STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

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

Layne Savage	:	
	:	
v.	:	**A.A. No. 13 - 075**
	:	
State of Rhode Island	:	
(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.

Entered as an Order of this Court at Providence on this 17th day of November, 2014.

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

Layne Savage	:	
	:	
v.	:	**A.A. No. 2013-075**
	:	**(T12-0063)**
State of Rhode Island	:	**(12-101-500332)**
(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. On March 10, 2012, at about 6:30 p.m., the Barrington Police Department received a 911 emergency call advising that a white sport utility vehicle (SUV) was being driven erratically as it proceeded southbound on the Wampanoag Trail. A few minutes later, a Barrington Police officer spotted and stopped a vehicle of that type. Perceiving the operator of the white SUV to be exhibiting signs of alcohol consumption, the officer began to investigate whether she was driving under the influence. And after the operator — the Appellant, Ms. Layne Savage — declined to perform field sobriety tests, she was arrested for suspicion of

drunk driving. In addition to the criminal charges of drunk driving and driving on a suspended license (adjudicated in the District Court), Appellant was also charged with two civil traffic violations within the jurisdiction of the Rhode Island Traffic Tribunal (RITT) — "Refusal to Submit to a Chemical Test," as defined in Gen. Laws 1956 § 31-27-2.1, and "Presence of alcoholic beverages while operating a Motor Vehicle" ("open container"), as defined in Gen. Laws 1956 § 31-22-21.1.

At a trial conducted by a magistrate of the Traffic Tribunal, Ms. Savage was found guilty of both civil offenses. Appellant challenged her conviction for refusal to submit to a chemical test before a Traffic Tribunal appeals panel, but its members unanimously affirmed her conviction, overruling the three assertions of error she had presented. The instant case constitutes Ms. Savage's attempt to set aside the appeals panel's decision.

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 stated herein, I shall recommend to the Court that the decision rendered by the appeals panel in Ms. Savage's case be AFFIRMED.

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 Ms. Savage are fully and fairly stated (with appropriate citations to the trial transcript) in the decision of the RITT appeals panel. The following portion of the appeals panel's narrative begins just after the point when Officer Timothy Oser — a nine-year veteran of the Barrington Police Department who had made numerous prior drunk-driving stops — heard a dispatcher's broadcast about a white SUV being operated erratically on the Wampanoag Trail:

> … As he was traveling southbound on County Road in Barrington, he observed a male operator of a silver minivan near a Shell Gasoline station with the vehicle's hazard lights activated. [Vol. I Tr.] at 15. The male operator flagged Officer Oser down and identified himself as Jason Arnone, the person who had placed the 911 call to report the white sports utility vehicle that was "operating all over the road." Id. He then gave the officer a brief description of the vehicle and told him that the vehicle was headed southbound. Id. Officer Oser further testified that he noticed that Mr. Arnone, "… had some excitement in his voice …" when he spoke with the officer about the incident. Id. at 16.
>
> After speaking with Mr. Arnone, Officer Oser then continued southbound on County Road, where he eventually spotted a white 2004 Ford Explorer, bearing Rhode Island license plate "TV267." Id. at 18-19. Oser was then informed by dispatch that a second witness arrived at police headquarters to advise the same information as Arnone's complaint. (Vol. VI Tr. at 60.) Officer Oser immediately pulled the vehicle over after he determined that the vehicle matched

> the description given by Mr. Arnone. Id. at 19. The white Ford Explorer drove into the parking lot at the Barrington Early Learning Center. Id. at 20. Officer Oser then approached the vehicle and requested the operator to produce her license and registration. Id. at 21. Officer Oser then identified the operator as the Appellant, Layne Savage. Id. at 20.
>
> After exchanging some words with Appellant, the Officer observed that she had bloodshot eyes and slurred speech. Id. He also detected a strong odor of a fragrance emanating from inside the vehicle which seemed to be utilized by the motorist to mask an odor. Id. at 20, 55. In addition to these observations, Officer Oser witnessed that "both front passenger and front driver's side windows were down [ ]" and the outside temperature was in the thirty degree range. Id. After conducting a National Crime Information Center ("NCIC") check and running Appellant's driver's license through the system, Officer Oser discovered that the Division of Motor Vehicles had previously suspended her driver's license. Id. at 21. Officer Oser asked Appellant whether she had consumed any alcohol that evening, to which she admitted she had consumed two glasses of wine. Id. He then asked the Appellant to exit the vehicle, which Appellant did. Id. at 22. Officer Oser requested the Appellant to submit to a series of field sobriety tests; however, Appellant refused. Id. at 23.[1] …

At this point, Ms. Savage was arrested for suspicion of drunk driving, and read the "Rights For Use at the Scene."[2] Officer Oser, assisted by a colleague, then made an inventory search of her vehicle, discovering several opened and unopened bottles of alcoholic beverages.[3]

Ms. Savage was transported to the Barrington Police Station, where she was

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1 Decision of Appeals Panel, at 2-3.

2 Decision of Appeals Panel, at 4 citing Trial Transcript I, at 24.

3 Decision of Appeals Panel, at 4 citing Trial Transcript I, at 25-29.

given her "Rights For Use at Station."[4] She was allowed to make a confidential telephone call.[5] Then, when asked to consent to a chemical test of her breath for the presence of alcohol, she declined.[6]

At her RITT arraignment, Ms. Savage entered not guilty pleas to both civil charges; the Court ordered a preliminary suspension of her operator's license.[7] Her trial, which began on June 12, 2012, was presided over by Chief Magistrate William Guglietta. The first item addressed by the Court was Ms. Savage's Motion to Dismiss premised on collateral estoppel.[8]

Ms. Savage's argument on this point had three parts. First, she asserted a historical fact — that after a "full hearing,"[9] the District Court judge dismissed the drunk-driving charge due to the lack of probable cause for her arrest.[10] Second, she

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4 Decision of Appeals Panel, at 4 citing Trial Transcript I, at 24, 31.

5 Decision of Appeals Panel, at 4 citing Trial Transcript I, at 31.

6 Decision of Appeals Panel, at 4 citing Trial Transcript I, at 31.

7 See Docket Sheet, Summons No. 12-101-500332 and Suspension Order. The Court's authority to issue preliminary suspensions is found in Gen. Laws 1956 § 31-27-2.1(b).

8 Trial Transcript I, at 2-9.

9 A transcript of the District Court hearing provided by counsel runs to a total of seventeen pages. District Court Hearing Transcript, State v. Savage, May 11, 2012, passim.

10 Trial Transcript I, at 2-3. District Court Hearing Transcript, State v. Savage, May 11, 2012, at 15-16. Also, Order, 61-12-3157, May 11, 2012, at 1.

argued that probable cause is an issue in a refusal prosecution, as it is the equivalent to the reasonable grounds standard found in § 31-27-2.1.[11] Third, she urged that further litigation of the issue was therefore barred.[12]

The State responded that refusal to submit to a chemical test and driving under the influence are separate and distinct offenses, not subject to principles of double jeopardy.[13] And the State argued that it follows from this fact — and the fact that the State bears a higher burden of proof in the drunk-driving case — that the State should not be barred from proceeding in the refusal case.[14] Noting the importance of the question, the trial magistrate reserved judgment, pending clarification of the exact nature of the District Court's ruling.[15]

The first witness for the State was the arresting officer, Patrolman Timothy Oser, who gave testimony consistent with the foregoing narrative.[16] Next, the Court heard from his assisting officer, Officer Greg Koutros.[17] The state's third

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11 Trial Transcript I, at 2-3. She specifically argued that "reasonable grounds" to request a motorist to submit to a chemical test is the equivalent of probable cause to arrest for driving under the influence. Trial Transcript I, at 3.

12 Trial Transcript I, at 3.

13 Trial Transcript I, at 4.

14 Trial Transcript I, at 4, 7.

15 Trial Transcript I, at 7-9.

16 Trial Transcript I, at 10–66.

17 Trial Transcript II, at 4–16.

witness (on June 14, 2014) was Regina Coffey, a forensic scientist for the Department of Health, who testified regarding the tests she performed on the evidence (i.e., the liquor bottles) seized from the defendant's vehicle.[18] The fourth witness was Mr. Jason Arnone, the motorist who called in the 911 call which prompted this investigation.[19] The fifth witness for the state was the Barrington Police Department dispatcher, Mr. Glenn Maciel.[20] The State's sixth and seventh witnesses were Detective Benjamin Ferreira and Detective Lieutenant Dino DeCrescenzo of the Barrington Police Department, who testified as to the chain of custody of certain evidence that was removed from Ms. Savage's vehicle and subsequently tested by the Department of Health.[21] Then, on July 5, 2012, Officer Oser was recalled briefly for additional testimony.[22] After closing arguments,[23] the trial ended.

On August 29, 2012, Chief Magistrate Guglietta rendered his bench

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18 Trial Transcript III, at 8–39.

19 Mr. Arnone's testimony began on June 14, 2012. Trial Transcript III, at 42–99. It concluded on June 25, 2012. Trial Transcript VI, at 2–48.

20 Trial Transcript VI, at 53–79.

21 Trial Transcript VI, at 80–102 (Ferreira) and Trial Transcript VII, at 4–10 (DeCrescenzo).

22 Trial Transcript IX, at 2–22.

23 Trial Transcript IX, at 32-50 (defense) and 50-60 (prosecution).

decision.[24] He began by undertaking a thorough review of the applicable law and precedents[25] and the testimony given by the witnesses in the case.[26] He first resolved Ms. Savage's pre-trial Motion to Dismiss — ruling that the RITT was not bound (under principles of issue preclusion) by the District Court's prior determination (in the drunk-driving case) that Officer Oser did not have probable cause to arrest Ms. Savage for driving under the influence.[27]

Next, reviewing the facts available to Officer Oser, the Chief Magistrate found the officer did have reasonable grounds to request Appellant to submit to a chemical test; in so finding he cited the two reports from dispatch (indicating erratic operation), his meeting with Mr. Arnone, Ms. Savage's bloodshot and watery eyes, her slurred speech, her defiant demeanor and her admission to having two glasses of wine.[28] The trial magistrate also found that the presence of a very strong fragrance in the vehicle, which had its windows down despite the cold temperature, could be viewed as an attempt to mask the odor of alcohol.[29]

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[24] See Trial Transcript X, passim.

[25] Trial Transcript X, at 4-24.

[26] Trial Transcript X, at 27-46.

[27] Trial Transcript X, at 24-26.

[28] Trial Transcript X, at 50-52.

[29] Trial Transcript X, at 52-54.

Finally, Chief Magistrate Guglietta addressed a second Fourth Amendment issue — whether Officer Oser had reasonable suspicion to stop Ms. Savage's vehicle — and found that he did.[30] The Chief Magistrate therefore adjudicated Appellant guilty of both the refusal charge and the open-container charge.[31]

Ms. Savage appealed and the matter was heard by an RITT appeals panel composed of Administrative Magistrate David Cruise (Chair), Judge Lillian Almeida, and Magistrate Domenic DiSandro on December 19, 2012. Before the appeals panel, Appellant presented three assertions of error — first, that the State had not proven that Officer Oser's stop of her vehicle was supported by reasonable suspicion; second, that the officer did not have probable cause to arrest her for operating under the influence; and, third, Officer Oser did not have reasonable grounds to conclude she had been operating under the influence, the prerequisite for a lawful request to submit to a chemical test under the implied-consent law.[32] In its April 12, 2013 decision, the appeals panel rejected each of Ms.

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30 Trial Transcript X, at 55-73.

31 The magistrate sentenced Ms. Savage to pay a fine of $200.00, to perform 40 hours of community service, to suffer a 9-month license suspension, to attend an Alcohol Education Program, and to pay the highway assessment fee, the Department of Health fee, and court costs. Trial Transcript X, at 86. He also found Ms. Savage guilty of the alcohol violation — and imposed a concurrent 3-month license suspension. Trial Transcript X, at 86-87.

32 Decision of Appeals Panel, at 7.

Savage's three assertions of error.

