STATE OF MAINE
PENOBSCOT, SS.

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
LAW DOCKET NO.: Pen-25-24

STATE OF MAINE,

Appellee

v.

KENNETH RHOADES,

Appellant

ON APPEAL FROM THE PENOBSCOT COUNTY
UNIFIED CRIMINAL DOCKET

BRIEF OF THE APPELLANT KENNETH RHOADES

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PROCEDURAL HISTORY

On November 21, 2022, a criminal complaint was filed against the Defendant/Appellant, Kenneth Rhoades, in the Penobscot County Unified Criminal Court, alleging Operating Under the Influence, 29-A M.R.S. §2411(1-A)(B)(2) (Class C).

On December 15, 2022, an initial appearance was held and no answer was entered.

On March 1, 2023, an indictment was filed alleging Operating Under the Influence, 29-A M.R.S. § 2411(1-A)(B)(2) (Class C).

On March 8, 2023, Defendant filed a Motion to Suppress.

On May 16, 2023, a hearing was held on the Defendant's Motion to Suppress. The Court denied the motion on that date.

The State filed a Motion for Protective Order on August 31, 2023, which was granted on the same date.

On September 7, 2023, Defendant filed a Motion for Sanctions. The motion was dismissed without prejudice on November 29, 2023, but, upon a motion to reconsider, the dismissal was vacated on November 30, 2023.

A hearing was held on Defendant's Motion for Sanctions on March 8, 2024. The motion was denied by the Court in an order dated March 15, 2024.

On May 9, 2024, Defendant filed a Motion to Vacate Discovery Order.

The Motion to Vacate Discovery Order was denied on July 16, 2024.

Jury selection occurred on July 19, 2024.

An arraignment on the indictment was held on July 29, 2024, at which time the Defendant entered a plea of not guilty. Defendant filed proposed jury instructions on that date.

A jury trial was held on July 29, 2024. The jury returned a verdict of guilty on that date.

On August 12, 2024, the Defendant filed a Motion to Compel Discovery. The motion was granted by the Court on August 19, 2024.

A sentencing hearing was held on January 16, 2025. Defendant was sentenced to the Penobscot County Jail for a term of nine (9) months, with all but 30 days suspended, one year of probation with conditions, and fines and fees totalling $1,410.00. Execution of the period of incarceration was stayed pending appeal.

Defendant timely filed a notice of appeal to this Court on January 16, 2025.

STATEMENT OF FACTS

On or about September 28, 2022, in Lincoln, Maine, Appellant Kenneth Rhoades was stopped by an officer of the Lincoln Police Department for allegedly traveling over the posted speed limit. (Indictment, Appendix at 58.) He was subsequently arrested and charged with Operating Under the Influence, 29-A M.R.S. § 2411(1-A)(B)(2) (Class C). Through counsel, Mr. Rhoades filed several pretrial motions in the Penobscot County Unified Criminal Court, including a motion to suppress evidence and a motion for discovery sanctions. Both motions were denied by the trial court. A jury was selected on July 19, 2024, and the case went to trial on July 29, 2024. During trial the Court, over the defense's objection, admitted evidence of a 0.16 blood alcohol content test result. Defendant was convicted of the felony OUI charge and was subsequently sentenced.

A. Pretrial Motions.

1. Defendant's Motion to Suppress.

The defense filed a motion to suppress evidence dated February 18, 2023, arguing that Mr. Rhoades was pulled over without reasonable

articulable suspicion. (See Defendant's Motion to Suppress, Appendix at 59 et seq.) A hearing was held on the motion on May 16, 2023.

At the very brief suppression hearing, Lincoln Police Department Officer Daren Mason testified that he was on duty in a cruiser on the afternoon of September 28, 2022. (Transcript of Hearing on Motion to Suppress, Appendix at 30.) The cruiser did not have WatchGuard recording equipment at that time, meaning that the officer's interactions with Mr. Rhoades were not recorded from the police vehicle. (Id.)

Officer Mason testified to his training and experience in "the area of visual estimation of vehicle speeds" at the Maine Criminal Justice Academy back in May of 2008:

> Officer Mason: So the training on the visual speed, I would be – we had an instructor, certified instructor. I would be in the driver's seat. I would be operating the motor vehicle. The instructor would be in the passenger's side. He had the readout, the speed readout, so I could not see it.
>
> So we would just drive down the road, and he would randomly say – he'd point out a car – that car. And we had to estimate that speed within five mile an hour.
>
> Mr. Rucci: If – what if you couldn't estimate the speed within five miles an hour?
>
> Officer Mason: You have to start over.
>
> Mr. Rucci: Start over until you could?

Officer Mason: Yes.

Mr. Rucci: Was there a certification process for this?

Officer Mason: Yeah.

Mr. Rucci: Are you certified in the visual estimation of vehicle speeds?

Officer Mason: I am.

Mr. Rucci: Okay. How many days did that portion of your training consume?

Officer Mason: That one day on the visual estimate, I believe that was just a one-day with the instructor.

Mr. Rucci: How many times did you have to get it right before you passed, so to speak?

Officer Mason: I got it right the first time.

Mr. Rucci: Okay.

Officer Mason: Passed the first time.

Mr. Rucci: So you did it once?

Officer Mason: Correct.

(Id. at 31-32.)

