 8-11.

185 Decision of Appeals Panel, at 18-21 (Dissenting opinion).

unreasonable searches and seizures more effective, the United States Supreme Court declared, in *Weeks v. United States,*[186] that evidence gathered by federal law enforcement officers through actions which violate the Fourth Amendment would no longer be admissible in federal criminal trials.[187] However, this judicially-created prophylactic, dubbed the "exclusionary rule," was not made mandatory in state criminal trials until 1961, when, in the landmark case of *Mapp v. Ohio,*[188] the Court held that the Due Process Clause of the Fourteenth Amendment required implementation of the exclusionary rule by the states.[189]

The fundamental tenets of the exclusionary rule were lucidly summarized by our Rhode Island Supreme Court in *State v. Morris*:

> It is axiomatic that "[t]he exclusionary rule bars from introduction at trial evidence obtained either during or as a direct result of searches and seizures in violation of an individual's Fourth Amendment rights." *State v. Jennings,* 461 A.2d 361, 368 (R.I. 1983). This prohibition against the use of evidence obtained after an illegal search applies with equal force against the use of evidence obtained from an unlawful arrest. *See Wong Sun v. United States,* 371 U.S.

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186 232 U.S. 383 (1914).

187 *Weeks, ante,* 232 U.S. at 398. It was not until the Supreme Court's decision in *Elkins v. United States,* 364 U.S. 206, 223-24 (1960), that evidence illegally obtained by *state* officers was also barred in federal criminal trials.

188 367 U.S. 643 (1961).

189 *Mapp, ante,* 367 U.S. at 654-55. *Acknowledged in: State v. Mercurio,* 96 R.I. 464, 468, 194 A.2d 574, 576 (1963).

471, 485, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).[190]

A fundamental precept of the rule is that its purpose is to deter future violations of Fourth Amendment rights — not to vindicate the rights of the accused.[191] And since the interest it was designed to serve is the public good, it must be interpreted with that purpose in mind:

> "[W]hether the exclusionary rule's remedy is appropriate in a particular context … [is] an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct." *Illinois v. Gates,* 462 U.S. 213, 223, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). The United States Supreme Court has warned that "unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury." *United States v. Payner,* 447 U.S. 727, 734, 100 S.Ct. 2439, 65 L.Ed.2d 468 (1980).[192]

Thus, the rule must be interpreted *realistically*, not *idealistically*.

2

Extended Application of the Exclusionary Rule

The exclusionary rule not only bars the admission of evidence gathered as a result of an illegal *search*; it also requires suppression of evidence obtained as a result of an illegal *arrest*. And this is not the only

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190 *Morris, ante,* 92 A.3d 920, 927 (R.I.2014).

191 *See State v. Spratt,* 120 R.I. 192, 193, 386 A.2d 1094, 1095 (1978) (*citing Calandra, ante,* 414 U.S. at 347, *United States v. Janis,* 428 U.S. 433, 446-47 (1976), *and Elkins, ante,* 364 U.S. at 217).

192 *Morris, ante,* 92 A.3d 920, 927 (R.I.2014).

way in which the exclusionary rule exhibits elasticity.

a

Extended Application of the Exclusionary Rule — Confessions

The rule applies to statements given after illegal arrests:

> The rule also forbids the use of indirect as well as direct products of an illegal arrest or search. *Wong Sun v. United States,* 371 U.S. at 484, 83 S.Ct. at 416, 9 L.Ed.2d at 453; *Silverthorne Lumber Co. v. United States,* 251 U.S. 385, 391-92, 40 S.Ct. 182, 182-83, 64 L.Ed. 319, 321 (1920). *Thus, the rule mandates that statements obtained by exploitation of an illegal arrest are fruits of the poisonous tree and are to be excluded at trial*. *See Wong Sun v. United States,* 371 U.S. at 485, 83 S.Ct. at 416, 9 L.Ed.2d at 454.[193]

As a result, when the prosecution seeks to admit a confession which was given during or after an illegal arrest or search, both Fifth Amendment and Fourth Amendment issues must be addressed:

> Such statements may be admissible if the state can establish that the connection between the unlawful action and the subsequent statement has "become so attenuated as to dissipate the taint." *Nardone v. United States,* 308 U.S. 338, 341, 60 S.Ct. 266, 268, 84 L.Ed. 307, 312 (1939). An individual may make a statement that is "sufficiently an act of free will to purge the primary taint of the unlawful invasion." *Wong Sun v. United States,* 371 U.S. at 486, 83 S.Ct. at 416-17, 9 L.Ed.2d at 454. A finding that a confession may satisfy the voluntariness standards of the Fifth Amendment, however, does not necessarily mean that there is no Fourth Amendment violation. Voluntariness is merely a threshold requirement for the purposes of Fourth Amendment analysis. *Dunaway v. New York,* 442 U.S. 200,

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193 *State v. Burns,* 431 A.2d 1199, 1205 (R.I.1981)(Emphasis added).

> 217, 99 S.Ct. 2248, 2259, 60 L.Ed.2d 824, 839 (1979); *State v. Burns,* 431 A.2d at 1205. Consequently, giving a suspect *Miranda* warnings alone does not *per se* make any subsequent statement sufficiently a product of free will to break the causal connection between the confession and the unlawful action. *Taylor v. Alabama,* — U.S. —, 102 S.Ct.2664, 2667-68, 73 L.Ed.2d 314, 319 (1982); *Brown v. Illinois,* 422 U.S. 590, 603, 95 S.Ct. 2254, 2261, 45 L.Ed.2d 416, 427 (1975).
>
> The focus of the Fourth Amendment inquiry, therefore, must be "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun v. United States,* 371 U.S. at 488, 83 S.Ct. at 417, 9 L.Ed.2d at 455 (quoting Maguire, *Evidence of Guilt* 221 (1959)). The court must examine the particular facts of each case and consider the voluntariness of the confession as well as (1) the temporal proximity of the illegality and the confession, (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the illegal police conduct. *Brown v. Illinois,* 422 U.S. at 603-04, 95 S.Ct. at 2261-62, 45 L.Ed.2d at 427; *State v. Burns,* 431 A.2d at 1205-06.[194]

Thus, the Fifth Amendment issue is voluntariness and the Fourth Amendment issue is whether there has been purgation of the taint.

b

Consent to Search After an Illegal Search or Arrest

Searches which have been conducted pursuant to consent "freely and voluntarily given" are constitutional.[195] But, illegal arrests may affect

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194 *State v. Jennings,* 461 A.2d 361, 368 (R.I.1983).