The appeals panel first addressed Appellant's claim that Officer Oser did not possess probable cause to arrest her. Specifically, the appeals panel ruled that the trial magistrate was not bound — through the invocation of the doctrine of issue preclusion (or collateral estoppel) — by a District Court judge's finding in the related criminal prosecution that Officer Oser did not have probable cause to arrest Ms. Savage for the criminal charge of drunk-driving.[33] The appeals panel overruled this argument for two reasons: (1) the two charges (drunk-driving and refusal) have different elements[34] and so the issue of probable cause for arrest is irrelevant in the refusal case; and (2), a different standard of proof applies in each proceeding — while it is beyond-a-reasonable-doubt in the criminal DUI trial in the District Court, it is the lesser standard of clear-and-convincing-evidence in the civil refusal trial at the RITT.[35] Accordingly, it found the trial magistrate did not err by declining to declare the Traffic Tribunal bound by the District Court decision (holding that Officer Oser did not possess probable cause to arrest Ms. Savage).[36]

Second, the appeals panel rejected Ms. Savage's assertion that Officer Oser

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33 Decision of Appeals Panel, at 8-9.

34 Decision of Appeals Panel, at 8 citing State v. Jenkins, 673 A.2d 1094, 1096-97 (R.I. 1996) and State v. Quatrucci, 39 A.3d 1036, 1041 (R.I. 2012).

35 Decision of Appeals Panel, at 9.

did not possess reasonable suspicion to stop her vehicle.[37] This conclusion was presented after an extensive exposition of the law of anonymous tips and their value in a reasonable-suspicion analysis.[38] The panel noted that face-to-face informants are viewed as having more reliability than those that supply their information anonymously, by telephone.[39] It further found that Mr. Arnone's 911 call was corroborated by (1) his face-to-face meeting with Officer Oser and (2) the fact that a second eye-witness came into the police station to report the actions of the white SUV.[40] And so, the appeals panel concluded that trial magistrate did not err in finding the stop of Ms. Savage was made with reasonable suspicion.[41]

Third, the appeals panel found the trial magistrate committed no error when he found Officer Oser had reasonable grounds to believe Ms. Savage had been driving under the influence of liquor.[42] Regarding this issue the panel found that —

> … the officer's observation of Appellant's car windows rolled all the way down in thirty degree weather, Appellant's slurred speech,

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36 Decision of Appeals Panel, at 9.

37 Decision of Appeals Panel, at 9-13.

38 Id.

39 Decision of Appeals Panel, at 10 citing Adams v. Williams, 407 U.S. 143, 146, 92 S.Ct. 1921, 1924 (1972).

40 Decision of Appeals Panel, at 12. Officer Oser was informed of this fact. Id.

41 Decision of Appeals Panel, at 13.

42 Decision of Appeals Panel, at 13-15.

> bloodshot eyes, admission of having had two glasses of wine, appellant's defiant behavior, and the overwhelming smell of fragrance coming from her vehicle — constituted reasonable grounds for Officer Oser to believe that Appellant had driven her vehicle under the influence of alcohol.[43]

Thus, the panel found that reasonable grounds under § 31-27-2.1 had been shown without reference to the information provided by Mr. Arnone, which it also found probative,[44] and without considering Officer Oser's special training in DUI investigations.[45] On the basis of these determinations, the appeals panel upheld Ms. Savage's adjudication on the charge of refusal.[46] Ten days later, on April 22, 2013, Ms. Savage filed an appeal of this decision in the Sixth Division District Court.

A conference was held before the undersigned on May 29, 2013 and a briefing schedule was set. Both parties have submitted memoranda which ably relate their respective viewpoints. I have found each to be genuinely helpful.

II
STANDARD OF REVIEW

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

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43 Decision of Appeals Panel, at 14 citing Trial Transcript X, at 50 and State v. Jenkins, 673 A.2d at 1097.

44 Id., at 14 citing State v. Lusi, 625 A.2d 1350, 1356 (1993).

45 Decision of Appeals Panel, at 14 citing Trial Transcript X, at 51, 56.

> (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 standard of review is a mirror-image of that found in Gen. Laws 1956 § 42-35-15(g) — the State 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.'"[47] 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

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[46] Decision of Appeals Panel, at 15.

[47] 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).

weight of the evidence on questions of fact."[48] This Court's review, like that of the RITT appeals panel, "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."[49]

III
APPLICABLE LAW
A
The Refusal Statute
1
Theory — Distinctions Between Refusal and DWI Charges.

Any discussion of the civil offense of refusal to submit to a chemical test must begin by distinguishing it from the criminal charge of drunk driving. Although the two charges are factually related in many cases, they are discrete, having different elements[50] and arise from different theoretical origins.

Drunk driving is a criminal offense against the public health and welfare. Our Supreme Court declared in State v. Locke,[51] that the statute that criminalizes

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48 Link v. State, 633 A.2d 1345, 1348 (R.I. 1993) citing Liberty Mutual Insurance Co. v. Janes, 586 A.2d 536, 537 (R.I. 1991).

49 Link v. State, 633 A.2d 1345, 1348 (R.I. 1993) citing Environmental Scientific Corporation v. Durfee, 621 A.2d 200, 208 (R.I. 1993).

50 State v. Jenkins, 673 A.2d 1094 (R.I. 1996) and State v. Quattrucci, 39 A.3d 1036, 1041 (R.I. 2012).

51 418 A.2d 843, 849 (R.I. 1980).

drunk driving is a valid exercise of the police power, the goal of which is to reduce the "carnage"[52] perpetrated on our highways by "drivers who in drinking become a menace to themselves and to the public."[53] Like, for example, the charge of reckless driving, it directly proscribes dangerous conduct on the highways.

On the other hand, the civil charge of refusal[54] has its origins in the implied-consent law — which provides that, by operating motor vehicles in Rhode Island, motorists (impliedly) promise to submit to a chemical test designed to measure their blood-alcohol content, whenever a police officer has reasonable grounds to

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[52] Locke, 418 A.2d at 849-50 citing People v. Brown, 174 Colo. 513, 522-23, 485 P.2d 500, 505 (1971) and DiSalvo v. Williamson, 106 R.I. 303, 305-06, 259 A.2d 671, 673 (1963).

[53] Locke, 418 A.2d at 850 citing Campbell v. Superior Court, 106 Ariz. 542, 546, 479 P.2d 685, 689 (1971).

[54] 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.

believe they have driven while under the influence of liquor.[55] And a motorist who reneges on his or her promise to take such a test may be charged with the civil offense of refusal and suffer the suspension of his or her operator's license.[56] 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.[57]

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[55] The implied-consent law is stated in the same statute as the charge of refusal — § 31-27-2.1 — in subsection (a):

> (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. No more than two (2) complete tests, one for the presence of intoxicating liquor and one for the presence of toluene or any controlled substance, as defined in § 21-28-1.02(7), shall be administered at the direction of a law enforcement officer having reasonable grounds to believe the person to have 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. * * *

We see that, by its terms, the law also applies to controlled substances and the chemical toluene but these aspects of the statute are immaterial in the instant case.

[56] In Locke, supra, 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 Brown, 174 Colo. at 523, 485 P.2d at 505.

[57] In theory — though certainly not in fact — a refusal charge is akin to a charge of failing to obtain a safety inspection for one's vehicle (which is a feature of the State's effort to identify and eliminate unsafe vehicles from our roads).

As a result, the viability of a refusal charge is not dependent on proof of intoxication.[58] Indeed, the defendant's actual intoxication vel non is immaterial in a refusal case. This was the teaching of State v. Bruno,[59] in which the trial judge acquitted Mr. Bruno because the defense presented a medical opinion that the behavior and personal attributes he exhibited during the car-stop were entirely attributable to a non-alcoholic cause.[60] Notwithstanding this evidence, the Supreme Court reinstated the charge, holding that — so long as the State proves that the motorist provided an officer with indicia of intoxication sufficient to satisfy the reasonable-grounds standard — the Court must affirm the violation.[61] In my view, it is this aspect of refusal law — that the metaphysical truth of what the motorist did or did not imbibe is immaterial — that is most jarring to the uninitiated;[62] a refusal case is not a "light" version of a drunk-driving charge.

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58 State v. Hart, 694 A.2d 681, 682 (R.I. 1997).

59 709 A.2d 1048 (R.I. 1998).

60 Bruno, 709 A.2d at 1049. The alternate cause proffered was the ingestion of prescribed medication. Id.

61 Bruno, 709 A.2d at 1049-50.

62 Another confusing aspect of refusal cases is that we focus on an issue — the question of reasonable grounds — that in all other areas of penal law is merely a preliminary question, not the ultimate question.

2

Elements of the Offense of Refusal to Submit to a Chemical Test.

The four statutory elements of a charge of refusal which must be proven at trial are enumerated in the statute. In plain language, they are — one, that the officer had reasonable grounds to believe that the motorist had driven while intoxicated; 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.[63] The State must also prove that the stop was legal (i.e., supported by reasonable suspicion) and the motorist was notified of the right to make a phone call for the purposes of securing bail.[64]

In the instant appeal, one of Ms. Savage's assignments of error is that the State failed to prove an element of the offense of refusal — viz., she asserts that Officer Oser did not have "reasonable grounds" to request her to submit to a chemical test.[65] Accordingly, we shall focus on this part of the statute.

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[63] See Gen. Laws 1956 § 31-27-2.1(c), ante at 15 n. 54.

[64] See State v. Perry, 731 A.2d 720, 723 (R.I. 1999) and State v. Bruno, 709 A.2d 1048, 1050 (R.I. 1998)(legality of the stop) and State v. Quattrucci, 39 A.3d 1036, 1040-42 (R.I. 2012)(right to telephone call).

[65] For convenience, let us begin by setting out this element once again. Subdivision 31-27-2.1(c)(1) provides — "… the law enforcement officer making the sworn report had reasonable grounds to believe that the arrested

Beginning our analysis of the first element, we may note that the language of the provision is unambiguous, except for the standard of evidence that must be presented — "reasonable grounds." Fortunately, this term was clarified for us by the Rhode Island Supreme Court — it is the equivalent of the "reasonable-suspicion" standard,[66] which is well-known in Fourth Amendment litigation as the standard for making an investigatory stop.[67]

But while we know the standard of evidence to be utilized, its application can never be perfunctory, for there is no bright-line rule regarding the quality or quantity of the evidence that must be mustered to satisfy the reasonable-suspicion test; instead, a judgment must be made in each case on the basis of the totality of the circumstances present therein. We are fortunate, therefore, to

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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 …." (Emphasis added).

[66] State v. Perry, 731 A.2d 720, 723 (R.I. 1999) citing State v. Bjerke, 673 A.2d 1069, 1071 (R.I. 1997) and State v. Bruno, 709 A.2d 1048, 1050 (R.I. 1998). It is the standard by which so-called "stop-and-frisks" are evaluated.

[67] See Terry v. Ohio, 392 U.S. 1 (1968). I suggest this term was potentially problematic because in State v. Haigh, 112 R.I. 740, 743, 315 A.2d 431, 433 (1974), our Supreme Court held that the term "reasonable ground," as used in Gen. Laws 1956 § 12-7-3 (the misdemeanor arrest statute) and the term probable cause (as used in Fourth Amendment arrest theory) are "practically synonymous."

have at our disposal several cases in which our Supreme Court performed this exercise. We shall review these cases now.

We can learn much from our Supreme Court's decision in State v. Bjerke (1997).[68] In Bjerke, the Warwick Police responded to a telephone tip of a possible drunk driver operating on Airport Road.[69] However, the initial stop was justified on alternative grounds — the investigation of a criminal offense for which there was probable cause to arrest the defendant.[70] Nevertheless, the Supreme Court paused to note the factors present in the case from which reasonable grounds may be discerned:

> … Because the officer had probable cause to stop Bjerke, on the basis of his commission of a criminal offense in the presence of the officer, the anonymous tip became irrelevant to the question of whether the stop was constitutional. The defendant's commission of a criminal misdemeanor alone gave the officer probable cause to stop and detain him, and then from that point on, any evidence obtained pursuant to that lawful stop, such as the odor of alcohol, the slurred speech, and bloodshot 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. (Emphasis added).[71]

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68 697 A.2d 1069 (R.I. 1997).

69 Bjerke, 697 A.2d at 1070. Citing Alabama v. White, 496 U.S. 325 (1990) — which we shall discuss post, at 27-29 — our Court expressed doubt that this statement constituted reasonable suspicion. Bjerke, 697 A.2d at 1072.

