
IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

TINA SIMUNEK,
Plaintiff-Appellant

v.

State of South Dakota
Defendant-Appellee

BRIEF OF THE APPELLANT
TINA SIMUNEK
FILED BY ATTORNEY FOR
APPELLANT J. SCOTT JAMES

STATE OF SOUTH DAKOTA,
APPELLEE REPRESENTED BY
ATTORNEY GENERAL MARTY
JACKLEY AND STATE'S
ATTORNEY LANCE RUSSELL

APPEAL FROM THE CIRCUIT COURT OF FALL RIVER COUNTY, SOUTH
DAKOTA
THE HONORABLE JEFFREY CONNOLLY, CIRCUIT COURT JUDGE
CIRCUIT COURT CASE NO.
23CRI22-28

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NATURE OF THE CASE

This is an appeal of a conviction by the Defendant, Tina Simunek. The Defendant appeals from the Circuit Court's denial of her motion to suppress.

Notice of Appeal was filed with the Circuit Court on November 11, 2024.

ISSUES ON APPEAL

Issue I: Did the Circuit Court err in finding that there was reasonable suspicion to support extension of a public welfare check into an investigatory detention for a Driving under the Influence?

STATEMENT OF FACTS

1. On January 16, 2022, Fall River Sheriff's Deputy Isnalawica Belt received

a report from dispatch that there was a woman in the driver's seat of a vehicle at the Coffee Cup Truck Stop that appeared to be asleep or unconscious (Transcript of Suppression Hearing p. 7, lines 1 through 14).

2. When Deputy Belt arrived at the Coffee Cup, he saw the vehicle and observed it was still running and had its left rear turn signal blinking. The officer observed the driver, later identified as Tina Simunek, slumped forward in the driver's seat with her chin resting on her chest, seemingly asleep. Before engaging with Ms. Simunek, the officer took photographs of both the vehicle and its occupant (Ibid., p. 8, lines 13 through 25).
3. The officer then knocked on the vehicle window and inquired whether Ms. Simunek was okay. She responded affirmatively, explaining that she had been traveling all day from Scottsbluff, Nebraska, and had pulled over to rest. She complied with the officer's request for personal information and voluntarily shut off her vehicle (Ibid., p. 8, line 24 and page 10, lines 5 through 13).
4. Officer Belt testified that it was thirty (30) degrees Fahrenheit outside (Ibid., p. 16, lines 9 through 23), that it was "freezing" and that "it could be a lot colder with wind chill" (Ibid., p. 16, lines 9 through 23).
5. Officer Belt had Ms. Simunek get out of the car, and noted that she had bloodshot eyes and slurred speech (Ibid., p. 9, lines 7 through 14). He suspected that she was under the influence at that time (Ibid., p. 10, lines 17 through 19).
6. After attempting to conduct field sobriety tests, including the walk and turn and one leg stand tests, and a lack of convergence test, Officer Belt arrested Ms. Simunek for suspicion of driving under the influence. Deputy Belt noted that he did not notice an odor of marijuana nor an odor of methamphetamine (Ibid., p. 27 lines 14 through 18). Deputy Belt intentionally decided not to offer Ms. Simunek a Preliminary Breath Test (PBT) because of his beliefs about how they do not assist him in an investigation (Ibid, p., 30, lines 6 through 21).
7. In a September 27, 2023 decision, the trial court denied a motion to suppress which had been heard on June 23, 2023 (See Memorandum Opinion Denying

Suppression, p. 2). The trial court reasoned that because “Simunek was already stopped and parked...Belt did not take any action that caused Simunek to stop her vehicle...Therefore Deputy Belt did not conduct a stop that would trigger 4th amendment scrutiny when he stopped his cruiser behind Simunek’s already parked vehicle, in a manner which allowed her to leave (Ibid., p. 3).

8. The trial court then reasoned that “Deputy Belt’s [observations led him to] believe that there was a fair probability Simunek had committed a criminal offense (citing *Waltz v Randall* 2 F. 4th at 1100).
9. Notably, at a bench trial in the matter, the Court found Ms. Simunek not guilty of driving under the influence (Transcript of Sentencing, p. 2, lines 18 through 19).

ARGUMENT AND AUTHORITIES

Issue I: Did the Circuit Court err in finding that there was reasonable suspicion to support extension of a public welfare check into an investigatory detention for a Driving under the Influence?

STANDARD OF REVIEW

The review standard was announced for motions to suppress in *State v. Kleven*, 887 N.W.2d 740 (S.D. 2016) “We review the circuit court’s grant or denial of a motion to suppress involving an alleged violation of a constitutionally protected right under the de novo standard of review.” *State v. Smith*, 2014 S.D. 50, ¶ 14, 851 N.W.2d 719, 723. We review the circuit court’s factual findings for clear error. *State v. Mohr*, 2013 S.D. 94, ¶ 12, 841 N.W.2d 440, 444. Once the facts have been determined, we give no deference to the court’s application of a legal standard to those facts. *State v. Fierro*, 2014 S.D. 62, ¶ 12, 853 N.W.2d 235, 239. Those questions of law are reviewed de novo. *Id.*” *State v. Kleven*, 887 N.W.2d 740 (S.D. 2016)

ARGUMENT

Issue I: Did the Circuit Court err in finding that there was reasonable suspicion to support extension of a public welfare check into an investigatory detention for a Driving under the Influence, or alternatively probable cause to arrest the Defendant?

- A. Reasonable articulable suspicion is required when a public welfare check is escalated to an investigative detention

The Fourth Amendment prohibits "unreasonable searches and seizures" by the Government, and its protections extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest. *Terry v. Ohio*, 392 U. S. 1, 9 (1968); *United States v. Cortez*, 449 U. S. 411, 417 (1981). Because the "balance between the public interest and the individual's right to personal security," *United States v. Brignoni-Ponce*, 422 U. S. 873, 878 (1975), tilts in favor of a standard less than probable cause in such cases, the Fourth Amendment is satisfied if the officer's action is supported by reasonable suspicion to believe that criminal activity "'may be afoot,'" *United States v. Sokolow*, 490 U. S. 1, 7 (1989) (quoting *Terry*, *supra*, at 30). See also *Cortez*, 449 U. S., at 417 ("An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity").

Welfare checks, which are non-investigatory and conducted for community caretaking purposes, do not initially require suspicion of a crime. *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973). However, if the welfare check escalates beyond a mere inquiry into the person's well-being and moves toward a more intrusive investigative detention, then reasonable suspicion of criminal activity

must be established to justify the further intrusion. *Terry v. Ohio*, 392 U.S. 1 (1968).

The South Dakota Supreme Court has analyzed what it refers to the "community caretaking exception as follows:

"*Cady v. Dombrowski* , and the recognition that local law enforcement officers often exercise "community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." 413 U.S. 433, 441, 93 S. Ct. 2523 2528, 37 L.Ed. 2d 706 (1973). We have described the realities associated with law enforcement's community caretaking role in the following terms:

Modern society has come to see the role of police officers as more than basic functionaries enforcing the law. From first responders to the sick and injured, to interveners in domestic disputes, and myriad instances too numerous to list, police officers fulfill a vital role where no other government official can. Lives often depend upon their quick exercise of pragmatic wisdom.

Deneui , 2009 S.D. 99, ¶ 49, 775 N.W.2d at 242.

[¶15.] Because the potential exists for police officers to chance upon evidence of criminal activity while acting as community caretakers, "the community caretaking exception should be cautiously and narrowly applied in order to minimize the risk that it will be abused or used as a pretext for conducting an investigatory search for criminal evidence." *State v. Rinehart* , 2000 S.D. 135, ¶ 10, 617 N.W.2d 842, 844 (quoting *Commonwealth v. Waters* , 20 Va.App. 285, 456 S.E.2d 527, 530 (1995)). Within the guidance of this

admonition, we have upheld a warrantless stop or temporary seizure of a vehicle under the community caretaker exception in two decisions.” *State v. Short Bull*, 928 N.W.2d 473 (S.D. 2019)

B. DUI Statute and Relevant Case Law

SDCL 32-23-1, South Dakota’s driving under the influence statute, prohibits any person from driving or being in “actual physical control” of a vehicle while intoxicated, under the influence of drugs, or with a blood alcohol content of 0.08% or higher.

The South Dakota Supreme Court has over time broadened its interpretation of “actual physical control” to include an expanding set of circumstances involving operators unconscious or asleep in the driver’s seat of a motionless vehicle. The first circumstances involved defendants found unconscious in the drivers’ seat of a vehicle involved in a car crash. See, e.g., *State v. Townsend*, S.D., 231 N.W.2d 367 (1975); *State v. Boyles*, S.D., 260 N.W.2d 642 (2001). South Dakota courts dismissed arguments by these defendants that there was no direct evidence that the defendants were not operating the car, and found the jury’s determination to the contrary to be reasonable.

The next set of circumstances involved vehicles parked in or around roadways, such being “parked in the middle of a main street intersection,” *State v. Hall*, 353 N.W.2d 37, 39 (1984), or “parked with the left wheels on the traveled roadway portion of a street[.]” *Kirby v. State, Dep’t of Pub. Safety* 262 N.W.2d 49, 50 (S.D. 1978). The Kirby Court, agreeing with other jurisdictions’ analysis of

similar situations of vehicles parked in traffic lanes or at a ninety degree angle on a highway, reasoned that even though the vehicle was motionless, it still remained a danger:

"We believe that an intoxicated person seated behind the steering wheel of a motor vehicle is a threat to the safety and welfare of the public. The danger is less than where an intoxicated person is actually driving a vehicle, but it does exist. The defendant when arrested may have been exercising no conscious violation with regard to the vehicle, still there is a legitimate inference to be drawn that he placed himself behind the wheel of the vehicle and could have at any time started the automobile and driven away. He therefore had 'actual physical control' of the vehicle within the meaning of the statute." Kirby at 51, citing *Hughes v. State*, Okl.Cr., 535 P.2d 1023, at 1024.