There was no specific information about the "certification" that Officer Mason had received some fourteen years earlier. Officer Mason apparently received his certification following *one* radar test with an unnamed instructor. No certificate was produced. No literature about the

program was produced. There was no information about the extent to which "passing" one estimation as a student at a police academy correlated with future success in visually estimating speed. No information was presented as to the numbers of academy attendees who had "failed" the testing, if any. Officer Mason testified that he had tested himself daily during his career and "I'm pretty close, within three to four miles an hour." (Id. at 32-33.) No documentation of this claim was produced.

Officer Mason testified at the suppression hearing that he was patrolling Main Street in Lincoln on the afternoon of September 28, 2022, in a marked cruiser. (Id. at 33-34.) He was parked stationary, backed into a private drive. (Id. at 34.) He observed a red truck approaching from his left at a high rate of speed. (Id.) He visually estimated that the truck was travelling 55 miles per hour in a 35 mile per hour speed zone. (Id. at 35.) He did not utilize his radar "[b]ecause the radar will not pick up at that – at that angle." (Id.) The officer testified: "As the vehicle passed by, I pulled out behind the vehicle, caught up to the vehicle, activated my emergency lights to initiate the traffic stop." (Id. at 35.) The vehicle did not stop immediately but eventually stopped. (Id. at 36.)

Officer Mason did not describe how long he followed the vehicle after he activated his emergency lights. He did not testify as to how long it took

him to catch up with the vehicle. He did not testify as to how fast he, Officer Mason, was traveling while following the vehicle. There was no information provided about the distance between where Officer Mason was parked and where the vehicle pulled over. There was evidence that the vehicle swerved in any way or was otherwise operated erratically. There was no evidence that the vehicle pulled over improperly, or ultimately parked in any improper manner or at any improper angle. There was no evidence of any mechanical problems with lights, tires, or any other parts of the truck. There was no evidence that the registration plates and inspection sticker were anything but accurate and up to date. Before he stopped the vehicle, Officer Mason apparently made no effort to glance down at his speedometer in an effort to corroborate his suspicions about the speed of the truck, nor did he, at that now proper angle, activate his radar.

Officer Mason testified that his "certification" and practice of guessing speeds was not based on any measurement being involved:

> Mr. Smith: And so your certification and visual estimates of speeds is just based on your guessing speeds and you getting enough correct. There's no measurement involved?
>
> Officer Mason: So as measurement, it's all visual.
>
> Mr. Smith: Right. So you're –

Officer Mason: Correct, if that's what you're asking, no.

Mr. Smith: But you're never measuring time or distance?

Officer Mason: Oh, no. No. If that's what you're asking, no.

Mr. Smith: You're just guessing.

Officer Mason: No.

(Id. at 36-37.)

In a ruling from the bench, the Court denied the motion to suppress. (Id. at 39-40.)

2. Defendant's Motion for Sanctions.

Mr. Rhoades was arrested and charged with a felony OUI in September 2022. After the suppression motion was denied in May 2023, the defense sent the State a request for a qualified witness pursuant to 29-A M.R.S. sec. 2431. (See Defendant's Motion for Sanctions, Appendix at 63 et seq.) Mr. Rhoades and his attorney appeared for jury selection on July 7, 2023, but the case was not reached. (Id.)

In late August 2023, after a trial would have happened if the Court had been able to fit it into the July schedule, the attorney for the State sent an email that disclosed to defense counsel the existence of impeachment information about the State's expected qualified witness. Without

disclosing the information itself, the attorney for the State proposed a protective discovery order, and defense trial counsel objected. The prosecuting attorney did not provide the pertinent information and suggested he would file a motion. (Unbeknownst to defense counsel the prosecutor did in fact file an ex parte motion for protection which was granted, ex parte, by the Court, without any knowledge or input from defense counsel.) As of September 5, 2023 – the date that defense counsel filed a motion for discovery sanctions – the defense had not been provided with any motion, nor was aware of any protective order. The case was exposed to jury selection just three days later, on September 8, 2023. (Id.)

In the meantime, defense trial counsel had asked other defense attorneys whether they knew about impeachment information concerning the State's potential qualified witness. Defense counsel learned from other defense attorneys that: 1) The witness had been demoted after an investigation by the Millinocket Police Department revealed that he had lied twice about a matter that involved his job; 2) the Penobscot County District Attorney's Office knew about this issue no later than February 2021; and 3) Marianne Lynch, while still the District Attorney, took the position in March

2021 that her office would have to disclose this information to the defense in cases where the witness would be expected to testify. (Id.)

The defense filed a motion for sanctions requesting that the indictment be dismissed with prejudice or, in the alternative, that the qualified witness be prohibited from testifying at trial. The trial court, after hearing, denied the motion in an order dated March 15, 2024. (See Discovery Sanctions Order, Appendix, at 42-43.)

B. Trial.

The case finally went to trial in July 2024, nearly two years after Mr. Rhoades was arrested. Officer Mason testified that Mr. Rhoades was belligerent and uncooperative. Officer Mason detected an odor of metabolized alcohol coming from within the truck. (Trial Transcript at 47.) Mr. Rhoades was larger than Officer Mason and Officer Mason called a second officer, a Penobscot County sheriff's deputy, to the scene. (Id. at 49.) Officer Mason testified that Mr. Rhoades became aggressive and that, at one point, the officer pulled out his taser. (Id. at 53-54.) Officer Mason observed the obligatory slurred speech and glassy, bloodshot eyes (id. at 55), but offered no observations on Mr. Rhoades's balance or other indicia of impairment. No field sobriety tests were administered.