70 Bjerke, 697 A.2d at 1072.

71 Bjerke, 697 A.2d at 1072.

Accordingly, from Bjerke we may draw the inference that emitting the odor of alcohol, slurred speech and bloodshot eyes are accepted as indicia of intoxication.

Next, we may examine State v. Bruno (1998), in which multiple indicia of the consumption of alcohol were exhibited. Among these were swerving and speeding, evidence of vomit in the vehicle, the odor of alcohol, slurred speech, and appearing confused.[72]

Finally, in evaluating the sufficiency of the evidence supporting a finding of reasonable-suspicion in this case we may consider State v. Perry (1999).[73] On the issue of whether the officer had reasonable grounds to believe Mr. Perry was driving under the influence, the Court noted front-end damage to the car, the smell of alcohol, bloodshot eyes, and stumbling.[74] And although no field tests were administered, the Court ruled that reasonable grounds were present.[75]

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72 Bruno, 709 A.2d at 1049.

73 731 A.2d 720, 723 (R.I. 1999). In Perry, as in Bjerke, the stop was justified on non-DUI grounds (specifically, the Court found the officer had reasonable suspicion to believe the motorist had left the scene of an accident). Perry, 731 A.2d at 723.

74 Perry, 731 A.2d at 722.

75 Perry, 731 A.2d at 722-23.

B

The Fourth Amendment — Grounds For the Stop

1

Generally

Appellant Savage also challenges the legality of the initial stop of her vehicle.

It is well-settled that in every prosecution for refusal to submit to a chemical test the prosecution must prove that the initial investigatory stop of the defendant's vehicle did not run afoul of the Fourth Amendment's ban on unreasonable searches and seizures.[76] But before we attempt to determine whether a particular person was in fact "seized," we must first define the term "seizure."

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."[77] The test employed to answer this question is whether, under the circumstances, "… a reasonable person would have believed that he was not free to leave."[78] The Fourth Amendment governs even brief seizures.[79]

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[76] State v. Perry, 731 A.2d 720, 723 (R.I. 1999); State v. Jenkins, 673 A.2d 1094, 1097 (R.I. 1996).

[77] United States v. Mendenhall, 446 U.S. 544, 553, 100 S.Ct. 1870, 1877 (1980).

[78] Mendenhall, 446 U.S. at 554, 100 S.Ct. at 1877; Florida v. Royer, 460 U.S. 491, 501-02 (1983). The "reasonable person" test presupposes an innocent person. Florida v. Bostick, 501 U.S. 429 (1991).

[79] Mendenhall, 446 U.S. at 551-52, 100 S.Ct. at 1875-76. Of course, if the officer's intrusion into the liberty of the citizen was the result of consent given

In my view, after the initial stop, Ms. Savage could not have immediately left the scene. So, she was seized within the meaning of the Fourth Amendment.[80]

But a finding of a Fourth Amendment "seizure" does not, per se, imply an arrest has been made. Professor Wayne LaFave, in his esteemed Fourth Amendment treatise, explains the relationship between the two questions — seizure and arrest — thusly:

> Assuming now that it is clear a Fourth Amendment seizure has occurred, 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).[81]

In other words, prior to the publication of the Supreme Court's opinion in Terry v. Ohio,[82] it could have been assumed (and often was) that a Fourth Amendment "seizure" was synonymous with an "arrest," and therefore probable cause was

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voluntarily, then the Fourth Amendment is not impacted. See Mendenhall, 446 U.S. at 555-60, 100 S.Ct. at 1877-80 (1980). 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).

80 Cf. Simmons, 87 A.3d at 416-17.

81 3 LaFave, Search and Seizure, (5th ed. 2012), § 5.1(a) at 11.

82 392 U.S. 1, 88 S.Ct. 1868 (1968).

necessary to justify all seizures.[83]

But Terry altered our Fourth Amendment jurisprudential landscape radically. Although the Supreme Court conceded that even a brief, investigatory car stop constituted a "seizure" of the person or persons within it,[84] it held that lesser restraints or intrusions (i.e., those not constituting an arrest) would no longer require probable cause.[85] Henceforth, the Court declared, investigative stops (or "Terry-type stops," as they are often called) will pass Fourth Amendment muster if the officer possessed "reasonable suspicion."[86] In the past forty-six years, the parameters of

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[83] See Henry v. United States, 361 U.S. 98, 103, 80 S.Ct. 168, 171 (1959)(In Henry the Supreme Court held the arrest occurred when the officers stopped the vehicle). See also Terry, 392 U.S. at 35, 88 S.Ct. at 1887 (Dissent of Mr. Justice Douglas).

[84] Terry, 392 U.S. at 16-19, 88 S.Ct. at 1877-79; see also United States v. Whren, 517 U.S. 806, 809-10, 116 S.Ct. 1769, 1772-73 (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 purpose, constitutes a 'seizure' of 'persons' within the meaning of the [Fourth Amendment].")

[85] Terry, 392 U.S. at 27, 88 S.Ct. at 1883.

[86] In 2012, forty-four years after Terry was decided, the Rhode Island Supreme Court summarized its holding as follows — "Terry v. Ohio, 392 U.S. 1, 21, 30, 88 S. Ct. 1868, 20 L.Ed 2d 889 (1968) instructs that police officers may conduct an investigatory stop and frisk of a suspect provided that the officer has a reasonable suspicion based on specific and articulable facts that the person to be detained is engaged in criminal activity." State v. Taveras, 39 A.3d 638, 642 n.6 (R.I. 2012).

Terry-type stops have been revisited often.[87]

Finally, it is important to remember that traffic stops are conceptually distinct from Terry-type investigative stops, although the two have often been equated.[88] Traffic stops 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.[89]

Our Supreme Court has ruled that if there is an alternative justification for the stop of the motorist, whether it be reasonable-suspicion to stop the subject for a separate criminal offense or probable cause to make a traffic stop, the State need not show (in a refusal prosecution) that the officer possessed reasonable suspicion to believe the motorist was driving under the influence at the time of the stop.[90]

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87 Our own Supreme Court commented, in State v. Taveras, 39 A.3d 638, 647 (R.I. 2012), that it has restated the Terry-standard "[o]n numerous occasions." In Taveras, the Court reminded us that the Terry standard is applied by evaluating objective facts on the basis of the "totality of the circumstances." Id.

88 They have been equated as to their brevity, although conceptually they are very much distinguishable.

89 United States v. Whren, 517 U.S. 806, 809-10, 116 S.Ct. 1769, 1772, 135 L.Ed.2d 89 (1996). An interesting question, as yet unresolved, is whether a vehicle may be stopped if the officer has only "reasonable suspicion" of the commission of a civil traffic violation.

90 See State v. Bjerke, 697 A.2d 1069, 1072 (R.I. 1997)(Court will not analyze existence of reasonable suspicion of drunk-driving where the officer had probable cause to arrest defendant for commission of criminal offense in his presence). In Bjerke, the Court commented that "[c]ommon sense militates

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Anonymous Tips

We must examine one more line of cases: those in which reasonable-suspicion for a stop is predicated upon information obtained from anonymous informants.[91] This is certainly a difficult area in which to apply constitutional principles — highly fact-intensive, to say the least. The following comments from Adams v. Williams (1972)[92] — wherein the Court rejected the notion that reasonable suspicion could only be predicated on information officers garner by their personal observations — explain the Supreme Court's approach in this area:

> ... we reject respondent's argument that reasonable cause for a stop and frisk can only be based on an Officer's personal observation, rather than on information supplied by another person. Informants' tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and reliability. One simple rule will not cover every situation. Some tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized. But in some situations — for example, when the victim of a street crime seeks immediate police aid and gives a description of the assailant, or when a credible informant warns of a specific impending crime — the subtleties of the hearsay rule should not

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against" the defendant's view — that an intoxicated driver would escape prosecution because he was also being investigated for other charges. Id. See also State v. Perry, 731 A.2d 720, 723 (R.I. 1999).

91 For background on the issue, see 4 W. LaFave, Search and Seizure — A Treatise on the Fourth Amendment, (4th ed. 2004), §9.5(h) at 570.

92 407 U.S. 143 (1972).

thwart an appropriate police response.[93]

And so, the Court ruled that reasonable suspicion can be based on information received from others — even from an anonymous tip — if it carries sufficient "indicia of reliability."[94] The Court made it clear that information received from a known informant is generally to be considered more reliable than that obtained from an unknown source.[95] Subsequent to Adams, the Supreme Court of the United States has addressed the issue of reasonable suspicion based on informants' tips three times. Each case merits individual attention.

The first decision is Alabama v. White (1990).[96] In White, Corporal Davis of the Montgomery Police Department received an anonymous phone call indicating that Ms. Vanessa White would be exiting a certain apartment at a certain time carrying an attaché case containing cocaine; she would then enter a certain vehicle and travel to Dobey's Motel.[97] The Corporal and his partner proceeded to the apartment and watched Ms. White exit the apartment and enter the vehicle, which

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93 Adams, 407 U.S. at 147.

94 Id.

95 Adams, 407 U.S. at 146-47. Also United States v. Riudiaz, 529 F.3d 25, 30-31 (1st Cir. 2008) and United States v. Romain, 393 F.3d 63, 71 (1st Cir. 2004).

96 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990).

97 White, 496 U.S. at 327.

was stopped when it approached the motel.[98] After obtaining Ms. White's consent to search, the officers found marijuana in the attaché and cocaine in her purse.[99]

After her Motion to Suppress was denied, Ms. White pled guilty — preserving the right to appeal from the denial of the motion.[100] The Alabama Court of Criminal Appeals reversed and the Alabama Supreme Court denied certiorari.[101] The United States Supreme Court reversed.[102] Citing Illinois v. Gates (1983),[103] the Court indicated that "veracity," "reliability," and "basis of knowledge" are highly relevant factors in determining whether — under the "totality of the circumstances" — an informant's tip establishes probable cause or reasonable suspicion.[104] While the Court indicated the tip in White did not provide much in the way of "basis of knowledge" or "veracity," it did find the tip to constitute reasonable-suspicion based on the corroboration the tip received before Ms. White was stopped.[105] The Supreme Court of the United States accorded particular significance to the fact that

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98 Id.

99 Id.

100 White, 496 U.S. at 327-28.

101 White, 496 U.S. at 328.

102 Id.

103 462 U.S. 213 (1983).

104 White, 496 U.S. at 328-29.

105 White, 496 U.S. at 329-31.

the anonymous tip accurately predicted Ms. White's future conduct.[106]

A second informant-information case decided by the United States Supreme Court — Florida v. J.L. (2000)[107] — while not a car-stop case, is also instructive. In J.L., the Court affirmed a Florida Supreme Court decision reinstating a trial judge's ruling suppressing evidence seized after an investigatory stop. The case centered on the stop of a juvenile pedestrian; after an anonymous person reported to the Miami-Dade Police Department that a young black man standing at a certain bus stop wearing a plaid shirt was carrying a gun, officers responded and — based solely on the tip — frisked the defendant and seized a gun.[108] In a decision authored by Justice Ginsburg, the Court indicated that the indicia of reliability found in White, particularly the corroborative value of the informant's ability to predict Ms. White's movements, was not present in J.L. The Court stressed that although the identity aspect of the tip was corroborated, the information regarding the criminal activity was not.[109] And so, the

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106 In Bjerke, 697 A.2d at 1069, the Rhode Island Supreme Court cited White, 496 U.S. at 329-30, 110 S.Ct. at 2416, for the proposition that "[a]n anonymous tip without sufficient detail or corroboration will not permit even a brief stop." This statement was dicta since the stop was justified on alternative grounds.

107 529 U.S. 266 (2000).

108 Florida v. J.L., 529 U.S. at 268.

109 Florida v. J.L., 529 U.S. at 272.

Court decided the tip in J.L. fell short of the standard pronounced in White.[110]

Thus, after J.L. we had one case finding reasonable suspicion, and one case not.[111] And, for the past fourteen years, these two cases were the extent of the Supreme Court's teaching on the subject of stops based on anonymous tips.[112] As one could

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110 Florida v. J.L., 529 U.S. at 271. The Court declined to adopt a special rule for firearms cases. J.L., 529 U.S. at 272-73.