The Kirby Court then held that, in these situations, because the vehicle was near a roadway and could easily resumed driving, the driver is still a danger to the public and therefore is included in the definition of actual physical control under the statute:

"Likewise, all of the objective circumstances in the instant case pointed to the fact that respondent was in actual physical control of his vehicle: he was behind the wheel, albeit perhaps dozing; there was no one else in the vehicle; the motor was running; the parking lights were on; the vehicle was in a position where it could easily have resumed travel on the street; and respondent shut off the motor at the officers' request. In short, respondent was in a position in his vehicle under circumstances that would have supported a finding by a jury that he had driven the vehicle to the point where it was parked. Perforce, there was probable cause to believe that respondent was in actual physical control of his vehicle." Kirby at 52.

Lastly, in *State v. Kitchens*, 498 N.W.2d 649 (1993), the South Dakota Supreme Court expanded the definition of actual physical control to include instances even when the vehicle was parked in a parking lot. In *Kitchens*, the driver was observed slumped over the steering wheel, with the vehicle not

running and keys not in the ignition, but with several empty beer cans visible inside the vehicle.

In its analysis, the Kitchens court echoed concern other jurisdictions now have that the expansion of the definition of actual physical control may have been pushed too far, and become counter-productive to society's goal of providing safe highways, when it includes individuals who are waiting to sober up before driving. For example, Kitchens approvingly quotes *People v. Cummings*, 176 Ill.App.3d 293, 125 Ill.Dec. 514, 530 N.E.2d 672 (1988):

"We can expect that most people realize, as they leave a tavern or party intoxicated, that they face serious sanctions if they drive. While the preferred response would be for such people either to find alternate means of getting home or to remain at the tavern or party without getting behind the wheel until sober, this is not always done. And while we can say that such people should have stayed sober or planned better, that does not realistically resolve this all-too-frequent predicament.

For the intoxicated person caught between using his vehicle for shelter until he is sober or using it to drive home, [our case law] encourages him to attempt to quickly drive home, rather than to sleep it off in the car, where he will be a beacon to police.

We believe it would be preferable, and in line with legislative intent and social policy, to read more flexibility into [our case law]. In those rare instances where the facts show that a defendant was furthering the goal of safer highways by voluntarily "sleeping it off" in his vehicle, and that he had no intent of moving the vehicle, trial courts should be allowed to find that the defendant was not "in actual physical control" of the vehicle[.]” Kitchens at 653.

Kitchens states that “[the]soundness of this view is well represented[,],” citing *State, City of Falcon Heights v. Pazderski*, 352 N.W.2d 85 (Minn.Ct.App. 1984), where the court reasoned regarding a defendant that was found asleep in

his car in a parking area by his house where he would normally park it for the night:

"[T]he facts in this case do not support the conclusion that appellant exercised the necessary physical control. Conviction in this case would serve no purpose related to the statute because appellant had arrived home, had slept for about three hours, and had no intention of restarting the vehicle and/or driving any place else. "[T]he 'actual physical control' offense is a preventive measure intended to deter the drunken driver. One who has been drinking intoxicating liquor should not be encouraged to test his driving ability on the highway, even for a short distance, where his life and the lives of others hang in the balance." Kitchens at 654.

However, the Kitchens Court continued:

"[Kitchens'] case is not one of those rare instances where the facts show that the defendant was voluntarily sleeping off the effects of alcohol with no intention of moving the vehicle. Kitchens' vehicle was parked in a convenience store parking lot in close proximity to a city street. Obviously, Kitchens was far short of his intended destination as there is no indication in the record that he resided at the convenience store. Kitchens had passed out in the driver's seat with his hands still on the steering wheel and with his feet on the floorboard of the driver's side in proximity to the pedals. There were several twelve ounce cans of Budweiser Beer inside the vehicle. Kitchens could not produce a driver's license or proof of insurance. No one else was in the vehicle or near it. Although the vehicle was not running and the keys were not in the ignition, they were within quick and easy reach in Kitchens' pants pocket. At any point, Kitchens might have awakened, pulled the keys out of his pocket, started the vehicle and proceeded on to the nearby street in an inebriated condition, thereby posing a threat to the public. This is the precise risk the actual physical control statute is intended to avoid. For that reason, we find no error in the trial court's finding that Kitchens was in actual physical control of his vehicle while under the influence of alcohol."

Therefore, the Kitchens Court vocalizes, in dicta, an exception to the actual physical control definition in situations where a driver's intent is not to drive, but to remain sleeping in a safe location until able to drive again. In its analysis, it emphasizes whether the driver is at its destination or "far short" of a place the driver could reside. Other factors included the observable presence of

beer cans in the vehicle, which created an inference that the driver did not mean to discontinue his inebriated condition. This was also looked at in some detail in *Petersen v. Department of Public Safety*, 373 N.W.2d 38 (S.D. 1985) in which two South Dakota Supreme Court justices dissented from the more rigid view of "actual physical control"

"The effect of the majority opinion is to create a new crime: Parked While Intoxicated. No such crime exists in South Dakota and under these facts and circumstances I would hold, as did Judge Talbott, that Officer Farnsworth lacked probable cause and I would therefore vacate the Department's revocation order.

Respectable authorities supporting this viewpoint are: *State v. Zavala*, 136 Ariz. 356, 666 P.2d 456 (1983); and *State v. Bugger*, 25 Utah 2d 404, 483 P.2d 442 (1971). The facts in both of these cases are analogous to the present facts. In *Bugger*, the driver was asleep, the car was completely off the road, and the motor was not running. In reversing a conviction for being in actual physical control of a vehicle while intoxicated, the Supreme Court of Utah held that under those facts, the driver "was not controlling the vehicle, nor was he exercising any dominion over it." *Id.*, 483 P.2d at 443 (emphasis in original). In *Zavala*, the driver was unconscious, he was leaning out the driver's side window, the vehicle was pulled off the traveled portion of the highway, and the engine was off. In vacating a conviction for being in actual physical control of a vehicle while intoxicated, the Arizona Supreme Court found that although the driver remained behind the steering wheel, "the pulling off to the side of the road and turning off the ignition indicate that [the driver] voluntarily ceased to exercise control over the vehicle" *Id.*, 666 P.2d at 458-59.

Absolutism is an absolute standard or principle. No deviation. It is a marriage to unreasoned rigidity. An adherence to legal absolutism is an adherence to a principle from which there can be no sensible return. It is not sensible to hypothecate that every individual found in a motor vehicle, under the influence of intoxicants, is, ipso facto, exercising actual physical control of that motor vehicle. 3 Based on the circumstances of Petersen's arrest, I would affirm Judge Talbott's reversal of the Department of Public Safety. *Petersen v. Department of Public Safety*, 373 N.W.2d 38 (S.D. 1985).

Other States since *Kitchens*, have weighed in on what is sometimes called the "temporary shelter doctrine" in the context of "actual physical control".

Maryland Courts also utilize the "actual physical control" language in their DUI statute, and in *Atkinson v. State*, 331 Md. 199, 627 A.2d 1019 (Md. 1992), the Maryland court of Appeals reasoned as follows:

"We disagree with this construction of "actual physical control," which we consider overly broad and excessively rigid. Neither the statute's purpose nor its plain language supports the result that intoxicated persons sitting in their vehicles while in possession of their ignition keys would, regardless of other circumstances, always be subject to criminal penalty. In the words of a dissenting South Dakota judge, this construction effectively creates a new crime, "Parked While Intoxicated." *Petersen v. Department of Public Safety*, 373 N.W.2d 38, 40 (S.D.1985) (Henderson, J., dissenting). We believe no such crime exists in Maryland. Although the definition of "driving" is indisputably broadened by the inclusion in § 11-114 of the words "operate, move, or be in actual physical control," the statute nonetheless relates to driving while intoxicated. Statutory language, whether plain or not, must be read in its context. *NCR Corp. v. Comptroller*, 313 Md. 118, 125, 544 A.2d 764, 767 (1988). In this instance, the context is the legislature's desire to prevent intoxicated individuals from posing a serious public risk with their vehicles. We do not believe the legislature meant to forbid those intoxicated individuals who emerge from a tavern at closing time on a cold winter night from [627 A.2d 1026] merely entering their vehicles to seek shelter while they sleep off the effects of alcohol. As long as such individuals do not act to endanger themselves or others, they do not present the hazard to which the drunk driving statute is directed. Thus, rather than assume that a hazard exists based solely upon the defendant's presence in the vehicle, we believe courts must assess potential danger based upon the circumstances of each case. We therefore join other courts which have rejected an inflexible test that would make criminals of all people who sit intoxicated in a vehicle while in possession of the vehicle's ignition keys, without regard to the surrounding circumstances. *Atkinson v. State*, 331 Md. 199, 627 A.2d 1019 (Md. 1992) at pp. 212-213.

One might also wonder how this current analysis holds up in the near future when people may be utilizing fully autonomous vehicles and leaving a bar, but self driving attempts to get them home. A recent Law review article considers these questions in the context of a modernized view to 'actual physical control'

“1. The Majority of Jurisdictions Have Adopted the Totality of the Circumstances Approach to Determine if an Intoxicated Person Is in Actual Physical Control ("APC") of a Vehicle by Weighing All Relevant Factors

The majority of courts have adopted the totality of the circumstances approach for determining whether a person is in APC of a vehicle. By applying the totality approach, courts determine whether the driver was exercising control or imminently likely to exercise control over a motor vehicle while intoxicated. Although this test considers all relevant facts, courts have developed inexhaustive lists of factors for juries to consider in cases of APC. Factors may include operability of the vehicle, the intent of the driver, the position of the vehicle on the roadway, and the location of the keys. APC is ultimately determined by a case-by-case, factually intensive approach. 53 Creighton L. Rev. 397 Autonomous Vehicles and Driving Under the Influence: Examining the Ambiguity Surrounding Modern Laws Applied To Future Technology (Nebraska Creighton Law Review,).