Officer Mason arrested Mr. Rhoades and transported him to the Lincoln Police Department to administer an Intoxilyzer test. (Id. at 56.) Officer Mason testified that he administered the test properly, including properly complying with the mandatory fifteen minute observation period. (Id.) When presented with Mr. Rhoades's Intoxilyzer test result, Officer Mason testified that it had a proper "DHHS approval date" of April 29, 2022. (Id. at 59.) "So like the state comes in and they have – and they check the Intoxilyzer and make sure everything is within specifications, they check the instrument, calibration." (Id.)

Officer Mason testified that Mr. Rhoades had properly complied with the test requirements, and at this point the prosecutor moved for admission of the test results into evidence. (Id. at 60-61.) Defense counsel objected on the grounds that the State had not properly laid the foundation for the test to be admitted. The Court indicated that the State had met the requirements for admissibility but, after a colloquy with the prosecutor, it was agreed that the test results would not come in until the State chemist came in later, after lunch, to testify. (Id. at 61-65.)

On cross-examination, Officer Mason acknowledged that he did not mention in his police investigation report that the fifteen minute wait period had been administered. (Id. at 66-67.) For the first time during the two

year history of the case, the defense learned that the officer's bodycam was malfunctioning on the day of the arrest. (Id. at 68-70.) "I had a body camera on that day, it failed to record." (Id. at 76.) There were no dash cams at the scene: "We didn't get dash cams I believe until later. Later on we were suited up for dash cams." (Id. at 70.) The sheriff's deputy who showed up apparently did not have a body cam either; nor did he write a report, despite Officer Mason requesting him to do so. (Id. at 70.)

Officer Mason first testified that he pushed the button to have his body camera record, but that he did not notice that it had failed to record until he prepared his report on the next day, September 29, 2022. (Id. at 79.) He changed his testimony, however, when confronted with a checklist from the day before, September 28th, that indicated that no video recording existed. (Id. at 80-81.) Officer Mason finally conceded that he failed to mention in his report that he had a "nonfunctional" camera:

Mr. Smith: Right.

Officer Mason: Correct. I could have put that in there, yes, I probably should have, yes, in your eyes.

Mr. Smith: Yes. Right.

Officer Mason: Yeah.

(Id. at 82-83.)

Defense trial counsel then learned for the first time, on recross-examination, that the cameras in the Intoxilyzer room at the Lincoln Police Department were malfunctioning as well – a fact that, again, had not been disclosed in Officer Mason's police report.

Mr. Smith: Because it's important to include all the relevant information?

Officer Mason: Right. We have an issue with – with the cameras at the PD, it was not working, correct.

Mr. Smith: Because I'm learning this today for the first time.

* * * *

Mr. Smith: Was there a camera in the – that faced the Intoxilyzer room at this time?

Officer Mason: So there is a camera in there.

Mr. Smith: Okay. Was it operating at this time?

Officer Mason: No, no.

Mr. Smith: When was it functional?

Officer Mason: I don't recall two years ago. I know we had a lot of issues because of – a lot of issues that obviously we won't get into with other agencies trying to use it, et cetera, it's – it's just junk, it was not operational, or consistent.

Mr. Smith: When did – so you're just basing this on – on your recollection of that timeframe, September, 2022, you don't know –

Officer Mason: The 28th did you say? You said '22 – or the 28th?

Mr. Smith: September 28th of 2022. You don't remember specifically whether the camera was operating then?

Officer Mason: I know it was a huge controversy back then and we were not getting good recordings, et cetera, that's all I can recall.

(Id. at 84-85.)

Mr. Rhoades testified later in the day. His recollections of the afternoon he was arrested differed significantly from those of Officer Mason. (See testimony of Kenneth Rhoades, Trial Transcript at 141 et seq.) There were no radar results, however, or video evidence from either a cruiser dash camera, an officer body camera, or a police department Intoxilyzer room camera, to corroborate one version over the other.

After lunch the State called Maria Pease from the Maine Health and Environmental Testing Laboratory to discuss her responsibilities in managing the state's breath alcohol program. (Id. at 92.) By now there was concern that at least one, and possibly two, jurors appeared to be nodding off. (Id. at 113-114.) Ms. Pease testified that "[m]y primary responsibility is to make sure the instruments are approved semiannually according to the state regulations." (Id. at 93.) The Lincoln Police

Department, like most departments across the state, was using the Intoxilyzer 8000 series. (Id. at 94-95.)

According to Ms. Pease, the Intoxilyzer machines are required to be approved twice a year. (Id. at 95.)

> The process consists of a chemist going to the site and, you know, we do a visual inspection of the instrument to make sure that, you know, everything is there that is supposed to be there. And then we run a series of controls. So we have control samples that we run on the instrument and we have a certain result that we expect. So one of the controls is a .10 standard, so it should – you know, it mimics a .10 sample in the sample chamber. And, you know, we have certain readings we allow and based on the results we're going to accept or reject the data. If we accept all that data, then we would approve the instrument. And the approval is actually a stamp that is affixed, a label on top of the instrument that has the serial number, the date we were there and it would be signed by the chemist.

(Id. at 95-96.)

Ms. Pease testified that she affixed such stamps most of the time, but that another chemist at the laboratory assists her. (Id. at 96.) Ms. Pease was not sure whether she was the one who completed the inspection of the Lincoln Police Department Intoxilyzer back in 2022:

> Ms. Gurney: Did you do those checks in 2022?
>
> Ms. Pease: I'm not 100 percent sure about that. I know they were done. I don't know if it was me that did them personally though.

(Id. at 97.)