111 The two Rhode Island Supreme Court cases which have examined this issue in depth also form a pair, one pro and one con. We see that the U.S. Supreme Court's holding in White was embraced by the Rhode Island Supreme Court in State v. Keohane, 814 A.2d 327, 329 (R.I. 2003). In Keohane, the Woonsocket Police received an anonymous tip that the defendant would be traveling to Providence to purchase heroin which he would then sell in Woonsocket. Keohane, 814 A.2d at 328. Mr. Keohane and his companion — a Mr. Manzano — were followed to Providence, where they met with several men on Bucklin Street, and stopped when they returned to Woonsocket. Id. While no narcotics were found on their persons, Manzano told police where they could find drugs in the van, which they were. Id. Relying on White, the Court — in a per curiam opinion — found the tip had been sufficiently corroborated to become reliable and that the reasonable suspicion standard had been satisfied. Keohane, 814 A.2d at 330-31.

Alongside Keohane we must contrast a subsequent case — State v. Casas, 900 A.2d 1120 (R.I. 2006), facially similar, in which the Supreme Court of Rhode Island had "concerns" regarding the sufficiency of the facts known to the officers and whether they constituted reasonable suspicion. Casas, 900 A.2d 1132. Like Keohane, the case concerned an informant's tip and extensive movements by a suspected drug dealer. But in Casas, "... little, if any, informant information was confirmed before the stop." Id. The Court called the justification for the stop "dubious." Id. However instructive, the Court's comments must be considered dicta — because no items were seized in the stop, the Court made no decision on the reasonable-suspicion issue. Id.

112 We almost obtained further guidance in 2009, in Virginia v. Harris, 558 U.S. 978, 130 S. Ct. 10, 11-12 (2009)(Mem.)(Commonwealth of Virginia sought

well have predicted, during this period, trial and appellate courts began to recognize factors that would allow them to differentiate between and among "anonymous tip" cases. For instance, some decisions distinguish between those tipsters who are truly anonymous — i.e., unidentifiable — and those who, not exhibiting a particular desire for confidentiality, are merely "innominate" — i.e., unnamed.[113] Many, but not all, of these cases involve informants who gave their information to an officer face-to-face. Some courts, including a number of the federal courts of appeal, have come to regard tips from "face-to-face" or "in-person" anonymous informants as being

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certiorari from a decision of its Supreme Court requiring officers to make observations corroborating anonymous DUI tips; Roberts, C.J. and Scalia, J. file opinion dissenting from Court's denial of certiorari — criticizing what they call the "one free swerve" rule). In Harris, Chief Justice Roberts noted that a number of state supreme courts have upheld investigative stops of alleged drunk drivers even when the police officer did not observe any traffic violations before the stop. Harris, 130 S.Ct. at 11, n.2. It is clear that in the Chief Justice's view these cases were distinguishable from Alabama v. White and J.L. and constitute a separate rule for drunk driving cases, which he and Justice Scalia were eager to consider.

[113] See United States v. Torres, 534 F.3d 207, 213 (3rd Cir. 2008). In Torres, a cabbie called 9-1-1 to report he was following a vehicle, which he described, carrying a Hispanic man who had flashed a gun at a man trying to sell roses. Torres, 534 F.3d at 208. The car was stopped by police and a gun located; thereafter, Mr. Torres was indicted for possession of a firearm by a convicted felon. Torres, 534 F.3d at 209. The District Court granted a motion to suppress and the Government appealed. Id. The Third Circuit reversed, finding reasonable suspicion.

outside the White-J.L. anonymous-tip framework.[114] Instead, they place in-person tips somewhere[115] on the axis-line running between Adams (wherein a known informant provided information to an officer face-to-face) and White, (wherein information was provided by an unidentifiable, truly anonymous telephone caller).

The rationale for viewing in-person tips as being more reliable than anonymous telephone tips was convincingly explained by Circuit Judge Selya of the First Circuit Court of Appeals in United States v. Romain[116] —

> [the tip] cannot plausibly be said to be anonymous and unreliable in the sense that concerned the J.L. Court. Unlike a faceless telephone communication from out of the blue, a face-to-face encounter can afford police the ability to assess many of the elements that are relevant to determining whether information is sufficiently reliable to warrant police action. See White, 496 U.S. at 328-29, 110 S.Ct at 2412. A face-to-face encounter provides police officers the opportunity to perceive and evaluate personally an informant's mannerisms, expressions, and tone of voice (and, thus, to assess the informant's veracity more readily than could be done from a purely anonymous telephone tip). See e.g. United States v. Heard, 367 F.3d 1275, 1279 (11th Cir. 2004); United States v. Campa, 234 F.3d 733, 738 (1st Cir. 2000). In-person communications also tend to be more reliable because, having revealed one's physical appearance and location, the informant knows that she can be tracked down and held accountable if her assertions prove inaccurate. See J.L., 529 U.S. at 270-71, 120 S.Ct. 1375. Finally, a face-to-face encounter often provides a window into an informant's represented basis of

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114 See 4 La Fave, Search and Seizure — A Treatise on the Fourth Amendment, § 9.5(h)(4th ed. 2004), and cases cited therein at 583 n. 464.

115 Which is not to say they are situated at the spot equidistant from each pole.

116 393 F.3d 63 (1st Cir. 2004).

> knowledge; for example, her physical appearance at or near the scene of the reported events can confirm that she acquired her information through first-hand observation. See e.g., United States v. Lewis, 40 F.3d 1325, 1334 (1st Cir. 1994).[117]

The Court's legal reasoning is clear — in-person tips are unlike their truly anonymous cousins in that they generally offer more substance on the underlying factors of reliability, veracity, and basis of knowledge.[118] Unlike the tip in White, they do not require extraordinary corroboration to buttress reliability because the other two factors are able to contribute justification for the stop. Simply stated, an in-person tip is unlike its anonymous brother — it is not a one-legged stool.

And so, it seemed that anonymous face-to-face tips constituted a category unto themselves. Such tips were not seen as being presumptively reliable — like those from known informants, as in Adams v. Williams; nor are they presumptively unreliable — like those that are purely anonymous, as in Alabama v. White. They had to be viewed on a case-by-case basis — there being no presumption that such

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[117] Romain, 393 F.3d at 74 (emphasis added). The facts in Romain are rather unusual. A woman visiting her sister called 9-1-1 to report that she was visiting a friend and a man there was carrying a gun. Romain, 393 F.3d at 66. Police responded and were admitted. Id. The caller confirmed the tip and added more details — though at the time her name was not known. The police frisked the defendant and seized a weapon. Romain, 393 F.3d at 67. The Court held the tip was reliable because it was not anonymous in the J.L. sense, as stated above. Romain, 393 F.3d at 73.

[118] These, of course, are the factors specified as significant in Gates, discussed ante at 28-29 citing White, 496 U.S. at 328-29.

a tip was credible or incredible. Each was a jump-ball.

And this was the state of our Fourth Amendment jurisprudence regarding reasonable suspicion based on anonymous tips until April 21, 2014. But on April 22, 2014, the United States Supreme Court issued a decision — Navarette v. California[119] — which may be read to permit officers to accord allegations in anonymous tips substantial credibility even if they are only minimally corroborated. The facts in Navarette are illustrative.

In Navarette the Humboldt County 911 dispatcher received a call regarding a Silver Ford 150 pickup traveling southbound on Highway 1 which had run the caller off the roadway approximately five minutes before.[120] The call was referred to the Mendocino County dispatcher and a California Highway Patrol (CHP) officer was sent to intercept the truck.[121] The officer located the truck at 4:00 p.m. and pulled it over at 4:05.[122] And as the officer and a colleague approached the pickup truck, they smelled the odor of marijuana.[123] The following search revealed 30 pounds of marijuana.[124]

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119 572 U.S. --, 134 S.Ct. 1683, 188 L.Ed.2d 680 (2014).

120 Navarette, 134 S.Ct. at 1686–87.

121 Id.

122 Navarette, 134 S.Ct. at 1687.

123 Id.

124 Id.

The Court, after reviewing its previous rulings in White and J.L., held that the "anonymous" phone call did meet the reliability standard because (a) it was contemporaneous, (b) the truck was found at a location consistent with the phone call, and (c) it was made through the 911 system — which callers know subject them to identification.[125] And so, based solely on the 911 call, the Court held that the officer possessed reasonable suspicion to believe that the operator was driving under the influence.[126] It therefore upheld the stop.

C

Probable Cause for Arrest — The Constitutional Analysis

In her appeal Appellant Savage also challenges the legality of her arrest.

Like the question of the legality of a stop, the issue of the legality of an arrest is governed by the Fourth Amendment to the United States Constitution.[127] The fundamental principle of the Fourth Amendment is that "for a seizure to be deemed reasonable under the Fourth Amendment, it must be effectuated with a

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125 Navarette, 134 S.Ct. at 1688–92.

126 Navarette, 134 S.Ct. at 1692.

127 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. State v. Castro, 891 A.2d 848, 853 (R.I. 2006) citing Mapp v. Ohio, 367 U.S. 643, 654-55 (1961).

warrant based on probable cause."[128] But, warrants are not required for arrests in all circumstances.[129] Nevertheless, when a warrantless arrest is made, the requirement of probable cause is said to be "absolute."[130]

What is probable cause? In State v. Berker (1978)[131] the Rhode Island Supreme Court quoted the following definition of probable cause to arrest given by the United States Supreme Court in Draper v. United States (1959)[132] —

> … 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 …[133]

And 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

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128 United States v. Torres, 534 F.3d 207, 210 (3rd Cir. 2008).

129 State v. Burns, 431 A.2d 1199, 1202-03 (R.I. 1981) citing United States v. Watson, 423 U.S. 411, 417 (1976).

130 Burns, 431 A.2d at 1203 citing Dunaway v. New York, 442 U.S. 200, 208 (1979).

131 120 R.I. 849, 391 A.2d 107 (1978).

132 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959).

133 Berker, 120 R.I. at 855, 391 A.2d at 111, citing Draper, 358 U.S. at 313, 79 S.Ct. at 333, 3 L.Ed.2d at 332, quoting Carroll v. United States, 267 U.S. 132, 162, 45 S.Ct. 280, 288, 69 L.Ed. 2d 543, 555 (1924).

information;[134] 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;[135] 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.[136]

D

Collateral Estoppel or Issue Preclusion

Appellant asked the trial magistrate to find that her arrest was not supported by probable cause, not by performing a constitutional analysis of the type described above in sub-part III-C of this opinion, but by urging that such an analysis was foreclosed to the RITT and that, instead, the trial magistrate was required to accord precedential deference to a previously rendered District Court ruling acquitting her of the criminal charge of drunk driving.

The doctrine by which a judgment or ruling in a case determines the outcome

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134 Torres, 534 F.3d at 210. See also State v. Guzman, 752 A.2d 1, 4 (R.I. 2000) citing State v. Firth, 418 A.2d 827, 829 (R.I. 1980).

135 See State v. Burns, 431 A.2d 1199, 1204 (R.I. 1981).

136 See Illinois v. Gates, 462 U.S. 213, 230-31 (1983).

(in whole or in part) in a subsequent proceeding is known as res judicata.[137] That part of the doctrine — which "makes conclusive in a later action on a different claim the determination of issues that were actually litigated in a prior action …" — is labelled "collateral estoppel" or "issue preclusion."[138] This aspect of res judicata has been recently (and concisely) reiterated by our Supreme Court in Foster-Glocester Regional School Committee v. Board of Review of the Department of Labor and Training (2004) —

> … "Under the doctrine of collateral estoppel, 'an issue of ultimate fact that has been actually litigated and determined cannot be re-litigated between the same parties or their privies in future proceedings.' " George v. Fadiani, 772 A.2d 1065, 1067 (R.I. 2001) (per curiam)(quoting Casco Indemnity Co. v. O'Connor, 755 A.2d 779, 782 (R.I. 2000)). Subject to situations in which application of the doctrine would lead to inequitable results, we have held that courts should apply collateral estoppel [ ] when the case before them meets three requirements: (1) the parties are the same or in privity with the parties of the previous proceeding; (2) a final judgment on the merits has been entered in the previous proceeding; (3) the issue or issues in question are identical in both proceedings. Lee v. Rhode Island Council 94, A.F.S.C.M.E., AFL-CIO, Local 186, 796 A.2d 1080, 1084 (R.I. 2002)(per curiam)(citing Wilkinson v. State Crime Laboratory

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137 As we shall see, "Res Judicata" is the name given to both the doctrine generally and the division of it relating to "claim preclusion." "Collateral estoppel" (or "issue preclusion") constitutes the other half. Foster-Glocester Regional School Committee v. Board of Review of the Department of Labor and Training, 854 A.2d 1008, 1014 n. 2 (R.I. 2004).