195 *Casas, ante,* 900 A.2d at 1134.

the validity of a defendant's subsequent consent to a search:

> The validity of a defendant's consent to search can be tainted fatally by an illegal stop, detention or arrest. "Consent given during an illegal detention is presumptively invalid." *United States v. Cellitti,* 387 F.3d 618, 622 (7th Cir.2004). This Court has held that evidence obtained by exploitation of an illegal arrest must be excluded at trial as the fruit of the poisonous tree. *State v. Burns,* 431 A.2d 1199, 1205 (R.I.1981).
>
> However, a defendant's consent can be deemed valid if it is sufficiently attenuated from the illegal police action "to dissipate the taint." *Wong Sun v. United States,* 371 U.S. 471, 487, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)(quoting *Nardone v. United States,* 308 U.S. 338, 341, 60 S.Ct. 266, 84 L.Ed. 307 (1939)). The state has "the burden of demonstrating that the causal connection between the statements and the illegal arrest was broken so as to dispel the primary taint of the illegal seizure." *Burns,* 431 A.2d at 1205. Factors to consider include, "[t]he temporal proximity of the arrest and the [consent to search], the presence of intervening circumstances, * * * and, particularly, the purpose and flagrancy of the official misconduct * * *." *Brown,* 422 U.S. at 603-04, 95 S.Ct. 2254; *see also Jennings,* 461 A.2d at 368; *Burns,* 431 A.2d at 1205-06.[196]

Thus, the analysis proceeds like that employed for a confession given after an illegal arrest.

C

The Federal Precedents

Generally speaking, the use of the exclusionary rule has been confined to criminal trials. Indeed, the United States Supreme Court, in

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[196] *Casas, ante,* 900 A.2d at 1134-35.

1976, declared:

> In the complex and turbulent history of the rule, the Court never has applied it to exclude evidence from a civil proceeding, federal or state.[197]

Along the way, the Court has found that the rule would not be applied in grand jury proceedings,[198] nor to federal tax hearings,[199] nor in federal deportation hearings,[200] and not to parole revocation hearings.[201] In the first of these, the 1974 decision regarding the exclusionary rule's applicability to grand jury proceedings, *United States v. Calandra,* the Court established the protocol to determine whether the exclusionary rule would apply at a particular type of proceeding. The Court stated:

> In deciding whether to extend the exclusionary rule to grand jury proceedings, we must weigh the potential injury to the historic role and functions of the grand jury against the potential benefits of the rule as applied in this context.[202]

Employing this cost-benefit analysis, the Court found that applying the

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197 *United States v. Janis,* 428 U.S. 433, 447 (1976).

198 *United States v. Calandra,* 414 U.S. 338, 354-55 (1974).

199 *United States v. Janis,* 428 U.S. 433, 453-54 (1976).

200 *Immigration and Naturalization Service v. Lopez-Mendoza,* 468 U.S. 1032, 1050 (1984).

201 *Pennsylvania Board of Probation and Parole v. Scott,* 524 U.S. 357, 364 (1998)(5-4 decision). *See generally,* ANNOT., *Admissibility, in State Probation Revocation Proceedings, of Evidence Obtained Through Illegal Search and Seizure,* 92 A.L.R.6TH 1 (2014).

202 *Calandra, ante,* 414 U.S. at 349.

rule in grand jury proceedings "… would seriously impede the grand jury."[203] And, on the other side of the ledger, the Court concluded that "[a]ny incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings would be uncertain at best."[204] And so, the Court declined to require the application of the exclusionary rule in grand jury proceedings.[205] This protocol was followed by the Supreme Court in cases decided subsequently.[206]

D

The Rhode Island Decisions

The Rhode Island Supreme Court has twice faced the issue of whether the exclusionary rule must be utilized in proceedings other than criminal trials. The outcomes have been mixed. And so, we shall discuss each decision in some depth.

1

The Exclusionary Rule in the Context of Probation Revocations Hearings: The *Spratt* Decision

The first Rhode Island case considering whether the exclusionary rule ought to be used in proceedings other than criminal trials, *State v.*

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[203] *Calandra, ante,* 414 U.S. at 349.

[204] *Calandra, ante,* 414 U.S. at 351.

[205] *Calandra, ante,* 414 U.S. at 351-52.

[206] *See Janis, ante,* 428 U.S. at 454; *Lopez-Mendoza, ante,* 468 U.S. at 1041-50*; Scott, ante,* 524 U.S. at 365-69.

Spratt,[207] was decided in 1978; in *Spratt,* the Court held that the rule would not be applied in probation-revocation hearings.[208] Although the Court's opinion was relatively brief, it gave several reasons for its conclusion. The Court began by noting that (at the time of the decision) every Court which had confronted the issue had declined to apply the exclusionary rule in probation-revocation hearings.[209]

The Court then observed that most of these decisions were grounded on the principle that the purpose of the exclusionary rule was to prevent future unconstitutional conduct by police officers, not to

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[207] 120 R.I. 192, 386 A.2d 1094 (1978).

[208] *Spratt, ante,* 120 R.I. at 194-95, 386 A.2d at 1096.

[209] *Spratt,* 120 R.I. at 192, 386 A.2d at 1094-95. At first glance, it would appear that this statement is no longer true. *See* 1 W. LaFave, SEARCH AND SEIZURE, § 1.6(g), *Revocation of Conditional Release, (*5th ed., Oct.2016 Update) and cases cited at n.105 as having applied the exclusionary rule in probation revocation cases (*e.g. United States v. Workman,* 585 F.2d 1205 (4th Cir.1978); *State v. Dodd, 419* So.2d 333 (Fla.1982); *State ex rel. Juvenile Dept. v. Rogers,* 314 Or. 114, 839 P.2d 127 (1992); *Wilson v. State,* 621 S.W.2d 799 (Tex.Crim.App.1981)). However, the Florida and Oregon decisions rested on provisions of their state constitutions, and the Fourth Circuit later conceded that its decision in *Workman* had been effectively overruled by the Supreme Court's decision in *Scott, ante. See United States v. Armstrong,* 187 F.3d 392, 394-95 (4th Cir.1999). Finally, the *Wilson* Court merely, without comment, that the exclusionary rule applied to probation revocation proceedings. *Wilson*, 621 S.W.2d at 803-05.

Most recently, *see Commonwealth v. Arter, 151* A.3d 149, 163-67 (Pa.2016), (holding that the exclusionary rule is made applicable in probation-revocation proceedings by a provision of Pennsylvania's state constitution).

"redress the injury to the privacy of the search victim."[210] And so, the Court considered whether the additional sanction of suppressing tainted evidence at a violation hearing would appreciably deter officers from acting illegally, when the same evidence was already barred from a criminal trial; our Court answered this question in the negative.[211] The Court also observed that implementing the exclusionary rule at probation-revocation hearings would "adversely affect the rehabilitative purposes underlying the probation system … ." [212]

Finally, the Court considered the impact of Gen. Laws 1956 § 9-19-25, which states:

> In the trial of any action in any court of this state, no evidence shall be admissible where the same shall have been procured by, through or in consequence of any illegal search and seizure as prohibited in section 6 of article 1 of the constitution of the state of Rhode Island.[213]

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[210] *Spratt,* 120 R.I. at 192-93, 386 A.2d at 1095 (*citing Calandra,* 414 U.S. at 347).

[211] *Spratt,* 120 R.I. at 193-94, 386 A.2d at 1095.