Over objection, Ms. Pease was allowed to testify that Mr. Rhoades's breath alcohol test result was 0.16. (Id. at 110.)

Ms. Pease did not observe Officer Mason transcribing the date the machine was approved onto the Intoxilyzer report, as was required. (Id. at 115-116.)

Mr. Smith: You did not actually witness that occurring?

Ms. Pease: No.

Mr. Smith: And you have no independent recollection of certifying this instrument yourself?

Ms. Pease: I don't, no.

Mr. Smith: Okay. So this is important, right, because if the machine is not inspected semiannually we cannot trust the results, can we?

Ms. Pease: That's correct. In order for the results to be accepted as accurate and reliable, it has to be done on an approved instrument.

(Id. at 116.)

Ms. Pease testified that there is a separate certification process for the solution that is used in the control samples. (Id.) The site coordinator, or officers in charge of the Intoxilyzer, would be responsible for periodic checks to ensure that the solutions are at acceptable levels. (Id. at 117.)

ISSUES PRESENTED

1. Whether the Court erred in denying the Defendant's motion to suppress evidence.

2. Whether the Court erred in admitting blood alcohol test results into evidence.

3. Whether the Court erred in denying the Defendant's motion for discovery sanctions.

SUMMARY OF THE ARGUMENT

An arrest for felony OUI is a serious, life altering matter. If the government wants to infringe on a person's constitutional protections, it needs to have its act together. It needs to have a working dash cam in the cruiser. It needs to have a functioning body cam. It needs to have working cameras in the Intoxilyzer room. If an officer intends to stop someone because they "think" he was speeding, they need to take a second to look down at their speedometer to corroborate their guess. They need to measure distances and gauge the time of travel from one point to the next, and this information needs to be presented at a suppression hearing and trial. The prosecution needs to produce the actual chemist who actually certified the Intoxilyzer at the time of the arrest. It needs to disclose *Giglio* information in a timely manner. This was a half-baked investigation and prosecution, in violation of Kenneth's due process rights. The state needs to be held to a much higher standard than what was presented here.

ARGUMENT

1. The Court erred in denying the Defendant's motion to suppress evidence.

Especially during these perilous times in our court system, we run the risk of the Fourth Amendment's reasonable suspicion standard becoming an antiquated legal term that is often recited but has no practical utility in today's society. This case presents a police officer's apparently instantaneous "estimate" of Kenneth's speed, without any other objective information to back it up, and was based on speculation rather than an articulable suspicion. This violates basic due process.

On September 28, 2022, a Lincoln police officer made a *Terry*-type traffic stop of a pickup truck allegedly traveling at a speed that the officer visually estimated at 20 mph above the legal limit. The driver, who would turn out to be Kenneth Rhoades, eventually was arrested on suspicion of OUI and brought to the Lincoln police station to take a breath test.

The seizure of Mr. Rhoades violated the Fourth Amendment because it was based on speculation, not reasonable articulable suspicion, and thereby tainted all evidence against him that was obtained as a result. There was no testimony or evidence presented that created a "totality of

the circumstances" that could be rationally considered by the Court in determining the reasonableness of the stop. Officer Mason testified that a red truck approached from his left and he made an apparent instant judgment that the vehicle was traveling twenty miles per hour over the speed limit. Officer Mason did not say how long he observed the truck before deciding to pull out from his position perpendicular to Main Street in Lincoln. He did not say how far ahead the vehicle was by the time he pulled out into the road. He did not indicate how much time elapsed while he was following the driver. He did not indicate how much distance had been passed by the time he stopped the vehicle. He apparently made no effort to glance down at his own speedometer while he was following the vehicle. There was no testimony about road conditions or how much other traffic was on the road. There was no evidence that the driver was swerving or acting in an otherwise erratic manner, or that other drivers were in exigent circumstances or immediate danger. Officer Mason never made an effort to “pace” the vehicle or activate his radar detector during the unspecified amount of time that he followed the vehicle. Knowing the exact location of the stop and how far away it was from Officer Mason’s first observation of the vehicle would have been very probative information in assessing the correlation between time and distance involved in this case,

i.e., the “speed” at which Mr. Rhoades was travelling. No such information whatsoever was presented at either the suppression hearing or the trial. For reasons that remain unexplained, there was no dashcam video footage of the stop. We are required to accept the officer’s speed estimate without an ounce of corroborating evidence or any other information, objective or otherwise, about the circumstances and scene that would help us assess his testimony.

In denying the suppression motion, the trial court gave unfettered power to law enforcement to stop and detain any individual at any time. All a police officer needs to say is that he or she “thinks the driver was speeding” — without any other evidence necessary — for a stop to be valid.

There was initially undisclosed *Giglio* information in this case involving another officer, but the concern here does not even require dishonesty on the part of the officer. A quick review of Officer Mason’s brief testimony alone identifies at least two mistakes — he testified that the stop occurred at 2:51 p.m. (rather than the actual time of 4:51 p.m.), and he mistakenly testified on direct examination that he discovered the malfunction of the body cam recording the next day when he wrote his

report, only to change his testimony to the day before when corrected during cross-examination. (See Trial Transcript at 74 and 79-81 respectively.)

Without at least some minuscule corroborating evidence, as was the case here, we are left with absolutely nothing to assess the objective reasonableness of the officer's suspicion.