138 Foster-Glocester Regional School Committee, 854 A.2d at 1014 n. 2, citing E.W. Audet & Sons, Inc. v. Fireman's Fund Insurance Co. of Newark, New Jersey, 635 A.2d 1181, 1186 (R.I. 1994).

Commission, 788 A.2d 1129, 1141 (R.I. 2002)).[139]

The Court noted that issue preclusion "may apply even if the claims asserted in the two proceedings are not identical."[140] Procedurally, the burden of proving the merit of an application for collateral estoppel is on the party seeking its invocation.[141]

Now, in this case, Ms. Savage urges that the District Court ruling that acquitted her based on a finding that, at the moment of her arrest, Officer Oser did not possess probable cause to believe she had been driving under the influence should be given preclusive effect.[142] Of course, courts have generally been reluctant to give preclusive effect to acquittals in criminal cases.[143] This viewpoint is reflected in the second Restatement of the Law of Judgments —

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139 Foster-Glocester Regional School Committee, 854 A.2d at 1014 (footnote omitted).

140 Foster-Glocester Regional School Committee, 854 A.2d at 1014 n. 2. And so, when we analyze the merits of Appellant's invocation of issue preclusion, it shall not be a justification for the trial magistrate's refusal to invoke the District Court's ruling that the elements of the criminal charge of drunk driving and the civil charge of refusal to submit to a chemical test do in fact differ.

141 See State v. Pineda, 712 A.2d 858, 861-62 (R.I. 1998) and 47 Am. Jur. 2d Judgments, § 640.

142 On May 30, 2014, counsel for Ms. Savage tendered to this Court a copy of what appears to be an 18-page transcript of a motion hearing held by a judge of this Court in the related criminal charge of driving under the influence. Motion to Dismiss Hearing Transcript, State v. Savage, May 11, 2012, passim. Officer Oser was the town's sole witness. Id., at 1-12. At the conclusion of his testimony the Court dismissed the complaint for lack of probable cause. Id., at 16.

§ 85 Effect of Criminal Judgment in Subsequent Civil Action.

> With respect to issues determined in a criminal prosecution:
> …
> (3) A judgment against the prosecuting authority is preclusive against the government only under the conditions stated in §§ 27-29.

And of the five circumstances enumerated in § 28 — in which the Restatement recommends preclusive effect ought not to be given to a prior judgment — two appear particularly pertinent to the instant case;[144] these are the situations in which the party against whom preclusion is sought (1) could not obtain review of the judgment,[145] and (2) had a significantly higher burden of proof in the initial action.[146]

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143 See 47 Am. Jur. 2d Judgments, § 652.

144 In Restatement of Laws (Second) Judgments, § 85, Comment (g), it was noted that, as a result of these two factors, "… it would be a rare case in which an acquittal could result in preclusion against the government in a subsequent civil action."

145 This has not been recognized as a factor preventing the invocation of estoppel in any Rhode Island cases that I have been able to locate.

146 The fact that the burden of proof was higher in the initial action was recognized as a circumstance precluding collateral estoppel in Cannone v. New England Tel. and Tel. Co., 471 A.2d 211, 213-14 (R.I. 1984)(Court rules Superior Court properly excluded evidence of acquittal of motorist at Administrative Adjudication Division of the Department of Transportation [the second-level predecessor to the RITT] on charge of failure to yield from civil law suit regarding accident where AAD standard is clear and convincing evidence and civil standard is preponderance).

In the Reporter's Note to Comment (g) to § 85, Helvering, Commissioner of Internal Revenue v. Mitchell, 303 U.S. 391, 397-98, 58 S.Ct. 630, 632 (1938)

To my knowledge, the Rhode Island Supreme Court has never accorded an acquittal in a criminal case preclusive effect in a later civil case or in the prosecution of a civil violation — although the Court has been requested to do so on several occasions.

In the first case, Knight v. Knight (1942),[147] a suit in equity for divorce based on neglect, the Rhode Island Supreme Court held that the Superior Court[148] justice who heard the case properly declined to give "res judicata" effect to Mr. Knight's acquittal in the District Court to a criminal charge of non-support.[149] The Court specifically noted the higher burden of proof in the criminal charge and the fact that the issues presented in the two cases were not identical.[150]

More than fifty years later, in State v. Jenkins (1996), our Supreme Court was asked to invoke estoppel in a refusal case based on the ruling in the related drunk driving trial.[151] However, the Court held that the District Court record was

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is cited for the principle that the difference in degree of the burden of proof precludes application of the doctrine of res judicata.

147 67 R.I. 412, 24 A.2d 612 (1942).

148 Prior to the passage of the Family Court enabling act, domestic relations matters were heard in the Superior Court. See P.L. 1961, ch. 73, § 20.

149 Knight, 24 A.2d at 613.

150 Id.

151 673 A.2d 1094 (R.I. 1996).

insufficient to prove a finding more specific than a general acquittal.[152]

Two years later, in State v. Pineda (1998), our Court had another opportunity to consider whether an acquittal in a drunk driving case (based on a lack of compliance with § 31-27-3, relating to the right to an independent examination) would be accorded preclusive effect in the related refusal case.[153] Once again, however, the Court concluded it was unable to reach the issue.[154] The record of the District Court proceeding contained in the Administrative Adjudication Court record was deemed insufficient.[155] Moreover, the Court found the District Court's ruling was marked by error, since it was addressed on a motion for judgment of acquittal and not a motion to dismiss as prescribed by our Supreme Court in State v. McKone (1996).[156]

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152 Jenkins, 673 A.2d at 1096. The Court also found the request insufficient because it was targeted to an issue — i.e., probable cause to arrest — which was immaterial in the refusal case. Jenkins, 673 A.2d at 1097.

153 712 A.2d 858 (R.I. 1998).

154 Pineda, 712 A.2d at 861-62.

155 Id. The Administrative Adjudication Court (AAC) was the immediate predecessor to the RITT within the Rhode Island judiciary.

156 673 A.2d 1068 (R.I.1968) cited in Pineda, 712 A.2d at 861-62.

IV

ISSUE

The issue before the Court is whether the decision of the appeals panel was clearly erroneous in light of the reliable, probative, and substantial evidence of record or whether it was affected by error of law. Or, did the appeals panel err when it upheld Ms. Savage's conviction for refusal to submit to a chemical test?

V

ANALYSIS

As she did before the appeals panel, Ms. Savage presents three arguments in support of her effort to set aside her refusal conviction — (1) Officer Oser did not have probable cause to arrest her;[157] (2) Officer Oser did not have reasonable suspicion to stop her vehicle;[158] and, (3) Officer Oser did not have reasonable grounds to believe she had been driving under the influence — so he had no right to ask her to submit to a chemical test.[159] We shall address each of these arguments, in turn, after making a detailed review of the facts of record.

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157 Appellant's Memorandum, at 16-23.

158 Appellant's Memorandum, at 23-30.

159 Appellant's Memorandum, at 30-33.

A

Essential Facts of Record

As I stated at the outset of this opinion, I believe the facts of record are fairly stated in the Decision of the Appeals Panel. Nevertheless, in order to facilitate our analysis, I shall now restate the circumstances of Appellant's stop and arrest, emphasizing the facts necessary to resolve the issues before the Court.

On March 10, 2012 at about 6:30 p.m. Mr. Jason Arnone, a 41 year-old art manager at a game development company who resided in the Town of Barrington, was traveling south on the Wampanoag Trial (Route 114) in his Toyota mini-van with his wife and two of his children, when he saw a white sport utility vehicle ahead of him that was drifting back-and-forth between the two southbound lanes, causing traffic behind it to become congested.[160]

Mr. Arnone observed that the white SUV was a Ford Explorer.[161] Keeping a safe distance, but fearing for the safety of his fellow residents, he followed the car south, even beyond the turn-off to his home; and when he arrived at the intersection of Massasoit Avenue, he decided to call 911.[162] A recording of his 911

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160 Trial Transcript III, at 45-48. Luckily, at this point, the road is divided by a median with a guard rail, which ends at Massasoit Avenue (at the White Church). Id., at 55-56.

161 Trial Transcript III, at 57.

162 Trial Transcript III, at 50, 59.

call was introduced (and played) at trial;[163] it was transcribed as follows —

RECORDED VOICE:	9-, 911. Where is your emergency?
RECORDED VOICE 2:	Um, the Presbyterian Church[164] on Route 114. It's a white Ford Explorer all over the road. Um, I think they must be drunk or something.
RECORDED VOICE:	Are they going away from Barrington or into Barrington?
RECORDED VOICE2:	Into Barrington.
RECORDED VOICE:	Okay.
RECORDED VOICE 2:	Um, we're passing in front of the White Church now.
RECORDED VOICE:	Okay. (inaudible) license plate (inaudible)?
RECORDED VOICE 2:	Um, they just ran a red light. I didn't see the …
RECORDED VOICE:	Okay.
RECORDED VOICE 2:	… license plate. They're in the wrong lane now, so …
RECORDED VOICE:	All right. We'll get someone out there.
RECORDED VOICE2:	Thank you, sir.
RECORDED VOICE:	Okay.[165]

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163 See Exhibit 6.

164 The informant erred regarding the affiliation of the house of worship known locally as the "White Church." It is of the Congregational denomination.

165 Trial Transcript III, at 63-64 and Trial Transcript VI, at 52-53. The recording was played twice at the trial and the transcriptions differ slightly. I have presented the first version, which comes in the midst of Mr. Arnone's testimony.

In the second transcription, Mr. Arnone's preliminary conversation with the 911 operator, before he is transferred to the Barrington dispatcher, is recorded,

And then, as Mr. Arnone endeavored to catch up to the Explorer,[166] the Barrington dispatcher, Mr. Glenn Maciel, made a radio broadcast of the information just received. Although it was directed to Officer Greg Koutros, who had the post near the Congregational Church, it could be heard by all patrol officers —

> 14, I have a complaint of an erratic operator operating a white Ford Explorer. No plate was given. Uh, it was County Road South. At the time of the call, it was in front of Barrington Congregational Church. Uh, said they're, they're, operator was going left of center and was actually operating for quite some distance in the northbound lane.[167]

Officer Timothy Oser, a nine-year member of the Barrington Police Department, who had made more than thirty drunk-driving arrests also heard the broadcast.[168] When he heard that the vehicle — which was "supposedly all over the road" — was in the area of the Congregational Church,[169] he concluded the vehicle had passed him, so he turned around and headed southbound on Route 114.[170]

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as is a comment he makes just before the town dispatcher comes on the line — "Oh my God. Oh, my God." And in the second transcription the line which reads "Okay. (inaudible) license plate (inaudible)?" above is rendered "Okay. You didn't happen to see the license plate, did you?"

166 Trial Transcript III, at 67.

167 Trial Transcript VI, at 56.

168 Trial Transcript I, at 10-13.

169 Id.

170 Trial Transcript I, at 15.

Then, as the patrolman neared a Shell gasoline station, a minute or two after he received the dispatch, he saw a silver minivan with its hazard lights on, and a man was sticking his arm out the window, trying to flag him down; the officer stopped alongside the vehicle and the man identified himself as the caller.[171] The gentleman, who was excited, appeared to be in his 30's, maybe his early 40's; he reiterated, in a conversation that lasted a couple of seconds, that the white sport utility vehicle was being driven "all over the road" and informed him (by pointing) that it was heading south.[172]

At about this time[173] another person[174] came into the lobby of the Barrington Police Station and said — "Hey there's, there's an erratic operator out there, and I was the one who called."[175] The citizen told Dispatcher Maciel the first two letters on the license plate of the white SUV.[176] As a result, the Dispatcher

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171 Trial Transcript I, at 15-17, 37. Officer Oser indicated that he was not previously familiar with the gentleman. Id., at 25.