The analysis of “actual physical control and a model opinion in Arizona continued:

“a. The Supreme Court of Arizona Adopted the Totality of the Circumstances Approach in State v. Love to Determine Actual Physical Control ("APC")

In State v. Love, the Supreme Court of Arizona adopted the totality of the circumstances approach for determining actual physical control ("APC") of a vehicle while under the influence of alcohol. In Love, an officer found Victor Love asleep in his car parked in the emergency lane of an interstate. The engine of the vehicle was running and Love's legs were beneath the steering wheel while his head rested near the passenger seat. The officer woke Love and, after detecting an odor of alcohol, asked Love to perform a sobriety test. Love failed the test and was subsequently arrested for driving or being in APC of a vehicle while under the influence. The trial court found Love guilty of driving under the influence ("DUI") and the Court of Appeals of Arizona affirmed the lower court's holding. Love appealed and the Supreme Court of Arizona granted certiorari.

The court vacated the decision of the Court of Appeals, and reversed and remanded Love's conviction, because exercising APC depends on the fact finder considering all of the circumstances. The court reasoned that the bright-line tests established in State v. Webb and State v. Zavala resulted in inappropriate rigidity not consistent with criminal jurisprudence. The court reasoned that a bright-line test may lead to difficulties and unfair results. Instead, the court determined that the totality of the circumstances approach recognizes the uniqueness of each case by requiring the fact finder to weigh the circumstances. This allows the fact finder to assess whether a driver was in APC or whether a

driver relinquished such control. In adopting the totality approach, the court provided non-exhaustive factors to consider in determining APC including whether the key was in the ignition, the capacity of the driver, and the position of the vehicle on the roadway. The court also noted that even in situations where a defendant is determined to have relinquished APC, evidence that the defendant drove while intoxicated to reach the place where the defendant was apprehended will support a judgment of DUI. 53 Creighton L. Rev. 397 Autonomous Vehicles and Driving Under the Influence: Examining the Ambiguity Surrounding Modern Laws Applied To Future Technology (Nebraska Creighton Law Review)” (emphasis added).

It is the Defendant’s position that, in order to have sound public policy which encourages intoxicated persons not to take unnecessary risks on the roadway, the “actual physical control” standard should be reconsidered, and that applying such factors as in State v. Love, would result in more flexible jurisprudence.

II. Application of the law to the facts of this case.

- A. The encounter with Ms. Simunek began as a welfare check, but escalated to an investigative detention, which requires reasonable suspicion

Notably, the Trial Court’s decision in this case skipped this step in the analysis, concluding that Belt had sufficient cause to initiate a community caretaking encounter, and then finding that there was probable cause to arrest post-field sobriety testing. It is assumed that the Court believed there was reasonable suspicion to continue the detention of Ms. Simunek beyond the caretaking encounter, though it did not directly address that subject. It is still required, however that law enforcement has sufficient articulable facts that a crime is being

or has been committed to continue the detention beyond initially checking on the person's welfare.

- B. Reasonable suspicion did not exist because Kitchens holds persons resting at rest stops does not violate SDCL 32-23-1, alternatively Kitchens should be updated to include relevant factors and not a rigid approach.

Ms. Simunek was parked at a rest stop, a designated location for travelers to rest safely. Her statement to the officer—that she had been traveling all day and pulled over to rest—is consistent with this purpose, and indicates that this rest stop was Ms. Simunek's destination. Unlike in Kitchens, there is no evidence to suggest she was "far short" of her intended destination or had any intent to drive while impaired, and instead, all indications were that she was at her intended destination, and was simply resting before proceeding further.

Further, this case is distinguishable from Kitchens, because Kitchens was found at a convenience store, and not at a truck stop intended for overnight stays, and that there were "several empty beer cans" surrounding Kitchens, where here there were no such indicia visibly present to Deputy Belt. After Deputy Belt established that Ms. Simunek was sleeping in her vehicle, he had no information to suggest that she had intentions of doing anything other than attempting to sleep off whatever issues she was having that night.

If the Court were to employ an analysis like *State v. Love*, there are factors weighing in favor of finding that Ms. Simunek was not in actual physical control would include her position on the roadway (she wasn't on the roadway and was legally parked at a private location), and whether the person was awake or asleep (she was asleep and stated her intentions to rest), but a "totality of the circumstances" test should control. Love emphasizes that a test which rigidly holds that a "key in" or "key out" approach which could be changed with the flick of a driver's wrist is also an absurd rule. The circumstances in this case all indicated that Ms. Simunek was well off the roadway, was not endangering other persons on the roadway, and had no present or future intentions to do so.

C. Because reasonable suspicion did not exist, the investigative detention was unlawful

In this matter, Officer Belt did not have any belief that Ms. Simunek intended to operate the vehicle further that night, and knew that she was at her final destination. He may have suspected impairment when he converted the caretaking stop into a public safety stop, but the actual physical control component was so far removed from actual highway operation that it should not have been a concern to investigate. As Justice Talbott observed in *Petersen*, this case fits the depiction of the investigation of a new crime: "Parked While Intoxicated." This is the nonexistent offense that Deputy Belt sought to investigate after he removed Ms. Simunek from the vehicle and began his field Sobriety testing.

D. All evidence obtained under Ms. Simunek's unlawful detention must be suppressed

There did not exist probable cause for driving under the influence in Ms. Simunek's case because the facts all indicate her intent was to continue to rest at the rest stop until she was able to continue driving, as allowed by the exception referenced by the Kitchens court. Ms. Simunek was parked at a rest stop, and was resting from a long day of travel. She notified as much to the officer, and gave off no other indications of intoxication or any other unlawful activity. Therefore, Ms. Simunek's presence in the parking lot of a rest stop, and intent of resting until she could travel further, does not create probable cause, as it is including in the exception created by dicta in Kitchens. Also there was no evidence in the vehicle that she intended to continue intoxicating herself like in Kitchens surrounded by beer cans.

Because the officer did not have reasonable suspicion for anything unlawful, all investigation after the questioning of Ms. Simunek in her car is unlawful. The officer did not have authority to arrest her, etc. Additionally, should the Court determine that the suspicion of DUI was warranted, then it is argued that once the field sobriety testing was complete, it did not amount to probable cause that she was in actual physical control of the vehicle per the Defendant's reading of Kitchens, or the analysis suggested in the Arizona case, *State v. Love*.

CONCLUSION

Therefore, the Circuit Court's denial of the Defendant's Motion to Suppress should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and correct copy of the above and foregoing BRIEF OF APPELLANT was served upon Attorney General Marty Jackley and Fall River County State's Attorney Lance Russell by electronic filing and by us postal mail at the address listed below on this 18th Day of February, 2025:

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IN THE SUPREME COURT OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,)
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Defendant.)

Appellate Case No. 30895
Circuit CASE NO.: 23CRI22-28

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 15-26A-66(b), I certify that the Brief of Appellant contains 5,028 words and complies with the type volume limitation imposed.

Respectfully submitted on this 18th day of February, 2025.

/s/ J. Scott James

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STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
)	
COUNTY OF FALL RIVER)	SEVENTH JUDICIAL
		CIRCUIT
STATE OF SOUTH DAKOTA,)	
)	
Plaintiff,)	
v.)	23CRI 22-28
)	
TINA MARIE SIMUNEK)	
DOB: 06.11.1976)	
)	
Defendant.)	

JUDGMENT OF CONVICTION
(SUSPENDED EXECUTION OF SENTENCE)

An Information was filed in this Court on August 11th, 2022, charging the Defendant with the crime of

COUNT 1: INGESTION OF CONTROLLED DRUG OR SUBSTANCEi, in violation of SDCL 22-42-5.1, (Cl. 5 felony);

COUNT2: DRIVING OR CONTROL OF VEHICLE WHILE UNDER THE INFLUENCE, in violation of spcL §§ 32-23-1 and 32-23-2 (First Offense), a class 1 misdemeanor.

COUNT3: POSSESSION OF DRUG PARAPHERNALIA, in violation of SDCL 22-42A-3, (Cl. 2 misd.).

With the State being represented by Lance S. Russell and the Defendant being represented by Jeff Fransen on January 12, 2024, a court trial was held for the charges of

COUNT 1: INGESTION OF CONTROLLED DRUG OR SUBSTANCEi, in violation of SDCL 22-42-5.1, (Cl. 5 felony);

COUNT2: DRIVING OR CONTROL OF VEHICLE WHILE UNDER THE INFLUENCE, in violation of spcL §§ 32-23-1 and 32-23-2 (First Offense), a class 1 misdemeanor.

COUNT3: POSSESSION OF DRUG PARAPHERNALIA, in violation of SDCL 22-42A-3,
(Cl. 2 misd.).

It is the determination of this Court that the Defendant is guilty of
COUNT 1: INGESTION OF CONTROLLED DRUG OR SUBSTANCEi, in violation of
SDCL 22-42-5.1, (Cl. 5 felony) and
COUNT3: POSSESSION OF DRUG PARAPHERNALIA, in violation of SDCL 22-42A-3,
(Cl. 2 misd.) and that count 2 is dismissed.