[212] *Spratt,* 120 R.I. at 194, 386 A.2d at 1095-96.

[213] Article 1, Section 6 of the Rhode Island Constitution provides:

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

The Court expressed the belief that the statute was enacted in response to the Court's 1955 decision in *State v. Olynik,*[214] in which it had declined to adopt the exclusionary rule in criminal trials; it therefore declined to accord the statute a broader meaning.[215]

The Court has reiterated its holding in *Spratt* on multiple occasions,[216] and has extended the ruling to bail-revocation hearings.[217]

2

The *Pastore* Decision

Five years later, in *Board of License Commissioners of the Town of Tiverton v. Pastore,*[218] the Court considered whether the exclusionary

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[214] 83 R.I. 31, 113 A.2d 123 (1955).

[215] *Spratt,* 120 R.I. at 194-95, 386 A.2d at 1096. In a footnote, the Court left open the possibility that the exclusionary rule could be triggered at a probation revocation hearing where the police engaged in conduct which shocked the conscience of the court or which was consciously intended to harass probationers. *Spratt, ante,* 120 R.I. at 193 n.2, 386 A.2d at 1095 n.2.

[216] *See State v. Jennings,* 461 A.2d 361, 368 (R.I. 1983); *State v. Campbell,* 833 A.2d 1228, 1232 (R.I. 2003); *State v. Texter,* 896 A.2d 40, 43 (R.I. 2006).

[217] *See State v. Delaurier,* 488 A.2d 688, 691-92, & n.2 (R.I. 1983); *Bridges v. Superior Court,* 121 R.I. 101, 108 & n.7, 396 A.2d 97, 101 & n.7 (1978)(finding bail revocation hearing not to be a trial within the meaning of § 9-19-25).

[218] 463 A.2d 161 (R.I. 1983), *cert. granted* 468 U.S. 1216 (1984), *dismissed as moot,* 469 U.S. 238 (1985). The Supreme Court took the case to decide whether the exclusionary rule should apply at liquor-license revocation hearings, but dismissed it as moot when it discovered that the license holder had gone out of business. 469 U.S. at 239-40. The issue has not been revisited by the Court.

rule would apply at a hearing to determine whether a liquor license should be suspended. The Court cited a series of cases which emphasized the gravity of the consequences which might flow from a liquor-license suspension, beginning with a case from the United States Supreme Court, *One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania.*[219] In *Plymouth Sedan,* the Court, writing only four years after its decision in *Mapp* was rendered, decided that the exclusionary rule should apply to a hearing to determine whether a vehicle should be forfeited, because it allegedly was carrying unsealed liquor, a violation of a Pennsylvania (criminal) law.[220] From its reading of *Plymouth Sedan,* our Court drew the following lesson:

> Thus, *Plymouth Sedan* stands for the proposition that the exclusionary rule should apply to proceedings that are " 'quasi-criminal' in character" in that their object "is to penalize for the commission of an offense against the law." 1 LaFave, [*Search and Seizure: A Treatise on the Fourth Amendment*] § 1.5 at 98 [1978]. Accordingly, it is reasonable to conclude that the exclusionary rule applies in administrative hearings, wherein a state agency, responsible for control of liquor sales, is empowered to impose fines or declare forfeitures of licenses for criminal

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[219] *Pastore, ante,* 463 A.2d at 162-63 (*citing One 1958 Plymouth Sedan v. Comm. of Pennsylvania,* 380 U.S. 693 (1965). As to use of exclusionary rule in forfeiture hearings generally, *see* 1 W. LaFave, SEARCH AND SEIZURE, § 1.7(a), *Forfeiture Proceedings,* (5th ed., Oct.2016 Update).

[220] *Pastore, ante,* 463 A.2d at 162-63 (*citing Plymouth Sedan,* 380 U.S. at 697-98). The liquor in question had been suppressed in the criminal case because it had been illegally seized. *Id.*

> acts and other violations by those operating or connected with the establishment.[221]

The Court then reiterated the primacy of the fact that the misconduct to be proven was a violation of the criminal law:

> … "it would be anomalous … to hold that in [a] criminal proceeding, illegally seized evidence is excludable, while in [a] forfeiture proceeding, *requiring the determination that a criminal law has been violated,* the same evidence would be admissible." *Plymouth Sedan,* 380 U.S. at 701, 85 S.Ct. at 1251, 14 L.Ed.2d at 175.[222]

And so, the *first prong* of the test for application of the exclusionary rule in a non-criminal proceeding is whether a violation of a criminal law must be proven.[223]

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[221] *Pastore, ante,* 463 A.2d at 163. The Court then added, that the "magnitude of the consequences for the individual involved" in the forfeiture proceedings is often greater that the penalties imposed in the criminal case. Id. ((*citing Finn's Liquor Shop v. State Liquor Authority, 24* N.Y.2d 647, 249 N.E.2d 440, 301 N.Y.S.2d 584, *cert. denied,* 396 U.S. 840 (1969); *Leogrande v. State Liquor Authority,* 25 A.D.2d 225, 268 N.Y.S.2d 433 (1966), *rev'd on other grounds,* 19 N.Y.2d 418, 227 N.E.2d 302, 280 N.Y.S.2d 381 (1967); *Penn. Liquor Control Bd. v. Leonardziak,* 210 Pa.Super. 511, 233 A.2d 606 (1967).

[222] *Pastore,* 463 A.2d at 163 (Emphasis added).

[223] Fourteen years later, in *State v. One 1990 Chevrolet Corvette,* 695 A.2d 502, 507 (R.I.1997), the Court commented that *Plymouth Sedan's* holding — that forfeiture proceedings were "quasi-criminal" — was of "dubious authority," in light of the U.S. Supreme Court's subsequent decision in *United States v. Ursery, 518* U.S. 267, 274-75 (1996)(holding that forfeiture proceeding was not criminal for purposes of the Double Jeopardy Clause's ban on successive prosecutions).

Next, the *Pastore* Court discussed the U.S. Supreme Court's decision in *United States v. Calandra*[224] — in which the Court ruled that the exclusionary rule would not apply to grand jury proceedings[225] — and noted that the high Court's opinion analyzed whether the deterrent effect of applying the rule would outweigh the potential damage (such an application would cause).[226] The *Pastore* Court marked this as the *second prong* of the test.[227]

Employing this two-element test, the Court, after discussing three sister-state cases (two from New York and one from Pennsylvania)[228] held that the exclusionary rule should apply in liquor-license revocation hearings.[229]

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224 414 U.S. 338 (1974).

225 *Calandra, ante,* 414 U.S. at 349-52.

226 *Pastore, ante,* 463 A.2d at 163.

227 *Id.* More precisely, the Court called it — "… a second important consideration in determining whether the exclusionary should apply in administrative is the extent to which exclusion would deter illegal searches and seizures." *Id.*

228 *Pastore, ante,* 463 A.2d at 163-64 (*citing Finn's Liquor Shop, ante; Leogrande, ante,* 25 A.D.2d at 231-32, 268 N.Y.S.2d at 440; *Leonardziak, ante,* 210 Pa.Super. at 514, 233 A.2d at 608).