The Fourth Circuit U.S. Court of Appeals has held that "the Fourth Amendment does not allow, and the case law does not support, blanket approval for the proposition that an officer's visual speed estimate, in and of itself, will always suffice as a basis for [reasonable suspicion] to initiate a traffic stop." *United States v. Sowards*, 690 F.3d 583, 591 (4th Cir. 2012). "In the absence of sufficient indicia of reliability, an officer's visual approximation that a vehicle is traveling in excess of the legal speed limit is a guess that is merely conclusory and which lacks the necessary factual foundation to provide an officer with reasonably trustworthy information to initiate a traffic stop." (Id.)

"[R]easonable suspicion is a less demanding standard than probable cause," requiring a showing "considerably less than preponderance of the evidence," but there must be *"at least a minimal level of objective*

justification for making the stop." Illinois v. Wardlow, 528 U.S. 119, 123 (2000) (emphasis added). A hunch will not suffice. *Terry v. Ohio*, 392 U.S. 1, 27 (1968). Rather, an "officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the investigative stop. (Id. at 21.) The officer may then "briefly stop the suspicious person and make 'reasonable inquiries' aimed at con-firming or dispelling his suspicions." *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1973).

The Court must evaluate the "totality of the circumstances" to determine whether the investigators had a "particularized and objective basis" for suspecting legal wrongdoing. *United States v. Arvizu*, 534 U.S. 266, 273 (2002); see also *United States v. Williams*, 619 F.3d 1269, 1271 (11th Cir. 2010). Stated somewhat differently, reasonable suspicion "takes into account 'the totality of the circumstances – the whole picture.'" *Navarette v. California*, 572 U.S. 393, 397 (2014).

In Maine, the Law Court has acknowledged the need for objective evidence. To comply with Fourth Amendment restrictions against "unreasonable" seizures (U.S. Const. amend. IV), law enforcement officers may make a brief, *Terry*-type detention rather than a formal arrest of someone if it is supported by objectively reasonable, articulable suspicion

of criminal conduct or a safety concern. See *State v. Coimei*, 2015 ME 147, par 8, 127 A.3d 548; *Terry v. Ohio*, 392 U.S. 1, 16 - 21 and n. 16 (1968); 29-A M.R.S. § 105(1). The "reasonable articulable suspicion standard" requires that a law enforcement officer's "suspicion be more than mere speculation or an unsubstantiated hunch." *State v. Simons*, 2017 ME 180, par 12, 169 A3d 399. The law enforcement officer must act on the basis of specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion" on the individual's liberty. *State v. Caron*, 534 A.2d 978, 979 (Me. 1987) (quotation marks omitted).

"The burden is on the State to prove the underlying facts bringing the case within one of the exceptions to the warrant requirement." *State v. Boilard*, 488 A.2d 1380, 1384 (Me. 1985). The remedy for a Fourth Amendment violation generally is application of the exclusionary rule. *Mapp v. Ohio*, 367 U.S. 643, 656 - 658 (1961). The exclusionary rule covers both tangible objects and statements obtained from an accused person. *Wong Sun v. United States,* 371 U.S. 471, 485 (1963).

Although the reasonable articulable suspicion standard is lower than probable cause, a law enforcement official making *Terry*-type traffic stops, nonetheless, does not have carte blanche to seize individuals arbitrarily or

based on speculation. See *Delaware v. Prouse*, 440 U.S. 648, 661 (1979) (Fourth Amendment circumscribes "standardless and unconstrained discretion" that would allow officers to stop any driver at random); *United States v. Lopez-Valdez*, 178 F.3d 282, 289 (5th Circ. 1999) ("if officers are allowed to stop vehicles based upon their subjective belief that traffic laws have been violated even where no such violation has, in fact, occurred, the potential for abuse of traffic infractions as pretext for effecting stops seems boundless and the costs to privacy rights excessive").

Speed, also known as velocity, is "the rate of change of position along a straight line with respect to time" or "the derivative of position with respect to time." Merriam-Webster's New Collegiate Dictionary 1387 (Linda Picard Wood, ed., 11th ed. 2014). To calculate speed, one must "discern both the increment of distance traveled and the increment of time passed." *United States v. Sowards*, 690 F.3d 583, 589 (4th Circ. 2012). The "definition" of speed is "derive[d] from the mathematical formula of distance divided by time," and a court "may properly take judicial notice of this formula." (Id.) Hence, for example, the motor vehicle code's expression of speed in terms of miles per hour. See 29-A M.R.S. § 2074(1). In a criminal or civil traffic infraction case acceptable "instruments" for the measurement of speed include: radar; " [a]n electronic device that measures speed by

radiomicrowaves, laser[,] or otherwise"; or a device that measures distance and time from a law enforcement officer's vehicle and computes the average speed of another vehicle by comparison. 29-A M.R.S. § 2075(4). In summary, it is not something that can be "visually estimated," no matter how experienced someone is at enforcement of traffic laws.

The sole basis for the *Terry* stop in this case was the officer's "visual estimate" of speed, but that estimate was no more than speculation or guesswork and consequently cannot support a warrantless seizure, no matter how brief. The officer was able to articulate a rationale that might have been reasonable if he had possessed an objective basis for it, but he lacked that required element. This was an unreasonable stop, and all of the evidence that was obtained as a result was tainted and should have been suppressed.

2. The Court erred in admitting blood alcohol test results into evidence.

The Appellant's attorney was provided evidence in discovery of a 0.16 BAC result following Kenneth's arrest. Kenneth disputed this high result. He denied that his condition, appearance, and behavior were as Officer Mason described in his report and in court. The other officer who

was at the scene neither wrote a report nor was called as a witness at trial. There was no dashcam, bodycam, or Intoxilyzer room audio or video evidence. It was obviously a major part of the defense's trial strategy to question the reliability of the Intoxilyzer test result.