SENTENCE

On August 22, 2024, the Court asked the Defendant if any legal cause existed to show why Judgment should not be pronounced. As no cause was offered the Court thereupon pronounced the following sentence:

IT IS ORDERED, that the Defendant, TINA MARIE SIMUNEK, be sentenced to five (5) years in the South Dakota State Women's Penitentiary:

IT IS FURTHER ORDERED, that execution of the above-ordered five (5) year Penitentiary sentence shall be suspended and the Defendant shall be placed on Supervised Probation, for a period of three (3) years, upon the following terms and conditions:

Defendant shall serve one hundred eighty (180) days in the Fall River County Jail with credit for one (1) day served and one hundred seventy-nine (179) days shall be suspended.

2. Defendant shall pay Court Costs in the amount of one hundred sixteen dollars and fifty cents (\$116.50), Court Appointed Attorney Fees in an amount to be determined by order and which may be liened, the cost of the State Health Lab Chemist testimony fee in

the amount of four hundred dollars (\$400.00) and laboratory testing fees in the amount of one hundred ninety dollars (\$190.00).

3. Defendant shall obey all laws and remain on good behavior and cooperate and comply with all rules and regulations of the court services officer, notify court services of any changes in contact information and/or address and attend any counseling as directed.

4. Defendant shall remain gainfully employed or enrolled in school and shall support any dependents to the best of her ability.

5. Defendant shall not be in any place where any controlled substances are being used or associate with known felons, drug users or dealers. This includes medical marijuana without prior approval from this Court. Defendant shall be allowed a Waiver of THC for a period of three (3) weeks starting today. (08.22.2024)

6. Defendant shall submit to random testing of her bodily fluid and breath upon request by any law enforcement officer, jailer, or court services officer and shall pay for said testing

7. Defendant shall submit her person and property to search and seizure upon demand by any law enforcement officer, jailer, or court services officer at any time of the day or night with or without a search warrant.

8. Defendant shall participate in the 24-7 Sobriety Program and take a urinalysis test three (3) times per week for ninety (90) days and shall pay for the costs of said testing. Further testing shall be at the discretion of her court services officer.

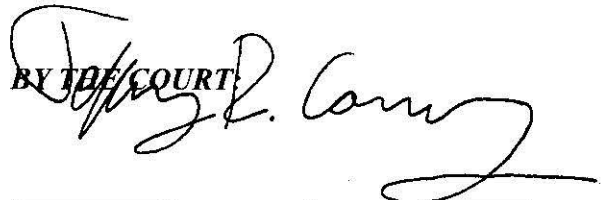
9. Defendant shall successfully complete MRT (Moral Reconciliation Therapy) and provide proof to her court services officer.

10. Defendant shall successfully complete the CBISA program and provide proof to her court services officer

11. That the Defendant abide by the attached terms and conditions as signed and agreed to on this ____ day of _____, 20____.

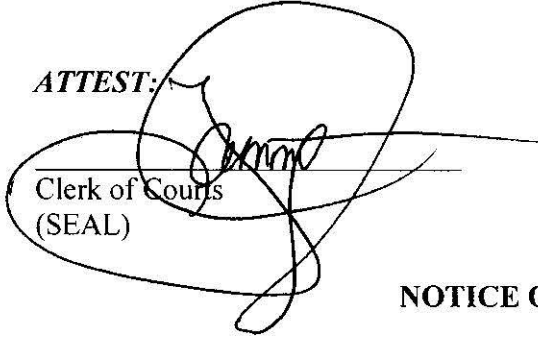
YOU ARE FURTHER ADVISED, you shall be subject to the Unified Judicial System's Application of Supervisory Responses (ASR) Grid. You may seek review of any moderate or serious sanction imposed by your Court Services Officer by requesting review by the Chief Court Services Officer.

DATED this 1 day of Oct, 2024, nunc pro tunc the 22nd day of August 2024.

BY THE COURT:


The Honorable **JEFFREY R. CONNOLLY**
CIRCUIT COURT JUDGE

ATTEST:


Clerk of Courts
(SEAL)

CIRCUIT COURT
AT HOT SPRINGS, SD

OCT 01 2024

By: _____

NOTICE OF RIGHT TO APPEAL

You, TINA MARIE SIMUNEK, are hereby notified that you have a right to appeal as provided for by SDCL 23A-32-15, which you must exercise by serving a written notice of appeal upon the Attorney General of the State of South Dakota and the State's Attorney of Fall River County and by filing a copy of the same, together with proof of such service with the Clerk of this Court within Thirty (30) days from the date that this Judgment is filed with said clerk.

STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
)SS	
COUNTY OF FALL RIVER)	SEVENTH JUDICIAL CIRCUIT
)	
STATE OF SOUTH DAKOTA,)	FILE NO. 23CRI22-000028
Plaintiff,)	
v.)	
)	MEMORANDUM ORDER
TINA SIMUNEK,)	
Defendant.)	

On January 16, 2022, Fall River Deputy Sheriff Isnalawica Belt received a call from dispatch advising of a suspicious vehicle at the Coffee Cup Travel Plaza on Highway 385. The report, from the employees at the travel plaza, indicated a driver was slumped over in the driver's seat of a white SUV parked between a white Tahoe and a gray SUV in the North part of the parking lot. The call to dispatch was recorded and is in the record. Belt responded. He located a vehicle matching the description and position of the reported vehicle and parked behind the vehicle. Belt's body worn camera recorded what transpired and is in the record. Although Belt was parked behind Simunek, he did not park in a manner that would have prevented Simunek from leaving.

Belt reported, and the video shows, that defendant Simunek's lights were on, and a blinker was blinking. Belt observed the Simunek unconscious in the driver's seat. He noticed she was breathing and took a photograph. When he knocked on the window, she woke up and rolled down her window. She said she was sleeping and that she had been driving all day. After a brief interaction, Belt informed Simunek that he observed bloodshot eyes and suspected she was under the influence. In his report, he noted her slurred speech. Later Simunek reported she had not been driving but was sleeping. She said she was not far from home and wanted to go home. Belt indicated that Simunek was confusing him.

Belt administered several field sobriety tests, each indicating that Simunek was impaired. Belt then arrested Simunek for DUI. He transported her to the Fall River County Jail. Belt performed an inventory search of the vehicle and discovered a glass pipe with white residue. At the jail, Simunek refused requests to provide a blood sample. Belt applied for and was granted a search warrant for her blood. Simunek was charged by complaint with DUI on January 21, 2022.

On March 4, 2022, a blood alcohol affidavit and a lab report were filed. The blood alcohol affidavit showed that Simunek had no alcohol in her blood. The health lab report showed the presence of amphetamine and methamphetamine. Simunek was charged in an amended complaint with DUI and ingestion of methamphetamine.

On January 20, 2023, she moved to suppress. A hearing was held on June 23, 2023. Belt testified. The Court received several exhibits and heard the argument of counsel.

DISCUSSION

Simunek first argues that Belt did not have reasonable suspicion to initiate a stop or a detention of defendant. “[N]ot every encounter between a citizen and the police constitutes a Fourth Amendment seizure.” *State v. Iversen*, 2009 S.D. 48, ¶8, 768 N.W.2d 534, 536. “Only when an officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may a court conclude that a seizure has occurred. *Id.* at ¶10.

[T]he test for determining when an encounter between a police officer and a citizen constitutes a Fourth Amendment detention or seizure [is] whether, taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.

Id. at ¶15 (citing *Barry*, 394 F.3d at 1074–75; quoting *Bostick*, 501 U.S. at 437, 111 S.Ct. at 2387). “[A] seizure does not occur simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free to disregard the police and go about his business, the encounter is consensual and no reasonable suspicion is required.” *Id.* at ¶12 (citing *Florida v. Bostick*, 501 U.S. 429, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991)). “The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature.” *Id.*

Here, Simunek was already stopped and parked at the Coffee Cup parking lot when Belt came upon her vehicle. Belt did not take any action that caused Simunek to stop her vehicle. She was unconscious and already parked in a parking space. In fact, there is no indication that Deputy Hayashi exerted any force or authority over Simunek. She rolled her window down when he knocked and woke her up. Therefore, Deputy Belt did not conduct a stop that would trigger 4th Amendment scrutiny when he stopped his cruiser behind Simunek’s already parked vehicle, in a manner which allowed her to leave.

Simunek next challenges whether Deputy Belt had probable cause to effectuate Simunek’s arrest. This Court determines that Simunek’s arrest was supported by probable cause.

Under the Fourth Amendment, warrantless arrests must be supported by probable cause. Officers are not required to have collected enough evidence so as to justify a conviction for there to be a legitimate finding of probable cause to justify a warrantless arrest. Rather, probable cause requires that the officers involved in an arrest are aware of facts establishing a fair probability that the person being arrested has committed a criminal offense. The existence of probable cause is based on the facts available to the officers at the moment an arrest is made and is determined from the standpoint of an objectively reasonable police officer,

Walz v. Randall, 2 F.4th 1091, 1100 (8th Cir. 2021) (cleaned up) (citations omitted).

Belt noted that Simunek's car was parked with the lights and a blinker on. After approaching the car, he noted the lights were on and Simunek was unconscious behind the wheel. When she woke, she rolled down her window and engaged with Belt. She was confusing, her explanation for why she was there was disjointed and inconsistent. She had blood shot eyes, and her speech was slurred. Field sobriety tests indicated impairment. At that point, Deputy Belt had probable cause to believe Simunek had committed the crime of driving with under the influence.