229 *Pastore,* 463 A.2d at 164. *After* announcing its ruling, the Court proceeded nonetheless to reject the Licensing Board's arguments that (a) the rule should not apply because its proceedings are civil in nature, (b) the Court's decision in *Spratt* required the opposite result, and (c) Gen. Laws 1956 §§ 3-12-3 and 3-2-6.

E

Driver's License Revocation Proceedings

Unfortunately, we have no precedent to guide us with regard to the applicability of the exclusionary rule to the particular type of proceeding experienced by Mr. Rhodes: the *judicial* trial of a civil traffic violation — one that is punishable by a suspension of one's privilege to drive a motor vehicle and other sanctions. My research has revealed no case arising in a jurisdiction with a similar arrangement.[230] This well may be an issue of first impression — in any American jurisdiction.

However, many decisions have been issued by courts in jurisdictions where the license-revocation procedure (based on refusal to submit to a chemical test) is *administrative* in nature.[231] In the majority of these cases, the Courts employ the balancing test set forth in *Calandra.* The following, from the Supreme Court of Maine, is

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[230] The closest case, procedurally, would seem to be *State v. Lussier,* 171 Vt. 19, 23-25, 757 A.2d 1017, 1020-21 (2000)(The Vermont Supreme Court reviewed an appeal from a District Court "civil suspension proceeding," grounded on the motorist's non-compliance with the state's implied-consent law.).

[231] *See* decisions listed in Thomas M. Fleming, Annotation, *Admissibility, in Motor Vehicle License Suspension Proceedings, of Evidence Obtained by Unlawful Search and Seizure,* 23 A.L.R.5TH 108 (1994 and October, 2016 update) *and* 1 W. LaFave, SEARCH AND SEIZURE, § 1.7(f), *Administrative Hearings,* n.89, (5th ed., Oct.2016 Update).

representative of the analysis that most courts have adopted when confronting the issue:

> Because the evidence has already been excluded from the criminal proceeding, there is little additional deterrent effect on police conduct by preventing consideration of the evidence by the hearing examiner. The costs to society resulting from excluding the evidence, on the other hand, would be substantial. The purpose of administrative license suspensions is to protect the public. *Thompson v. Edgar,* 259 A.2d 27, 30 (Me. 1969). Because of the great danger posed by persons operating motor vehicles while intoxicated, it is very much in the public interest that such persons should be removed from our highways. *See State v. Chapin,* 610 A.2d 259, 261 (Me.1992); *State v. Leighton,* 551 A.2d 116, 118 & n.2 (Me.1988).[232]

Following this rationale, state courts have considered this issue during the last thirty years and have held that the exclusionary rule of the Fourth Amendment does not apply at administrative license-revocation hearings.[233] During the research efforts I have personally made, I have found no cases which, upon inspection, are truly to the contrary.[234]

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[232] *Powell v. Secretary of State,* 614 A.2d 1303, 1306-07 (Me.1992). *Also, Tornabene v. Bonine ex rel. Arizona Highway Department, 203* Ariz. 326, 335-37, 54 P.3d 355, 364-66 (2003)(Stating, "… application of the exclusionary rule in civil license suspension proceedings would likely have only a marginal, if any, deterrent effect on police misconduct.").

[233] *Accord, Fishbein v. Kozlowski,* 252 Conn. 38, 54, 743 A.2d 1110, 1119 (1999); *Riche v. Director of Revenue,* 987 S.W.2d 331, 334-35 (1999)(En banc); *Chase v. Neth,* 269 Neb. 882, 892, 697 N.W.2d 675, 684 (2005); *Lopez v. Director, New Hampshire Division of Motor Vehicles,* 145 N.H. 222, 225, 761 A.2d 448, 451 (2000); *Jacobs v. Director, New Hampshire Division of Motor Vehicles, 149* N.H. 502, 504, 823 A.2d 752, 754 (2003); *Beylund v.*

However, this question — *i.e.,* whether a legal arrest must be shown — has been analyzed, not only from a constitutional (exclusionary rule) perspective, but also as an issue of statutory construction. Indeed, many of the opinions examining the Fourth Amendment claim have also considered whether their license-revocation statutes require proof of a lawful stop and arrest. Most cases deny such a requirement,[235] but in a

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Levi, 889 N.W.2d 907, 916 (N.D.2017); *Pooler v. Motor Vehicles Division,* 306 Or. 47, 50-52, 755 P.2d 701, 702-03 (1988)(En banc)(But, *statutory language* requires proof of valid arrest).

[234] *Cf. Lussier, ante,* 171 Vt. at 30-34, 757 A.2d at 1025-27 (The Vermont Supreme Court, noting that the U.S. Supreme Court "continues to restrict the scope of the exclusionary rule," held that the rule would be applied in a District Court "civil suspension proceeding," allowing the motorist to challenge the legality of the initial stop of his vehicle, under the search and seizure provision (Chapter I, Article 11) of the Vermont Constitution); *People v. Krueger,* 208 Ill. App.3d 897, 906-07, 567 N.E.2d 717, 722-23 (1991)(Stating, "… we prefer to rest our holding here on the construction of the statute that we have put forth rather than on the application of the exclusionary rule as such.").

[235] *See Tornabene, ante,* 203 Ariz. at 333, 54 P.3d at 362 (Court of Appeals also holds that the terms of Arizona's implied-consent statute do not require proof of legality of stop); *Fishbein, ante,* 252 Conn. at 46-50, 743 A.2d at 1115-17 (Court finds issue of reasonable suspicion for initial stop not material in administrative suspension hearing — not implicitly included in the statutory element of probable cause for arrest); *Powell, ante,* 614 A.2d at 1305-06 (Court finds that element in license-revocation statute which requires "probable cause to believe that the person was operating or attempting to operate a motor vehicle while having 0.08% or more weight of alcohol in his blood" did not necessitate proof of probable cause justifying stop — merely probable cause that "the officer had sufficient reason to justify the administration of a blood-alcohol test."); *Lopez, ante,* 145 N.H. at 224-25, 761 A.2d at 450-51 (Declaring that the applicable statute, RSA 265:91, does not require proof of a valid stop and arrest).

few cases, such an element of proof has been located.[236] But, as we stated *ante,* our Rhode Island Supreme Court has determined that a lawful stop is an element of the charge of refusal — but probable cause to arrest for drunk driving is not.[237]

F

***Resolution*: The Applicability of the Fourth Amendment's Exclusionary Rule**

We must now confront the ultimate constitutional issue in this case, one of pure law: whether the Fourth Amendment's exclusionary rule applies at the trial of a civil violation (refusal to submit to a chemical test) at the Traffic Tribunal. Based on the summary of the pertinent law we presented *ante,* it is certainly clear that there are

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[236] *Lussier, ante,* 171 Vt. at 23-28, 757 A.2d at 1020-23)(Vermont Court held that the requirement, in paragraph 23 V.S.A § 1205(h)(1), that "the law enforcement officer had reasonable grounds to believe the person was operating … [under the influence];" that question, the Court explained, "… is logically extended to the question of whether there was a reasonable basis for the stop."); *Watford v. Bureau of Motor Vehicles,* 110 Ohio App.3d 499, 501-02, 674 N.E.2d 776, 778 (1996) (Holding that proof of a constitutional stop is mandated by the statutory provision requiring that "… the law enforcement officer had *reasonable ground to believe* the arrested person was operating a vehicle … under the influence of alcohol …."); *Krueger, ante,* 208 Ill. App.3d at 904, 567 N.E.2d at 721 (Holding that its statute requires proof that the arrest was lawful.); *Pooler, ante,* 306 Or. at 50-52, 755 P.2d at 702-03(*Statutory language* requires proof of valid arrest).