172 Trial Transcript I, at 15-18, 37, 39, 61.

173 In the supplemental testimony he gave, Officer Oser made it clear that he had received the partial plate information from dispatch before he stopped Appellant's vehicle. Trial Transcript IX, at 6.

174 It appears it could not be Mr. Arnone because he was at the Shell Station with Officer Oser.

175 Trial Transcript VI, at 60.

176 Trial Transcript VI, at 72.

made a second broadcast informing the officers on the road that the first two letters "may" be "Thomas Victor."[177]

Officer Oser resumed pursuit after speaking with the person later determined to be Mr. Arnone and, a few seconds later, located a white sport utility vehicle, with a license plate TV267, which he pulled over, based on the report of erratic operation.[178] He approached the vehicle and noticed a strong odor of a fragrance, and the fact that the front windows were down all the way, even though it was March and the temperature was in the 30's.[179] The operator presented a driver's license that identified her as Ms. Layne Savage; Officer Oser observed her to have bloodshot eyes and slurred speech.[180] The officer returned to his vehicle and ran a license check, a warrant check, and an NCIC check; from the first, he learned her license was suspended.[181] Appellant told Officer Oser that she had been out with co-workers in Providence and had two glasses of wine.[182] He asked her to

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177 Trial Transcript VI, at 66.

178 Trial Transcript I, at 18-19.

179 Trial Transcript I, at 20. Patrolman Greg Koutros, who arrived after the stop, found the windows being open as "odd." Trial Transcript II, at 5. He also testified the strength of the fragrance was unusual. Trial Transcript II, at 6.

180 Trial Transcript I, at 20.

181 Trial Transcript I, at 21, 47, 60-61, 65.

182 Trial Transcript I, at 21.

exit the vehicle and proceed to the rear bumper, which she did without stumbling or using the car for balance.[183]

At this point the officer looked inside the vehicle and found a spray bottle with a purple liquid inside.[184] He asked Appellant to perform field sobriety tests, which she refused.[185] He described her demeanor as defiant.[186]

Officer Oser then took Ms. Savage into custody and placed her in the rear seat of his police cruiser, where he read her the "Rights For Use at Scene."[187] Then, with the assistance of Officer Greg Koutros, who had arrived to assist him, he conducted an inventory search of the vehicle, and found three prescription pill bottles in the center console; and, in a black bag on the floor of the vehicle, they found three bottles of alcohol — two bottles of Baccardi Gold rum (one of which was partially consumed), two small bottles of Pinot Grigio wine (of which, again, one bottle was partially consumed), and a partially consumed nip.[188]

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183 Trial Transcript I, at 22. Officer Koutros noted she did so "deliberately." Trial Transcript II, at 6.

184 Trial Transcript I, at 22.

185 Trial Transcript I, at 23. Trial Transcript II, at 6.

186 Trial Transcript I, at 24.

187 Trial Transcript I, at 24-25.

188 Trial Transcript I, at 26-27, 48; Trial Transcript II, at 7. In response to a leading question from defense counsel, Officer Koutros conceded the interior of the car was a "pigsty." Trial Transcript II, at 9.

And, after she was transported to Barrington Police Headquarters, Officer Oser allowed Ms. Savage to make a confidential telephone call and read her the "Rights For Use at the Station."[189] She then refused to sign the form.[190] He then booked Appellant for the criminal charges of driving under the influence and driving on a suspended license and cited her for the civil violations of refusal to submit to a chemical test and open container of alcohol.[191]

We now take up Appellant's three assertions of error.

B

Appellant's Request to the RITT to Invoke Estoppel on the Issue of Probable Cause For Her Arrest Was Properly Declined

1

Generally

Ms. Savage urged that the refusal charge lodged against her should have been dismissed because Officer Oser did not have probable cause to arrest her for drunk-driving. However, she did not ask the trial magistrate (or the appeals panel) to arrive at this conclusion through a diligent and exhaustive application of the facts of this case to the established test for probable cause.[192] Instead, she urges

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189 Trial Transcript I, at 32.

190 Trial Transcript I, at 32.

191 Trial Transcript I, at 33, 36.

192 The fundamentals of this test are described in Part III–C of this opinion.

that the appeals panel should have given preclusive effect to a prior ruling made by a judge of the District Court, in the related drunk-driving case, in which he held that Patrolman Oser did not have probable cause to arrest her for drunk driving.[193] She urges that the appeals panel's failure to do so constituted error.[194]

The appeals panel rejected Appellant's entreaties on this point for two reasons — (1) the drunk driving and refusal statutes are separate and distinct,[195] and the issue of probable cause (to arrest) is irrelevant in the refusal case;[196] and (2) the burden of proof in the DUI charge is greater than that for refusal (beyond a reasonable doubt vs. clear and convincing).[197]

So, did the members of the appeals panel have a sound legal basis to reject Appellant's request for the invocation of collateral estoppel? In my view, they had several — more than the two the panel cited. In any event, we shall answer this question by applying the three-part test set forth in Foster-Glocester.[198]

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193 See Motion to Dismiss Hearing Transcript, State v. Savage, May 11, 2012, at 16.

194 Appellant's Memorandum of Law, at 16-23.

195 Decision of Appeals Panel, at 8 citing State v. Quattrucci, 39 A.3d 1036, 1041 (R.I. 2012) and State v. Jenkins, 673 A.2d at 1094, 1097 (1996).

196 Decision of Appeals Panel, at 8 citing State v. Jenkins, 673 A.2d at 1097 and § 31-27-2.1.

197 Decision of Appeals Panel, at 9.

198 Foster-Glocester, 854 A.2d at 1014 citing Lee v. Rhode Island Council 94, A.F.S.C.M.E., AFL-CIO, Local 186, 796 A.2d 1080, 1084 (R.I. 2002), quoted

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The Procedural Issue — The Initial Lack of Documentation

But before entering into a discussion of the viability of Appellant's assertion of issue preclusion under the three-part test reiterated in Foster-Glocester Regional School Committee, we must address a preliminary issue — the state of the record.

When I began my consideration of this question by examining the record certified to this Court by the RITT, I became concerned that — while the issue was discussed below by counsel and the trial magistrate — there was no documentation within the record evidencing the District Court's decision acquitting Ms. Savage on the criminal charge of drunk driving. Clearly, this fact imperiled Ms. Savage's invocation of collateral estoppel, for our Supreme Court has held the lack of such a record to be fatal to such a request.[199]

Realizing the absence of such evidence, I attempted to cure this omission by ordering the cited District Court case to be transmitted to me, only to be told it was unavailable — it had been expunged.[200] And so, I informed counsel of the

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ante at 38-39.

199 State v. Jenkins, 673 A.2d at 1094, 1096 (1996).

200 I subsequently learned that a motion to seal was granted on May 25, 2012. I should also state that I sought to review the file in the criminal case, sua sponte, under the authority of Foster-Glocester Regional School Committee v. Board of Review of the Department of Labor and Training, 854 A.2d 1008, 1015 n. 4 (R.I. 2004).

situation; in response, I received, from counsel for Appellant, on May 29, 2014, a transcript of the District Court bench decision from counsel for Appellant. Thereafter, by agreement of the parties, this Court ordered the unsealing (and subsequent resealing) of the District Court case file; by this device, counsel for Appellant was able to present the order of dismissal entered by our District Court colleague on May 11, 2012.[201] With this filing, Appellant pronounced herself satisfied with the state of the record. And I agree that, with these documents in hand, the earlier decision of this Court is now before us.

Of course, we must not lose sight of the fact that administrative appeals are ordinarily decided solely by reference to the testimony and evidence that was before the previous tribunal. So what was before the RITT when it addressed the issue? When, at the outset of her trial on June 12, 2012, Appellant urged Chief Magistrate Guglietta to find that Officer Oser lacked probable cause to arrest her (solely on the basis of the prior District Court ruling), she was invoking an expunged case.[202] At that juncture she could not have obtained a certified copy of the District Court record (or any part of it) for presentation to the Traffic Tribunal.

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[201] See Order, State v. Layne Savage, 61-2012-3157. This Order was filed in this case on September 29, 2014.

[202] As stated above, ante at 52, n. 200, Ms. Savage's motion to seal was heard and granted on May 25, 2012.

She had removed it from the public record; indeed, by citing the District Court decision, she acted contrary to the mandates (or at least the spirit) of Gen. Laws 1956 §§ 12-1-12 and 12-1-12.1. Given the dearth of evidence of the District Court criminal proceedings in the RITT record, we must come to the ineluctable conclusion that Appellant failed to satisfy her burden of supporting her request to invoke issue preclusion with sufficient documentation.[203]

I do not believe it would have been proper for the RITT to invoke principles of collateral estoppel based on an expunged decision. And so, although they apparently were not aware of this circumstance, the trial magistrate and the appeals panel properly rejected her request to invoke the prior District Court ruling under principles of issue preclusion (or collateral estoppel).

Nevertheless, our Supreme Court has instructed this Court that we are able to take judicial notice when considering a case pursuant to the Administrative Procedures Act (APA),[204] even when it had not been taken by the prior tribunal.[205]

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[203] For the principle that the burden of proof (including the burden of production) is on the party seeking to invoke issue preclusion, see Pineda, 712 A.2d at 861-62; also 47 Am. Jur. 2d Judgments, § 640.

[204] See Foster-Glocester Regional School Committee v. Board of Review of the Department of Labor and Training, 854 A.2d 1008, 1014-16 (R.I. 2004). Of course, this case is not an administrative appeal — but our review has that nature. See Part II of this opinion, "Standard of Review," ante at 12-14.

[205] Id., at 1015 n. 4.

As a result, we must consider the issue whether this Court's earlier ruling requires us to vacate the verdict below by application of the doctrine of collateral estoppel.

3

Applying the Three-Part Test — Generally

Two of the three elements of the test enunciated in Foster-Glocester are not at issue in the instant appeal. The first element — privity — is apparently satisfied, since the defendant was Ms. Savage in both matters and the Town of Barrington prosecuted the drunk-driving case on behalf of the State.[206] And we will omit any discussion of the second element — that there was a final judgment on the merits

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[206] The criminal drunk-driving charge leveled against Ms. Savage was prosecuted by the Town of Barrington, its Police Department, and its solicitor. The instant refusal case has been prosecuted and defended on appeal by the Department of the Attorney General. Moreover, in the instant case the State has not questioned the privity element.

Neither did the State apparently raise the privity issue in two prior cases in which it was asked to give estoppel effect to an acquittal (i.e., Jenkins and Pineda), it did not raise the issue, even though in both cases the criminal prosecution had been handled by a municipality.

And yet, it may be noted that other cases take a contrary view. E.g. Commonwealth, Department of Transportation v. Crawford, 121 Pa. Cmwlth. 613, 616, 550 A.2d 1053, 1054-55 (1988)(Court declines to find privity between the District Attorney [who prosecutes the criminal charge of drunk driving] and the Department of Transportation [which initiates the civil suspension proceeding]) and State v. Hooley, 269 P.3d 949, 952-56 (Okla. Crim. App. 2012)(Court finds no privity between Department of Public Safety [responsible for license suspensions] and the several District Attorneys [responsible for criminal drunk-driving prosecutions]).

Accordingly, we shall assume privity exists.

— because the State does not question that this element was satisfied. And so, we may now turn to the third (and the only disputed) element of the test — the identity of the issues.

4

The Identity of Question Element

I believe, for several reasons, that the issue before the Traffic Tribunal was not the same as the issue that the District Court decided.

a

The Standard of Proof Difference

First, I believe (as did the appeals panel), that the legal issues are different due to the different standards of proof which apply to the criminal charge and the civil violation. Because the civil violation standard (clear and convincing evidence) is less demanding than the criminal standard (beyond a reasonable doubt), I believe issue preclusion cannot be made available to Ms. Savage in the manner that she desires.[207] Instead, the State was entitled to proceed on the refusal citation

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[207] See Cannone v. New England Tel. and Tel. Co., 471 A.2d 211, 213-14 (R.I. 1984)(Court rules Superior Court properly excluded evidence of acquittal of motorist at Administrative Adjudication Division [predecessor to RITT] on charge of failure to yield from civil law suit regarding accident where AAD standard is clear and convincing evidence and civil standard is preponderance. See generally Parker v. Parker, 103 R.I. 435, 441, 238 A.2d 57, 60-61 (1968) (wherein may be found an explication of the distinctions among the various degrees of proof recognized under Rhode Island law).

notwithstanding her acquittal on the drunk-driving complaint.[208]

The importance of this factor has been recognized by members of our Supreme Court,[209] and many cases from our sister states.[210] It has also been memorialized in the Restatement (Second) of Judgments.[211]

Now, it may be argued that the District Court ruled on a preliminary

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208 If the law were otherwise, every acquittal on a charge of, say, an assault, would preclude a civil suit based on the same conduct, which is not the rule.