No person may drive or be in actual physical control of any vehicle while:

- (1) There is 0.08 percent or more by weight of alcohol in that person's blood as shown by chemical analysis of that person's breath, blood, or other bodily substance;
- (2) Under the influence of an alcoholic beverage, marijuana, or any controlled drug or substance not obtained pursuant to a valid prescription, or any combination of an alcoholic beverage, marijuana, or such controlled drug or substance;
- (3) Under the influence of any controlled drug or substance obtained pursuant to a valid prescription, or any other substance, to a degree which renders the person incapable of safely driving;
- (4) Under the combined influence of an alcoholic beverage and or any controlled drug or substance obtained pursuant to a valid prescription, or any other substance, to a degree which renders the person incapable of safely driving; or
- (5) Under the influence of any substance ingested, inhaled, or otherwise taken into the body as prohibited by § 22-42-15.

SDCL § 32-23-1. There was sufficient information for Belt to reasonably believe Simunek was in control of the vehicle. She was in the driver's seat while the vehicle lights were on, and a blinker was blinking. Based on Simunek's appearance, statements, and performance on the field sobriety tests, there was sufficient information for Belt to reasonably believe She was under the influence. Clearly, a reasonable officer in

Deputy Belt's position would believe that there was a "fair probability [Simunek] ha[d] committed a criminal offense." *Randall*, 2 F.4th at 1100. Therefore, the Court concludes that Deputy Belt had probable cause to arrest Simunek. The other evidence was found either in a valid inventory search or pursuant to a warrant. The Court declines to suppress any evidence resulting from the stop or the arrest.

For these reasons, it is hereby:

ORDERED that Defendant's Motion to Suppress is **DENIED**.


Dated September 27, 2023, *nunc pro tunc* September 8, 2023.

BY THE COURT:

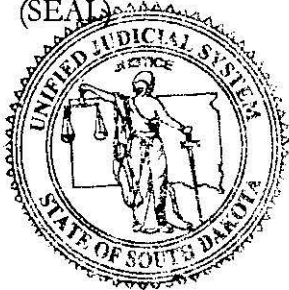


THE HONORABLE JEFFREY ROBERT CONNOLLY
CIRCUIT COURT JUDGE

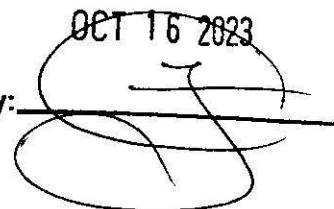
ATTEST:
TAMMY GRAPENTINE,
CLERK OF COURTS

By: 

Deputy
(SEAL)



FILED
7TH JUDICIAL CIRCUIT COURT
AT HOT SPRINGS, SD

OCT 16 2023
By: 

**53 Creighton L. Rev. 397 Autonomous Vehicles and Driving
Under the Influence: Examining the Ambiguity Surrounding
Modern Laws Applied To Future Technology (Nebraska Creighton
Law Review)**

**53 Creighton L. Rev. 397. AUTONOMOUS VEHICLES AND
DRIVING UNDER THE INFLUENCE: EXAMINING THE
AMBIGUITY SURROUNDING MODERN LAWS APPLIED TO
FUTURE TECHNOLOGY**

**AUTONOMOUS VEHICLES AND DRIVING UNDER THE
INFLUENCE: EXAMINING THE AMBIGUITY SURROUNDING
MODERN LAWS APPLIED TO FUTURE TECHNOLOGY**

-Callie A. Kanthack '21

I. INTRODUCTION

According to the U.S. Department of Transportation's National Highway and Traffic Safety Administration ("NHTSA"), in 2017, 10,874 people were killed in drunk driving related accidents, meaning one person was killed every forty-eight minutes in the United States. ^[1] In 2018, liquor industry groups began supporting the acceleration of the production of self-driving vehicles in the hopes of eradicating drunk driving related deaths while simultaneously increasing sales in liquor. ^[2]

Self-driving or autonomous vehicles are vehicles that do not require human intervention. ^[3] Although *fully* autonomous vehicles are not yet available to consumers, Tesla and other companies are routinely testing technology for such vehicles. ^[4] Elon Musk, Tesla's Chief Executive Officer, stated that Tesla cars will be self-driving by 2020; unfortunately, despite Musk's optimism and recent rise in stock prices, Tesla has yet to release a fully self-driving vehicle. ^[5] Regardless of the exact date of release to consumers, the transition to fully autonomous vehicles remains inevitable. ^[6]

Autonomous vehicles may notably provide a solution to the devastating societal costs of driving under the influence. ^[7] However, the legality of using or operating a self-driving vehicle must be considered. ^[8] Under current statutes, it remains unclear whether an intoxicated person operating an autonomous vehicle would be guilty of driving under the influence ("DUI"). ^[9] Although fully autonomous vehicles do not require human intervention, an intoxicated person may be charged with a DUI for maintaining actual physical control ("APC") over the vehicle. ^[10] Some states recently amended the definition of operator, thus creating potential liability for the person engaging the technology despite having no actual control over driving functions. ^[11] The possibility for operators of autonomous vehicles to be



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charged with DUI offenses not only contradicts current public policy surrounding DUI statutes, but it also prevents states from experiencing the revolutionary safety benefits. ^[12] Creating exemptions in DUI statutes for operators of autonomous vehicles will legally allow and consequently encourage the use of self-driving vehicles. ^[13]

This Note will begin by differentiating the levels of autonomy and explaining the emerging technology behind autonomous vehicles. ^[14] Next, this Note will examine recent foreign, national, and state legislation regarding autonomous vehicles. ^[15] This Note will then discuss the potential safety benefits of using autonomous vehicles. ^[16] Then, this Note will examine DUI statutes specifically in regards to APC over a vehicle. ^[17] This Note will further consider different tests applied by courts in the United States for determining APC. ^[18] Then this Note will argue that, under current laws, whether an intoxicated person operating an autonomous vehicle is guilty of DUI remains ambiguous. ^[19] This Note will claim that such ambiguity creates a barrier in achieving the safety benefits of autonomous vehicles by making it unlawful to use an autonomous vehicle regardless if an intoxicated person never exercises the driving functions. ^[20] This Note will suggest that states should enact legislation that creates exemptions for autonomous vehicles from statutes that penalize a human driver under the presumption that a human is in control of the vehicle. ^[21] Then this Note will acknowledge the potential issue of adopting legislation for fully autonomous vehicles without distinguishing between Level 4 and Level 5 vehicle capabilities. ^[22] Finally, this Note will consider the possibilities of permitting an intoxicated person to operate a Level 4 vehicle equipped with Driver Alcohol Detection System for Safety ("DADSS") technology. ^[23]

II. BACKGROUND

A. THE TECHNOLOGY AND CAPABILITIES OF AUTONOMOUS VEHICLES DETERMINE THE LEVEL OF AUTONOMY

Engineers apply the term *autonomous* to computer-controlled systems that determine choices about their own actions and are therefore able to direct their own activity. ^[24] Autonomous vehicles are essentially self-driving, requiring virtually no human intervention or input. ^[25] Autonomy in motor vehicles began in the 1930s and has progressed throughout the decades from no level of automation to a level of no human involvement. ^[26]

Self-driving or autonomous vehicles are classified by the level of autonomy. ^[27] Currently, the U.S. Department of Transportation recognizes six distinguished levels of autonomous vehicles ranging from Level 0 to Level 5. ^[28] The lowest level, Level 0, does not entail any automation; whereas, Levels

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1, 2, and 3 including increasing levels of autonomy.^[29] These levels are referred to as *semi-autonomous*.^[30] Semi-autonomous vehicles feature technology such as cruise control, anti-lock brakes, lane-keeping, weather alerts, and assisted steering.^[31] The current level of autonomy for vehicles available to consumers is Level 3.^[32]

Achieving Level 3 automation remains a significant technological milestone from the capabilities of Level 2 vehicles.^[33] The autopilot technology in Level 2 vehicles provides features enabling the vehicle to brake, steer, accelerate, and correct lanes without human intervention.^[34] In comparison, Level 3 vehicles embody a degree of autonomy characterized by decision-making that allows the vehicle to change lanes and successfully pass other vehicles.^[35]

Levels 4 and 5 are considered *fully* autonomous vehicles, because their operation would not require any human intervention or input.^[36] Fully autonomous vehicles would only require a human to choose the destination.^[37] The difference, however, between Level 4 and Level 5 is the ability of a human driver to maintain or regain control of the vehicle.^[38] Level 4 vehicles include fallback capabilities notifying a human operator of malfunctions and enables the operator to regain manual control of driving functions.^[39] Level 5 vehicles do not include the fallback features necessary for human intervention such as a steering wheel or driver controls.^[40]

The technology required for autonomous vehicles depends on the vehicle manufacturer and the desired level of autonomy.^[41] Most semi-autonomous vehicles operate through subsystems and Automated Driving Systems ("ADS").^[42] Subsystems are separate systems that control specialized driving functions such as steering, braking, antilock brakes, and traction control.^[43] ADS is a form of emerging technology found in advanced semi-autonomous vehicles that controls lane-keeping, parking, and adaptive cruise control.^[44] Tesla's Autopilot system on its most recent model features similar capabilities.^[45]

Fully autonomous vehicles operate through numerous technological systems that allow vehicles to react to changing conditions and make decisions absent human intervention.^[46] Many fully autonomous vehicles rely on pre-built maps, Global Positioning Satellite ("GPS"), annotated digital maps, and a computer coordinating system.^[47] The position of the vehicle, routes, traffic signals, and objects around the vehicle are determined by the computer coordinating system.^[48] In addition, vehicle-to-vehicle technology provides a network of data shared from vehicles within close proximity regarding speed, positions, and driving conditions.^[49] Several companies including Ford, Amazon, and Google primarily use Light Detection and

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Ranging ("LIDAR") technology, claiming that LIDAR is a critical aspect of autonomous vehicular safety. ^[50]