[237] *See Jenkins, ante,* 673 A.2d at 1097 (addressing the Appellant's collateral estoppel claim, Supreme Court finds the District Court's determination of no probable cause "unrelated to and irrelevant in the [refusal] trial …."); *State v. Perry,* 731 A.2d 720, 723 (R.I. 1997).

sound arguments to be made on both sides of the question. Nevertheless, I have concluded, for the reasons I shall now endeavor to explain, that the position of the majority (denying applicability) constitutes the sounder view.

In light of the United States Supreme Court's decisions in *Calandra,* (grand juries), *Janis,* (tax hearings), and *Lopez-Mendoza,* (deportation hearings), each of which declined to extend the ambit of the exclusionary rule, I believe we may fairly view *inapplicability* to be the starting point for any discussion of the exclusionary rule's use in any proceeding other than a criminal trial. This was also the approach taken by the Rhode Island Supreme Court in *Spratt, ante.* Applying the *Calandra* balancing test, it decided the increased deterrent effect which would be gained by excluding illegally seized evidence from probation revocation hearings and that much would be lost to the probation system by suppressing such evidence; accordingly, it declined to apply the exclusionary rule in such cases.

The other Rhode Island case discussing the applicability of the exclusionary rule in proceedings other than criminal trials is *Pastore,* a case I believe to be distinguishable from the case *sub judice.* In *Pastore,* the issue before the Court is whether a criminal law had been violated.

In this sense, it regarded the license-revocation hearing as "quasi-criminal." The same is true of the forfeiture case, *Plymouth Sedan,* upon which the *Pastore* case relied.

On the other hand, the refusal statute, § 31-27-2.1, while undoubtedly penal,[238] is purely civil; it penalizes the motorist's violation of the implied-consent law, not the transgression of any criminal statute, including drunk driving. It has different elements from drunk driving. Its most serious sanction is the suspension of the motorist's license.

We have also seen that the America's state courts have overwhelmingly determined that the exclusionary rule does not apply in their administrative refusal hearings, which trigger only license suspensions. Of course, however the existing precedents may militate against extending the exclusionary rule into the realm of refusal cases, we are nonetheless compelled to employ the balancing test specified in *Calandra* — comparing the likely increase in deterrence to the likely social cost.

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[238] The fact that civil penalties are assessed does not, *per se,* trigger the right to the same sort of proceeding to which a criminal defendant is entitled. *See Calore Freight Systems, Inc. v. State, Department of Transportation,* 576 A.2d 1214 (R.I. 1980)(Operator of overweight truck who was fined $ 66,950 by DOT in administrative proceeding was not entitled to trial by jury).

Having done so, it is my view that little would be gained by applying the exclusionary rule at refusal trials — because, at least in part, it already is. Recall that, at a refusal trial, the State must already prove that the stop was constitutional — not by application of the Fourth Amendment's exclusionary rule, but because it has been deemed to be an element of the offense. Therefore, any additional deterrent effect which would flow from requiring proof that the entire stop (from beginning to end) was lawful (*i.e.,* because the arrest made was constitutional) would be marginal, at best. On the other side of the ledger, we would suffer a diminution of highway safety. For these reasons, I find that the Fourth Amendment — as made applicable to the states through the Fourteenth Amendment to the United States Constitution — does not require that the exclusionary rule be used at RITT refusal trials.[239]

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[239] Neither do I believe this is an appropriate case in which to activate the exclusionary rule because of conduct which shocks the conscience, pursuant to a theory which was floated in *Spratt, ante,* 120 R.I. at 193 n.2, 386 A.2d at 1095 n.2. Even assuming such an exception would apply in matters other than probation revocation hearings, I do not believe it should be engaged in the instant case, where we see no suggestion of animus on the part of the officer, simply a misunderstanding of the law.

IX
The Rhode Island Exclusionary Rule: Gen. Laws 1956 § 9-19-25

A
Generally

Evidence gathered in violation of Article I, Section 6 is also subject to suppression. However, unlike its federal counterpart, Rhode Island's exclusionary rule was not fashioned judicially,[240] but was created legislatively; the statute, Gen. Laws 1956 § 9-19-25, which was enacted in 1955,[241] provides:

> In the trial of any action in any court of this state, no evidence shall be admissible where the evidence shall have been procured by, through, or in consequence of any illegal search and seizure as prohibited in section 6 of article 1 of the constitution of the state of Rhode Island.

The Court most recently commented on Article I, Section 6 in *State v. Morris,* in which the Court considered whether the exclusionary rule required the suppression of evidence obtained from an arrest which was lawful under the Fourth Amendment, but illegal under Rhode Island

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[240] In the words of Justice Condon, Article I, Section 6 does not, *ex proprio vigore,* require the suppression of evidence obtained in violation of its principles. *State v. Hillman,* 84 R.I. 396, 399, 125 A.2d 94, 96 (1956). But, I do not suggest that, if the statute were to be repealed by the General Assembly, the Supreme Court could not, or would not, recognize such a rule judicially.

[241] Enacted by P.L. 1955, ch. 3590, the statute became effective on May, 5, 1955. It was not accorded retroactive effect. *Hillman, ante*, 84 R.I. at 399, 125 A.2d at 96.

statutory law (because the municipal officers acted outside their territorial jurisdiction).[242] The Court rejected the Appellant's argument that § 9-19-25 required reversal; and, indicating that it would adhere to the guidance of the United States Supreme Court, the Court held that Article I, Section 6, like the Fourth Amendment, does not enforce territorial jurisdiction statutes.[243] Consequently, it determined that § 9-19-25 did not mandate suppression.[244]

B

***Resolution*: Exclusion under § 9-19-25**

I have concluded that the fruits of Mr. Rhodes' illegal arrest, while not subject to suppression under the Fourth Amendment's exclusionary rule, must be suppressed under § 9-19-25. In my estimation, the plain meaning of the statute permits no other result.

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[242] *State v. Morris,* 92 A.3d 920, 927-31 (R.I.2014).