Counsel for Mr. Rhoades objected at trial when the State prosecutor attempted to introduce the blood alcohol test certificate into evidence through Officer Mason, arguing that the State had failed to establish a sufficient foundation to allow its admission. While it did not come in through Officer Mason, the trial court allowed it into evidence, over objection, through the testimony of HETL chemist Maria Pease. Ms. Pease testified that "[m]y primary responsibility is to make sure the instruments are approved semiannually according to the state regulations." (Trial Transcript at 93.) She indicated that the machines are required to be approved twice a year. (Id. at 95.) Certification of the machines is a pretty involved process:

> The process consists of a chemist going to the site and, you know, we do a visual inspection of the instrument to make sure that, you know, everything is there that is supposed to be there. And then we run a series of controls. So we have control samples that we run on the instrument and we have a certain result that we expect. So one of the controls is a .10 standard, so it should – you know, it mimics a .10 sample in the sample chamber. And, you know, we have certain readings we allow and based on the results we're going to accept or reject the data. If we accept all

> that data, then we would approve the instrument. And the approval is actually a stamp that is affixed, a label on top of the instrument that has the serial number, the date we were there and it would be signed by the chemist.

(Id. at 95-96.)

Ms. Pease testified that she affixed such stamps most of the time, but that another chemist at the laboratory assists her. (Id. at 96.) Ms. Pease was not sure whether she was the one who completed the inspection of the Lincoln Police Department Intoxilyzer back in 2022:

> Ms. Gurney: Did you do those checks in 2022?
>
> Ms. Pease: I'm not 100 percent sure about that. I know they were done. I don't know if it was me that did them personally though.

(Id. at 97.)

She testified further about the truthfulness of the hearsay certification: "Those records are at the laboratory. But I do know the instrument in Lincoln has had all the approvals done." (Id.)

During cross-examination, Ms. Pease acknowledged the importance of the certification, the hearsay stamp of approval of which she had just verified was true:

> Mr. Smith: And you have no independent recollection of certifying this instrument yourself?
>
> Ms. Pease: I don't, no.

Mr. Smith: Okay. So this is important, right, because if the machine is not inspected semiannually we cannot trust the results, can we?

Ms. Pease: That's correct. In order for the results to be accepted as accurate and reliable, it has to be done on an approved instrument.

(Id. at 116.)

It is unclear why the records of who certified the machine were "back at the laboratory" and not there with Ms. Pease in the courtroom in a felony OUI trial. Ms. Pease had no independent recollection as to whether she had approved the machine prior to the arrest in this case. And yet she was allowed to testify to the truthfulness of the certification. She was quite possibly testifying in the capacity of a surrogate chemist to the work of the other chemist in the laboratory who did some of the testing on the Intoxilyzer 8000s across the state. (Id. at 96.)

As this Court is well aware, such surrogate chemist testimony is prohibited by the Confrontation Clause of the Sixth Amendment. U.S. Const. amend. VI. *See Smith v. Arizona*, 602 U.S. ___ (2024); *State v. Thomas*, 2025 ME 34; and *State v. Gleason*, 2025 ME 52. Challenging the validity of the testing and certification of the metal box at the Lincoln Police Department was the essence of the defense's case. Over objection, Ms.

Pease was allowed to testify to the authenticity of the hearsay stamp on the box… even though she could not recall having certified it.

The trial court must sometimes act as a gatekeeper at times to exclude the introduction of certain kinds of evidence. *See generally* M.R. Evid. 104(a); *see also, e.g., State v. Poulin,* 2016 ME 40,, ¶¶ 8-12,134 A.3d 886 (corpus delecti doctrine). Although Maine's OUI statute may be read erroneously to *require* the admission of *all* breath-alcohol content ("BAC") results at trial after the satisfaction of specific requisites (*see* 29-A M.R.S. § 2431(1)), the trial court retains its gatekeeping function pursuant to the rules of evidence. *See State v. Green*,, 2024 ME 44,, 14,, __ A.3d __ (regarding drug recognition expert testimony).

The state's OUI statute provides that "[t]he results of a self-contained breath-alcohol apparatus test is prima facie evidence of an alcohol level (29-A M.R.S. § 2431(2)(G));" that evidence that the testing equipment bore a Maine Department of Health and Human Services stamp of approval is prima facie evidence that the equipment was approved by the Department of Health and Human Services (29-A M.R.S. § 2431(2)(H));" and that "[e]vidence that materials used in operating or checking the operation of the self-contained breath-alcohol testing equipment bore a statement of the manufacturer or of the Department of Health and Human Services is prima

facie evidence that the materials were of the composition and quality stated (29-A M.R.S.A. § 2431(2)(I).” In practice, the person who administered the test must provide testimony to satisfy the elements of paragraph H, and a “site coordinator" must provide testimony to satisfy the elements of paragraph I. *State v. Williamson*, 2017 ME 108,, ¶¶ 19-20,163 A.3d 127. It is incumbent on each site coordinator to monitor and test the testing equipment itself to ensure compliance with the administrative rules that support the reliability of the testing results. C.M.R.10,144, ch. 269.. For example, the testing equipment has a component for "calibration checks.” *See* Me. Crim. Justice Academy,,*Breath Testing Device Operation and* Certification Student *Manual* 24 (2023). "Site coordinators [must] monitor the pressure gauge and contact the [Maine] HETL for replacements.” (Id.) Hence, absent the site coordinator's testimony,,the State should not be able to benefit from the “prima facie evidence” provision.