All autonomous vehicles rely on a coordinating computer system which combines data retrieved from sensors, cameras, and radars. ^[51] The computer system uses algorithms to determine the safety and legality of the vehicle's next movement. ^[52] Although the same technology operates in Level 4 and 5 vehicles, the distinction is merely the ability for a driver to regain or maintain actual control of the vehicle. ^[53] This distinction, however, bears significant potential legal implications. ^[54]

**B. LAWMAKERS IN THE UNITED STATES SUPPORT THE
DEVELOPMENT AND USE OF AUTONOMOUS VEHICLES TO INCREASE
HIGHWAY SAFETY BY REDUCING THE NUMBER OF DEATHS AND
ACCIDENTS CAUSED BY HUMAN ERROR**

KPMG International released an Autonomous Vehicle Readiness Index which ranks twenty-five countries based on policy and legislation, technology and innovation, infrastructure, and consumer acceptance of autonomous vehicles. ^[55] The United States, although ranking fourth overall, was ranked ninth in regards to policy and legislation. ^[56] Some nations ranking below the United States overall have recently enacted legislation to increase readiness for the use of autonomous vehicles by consumers. ^[57]

In 2016, the U.S. Department of Transportation's National Highway and Transportation Safety Administration ("NHTSA") announced a commitment of approximately four billion dollars over a period of ten years to accelerate the development of autonomous vehicles. ^[58] The NHTSA released guidelines in September 2017 for the safe testing and development of autonomous vehicles. ^[59] The guidelines provide the technical assistance needed for states and best practices for policymakers to follow. ^[60] The NHTSA released new guidelines in October 2018 to include all surface on-road transportation systems. ^[61]

Both state and federal governments have expressed continued support for the development and use of autonomous vehicles. ^[62] Over the past two years, Congress attempted to pass legislation encouraging the testing and deployment of highly automated vehicles and ensuring the safe production thereof by applying safety exemptions and testing standards. ^[63]

Likewise, state governments have demonstrated support for the safe production, testing, and use of autonomous vehicles. ^[64] As of March 2019, twenty-nine states have enacted legislation and governors from eleven states have issued executive orders regarding autonomous vehicles; however, most

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current driving and highway safety laws are based on the assumption that there is a human driver. ^[65]

Some states have enacted laws distinguishing the human operator of autonomous vehicles. ^[66] California defines an operator as the person located in the driver's seat or the person who initiates the autonomous technology. ^[67] Notably, California's laws are strictly for the approved testing of autonomous vehicles. ^[68] Florida, in comparison, is the only state to explicitly permit the use of autonomous vehicles beyond testing. ^[69] Florida laws consider the automated driving system to be the operator of an autonomous vehicle while the driving system is engaged, regardless of whether a human is physically present. ^[70] Florida Statutes section 316.85(3)(b) stipulates that traffic laws may not be construed to require a human operator and may not prohibit designating the automated driving system as the operator. ^[71] Although more states are addressing the emergence of autonomous technology, many states have not considered the implications of such technology in regards to current motor vehicle laws. ^[72]

Federal and state governments remain supportive of autonomous vehicle legislation to increase highway safety and subsequently reduce driving-related deaths and accidents. ^[73] Approximately ninety percent of vehicular accidents are caused by human error including, but not limited to the following dangerous driving risks: driving under the influence, distracted driving, not wearing seatbelts, and excessive speed. ^[74] Experts determined that if fifty percent of motor vehicles in the United States were autonomous, there would be 9,600 fewer deaths and two million fewer accidents each year. ^[75] The use of autonomous vehicles would prevent a significant number of accidents caused by driving while under the influence. ^[76]

**C. DRIVING UNDER THE INFLUENCE STATUTES INCLUDE ACTUAL
PHYSICAL CONTROL OVER A VEHICLE AS A PROPHYLACTIC
MEASURE TO INCREASE HIGHWAY SAFETY**

Most current driving under the influence ("DUI") statutes require actual physical control ("APC") of a vehicle while under the influence. ^[77] All states prohibit driving vehicles under the influence of drugs and alcohol, and many states have extended this prohibition to include possessing control of a vehicle, because an intoxicated person could potentially start or resume driving. ^[78] Over thirty states have adopted the Uniform Vehicle Code or a variation of its DUI statute which defines driving as operating or being in physical control of a vehicle. ^[79] In jurisdictions without a statutory definition of APC, courts have defined APC by focusing on the control or dominion of a vehicle or the potential to operate the vehicle. ^[80] Some states, for instance, have concluded that the following conduct constitutes APC:

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where an intoxicated person placed the keys in the ignition; where an intoxicated person in a vehicle admitted to being unable to find his keys; and where an intoxicated passenger pulled the steering wheel from the driver. ^[81]

States employ different tests to determine if a person was in APC of a vehicle for the purposes of a DUI. ^[82] There are two distinct approaches for determining APC: (1) the totality of the circumstances approach and (2) bright-line tests. ^[83]

1. The Majority of Jurisdictions Have Adopted the Totality of the Circumstances Approach to Determine if an Intoxicated Person Is in Actual Physical Control ("APC") of a Vehicle by Weighing All Relevant Factors

The majority of courts have adopted the totality of the circumstances approach for determining whether a person is in APC of a vehicle. ^[84] By applying the totality approach, courts determine whether the driver was exercising control or imminently likely to exercise control over a motor vehicle while intoxicated. ^[85] Although this test considers all relevant facts, courts have developed inexhaustive lists of factors for juries to consider in cases of APC. ^[86] Factors may include operability of the vehicle, the intent of the driver, the position of the vehicle on the roadway, and the location of the keys. ^[87] APC is ultimately determined by a case-by-case, factually intensive approach. ^[88]

*a. The Supreme Court of Arizona Adopted the Totality of the Circumstances Approach in *State v. Love* ^[89] to Determine Actual Physical Control ("APC")*

In *State v. Love*, the Supreme Court of Arizona adopted the totality of the circumstances approach for determining actual physical control ("APC") of a vehicle while under the influence of alcohol. ^[90] In *Love*, an officer found Victor Love asleep in his car parked in the emergency lane of an interstate. ^[91] The engine of the vehicle was running and Love's legs were beneath the steering wheel while his head rested near the passenger seat. ^[92] The officer woke Love and, after detecting an odor of alcohol, asked Love to perform a sobriety test. ^[93] Love failed the test and was subsequently arrested for driving or being in APC of a vehicle while under the influence. ^[94] The trial court found Love guilty of driving under the influence ("DUI") and the Court of Appeals of Arizona affirmed the lower court's holding. ^[95] Love appealed and the Supreme Court of Arizona granted certiorari. ^[96]

The court vacated the decision of the Court of Appeals, and reversed and remanded Love's conviction, because exercising APC depends on the fact finder considering all of the circumstances. ^[97] The court reasoned that the bright-line tests established in *State v. Webb* ^[98] and *State v. Zavala* ^[99] resulted in inappropriate rigidity not consistent with criminal

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jurisprudence. ^[100] The court reasoned that a bright-line test may lead to difficulties and unfair results. ^[101] Instead, the court determined that the totality of the circumstances approach recognizes the uniqueness of each case by requiring the fact finder to weigh the circumstances. ^[102] This allows the fact finder to assess whether a driver was in APC or whether a driver relinquished such control. ^[103] In adopting the totality approach, the court provided non-exhaustive factors to consider in determining APC including whether the key was in the ignition, the capacity of the driver, and the position of the vehicle on the roadway. ^[104] The court also noted that even in situations where a defendant is determined to have relinquished APC, evidence that the defendant drove while intoxicated to reach the place where the defendant was apprehended will support a judgment of DUI. ^[105]

2. Some Jurisdictions Use Bright-Line Tests to Determine Actual Physical Control ("APC") in Regards to Driving Under the Influence ("DUI") Statutes

Bright-line tests consist of objective rules that resolve issues in a clear and predictable manner determined by whether a certain condition has occurred. ^[106] Most jurisdictions reject bright-line tests because specific, rigid tests cannot appropriately be applied to all variations of factual circumstances. ^[107] However, bright-line tests still serve the purpose of preventing DUIs by prohibiting APC of a vehicle while intoxicated. ^[108]

a. The Arkansas Court of Appeals Applied a Bright-Line Test in State v. Rogers ^[109] to Determine Actual Physical Control Based on Whether the Key Was in the Ignition

In *State v. Rogers*, the Arkansas Court of Appeals determined that an intoxicated person cannot be in actual physical control ("APC") of a vehicle if the keys are not in the ignition. ^[110] In *Rogers*, two officers found Charles Rogers passed out in his vehicle parked outside of a lodge. ^[111] Rogers was in the driver's seat. ^[112] The engine was running and Rogers' foot appeared to be on the brake pedal; but officers testified that the keys to the vehicle were recovered from the front passenger area. ^[113] Rogers alleged that the keys were never in the ignition and that he used the remote start to stay warm until he was able to drive. ^[114] At trial, the Washington County Circuit Court heard expert testimony from an electronics technician explaining that when the engine is started by remote-start a driver may only use accessories such as the radio, heat, and air conditioning. ^[115] The technician testified that placing the keys in the ignition and turning the ignition on is the only way to move the vehicle. ^[116] Rogers moved for a directed verdict arguing the state lacked proof that he was in APC of the vehicle. ^[117] The motions were denied and Rogers was found guilty of driving while intoxicated. ^[118] Rogers

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appealed to the Arkansas Court of Appeals. ^[119] The Arkansas Court of Appeals clarified that a person cannot be in APC of a vehicle without placing his or her keys in the ignition. ^[120] The court relied on several cases in which Arkansas courts have used the bright-line rule requiring keys to be in the ignition for APC to begin. ^[121] The court determined that because the keys were not in the ignition, the state failed to prove Rogers was in APC of the vehicle. ^[122] Consequently, the conviction was reversed. ^[123]

b. The Circuit Court in *Commonwealth v. Reid* ^[124] Interpreted Actual Physical Control ("APC") Under a Bright-Line Test Which Required the Key to Be in the Ignition and the Intoxicated Person to Be Seated in the Driver's Seat