[243] *Morris, ante,* 92 A.3d at 930 (*quoting State v. Foster,* 842 A.2d 1047, 1050 n.3 (R.I.2004) *and citing Brousseau v. Town of Westerly,* 11 F.Supp. 177, 183 (D.R.I.1998)).

[244] *Morris, ante,* 92 A.3d at 930 (*quoting State v. Mattatall,* 603 A.2d 1098, 1113 (R.I.1992)(Commenting that "[t]he Rhode Island exclusionary rule is a statute that has never acquired or developed an independent body of jurisprudence." *Quoting Mattatall, id.*).

The Court also held that it would not mandate suppression under its supervisory authority. *Morris, ante,* 92 A.3d at 930 (*quoting State v. Jackson,* 570 A.2d 1115, 1117 (R.I.1990).

1

The Plain Language of the Statute

For a fairly recent (and splendidly concise) statement of our Supreme Court's teaching regarding the plain meaning rule of statutory construction,[245] we may turn to its 2012 decision in *McCain v. Town of North Providence,*[246] in which the Court declared:

> The sole issue before this Court is one of statutory interpretation. It is well settled that we apply a *de novo* review to such questions, with the "ultimate goal" of giving effect to that purpose which our Legislature intended in crafting the statutory language. *Webster v. Perrotta,* 774 A.2d 68, 75 (R.I.2001); *see also DaPonte v. Ocean State Job Lot, Inc.,* 21 A.3d 248, 250 (R.I.2011). We have acknowledged that in ascertaining and effectuating that legislative intent, "the plain statutory language" itself serves as "the best indicator." *DeMarco v. Travelers Insurance Co.,* 26 A.3d 585, 616 (R.I.2011) (quoting *State v. Santos,* 870 A.2d 1029, 1032 (R.I.2005)). When that statutory language is "clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings." *State v. Gordon,* 30 A.3d 636, 638 (R.I.2011)(*quoting Tanner v. Town Council of East Greenwich,* 880 A.2d 784, 796 (R.I.2005)). Moreover, "when we examine an unambiguous statute, there is no room for statutory construction and we must apply the statute as written." *Planned Environments Management Corp. v. Robert,* 966 A.2d 117, 122 (R.I.2009) (*quoting State v. Oliveira,* 882 A.2d 1097, 1110 (R.I.2005)). In fulfilling our interpretive calling, this Court remains mindful of the longstanding principle that "statutes should not be

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[245] *Generally,* 2A NORMAN SINGER, SUTHERLAND STATUTORY CONSTRUCTION, § 46:1, *The Plain Meaning Rule* (7th ed., Nov.2016 Update).

[246] 41 A.3d 239, 243 (R.I. 2012).

> construed to achieve meaningless or absurd results." *Ryan v. City of Providence,* 11 A.3d 68, 71 (R.I.2011) (quoting *Berthiaume v. School Committee of Woonsocket,* 121 R.I. 243, 247, 397 A.2d 889, 892 (1979)).

While we could highlight every line of this quotation, there are, in my view, three essential elements that we must glean as guidance for use in the instant case — which are: (1) the clear and unambiguous language of a statute, (2) which is the best indicator of the legislative intent, (3) must be interpreted as written so as to give the words of the statute their plain and ordinary meaning.

2

Applying the Doctrine in the Instant Case

I believe the viewpoint of the dissenting member of the panel regarding this issue is absolutely correct. Section 9-19-25, in very broad but straightforward language, directs the exclusion of all evidence obtained in violation of Article I, Section 6 in all *trials* of all *actions* in all *state courts*.[247] Under this provision, no *Calandra*-type balancing test is anticipated or required.

Each of these elements of the statutory rule is met in the instant case. The proceeding was a trial[248] of a refusal charge[249] in the Traffic

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[247] *See* Decision of the Panel, at 19 (Dissent of Goulart, M.).

[248] *See* Traffic Trib. Rule of Procedure 8, 9, 15, 17(c), designating its

Tribunal,[250] and, as determined *ante*, evidence was obtained as a consequence of an illegal *de facto* arrest in violation of Article I, Section 6.[251] The directives of our Supreme Court — requiring that we apply the plain meaning of statutes whenever possible — mandates this result.

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adjudicatory proceedings as "trials." Conceding, as I must, that § 31-27-2.1 uses the term "hearing," I am convinced that this discrepancy in nomenclature is insignificant. The proceeding before the Tribunal is not preliminary, it is the ultimate adjudication of the matter, which involves the imposition of significant penalties, and at which the Rhode Island Rules of Evidence apply. *See* Traffic Trib. Rule of Procedure 15(b). Neither is it ancillary to the core adjudication, as a probation revocation hearing or a bail revocation hearing may be said to be. We must recall that the rules, which bear the imprimatur of our Supreme Court, supersede conflicting statutes. *See* Gen. Laws 1956 § 8-6-2.

[249] The statute refers to "the trial *of any action* in any court of this state." While the term *an action* has been held to mean, within Gen. Laws 1956 § 9-1-14 and Super. R. Civ. Proc. 15(c), a *lawsuit*, *Dalessio v. B.T. Equipment Co., Inc.,* 114 R.I. 524, 528, 336 A.2d 563, 566 (1975), it must have a broader meaning here, since the statute has been held to apply to criminal trials continually since its enactment. *See State v. Davis,* 105 R.I. 247, 252, 251 A.2d 394, 397 (1969). Criminal cases are seldom called "actions" in common legal parlance, though they have been referred to as such occasionally. *See* Gen. Laws 1956 § 12-29-4(b)(Referring to "domestic violence actions") *and State v. Briggs,* 934 A.2d 811, 815 (R.I.2007)(Referencing Superior Court's authority "… to entertain equity actions, actions at law, and *criminal actions*."). And so, since the term "action" in § 9-19-25 includes criminal charges, I believe we can conclude, with a high degree of confidence, that the term will bear the slight additional weight of referencing prosecutions for the civil offense of refusal to submit to a chemical test.

[250] Established by Chapter 8.2 of Title 8 of the General Laws, the Traffic Tribunal is a component of Rhode Island's unified judicial department. *See* Gen. Laws 1956 § 8-15-1.

[251] Of course, the Fourth Amendment interest being protected in the instant case is neither ancillary nor statutory — it is the core constitutional interest of valid arrests being supported by probable cause.

Accordingly, the trial magistrate should have considered whether any evidence was gathered as a result of Mr. Rhodes' illegal arrest — and whether the evidence so collected should have been suppressed.[252]

X

Necessity of Remand

After finding that Mr. Rhodes was illegally arrested, the appeals panel decided that the exclusionary rule did not apply to refusal cases. Consequently, the appeals panel did not determine (or order a remand for the trial judge to decide) which items introduced as evidence should have been suppressed under Article I, Section 6.[253] Because of this circumstance, we have been left in a position in which we are unable to determine whether the trial judge's guilty finding would have survived the suppression of evidence.[254]

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[252] Obviously, this recommendation, if accepted as the decision of the District Court, is not of constitutional dimension — at least as to the issue of suppression. And so, this Court's ruling is not only subject to review by the Supreme Court, pursuant to Gen. Laws 1956 § 42-35-16; it may also be revised by an amendment to § 9-19-25 enacted by the General Assembly.