Conversely, I do not agree with the appeals panel when it cited the fact that drunk driving and refusal have different elements as a basis for precluding the invocation of issue preclusion. The rule is contrary — the fact that drunk driving and refusal are different charges does not preclude, per se, the invocation of collateral estoppel. Foster-Glocester Regional School Committee, 854 A.2d at 1014 n. 2, quoted ante at 38-39.

209 See Knight, ante at 41, and Pineda, discussed ante at 42, 712 A.2d at 862-63 (Flanders and Lederberg, JJ., concurring opinion).

210 See Ditton v. Department of Justice Motor Vehicle Division, 374 Mont. 122, 130-132, 319 P.3d 1268, 1276-77 (2014); Hooley, supra, 269 P.3d at 956-57; Miller v. Epling, 229 W.Va. 574, 579-81, 729 S.E. 2d 896, 901-03 (2012); Commonwealth v. Crawford, 550 A.2d 1053, 1054-55 (Pa.Cmwlth. 1988).

211 Restatement (Second) of Judgments, § 28(4),(1982) provides:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
> …
> (4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action;
> … (Emphasis added).

question — probable cause for arrest — an issue which does not require proof beyond a reasonable doubt.[212] But the hearing (and the resulting order) was not framed as, for example, a motion to suppress, but as a motion to dismiss for lack of probable cause for the arrest.[213] As I view it, the motion was brought pursuant to State v. McKone (1996), in which the standard of proof is beyond-a-reasonable-doubt.[214] So, the State did indeed bear a higher burden of proof in the earlier case.

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212 State v. Tavarez, 572 A.2d 276, 279 (R.I.1990)(Indeed, the standard of proof at a fourth amendment suppression hearing is merely a "fair preponderance").

213 See Order, 61-2012-3157, May 11, 2012.

214 673 A.2d 1068 (R.I.1996). McKone ended the use of Rule 29 motions for judgment of acquittal in criminal, non-jury cases. Instead, the Court weighs the evidence on a "McKone" motion to dismiss. The Court explained its McKone holding in State v. Berroa, 6 A.3d 1095, 1099-1100 (R.I. 2010) —

> "In a jury-waived criminal proceeding, a defendant may move to dismiss in order to challenge the legal sufficiency of the evidence." State v. Harris, 871 A.2d 341, 346 (R.I. 2005)(citing State v. Silvia, 798 A.2d 419, 424 (R.I. 2003)). "In ruling on such a motion, the trial justice acts as the fact-finder." Id. (citing State v. McKone, 673 A.2d 1068, 1072 (R.I. 1996)). "In carrying out that task, the trial justice is 'required to weigh and evaluate the trial evidence, pass upon the credibility of the trial witnesses, and engage in the inferential process, impartially, not being required to view the inferences in favor of the nonmoving party, and against the moving party.' " Id. (quoting McKone, 673 A.2d at 1072-73). The trial justice must deny the defendant's motion to dismiss if he or she concludes that the trial evidence is sufficient to establish guilt beyond a reasonable doubt." Id. (citing McKone, 673 A.2d at 1073).

By addressing the issue as a motion to dismiss under McKone the District Court followed the procedure our Supreme Court prescribed as proper in State v. Pineda, 712 A.2d 858, 861-62 (R.I. 1998).

b

Probable Cause For Arrest Is Not an Issue In Refusal Cases Generally

The second reason why I believe there is not an identity of issues between the drunk-driving and refusal cases is also broad in scope. Simply stated, Appellant insists that in every refusal case the prosecution must show, at the time of the motorist's arrest, that the arresting officer possessed information constituting probable cause that the motorist was driving under the influence — in other words, probable cause on the charge of drunk driving.[215] I believe this argument has several infirmities.

First of all, I do not believe that the Supreme Court of Rhode Island has ever declared, in a refusal case, that the State is required to prove the arresting officer possessed probable cause to arrest the motorist for drunk-driving or for any other offense. How could have it done so, when it has said that proof that the motorist drove while under the influence of liquor is not an element in a refusal

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[215] Appellant's Memorandum, at 17-18. Among the cases cited by Appellant for the proposition that probable cause for arrest if an element of a refusal case is one authored by the undersigned — Haley v. State of Rhode Island, A.A. No. 10-312 (Dist.Ct. 02/18/11). I believe the citation is infelicitous. In Haley we quoted the statutory language to the effect that a motorist who is under arrest for drunk driving may be asked to submit to a chemical test if certain preconditions are met. In other words, such a request may be made only of a person who is under arrest; the refusal statute does not expressly require a finding of that the arrest was made with probable cause. Haley, slip op. at 11.

case.[216] Appellant cites no case from the Rhode Island Supreme Court supporting such a requirement. She argues instead that probable cause to arrest is the equivalent of the phrase "reasonable grounds" in § 31-27-2.1.[217] However, this assertion is clearly erroneous.[218]

To the contrary, our Supreme Court has stated that proving that the officer had probable cause to arrest the motorist is not an element of a refusal case. In State v. Jenkins (1996),[219] the Court affirmed the Appellant's adjudication for refusal, holding that the officer possessed (1) reasonable-suspicion to justify the stop under the Fourth Amendment and (2) reasonable grounds (the equivalent of reasonable-suspicion), pursuant to § 31-27-2.1, to believe that Ms. Jenkins had driven while under the influence — thereby justifying the officer's request that she submit to a chemical test.[220] Justice Murray, writing for the Court, specifically commented that the issue of probable cause "… was unrelated to and irrelevant in

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216 See State v. Hart, 694 A.2d 681, 682 (R.I. 1997).

217 Appellant's Memorandum, at 17, 20.

218 See State v. Perry, 731 A.2d 720, 723 (R.I. 1999).

219 673 A.2d 1094 (R.I. 1996).

220 Jenkins, 673 A.2d at 1097.

the AAC trial ….”[221] Thus, we must find that the issue of probable cause for arrest is immaterial in a prosecution for refusal.

c

Probable Cause to Arrest Ms. Savage for Drunk Driving Was Not an Issue In this Case

But even if we were to accept the notion — for the sake of argument — that in a refusal case the State must show that the arrest of the motorist was accomplished lawfully (i.e., supported by probable cause), Appellant's invocation of estoppel still must be denied. Why? Because Appellant is asking this Court to apply (through collateral estoppel) the District Court's ruling that Officer Oser did not

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[221] Id. Accordingly, our Supreme Court rejected Ms. Jenkins' argument that a District Court finding of no probable cause (in the DUI prosecution) would not preclude the prosecution for refusal. Id. Appellant argues that the Supreme Court's holding was — facially, at least —that there was no probable cause "for the stop." This is certainly true. But the standard for the constitutionality of a stop was, at the time of Jenkins, reasonable suspicion, as it had been since 1968, when Terry was decided. In view of the fact that the law on this point was so well-settled, I simply do not believe the Court would have spent so much effort knocking down a "straw man." Instead, I believe that the Court's decision must be read as determining all probable cause issues to be immaterial in refusal cases. Finally the Court's reference to the "AAC" denotes the Administrative Adjudication Court, the RITT's immediate predecessor, which had jurisdiction over refusal cases at that time.

Finally, we may note that in subsequent refusal cases the Court has addressed the issues of reasonable-suspicion for the stop and reasonable grounds to request the motorist to submit to a chemical test, but not the issue of probable cause for arrest. See State v. Bruno, 709 A.2d 1048, 1050 (R.I. 1998) and State v. Perry, 731 A.2d 720, 723 (1999).

have probable cause to arrest Ms. Savage for drunk driving, and in this case, as it is in many, the Traffic Tribunal did not need to reach that issue, as the arrest was clearly lawful for a different offense.

We must recall that Officer Oser learned, prior to Appellant's arrest, that her operator's license had been suspended,[222] which gave him probable cause on that criminal charge.[223] So, Officer Oser was fully authorized to arrest Ms. Savage.[224] But, we must ask — if her arrest is predicated on this basis, is the officer then precluded from following through on his DUI investigation? No, he is not.

Our Supreme Court faced a similar question in Bjerke, supra, in which the appeals panel upheld the dismissal of a refusal charge where the stop was justified on the basis of the officer's knowledge that the vehicle the motorist was operating was unregistered.[225] But, the Supreme Court held that, when the information regarding the other charge became known to the officer, the issue of whether there was reasonable suspicion of drunk driving prior to the stop became

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222 Decision of Appeals Panel, at 3 citing Trial Transcript I, at 21.

223 See Gen. Laws 1956 § 31-11-18.

224 See Gen. Laws 1956 § 12-7-3.

225 Bjerke, 697 A.2d at 1070-71. The Court cited Whren v. United States, 517 U.S. 806 (1996) for the proposition principle that probable cause for a civil traffic offense constitutionally validates a car stop, even if pretextual. Id.

irrelevant.[226] The Court rejected the appeals panel's view — viz., that a drunk driving investigation was precluded by the fact that the officer did not have reasonable suspicion of drunk driving before the stop.[227] Writing for the Court, Justice Bourcier commented –

> To conclude piecemeal, as the panel did, that the probable cause that justified the stop was irrelevant, would have the perverse effect of permitting an intoxicated driver to escape prosecution merely because he was stopped for a separate and different motor vehicle violation. Common sense militates against such disparate analysis.[228]

The Court's rejection of the appeals panel's approach (rejecting constitutional authority to stop for alternative offenses — other than for drunk driving — as a predicate to a refusal prosecution) was reiterated two years later, in Perry, supra.[229] In Perry our Supreme Court reinstated a refusal charge — despite the panel's finding that the officer did not have reasonable suspicion of drunk driving — where there was ample evidence that he left the scene of an accident.

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[226] Bjerke, 697 A.2d at 1072, quoted ante at 20. Also, Perry, 731 A.2d at 723.

[227] Bjerke, 697 A.2d at 1072.

[228] Bjerke, 697 A.2d at 1072.

[229] Perry, 731 A.2d 720. In Perry our Supreme Court reinstated a refusal charge — despite the panel's finding that the officer did not have reasonable suspicion of drunk driving — where there was ample evidence that he left the scene of an accident.

And so, I have little doubt that the Court would apply this rationale in the instant case. Therefore, I must conclude, the propriety of the arrest on alternative grounds does not preclude the continuance of a drunk-driving investigation, up to and including a request to submit to a chemical test, since it was based upon reasonable grounds (or reasonable suspicion). As a result, I believe it would be irrational to permit Appellant to invoke estoppel on an issue — probable cause to arrest for drunk-driving — that, strictly speaking, was irrelevant in her case.

5

Other Policy Considerations

Before concluding my comments on this topic, I should like to cite two additional factors which are widely regarded as significant to an evaluation of the merit of a request to invoke the doctrine of collateral estoppel based on a criminal judgment of acquittal.

a

The Absence of the Right to Appeal

The first principle I should like to bring forward in a formal way at this time is one which was previously mentioned in passing — the prerequisite that the initial judgment be one which was subject to appeal. Now, this rule is not an aspect of the requirement that the prior judgment be valid and final but is, as least as it is

stated in the Restatement of the Law of Judgments,[230] an additional prerequisite to the invocation of collateral estoppel. This principle does not appear to have yet been acknowledged in Rhode Island jurisprudence.

Of course, Rhode Island has long recognized the principle that — absent constitutional or statutory authority[231] — the prosecution has no right to appeal in a criminal proceeding.[232] And while our Supreme Court has indicated that it may, pursuant to its supervisory jurisdiction over all inferior Rhode Island courts,[233] consider whether a lower court has acted "without jurisdiction or in excess of jurisdiction"[234] pursuant to a writ of certiorari brought by the State,[235] when doing

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230 Restatement (Second) of Judgments, § 28(4)(1982) provides:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> (1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action; … (Emphasis added).