In *Commonwealth v. Reid*, the Circuit Court of the City of Norfolk, Virginia, determined that when an intoxicated person is seated behind the steering wheel of a vehicle and the key is in the ignition, that person is in APC of the vehicle. ^[125] In *Reid*, Sheena Reid was arrested for driving under the influence ("DUI") after an officer observed her staggering to her car, sitting in the front seat, and placing the key in the ignition. ^[126] Reid admitted to being intoxicated, but claimed that it was raining and she needed to roll up her car windows. ^[127] The Norfolk General District Court convicted Reid of DUI and Reid appealed to the Circuit Court of the City of Norfolk. ^[128]

The circuit court affirmed the trial court's decision reasoning that Virginia's DUI statute has evolved into a bright-line rule specifying that an intoxicated person is in APC of a vehicle if the person is seated in the driver's seat and the key is in the ignition. ^[129] The court noted that the Virginia Supreme Court has consistently adhered to this bright-line rule. ^[130] The court determined that, based on Reid's own admissions of sitting in the driver's seat and placing the key in the ignition, the lower court did not err in concluding that Reid was in APC of the vehicle. ^[131]

III. ARGUMENT

This Note will argue that under the totality of the circumstances approach and bright-line tests, it remains unclear whether persons under the influence of drugs or alcohol while operating autonomous vehicles are in actual physical control ("APC") of the vehicle. ^[132] The separate tests for determining APC and the significant technological differences between Level 4 and Level 5 autonomous vehicles result in inconsistent application of APC. ^[133] This Note asserts that the possibility of being in violation of driving under the influence ("DUI") while operating an autonomous vehicle conflicts with the overall purpose of developing such vehicles and further hinders the opportunity to increase public safety. ^[134] As a result, states should adopt

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separate DUI statutes governing the use of autonomous vehicles or create exemptions for autonomous vehicles from current traffic laws that presume a human is driving. ^[135] States should, however, take into consideration the ability of intoxicated persons to operate the driving functions of Level 4 vehicles and adopt either laws distinguishing the level of autonomy or require additional technology limiting operator control. ^[136] This allows states to obtain benefits from autonomous vehicles while ensuring safety. ^[137] Autonomous vehicles have the potential to revolutionize driving safety, but to effectively utilize such technology requires a proactive legislative approach. ^[138]

**A. WHETHER THE OPERATION OF AN AUTONOMOUS VEHICLE BY AN
INTOXICATED PERSON CONSTITUTES ACTUAL PHYSICAL CONTROL
("APC") REMAINS AMBIGUOUS**

Policy makers, scientists, and corporations support the use of autonomous vehicles to combat driving under the influence, although fully autonomous vehicles are not yet available to consumers. ^[139] While drivers of semi-autonomous vehicles have been arrested for driving under the influence ("DUI"), it has not been considered whether a person operating a fully autonomous vehicle can be convicted of a DUI in the United States. ^[140] A person operating an autonomous vehicle under the influence without operating any driving functions cannot be convicted of a DUI for *driving* under the influence. ^[141] APC of a vehicle, opposed to driving, is not as concrete. ^[142] States have defined APC as having control or dominion over a vehicle as well as having the potential to operate the vehicle. ^[143] Moreover, a person in a vehicle not operating the driving functions is guilty of DUI for merely having the ability to operate driving functions. ^[144] The hypothetical application of separate tests for determining APC over autonomous vehicles by a person under the influence of drugs or alcohol will exemplify whether the conduct would constitute a DUI conviction. ^[145] To effectively apply the totality of the circumstances approach and bright-line tests, Level 4 and Level 5 vehicles must be considered separately due to the significant difference in operator capabilities. ^[146]

*1. The Operation of a Level 4 Autonomous Vehicle Would Most Likely
Constitute Actual Physical Control ("APC") Under the Totality Approach
Based on the Ability for an Intoxicated Person to Exercise Control of
Driving Functions*

A person operating a Level 4 autonomous vehicle while under the influence could be guilty of driving under the influence ("DUI"), because the operator retains the ability to exercise APC of the vehicle under the totality of the circumstances approach. ^[147] Although Level 4 autonomous vehicles are

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capable of operating without human interention, these vehicles may contain certain driving functions, including a steering wheel and brakes, that allow a human to exercise control of the vehicle as a fallback measure. ^[148] Therefore, an operator of an autonomous vehicle would have the ability to exercise control of driving functions. ^[149] The ability to exercise control is not indicative of APC; instead, the weighing of the totality factors determine APC. ^[150]

Most general factors applied by courts that have adopted the totality approach are prerequisites for an autonomous vehicle to actually operate. ^[151] For instance, if an intoxicated person was using a Level 4 vehicle on a public roadway as a mode of transportation prior to being stopped by law enforcement, the keys would need to be in the ignition and the engine would need to be on for the vehicle to be moving. ^[152] Other factors, such as the vehicle being on a public roadway and the intoxicated person located in the driver's seat, may occur without the operator of the autonomous vehicle exercising control over driving functions. ^[153]

Some jurisdictions have adopted certain factors that warrant additional consideration. ^[154] In weighing the operability of a vehicle, in application to the above scenario, the vehicle itself is plainly operable. ^[155] Operability refers to the vehicle's ability to physically move and the intoxicated person's ability to control the moving vehicle. ^[156] In a Level 4 autonomous vehicle, due to the vehicle's operability and the ability for an intoxicated person to immediately exercise available driving functions, this factor weighs in favor of the person being in APC of the vehicle. ^[157]

However, there are potential difficulties in evaluating the intent of the intoxicated person, because an intoxicated person operating a Level 4 vehicle could solely intend for the vehicle to be in operation to reach a specific destination. ^[158] Intent could be interpreted as the intent of the person to generally operate the vehicle or the intent of the person to actually operate driving functions. ^[159] This factor potentially weighs in favor of the intoxicated person being in APC. ^[160]

Under the totality approach, an operator of a Level 4 vehicle may also be found guilty of a DUI based on circumstantial evidence even if it is deemed the person relinquished control of the vehicle. ^[161] If a person is found intoxicated in a Level 4 vehicle but is not presently driving or in APC, the person may be found guilty of DUI if there is sufficient evidence showing that the person drove while intoxicated before being apprehended. ^[162] Level 4 technology contains a fully automated driving system, but allows an operator to retain control over driving functions. ^[163] Thus, it will be difficult

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to prove that an operator of a Level 4 vehicle was not driving the vehicle prior to relinquishing control. ^[164]

2. An Intoxicated Person Operating a Level 5 Autonomous Vehicle Under the Totality of the Circumstances Approach Would Most Likely Not Be Considered in Actual Physical Control ("APC") of the Vehicle Due to the Lack of Driver Controls

Under the totality of the circumstances approach, an intoxicated person operating a Level 5 vehicle would most likely not be guilty of driving under the influence ("DUI"), because operators of Level 5 vehicles do not have access to driving functions beyond the input of a desired destination. ^[165] APC involves the ability to control or the potential to operate a vehicle. ^[166] Level 5 vehicle technology does not contain driver functions, and subsequently, an intoxicated operator of such a vehicle is not able to control the operation of the vehicle. ^[167] In consideration of the totality factors, the operation of a Level 5 autonomous vehicle is similar to a Level 4 vehicle, because it meets general factors such as the engine being turned on and the vehicle being on a public roadway. ^[168] Unlike a Level 4 vehicle, the operability of the vehicle, the intent of the driver, and the ability to relinquish control weigh in favor of demonstrating that an intoxicated person cannot have APC over a Level 5 vehicle. ^[169]

In regards to operability, a Level 5 vehicle itself would not be inoperable in this scenario, and in the event a Level 5 vehicle becomes inoperable, an intoxicated person would still not be able to exercise control over the vehicle. ^[170] When using a Level 5 autonomous vehicle, the only human intervention required is to input the destination. ^[171] Operability, as applied to a Level 5 vehicle, would weigh in favor of an intoxicated person not exercising APC. ^[172]

Similarly, the intent of the person operating a Level 5 vehicle is unlikely to result in APC, because the human input required does not allow for the use of driving functions. ^[173] While a person operating a Level 5 vehicle intends the operation of the vehicle, the driver does not intend to personally operate the vehicle. ^[174] This intent to travel to a destination is similar to that of a person using a taxicab, Uber, or public transportation service - none of which allow the intoxicated individual any control regarding the driving functions. ^[175] In this situation, the intoxicated person is merely a passenger. ^[176]

In addition, an intoxicated person operating a Level 5 vehicle could not be convicted of a DUI based on circumstantial evidence that, prior to relinquishing control, the person was actually driving. ^[177] The concept of

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relinquishing control would not apply, because a person cannot relinquish control over something he or she never had controlover. ^[178]

3. The Operation of a Level 4 Autonomous Vehicle by an Intoxicated Person May Be Considered Actual Physical Control ("APC") Under Bright-Line Tests Regardless of Whether the Person Was Exercising Control of Driving Functions

Bright-line tests, unlike the totality approach, are easier to apply as such tests are essentially a matter of whether a certain condition has occurred. ^[179] Under the bright-line tests established in *Commonwealth v. Reid* ^[180] and *Rogers v. State*, ^[181] an intoxicated person operating a Level 4 autonomous vehicle could be considered in APC and, therefore, guilty of driving under the influence ("DUI"). ^[182]