[253] The panel did enumerate some, if not all, of the items of evidence subject to suppression, but it did not analyze the applicability of the exclusionary rule as to each. In any event, such summary treatment was not inappropriate, given that the observation made by the panel was dicta, and not essential to its holding.

[254] We are also constrained by the fact the parties did not fully brief this issue. In its Memorandum, the State merely associated itself with the panel's comment, without further discussion.[254] *See* State's Memorandum,

Accordingly, the only appropriate remedy available to us is to remand the instant case to the Traffic Tribunal, so that it may be assigned for a new trial before a single judge or magistrate. At the new trial, a motion to suppress based on § 9-19-25 may be heard and decided based on the principles specified *ante*, and the trial judge or magistrate shall make findings as to the suppression or admission of the various items of evidence which shall be proffered by the State.[255]

XI
Proceedings Upon Remand

In the course of such an admissibility proceeding (whether undertaken pre-trial, as in a motion to suppress or a motion *in limine*), the State will be free to argue that these items of evidence may be admitted *despite* the illegality of Mr. Rhodes' arrest, under any pertinent legal theory — the most prominent of which is undoubtedly the plain-

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at 1. Mr. Rhodes offers absolutely no comment regarding the appeals panel's plain-view analysis.

[255] It must be humbly noted that this is not a function which this Court is empowered to perform. As stated *ante* in Part II of this opinion, this Court's review is limited to a determination of whether the panel's decision was made upon improper procedure, was affected by error of law, or was clearly erroneous in view of the substantial, reliable and probative evidence of record. The issue of whether certain items of evidence would be admissible under the plain view doctrine would constitute a mixed question of fact and law. And this Court is not authorized to engage in fact-finding as part of its review.

view doctrine.[256] Indeed, in its decision, the appeals panel suggested that — even if we assume *arguendo* that the exclusionary rule *was* applicable to Mr. Rhodes' case — the evidence obtained by Officer Hughes would have been admissible under the plain view doctrine. In light of the panel's reference to the plain view doctrine, it is appropriate that, at this juncture, we should place the doctrine into perspective, as it applies in the context of this case.

A

A Summary of the Plain View Doctrine

While the plain-view doctrine[257] had its modern renaissance in the plurality opinion rendered by four members of the United States

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[256] In addition to the plain-view doctrine, which shall be discussed at length *post*, theories under which evidence may be admitted despite an illegal search or arrest include the "inevitable discover" and the "independent source" doctrines. *See* 6 W. LAFAVE, SEARCH AND SEIZURE, § 11.4(a), *Extent of the Taint: "But for"; "Attenuated Connection"; "Independent Source"; and "Inevitable Discovery,"* (5th ed., 10/2016 Update).

[257] Cases under the doctrine must also be distinguished from those in which there has been — prior to the observation — no Fourth Amendment intrusion. *See* 1 W. LAFAVE, SEARCH AND SEIZURE, § 2.2(a), *Plain View, Smell, Hearing or Touch,* at n.9 (5th ed., Oct.2016 Update)(*citing and quoting* from *Scales v. State,* 13 Md.App. 474, 478 n.1, 284 A.2d 45, 47 n.1 (1971)(In a footnote, Moylan, J., recommends that courts, when speaking of seizures of evidence made outside the framework of the doctrine, should indicate that evidence was "clearly visible," "readily observable," or "open to public gaze.))." Since Mr. Rhodes had been seized by Officer Hughes when his car was stopped, and was therefore a detainee, this definition of plain view has no applicability in the instant case.

Supreme Court in *Coolidge v. New Hampshire,*[258] the doctrine underwent something of a streamlining after that case was decided.[259] Ultimately, in 1994 in *State v. Pratt,* the Court adopted the following phrasing of the doctrine:

> The plain-view doctrine *allows seizure of evidence* that is openly on display when an officer, who is lawfully in a position to see the evidence and to have lawful access to it, immediately recognizes that the object is evidence of criminality.[260]

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[258] 403 U.S. 443 (1971).

[259] The plain-view doctrine, as defined in *Coolidge,* had three aspects: that there was a legal justification for the officer's initial intrusion; that the discovery was inadvertent; and the significance of the item was immediately apparent. *Coolidge, ante,* 403 U.S. at 466. This formulation was accepted and applied by our Rhode Island Supreme Court. *See State v. Marshall,* 120 R.I. 306, 310-11, 387 A.2d 1046, 1048 (1978); *State v. Ratenni,* 117 R.I. 221, 225, 366 A.2d 539, 541-42 (1976). While other Courts doubted whether the inadvertence requirement was an essential part of the doctrine, *see State v. Eiseman,* 461 A.2d 369, 380 (R.I.1983), our Court adhered to it until that element of the *Coolidge* definition was overruled in *Horton v. California,* 496 U.S. 128, 141 (1990) — which was recognized by our Court in *State v. Pratt,* 641 A.2d 732, 738 n.2 (R.I.1994).

In addition, the scope of the plain view doctrine's "immediately-apparent" requirement has also been sharply trimmed. In *Pratt,* our Court also recognized that the U.S. Supreme Court, in *Texas v. Brown,* 460 U.S. 730 (1983), stated that the phrase — "immediately-apparent" — "… was very likely an unhappy choice of words, since it can be taken to imply that an unduly high degree of certainty" is necessary prior to seizing the item." *Pratt, ante,* 641 A.2d at 738 (*citing Brown, ante,* 460 U.S. at 741). Instead, the Court said that this element will be satisfied if "… the facts available to the officer would 'warrant a man of reasonable caution in the belief ' … that certain items may be … useful as evidence of a crime." *Pratt, ante,* 641 A.2d at 738 (*citing Brown, ante,* 460 U.S. at 742).

[260] 641 A.2d 732, 738 (R.I.1994)(*citing Horton, ante,* 496 U.S. at 136-37)

To my knowledge, the foregoing remains the operative statement of the doctrine in Rhode Island.

B

Applying the Plain View Doctrine in the Instant Case

After reviewing the *Pratt* Court's definition of the doctrine, one can see that it likely will be the first element and second elements — *i.e.,* whether the officer was legally in a position to see the evidence and to have access to it — which are litigated in the retrial. In the context of a car stop (whether a *Terry* investigatory stop or a traffic stop), these provisions require that the initial stop must have been legal,[261] and that the officer did not precipitate the plain-view observation.[262] At this point we may offer a few comments regarding the duties which the trial judge will be obliged to perform upon remand.

(Emphasis added). Note that in this statement of the doctrine the Court emphasized, as it had in *Coolidge, ante,* 403 U.S. at 466, that the plain-view doctrine relates to seizures, not searches.

[261] *See Horton, ante,* 496 U.S. at 136 ("It is, of course, an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed.").