That is not the end of the admissibility question, however, because the issue of whether BAC testing can be admitted as evidence – rather than just the issue of whether it is given “prima facie” status – does not depend solely on compliance with the aforementioned section of Title 29-A. *State v. Beeler*,,2022 ME 47,, 14,, 281 A.3d 637. The scientific reliability and,,thus,,threshold admissibility of breath-alcohol testing results is

dependent on evidence that a particular testing machine has “been calibrated and certified using scientifically reliable methodology.” *Commonwealth v. Hallinan*, 491 Mass. 730, 207 N.E.3d 465,, 475 (2023). Thus, the Maine Legislature's enactment of this statutory provision must be read in conjunction with the legislative grant of authority to the Maine Supreme Judicial Court to prescribe rules of procedure for criminal cases (4 M.R.S. § 9), and this statute does not simply replace the court’s role as an evidence gatekeeper at trial.

"[B]reath test evidence, at its core, is scientific evidence,,and where evidence produced by a scientific theory or process is at issue, the judge plays an important gatekeeper role to evaluate and decide on its reliability as a threshold matter of admissibility." (Id. at 474 (internal citation and quotation marks omitted)). A line of appellate decisions from other states, stretching back a few decades, , demonstrates that BAC evidence should not be admitted at trial in the absence of adequate evidence that the machine that produced the BAC calculation was properly set up,maintained, and used. *See, e.g.*, *State v. Martinez,*141 N.M. 713,160 P.3d 894, 897-898 (2007) (holding that to satisfy the foundational requirements for the admission of breath test prosecution must make "threshold showing that,,at the time

of the test, the machine was properly calibrated and that it was functioning properly" and currently "certified"); *State v. Davis*, 40 Haw. 252, 400 P.3d 453, 466 (2017) (vacating OUI conviction because prosecution failed to establish reliability of breath-alcohol test results with evidence that "Intoxilyzer was in proper working order" at the time); *City of Mount Vernon v. Cochran*, 855 P.2d 1180 (Wash. App. 1993) (To get BAC results admitted, the "State must establish that the machine was in proper working order, that if chemicals were used in the testing they were correct and properly used, that the operator was qualified and performed the test correctly, and that the results are accurate."); *Dept. of Highway Safety & Motor Vehicles v. Farley*, 633 So.2d 69 (Fla. App.1994) (test results erroneously admitted because officer had not monitored defendant during full mandatory observation period); *Haegele v. Commissioner of Public Safety*, 353 N.W.2d 704 (Minn. App.1984) (reversing conviction because BAC machine operator did not follow all steps required to ensure reliability of testing results).

In order for the results of the scientific testing used to measure BAC in a particular case to be reliable enough to be admissible as evidence and not excluded for a lack of reliability (see, *e.g.*, *State v.*

Ericson, 2011 ME 28,, 14, 13 A.3d 777 (no error in court's exclusion of proffered expert testimony where “the test was unreliable" and, thus, "not relevant”), or perhaps for being more likely prejudicial than probative (see M.R.Evid. 403), the State must provide witnesses who are qualified to testify that all of the required procedures were followed in the investigation of that case and that the equipment and supplies were satisfactory. This testimony may occupy a gray area because the witnesses testify in a way that is not clearly observation-based or opinion-based (*see State v. Abdullhi,* 2023 ME 41,, 23,, 298 A.3d 815), but regardless they must provide an adequate basis to ensure the reliability of the results of the scientific test that they would be testifying about. *Beeler*, *supra*, 14 (BAC test result must be "reliable" to be admissible). *See also*,, *e.g.*, *State v. Garcia*,,455 P.3d 886,, 889 (N.M. App..2020) ("Though radar is generally accepted as reliable, the State is still required to lay a proper foundation regarding the accuracy of the particular radar unit before evidence of its measurements may be admitted at trial.”)

[Note: The “gatekeeper” discussion in this section is derived primarily from a memorandum of law prepared during the trial by trial counsel Zachary Smith.]

3. The Court erred in denying the Defendant's motion for discovery sanctions.

The epidemic of egregious prosecution discovery violations in Maine continues with this case. Here, the State failed to disclose serious *Giglio* information about a qualified witness it was going to call. The defense filed a motion for discovery sanctions. (Appendix at 63 et seq.) The facts outlined in the motion were not disputed by the State, and are summarized as follows:

Kenneth was arrested in September 2022. He was subsequently indicted on a felony OUI charge. The case proceeded through a dispositional conference in March 2023 and was ready for trial in July 2023. The case was not reached at the Jury 2023 docket call.

In late August, as the case was approaching a new trial list in September, the prosecutor discovered that the State had failed to disclose the *Giglio* information. After some wrangling about a protective order, in early September 2023 – just days before the case was coming up for trial – counsel for the Defendant had to find out on his own from other defense attorneys what the nature of the *Giglio* information was. It was serious: 1) The witness had been demoted after an investigation by the Millinocket Police Department revealed that he had lied twice about a matter that involved his job; 2) the Penobscot District Attorney's Office knew about this

issue no later than February 2021; and Penobscot County District Attorney Marianne Lynch took the position in March 2021 that her office would have to disclose this information to the defense in cases where the witness would be expected to testify. (Id. at 64.)