231 The only Rhode Island statute authorizing appeals by the State in criminal matters is Gen. Laws 1956 § 9-24-32, which, on its face, does not apply to District Court cases.

232 See State v. Alexander, 115 R.I. 491, 493, 348 A.2d 368, 370 (1975) citing State v. Beaulieu, 112 R.I. 724, 726, 315 A.2d 434, 435 (1974) and State v. Coleman, 58 R.I. 6, 190 A. 791, 793 (1937).

233 Coleman, 190 A. at 793-94.

234 Coleman, 190 A. at 794. The Court in Coleman enumerated Kenney v. State, 5 R.I. 385 and Antoscia v. Superior Court, 38 R.I. 332, 95 A. 848, as two cases in

so it may not reach the merits of the Court's action.[236] It should also be noted that it is not a writ of "strict right."[237]

In the instant case, there is not the merest hint that any ruling made by the District Court judge in the drunk-driving case brought against Ms. Savage exceeded this Court's jurisdiction. Therefore, no review was available to the State, even by certiorari. And so, if the principle espoused in § 28(1) of the Restatement — i.e., that a ruling cannot be given preclusive effect if the adverse party could not obtain review — is accepted into Rhode Island jurisprudence, Ms. Savage's application for invocation of collateral estoppel will necessarily be rejected.

b

The Intention of a Double Process

Finally, we may take cognizance of the rulings of those courts which have denied estoppel effect to acquittals on public policy grounds.[238] These courts begin

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which the Supreme Court had entertained the writ but had ultimately declined to issue it because the lower court had not actually exceeded its authority. Id.

235 Coleman, 190 A. at 793-94.

236 Coleman, 190 A. at 794.

237 Coleman, 190 A. at 793.

238 See Meyer v. State, Department of Revenue, Motor Vehicle Division, 143 P.3d 1181, 1186 (Colo. App. 2006)(Court finds previous ruling in drunk-driving case that officer did not possess reasonable suspicion for the stop was not binding in administrative license suspension proceeding on the basis of a statute allowing findings to be made "independent" of any determinations in

by noting that their state laws authorize the commencement of two separate processes when a motorist is arrested for drunk driving — one criminal and one administrative. The difference between the two has been commented upon by our Supreme Court on many occasions; nevertheless, the Court has not yet indicated whether, under Rhode Island law, each charge was designed to be fully independent of the other.

6

Summary of Findings on the Issue Preclusion Issue

To sum up my conclusions on this question —

I conclude that this Court should find that the trial magistrate did not err by refusing to invoke a prior District Court decision — by means of the doctrine of issue preclusion (also known as collateral estoppel) — which held that Officer Oser did not possess probable cause to arrest Ms. Savage for drunk driving. I so find because the record of the District Court proceedings was not properly before

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criminal case) — This ruling has been superseded by a June 30, 2014 decision of the Colorado Supreme Court that found the legality of the stop is not an issue in the license-suspension proceeding. Francen v. Colorado Department of Revenue, -- P.3d --, 2014 W.L. 2949167 at *4-5 (2014); Commonwealth v. Crawford, 121 Pa. Cmwlth. 613, 616-17, 550 A.2d 1053, 1054-55 (1988); Williams v. North Dakota State Highway Commissioner, 417 N.W. 2d 359, 360 (N.D. 1987); Joyner v. Garrett, 279 N.C. 226, 182 S.E.2d 553 (1971).

Conversely, see Hoban v. Rice, 22 Ohio App. 2d 130, 259 N.E. 2d 136, 137-39 (1970)(Conviction of drunk driving does not preclude administrative suspension).

the Tribunal.[239] Additionally, addressing the merits of this issue, I would further find that the request to invoke collateral estoppel in this case was defective because there was a lack of identity to the questions before the two courts: first, the standard of proof borne by the State in the criminal case was significantly higher;[240] second, I do not believe probable cause to arrest for drunk driving is an element that must be proven in a refusal case generally;[241] and third, the existence vel non of probable cause to arrest Ms. Savage for drunk driving was absolutely not an issue in the instant case because the officer had an alternative legal basis to arrest Ms. Savage — i.e., driving on a suspended license.[242] Finally, two other polices militate against Appellant's request to invoke the District Court ruling by means of collateral estoppel: (a) the State's inability to appeal from the prior District Court ruling,[243] and (b) the fact that the drunk driving and refusal prosecutions are established as mutually independent systems.[244]

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239 See Part V-B-2 of this opinion, ante at 52-55.

240 See Part V-B-4-a of this opinion, ante at 56-68.

241 See Part V-B-4-b of this opinion, ante at 59-61.

242 See Part V-B-4-c of this opinion, ante at 61-64.

243 See Part V-B-5-a of this opinion, ante at 64-66.

244 See Part V-B-5-b of this opinion, ante at 66-67.

C

Officer Oser's Stop of Ms. Savage's Vehicle Was Legal Because He Had Reasonable Suspicion To Believe That It Was Being Operated By a Motorist Under the Influence[245]

In support of her argument, Appellant urges that "… the Barrington Police did not meet minimum safeguards because none of the Town's police officers made any observations of erratic driving before ordering [Appellant] to pull over into the Barrington Early Learning Center parking lot."[246] In essence, she asserts that an anonymous tip must be substantially corroborated if it is to be deemed sufficiently reliable to establish reasonable suspicion.[247] In my estimation, this argument must be rejected because it arises from two false premises — one factual, one legal.

1

The factual flaw in Appellant's argument is fundamental. She assumes that the tips in this matter were anonymous. I believe this is not so, and, in so stating, I

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245 See DiPrete v. State of Rhode Island, A.A. 10-173, at 27-32 (Dist.Ct. 9/29/2011) and Kemp v. State of Rhode Island, A.A. 11-55, at 27-32 (Dist.Ct. 9/29/2011), in which we provided an extensive discussion of the law surrounding stops based on anonymous tips, especially face-to-face tips.

246 Appellant's Memorandum, at 23-24.

247 This position has been called the "one free swerve" rule. See Virginia v. Harris, 130 S.Ct. at 11-12, discussed ante, at 30-31 n. 112.

associate myself with the analysis of Circuit Judge Selya in Romain.[248]

Like the caller in Romain, Mr. Arnone called in on a 911 line known for its ability to identify callers and pinpoint their locations. Thus, Mr. Arnone was not a tipster seeking to shield himself with the protections of anonymity. It is more accurate to employ the terminology of the Third Circuit Court of Appeals (in Torres) and deem him merely "innominate."[249]

And however we classify Mr. Arnone's initial telephone call, we must at all times recall that he buttressed his call through a face-to-face encounter with Officer Oser. When he did so, all his prior statements became imbued with additional credibility and reliability. By doing so, like the caller in Romain, he converted his telephone tip into a personally-given citizen's tip, like that in Adams (although Officer Oser did not know the tipster, as did the officer in Adams).

Viewed in this light we see that Mr. Arnone's in-person reiteration of his telephone call substantially elevated his call's credibility in three ways — first, it buttressed the informant's personal veracity; second, its reliability soared; and third, his presence buttressed his basis of knowledge, both because of his proximity to the scene of the reported events and its contemporaneity. And so, we must

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248 See quotation from Romain, ante, at 32-33.

249 Torres, 534 F.3d at 213.

conclude that — even without reference to Navarette — the information provided by Mr. Arnone was sufficient to provide Officer Oser with reasonable suspicion which justified his stop of Ms. Savage.[250]

2

The infirmity in Appellant's legal argument is completely understandable. When Appellant perfected her appeal to this Court, her assertion that an anonymous tip requires extensive corroboration was, without doubt, wholly viable. But it is no longer. The United States Supreme Court's decision in Navarette has eviscerated it.[251]

In Navarette, the officer who caught up to the subject vehicle did not stop it immediately; instead, he observed it for a full five minutes, and saw no violations of the motor vehicle.[252] The Court was satisfied with the corroboration which arose from the mere fact that the tip accurately foretold the subject vehicle's location. With only this, the stop was approved by the Court.

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250 But as we shall see, even if we view the tips in the instant case as being "anonymous," the Court's ruling in Navarette — finding reasonable suspicion in a contemporaneous 911 call verified only as to the location of the vehicle — undercuts her argument that the tips here were insufficiently corroborated.

251 See discussion of Navarette, ante at 34-35.

252 Navarette, 134 S.Ct. at 1686–87.

We are thus forced to conclude that a lack of significant corroboration is not fatal to a finding of reliability; what is more, neither is apparent disproof.[253] And so, Appellant's position — that anonymous tips must be extensively corroborated — must be rejected, in light of Navarette. Mr. Arnone's telephone call was sufficient to justify the stop by itself. When we add-in Mr. Arnone's in-person statement to Officer Oser and the second informant's appearance at police headquarters,[254] there is no question that Officer Oser had reasonable suspicion to stop Ms. Savage.

With these factors in mind, Officer Oser had to consider the question — what was the likelihood that two citizens made contemporaneous but false face-to-face reports regarding the actions of a single vehicle. If he concluded they were anything but highly remote, he would have shown himself a rather obtuse member of the town's constabulary. But Officer Oser used good sense and stopped the vehicle, as he was duty-bound and constitutionally authorized to do. For these reasons, I conclude the appeals panel's decision regarding the legality of the stop was not clearly erroneous.

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253 See dissent of Scalia, J., 134 S.Ct. at 1696.

254 Like Mr. Arnone, this citizen also eschewed any cloak of anonymity.

D
Officer Oser Had Reasonable Grounds to Request Appellant Submit to a Chemical Test

Finally, we arrive at Appellant's statutory argument — that the officer lacked reasonable grounds to ask her to submit to a chemical test. The appeals panel enumerated the indicia of intoxication summarized in the trial magistrate's findings on the issue of "reasonable grounds" as follows —

> In sustaining the violation, the trial magistrate noted the following — the observation of Appellant's car windows rolled all the way down in thirty degree weather, Appellant's slurred speech, bloodshot eyes, admission of having had two glasses of wine, Appellant's defiant behavior, and the overwhelming smell of fragrance coming from her vehicle — constituted reasonable grounds for Officer Oser to believe that Appellant had driven her vehicle under the influence of alcohol. (Vol. X Tr. at 50); See Jenkins, 673 A.2d at 1097. Additionally, the testimony given by Mr. Arnone, which indicated that Appellant was operating her motor vehicle in such an erratic manner that she violated numerous motor vehicle violations, is competent evidence to conclude that Appellant was, in fact operating a motor vehicle under the influence of liquor that evening. Lusi, 625 A.2d at 1356. Lastly, the trial magistrate noted that Officer Oser was trained in DUI investigation and familiar with the characteristics of intoxication, indicating Officer Oser's ability to properly identify Appellant as intoxicated. (Vol. X Tr. at 51, 56.) Therefore, the record demonstrates that Officer Oser did have reasonable grounds to believe that Appellant had operated a motor vehicle under the influence of alcohol.[255]

In my view, this is a fair summary of the more expansive factual findings made by

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[255] Decision of Appeals Panel, at 14.

the trial magistrate on this issue. And, I believe it to be well-supported by the evidence of record.

In all, the State presented five indicia that Ms. Savage had operated under the influence: (1) she had admitted to the consumption of alcohol, (2) she had bloodshot eyes, (3) she exhibited a defiant manner, (4) the presence of a powerful fragrance, which could be deemed as an attempt to mask an alcoholic odor, and (5) her driving — i.e., that she was driving erratically, as reported by two civilians. Taken together, I believe these facts are sufficient — when measured against the standards established in prior Rhode Island Supreme Court decisions, especially the Perry case (where, like here, no field tests were done) to allow this Court to determine that the appeals panel's finding that Officer Oser possessed "reasonable grounds" to believe Ms. Savage had driven under the influence of liquor was not clearly erroneous and was in fact supported by the evidence of record.

VI
CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decision of the appeals panel was made upon lawful procedure and was not affected by error of law. Gen. Laws 1956 § 31-41.1-9. Furthermore, said decision is not clearly erroneous in view of the reliable, probative and substantial evidence

on the whole record. Gen. Laws 1956 § 31-41.1-9. Accordingly, I recommend that the decision that the Traffic Tribunal appeals panel issued in this matter be AFFIRMED.

/s/
Joseph P. Ippolito
MAGISTRATE

NOVEMBER 17, 2014