[262] *See also* 3 W. LAFAVE, SEARCH AND SEIZURE, § 7.5(a), *The "Plain View" Doctrine,* (5th ed., Oct.2016 Update)(*citing*, as an exemplar of this principle, *United States v. Davis,* 94 F.3d 1465, 1470 (10th Cir.1996), in which the doctrine was held not to permit the seizure of a weapon which the motorist was seen to toss into the rear seat as a result of an illegal stop.").

1

The Observations of Mr. Rhodes' Personal Characteristics

Certainly, there is a plain-view argument which can be made for the admission of Officer Hughes' testimony regarding his observations that Mr. Rhodes' breath emitted "a moderate odor consistent with an alcoholic beverage"[263] and the fact that "his eyes were bloodshot and watery."[264] It can be argued that this testimony was not tainted by the excessive intrusions of Officer Hughes, since the initial stop was lawful, and the officer can be said to have had the right to interact with Mr. Rhodes for that purpose.[265]

In this regard the Court may also choose to consider the pertinence of the following passage from *Bjerke, ante,* in which our Supreme Court considered the appeal of a motorist who was legally stopped for a reason *other* than drunk driving:

> … any evidence obtained pursuant to that lawful stop, such as the odor of alcohol, the slurred speech, and bloodshot

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263 Decision of Appeals Panel, at 3 (*citing* Trial Transcript, at 29).

264 *Id.*

265 *See also State v. Jewett,* 148 Vt. 324, 329, 532 A.2d 958, 960-61 (1987) (*citing State v. Phillips,* 140 Vt. 210, 218, 436 A.2d 746, 751 (1981)(*citing Wong Sun v. United States,* 371 U.S. 471, 488 (1963)(The Court finds that the defendant had failed to establish a connection between the evidence sought to be suppressed — including the odor of alcohol and the defendant's physical appearance — and the pat-down, since "all were readily observable by the arresting officer.")).

> eyes, would in effect be *in plain view* of the arresting officer and would support an arrest for suspicion of driving while under the influence. *See, e.g., State v. Aubin,* 622 A.2d 444 (R.I.1993).[266]

And so, it seems that the Court regarded the indicia of imbibing to be plain view material.

2

Statements Made by Mr. Rhodes

a

Statements Given *Before* Mr. Rhodes' Formal Arrest

The admissibility of the officer's testimony regarding any statements made by Mr. Rhodes after the pat-down (which is apparently *all* his statements), must also be evaluated. While the panel correctly found that Appellant was subjected to a *de facto* arrest, the Court, upon retrial, will have to decide whether Mr. Rhodes was *in custody* for Fifth Amendment purposes, and thereby protected by the rule announced in *Miranda v. Arizona,*[267] which states that "… if the police take a suspect into custody and then ask him questions without informing him of [his rights], his responses cannot be introduced into evidence to establish his guilt."[268] And so, if the Court finds that the defendant was in custody at

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266 *Bjerke, ante,* 697 A.2d at 1072 (Emphasis added).

267 384 U.S. 420 (1966).

268 *Miranda, ante,* 384 U.S. at 428.

the time he made any statement to Officer Hughes, the State must demonstrate "… that the defendant knowingly, intelligently, and voluntarily waived his [or her] constitutional rights expressed in *Miranda v. Arizona*."[269]

b

Statements Obtained *After* Formal Arrest

Evidence obtained after Mr. Rhodes was formally arrested may also be challenged. Statements given to an officer after arrest (and after the defendant was *Mirandized*) will be subject to suppression unless the prosecution shows, not only that the statements were given voluntarily, as required by the *Fifth* Amendment, but also that they were "an act of free will" sufficient to "purge the primary taint," as required by the *Fourth* Amendment.[270]

3

Field Sobriety Test Observations

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[269] *State v. Sabourin,* — A.3d. —, 2017 WL 2507853, at *7 (R.I.6/9/2017) (*quoting State v. Barros,* 24 A.3d 1158, 1179 (R.I.2011)(*quoting State v. Bido,* 941 A.2d 822, 835 (R.I.2008))). Before any statements may be admitted into evidence, the Court must find that the waiver was made knowingly and voluntarily. *Sabourin, id.,* (*citing State v. Jimenez,* 33 A.2d 724, 734 (R.I.2011), *State v. Leuthavone,* 640 A.2d 515, 519 (R.I.1994), and *State v. Mlyniec,* 15 A.2d 983, 996 (R.I.2011)).

[270] *See Brown v. Illinois,* 422 U.S. 590, 602 (1975)(*citing Wong Sun, ante,* 371 U.S. at 486). *See also State v. Burns,* 431 A.2d 1199, 1205 (R.I.1981). *See* discussion in Part VIII-B-2-a of this opinion, *ante.*

In addition, the trial judge or magistrate will have to consider the admissibility of testimony regarding Mr. Rhodes' performance on the field sobriety tests. While the United States Supreme Court and the Rhode Island Supreme Court have ruled that the administration of a breathalyzer test is a type of search incident to arrest,[271] the status of field sobriety tests has not been resolved by either Court. Generally, they are viewed as a type of search.[272] If it is treated as such, the voluntariness of Mr. Rhodes' consent to participate must also be evaluated.[273]

XII
CONCLUSION

Upon careful review of the evidence presented and the pertinent law, I recommend that this Court find that the decision rendered by the appeals panel in this case was not clearly erroneous insofar as it determined that Mr. Rhodes' privacy rights under the Fourth Amendment of the United States Constitution and Article I, Section 6 of

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[271] *See State v. Locke*, 418 A.2d 843, 846-47 (R.I.1980); *State v. DeOliveira*, 972 A.2d 653, 661 (R.I.2009). *See also Birchfield v. North Dakota*, — U.S. —, 136 S.Ct. 2160, 2174-84 (2016).

[272] *See generally*, 61A C.J.S. *Motor Vehicles* § 1592 ("Field Sobriety Tests") *and* 61A C.J.S. *Motor Vehicles* § 1611, ("Evidence Arising From Field Sobriety Tests").

[273] *See* discussion in Part VIII-B-2-b of this opinion, *ante*.

the Rhode Island Constitution were violated. I also recommend that this Court find that the appeals panel's ruling that the Fourth Amendment's judicially created exclusionary rule ought not to be applied in refusal trials at the Traffic Tribunal did not constitute an error of law. Lastly, I recommend that this Court find that the panel's decision that Rhode Island's statutorily created exclusionary rule, § 9-19-25, is also inapplicable at refusal trials, was contrary to law, since, for the reasons stated above, I conclude that § 9-19-25 does indeed apply at refusal trials. Accordingly, I must find that the decision of the appeals panel is, as to this one issue, affected by error of law. *See* § 31-41.1-9(d)(4).

Accordingly, I recommend that the decision that the Traffic Tribunal appeals panel issued in this matter be AFFIRMED IN PART and REVERSED IN PART. I further recommend that the instant case be REMANDED to the Traffic Tribunal for further proceedings consistent with this opinion.

/s/
Joseph P. Ippolito
MAGISTRATE
AUGUST 10, 2017