In other words, by September 2023 – nearly a year after Kenneth's arrest – the defense was finding out about this very serious information that was potentially detrimental to the State's felony OUI case. There was a possibility that the case could have gone to trial in July 2023 with the defense having no knowledge of this situation.

At the hearing on the motion for sanctions in March 2024, the prosecutor explained that he "did not take a hard look at" the file when it was coming up on the first docket call in July 2023. (See Transcript of Hearing on Motion for Sanctions, Appendix at 73.) The prosecutor indicated that he offered to disclose the *Giglio* information, subject to a protective order, when he learned about it upon taking a closer look at the file later in the summer. (Id. at 74.) The prosecutor argued that the defense was no longer prejudiced and that therefore, pursuant to Rule 16 of the Maine Rules of Unified Criminal Procedure, harsh sanctions like dismissal of the indictment or exclusion of the witness's testimony would not be appropriate. (Id. at 76.)

In denying the motion for sanctions, the trial court gave the usual weak admonition that "[t]he District Attorney's office must be better prepared for trial in matters on the brink of jury selection," and then summarily dismissed the motion. (See Discovery Sanctions Order dated March 15, 2024, Appendix at 42-43.)

The State's argument and the Court's order demonstrate a depressing lack of understanding of the first-year-of-law-school landmark values enunciated by the United States Supreme Court as far back as *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972). Innocent people are sometimes wrongfully convicted of crimes. Mechanical devices like Intoxilyzers, with many moving parts, sometimes malfunction. While the *Giglio* information was produced late in this case nearly a year after Kenneth's arrest, we have to wonder how many defendants have been convicted of crimes over the decades with the defense having no clue about potentially exculpatory information.

Space does not permit a more detailed analysis of the problem in this brief, but suffice to say the Maine defense bar has had grave concerns about this issue for more than a few years, especially since the COVID-19 pandemic, and especially during the current digital age, as the volume of megabytes of data in discovery has exploded exponentially. Appellant

incorporates herein and invites the Court to review trial counsel Zachary Smith's motion for sanctions filed in this case, as it recites forcefully the State's obligations pursuant to *Brady/Giglio* and reflects the Maine defense bar's frustrations with the flouting of discovery obligations by state prosecutors on what seems like a weekly basis. (Defendant's Motion for Sanctions dated September 5, 2023, Appendix at 63 et seq.) Lack of disclosure of information that the defense otherwise would have no knowledge about is fundamental to the right to a fair trial. If this were an isolated or rare incident that one be one thing, but this is happening at epidemic levels in the state, for multiple reasons. Just off-top-of-the-head cases that undersigned counsel has had to suffer through in recent years, among many others, have included: *State of Maine v. Damion Butterfield*, CUMCD-CR-2022-02188;[1] *State of Maine v. Germaine Page*, ANDCD-CR-2021-01203;[2] *State v. Hassan,* 179 A.3d 898 (Me. 2018).[3]

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[1] The defense in the Butterfield murder trial learned by mere chance about highly exculpatory jail calls after the Maine Attorney General's Office presented a single jail call out of context that appeared on its face highly incriminating. See Justice MaryGay Kennedy's *Order on Motion to Dismiss for Failure to Disclose Exculpatory Evidence,* dated December 14, 2023, in that case.

[2] See Justice Hal Stewart's *Order on Motion to Dismiss*, dated August 4, 2022, excluding dozens of text messages due to their late disclosure by the Auburn Police Department just prior to the attempted murder trial in that case.

[3] Judge Susan Oram dismissed 13 out of 15 counts of a felony welfare fraud indictment after the State produced hundreds of pages of potentially exculpatory documents *after* jury selection. The Law Court reversed the dismissal upon the State's interlocutory appeal.

Attorney Zachary Smith's motion includes additional cases that he was aware of at the time of trial, including similar situations that were going on in Penobscot County at the time. Justice Jennifer Archer's recent decision in *State of Maine v. K'Lyb Herrick,* ANDCD-CR-2023-02438, dated March 13, 2025, provides a good summary of the systemic mess that is the current state of affairs in Androscoggin County. Other cases upon which we have relied in recent discovery sanction motions have included Justice Daniel Billings's *Giglio* violation dismissal of a felony indictment in *State of Maine v. Jason Ibarra*, SAGCD-CR-2022-00335, and Deputy-Chief Judge Lea-Anne Sutton's dismissal of misdemeanor charges in *State of Maine v. Abbas Abdulsalam*, YRKCD-CR-2022-20139. There are numerous other unpublished trial level orders from across the state that have sanctioned prosecutors for violations less serious than the *Giglio* violation here. As defense counsel Zachary Smith summed up in his motion:

> If this court does not impose a reasonable sanction in this case, then the government's representatives will not be deterred from engaging in further discovery violations. If this court does nothing of significance, then it gives tacit approval for dilatory conduct, disregard for un-ambiguous black-letter law, a lackadaisical approach to due process principles, and frivolous legal arguments. What is the purpose of discovery obligations if they can be flouted without consequence?

(See Defendant's Motion for Sanctions, Appendix at 70.)

CONCLUSION

For all the foregoing reasons, the Appellant moves that the Court vacate the conviction and order that the case be remanded for dismissal of the indictment with prejudice, or, in the alternative, suppression of the State's evidence in the above matter, and for such further and other relief as the Court deems just and appropriate under the circumstances of this case.

Dated: August 19, 2025

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CERTIFICATE OF SERVICE

I, James P. Howaniec, attorney for the Appellant, certify that I have made service of the foregoing Brief of the Appellant by sending a copy via email this date to:

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