The bright-line test for Arkansas, as established by the *Rogers* court, concludes that a person is in APC of a vehicle when the keys are located in the ignition. ^[183] If an intoxicated person was operating a Level 4 vehicle with the key in the ignition or the engine turned on, then the person would automatically be guilty of a DUI regardless of if the person controlled any driver functions, because APC begins when the keys are in the ignition. ^[184]

In applying the bright-line test explicated in *Reid*, an intoxicated person operating a Level 4 vehicle may be considered in APC depending on the person's placement in the vehicle as well as the key being located in the ignition. ^[185] This bright-line test stipulates that the intoxicated person needs to be in the driver's seat of the vehicle. ^[186] Although a Level 4 vehicle is fully autonomous, fallback remedies might require a person to be seated in the driver seat in order to exercise control of the vehicle in the event the vehicle's technology malfunctions. ^[187] Therefore, whether an intoxicated person is in APC under Virginia's bright-line test will depend on the operator's location in the vehicle and whether that particular autonomous vehicle requires the operator to be seated in the driver's seat. ^[188]

4. An Intoxicated Person Operating a Level 5 Autonomous Vehicle May Be in Actual Physical Control ("APC") of the Vehicle Under Certain Bright-Line Tests

The operation of a Level 5 autonomous vehicle by an intoxicated person could potentially be considered APC under bright-line tests, because the conditions of the tests could be satisfied despite the operator retaining no control over driving functions. ^[189] Similar to Level 4 vehicles, a person operating a Level 5 vehicle would be in APC under the rule outlined in *Rogers v. State* ^[190] the moment the keys are located in the ignition or the engine is turned on. ^[191] The lack of driving functions in Level 5 vehicles is

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not dispositive of the ability to be in APC under the *Rogers* bright-line test.^[192]

However, analyzing the additional requirement in the bright-line test adopted by Virginia in *Reid v. Commonwealth*^[193] produces a different result.^[194] Virginia's test requires that the key be located in the ignition as well as the intoxicated person being seated in the driver seat.^[195] Level 5 vehicles do not contain driving functions associated with the driver's seat.^[196] Without a driver's seat present, an intoxicated operator of a Level 5 vehicle cannot be in APC under the bright-line test established in *Reid*.^[197]

**B. STATES SHOULD ADOPT SEPARATE DRIVING UNDER THE
INFLUENCE ("DUI") STATUTES OR EXEMPTIONS FOR AUTONOMOUS
VEHICLES TO PROMOTE THE DEVELOPMENT AND USE OF
AUTONOMOUS VEHICLES AND ENHANCE HIGHWAY SAFETY**

Whether an intoxicated person is in violation of DUI statutes while operating an autonomous vehicle remains ambiguous.^[198] Differences in technology and methods for interpreting actual physical control ("APC") result in inconsistent application of the law.^[199] Current application of DUI statutes inhibits the use of autonomous vehicles to prevent injury caused by driving under the influence, because a person could be charged with a DUI while using an autonomous vehicle.^[200] In response to the inevitable use of autonomous vehicles, states should adopt either separate laws or create exemptions for persons operating autonomous vehicles under the influence of drugs or alcohol to resolve current ambiguities.^[201]

Australia proactively seeks to address this dilemma by adopting separate legislation for autonomous vehicles.^[202] The Australian National Transport Commission published a report outlining policy recommendations to address the legal assumption that there is a human driver in autonomous vehicles.^[203] This report recommends Australian states and territories clarify that an intoxicated person operating an autonomous vehicle would not be subject to DUI-related offenses.^[204] Lawmakers have approved recommendations of the report and seek to create a uniform national approach to determine who is legally responsible for the operation of such vehicles.^[205]

Although the U.S. National Highway and Transportation Safety Administration suggested regulations for the use and development of autonomous vehicles, criminal fault has yet to be addressed by the majority of states.^[206] Some states have recently passed legislation specifically distinguishing the driver or operator of an autonomous vehicle.^[207] Some laws, however, remain counterproductive toward achieving increased

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highway safety. ^[208] California's autonomous vehicle statute explicitly defines operator as the person who is seated in the driver's seat or the person who causes the vehicle to engage. ^[209] This statute does not carve out an exception for autonomous vehicles, meaning the statute attaches both criminal and civil liability to the designated operator despite such person lacking control over any driving functions. ^[210] California's statute deters the use of autonomous vehicles by holding operators liable for the actions of the vehicle. ^[211]

Florida's recently enacted legislation not only exempts the presumption of a human driver, but also expressly characterizes an autonomous driving system ("ADS") as the operator of an autonomous vehicle while the system is engaged. ^[212] Unlike California, Florida absolves a human engaging the ADS from criminal or civil liability. ^[213] By removing liability, a person will not be penalized for properly using autonomous vehicles and, subsequently, will not be deterred from using autonomous vehicles. ^[214] Ultimately, such exemptions create the opportunity for states to benefit from autonomous vehicle technology. ^[215]

States should follow Florida's and Australia's lead in creating exemptions under current DUI statutes to allow for the operation of fully autonomous vehicles while under the influence. ^[216] Legislation creating DUI exemptions for autonomous vehicles would address the ambiguities explicated above and also promote public policy surrounding DUI statutes. ^[217] By encouraging and allowing an intoxicated person to travel without driving, the danger caused by human error would diminish. ^[218] States should adopt such laws to keep up with the fast pace of developing technologies and to effectively reap the safety benefits of autonomous vehicles. ^[219]

**C. THE POTENTIAL THREAT CAUSED BY INTOXICATED PERSONS
OPERATING LEVEL 4 AUTONOMOUS VEHICLES CAN BE REMEDIED
BY SEPARATE LEGISLATION OR ADDITIONAL TECHNOLOGY
REQUIREMENTS**

Providing an exemption for the operation of autonomous vehicles while intoxicated presents an issue of safety in regard to Level 4 vehicles. ^[220] States began including actual physical control ("APC") in driving under the influence ("DUI") statutes to increase roadway safety by allowing officers to apprehend an intoxicated person imminently likely to exercise control of driving functions. ^[221] Although the use of autonomous vehicles will revolutionize roadway safety, the operation of Level 4 vehicles by an intoxicated person may still result in DUI-related injuries and deaths, because operators have the ability to exercise control over driver functions. ^[222] The Australian National Transport Commission suggests that operators

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of autonomous vehicles with manual controls, such as a steering wheel and brakes, should be subject to current DUI statutes. ^[223] Limiting the DUI exemption strictly to Level 5 vehicles would prevent the potential harm caused by an intoxicated person exercising the available driving functions of a Level 4 vehicle. ^[224]

Exemptions should also be included for Level 4 vehicles that contain Driver Alcohol Detection System for Safety ("DADSS") technology. ^[225] The DADSS Program entered into an agreement with the Automotive Coalition for Traffic Safety ("ACTS") and the U.S. National Highway Traffic Safety Administration ("NHTSA") to explore new technology for alcohol detection in vehicle operators. ^[226] DADSS prevents vehicles from moving when the system detects a driver is intoxicated at or above the legal limit through touch-based and breath-based systems. ^[227] The system would operate in conjunction with Automated Driving Systems ("ADS") technology in Level 4 vehicles. ^[228] DADSS technology could be innovated to lock manual driver functions and prevent the use of fallback measures, and in the event of a technological malfunction, the vehicle would safely stop. ^[229] DADSS would allow an intoxicated person to operate a Level 4 vehicle as a Level 5 vehicle, and because the intoxicated person could not operate driving controls, an exemption should be included in proposed legislation for such technology. ^[230] Enacting exemptions and implementing additional technology addresses the potential risks associated with the ability of an intoxicated person to exercise control over driving functions in a fully autonomous vehicle. ^[231]

IV. CONCLUSION

Advancements in technology indicate that autonomous vehicles will soon be available to consumers across the United States. ^[232] Autonomous vehicles, however, present legal implications, especially in regards to driving under the influence ("DUI") statutes. ^[233] Under the totality of the circumstances approach and bright-line tests, it remains unclear whether an intoxicated person operating an autonomous vehicle is in actual physical control ("APC") over the vehicle in violation of DUI statutes. ^[234] Under some states' recently enacted laws governing autonomous vehicles, civil and criminal liability is placed on a human regardless of whether the autonomous driving system ("ADS") is in complete control of the vehicle's driving functions. ^[235] The ambiguity of whether a person is subject to DUI statutes while operating an autonomous vehicle consequently deters a person from using an autonomous vehicle, and thus, prevents states from experiencing substantial safety benefits. ^[236] To avoid this problem, states should enact separate DUI statutes or exemptions for the operation of autonomous vehicles. ^[237] However, states should consider the technological differences of Level 4 vehicles and create laws that distinguish between vehicles with driving

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functions or fallback technology available to an intoxicated person. ^[238] States should also recognize technology such as Driver Alcohol Detection for Safety Systems ("DADSS") to prevent an intoxicated person from being able to exercise control of driving functions in a Level 4 vehicle. ^[239]

Although only Level 3 autonomous vehicles are currently available to consumers, corporations are urgently working to produce consumer-ready fully autonomous vehicles. ^[240] If technology severely outpaces the law, issues will arise regarding civil and criminal liability, and producers and consumers may be deterred from selling and buying advanced technology. Laws must proactively address potential issues before they arise to ensure that autonomous vehicles are promoted in order to achieve safety benefits. Autonomous vehicles have the ability to prevent accidents caused by human error - including driving under the influence. It is human error, nevertheless, that may be the roadblock preventing the revolutionization of highway safety.

□ *Traffic Safety Facts: Alcohol Impaired Driving*, NAT'L HIGHWAY & TRAFFIC SAFETY ADMIN. (2018), <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812630>.

□ Caitlin Dewey, *Why the Liquor Industry Wants to Get Self-Driving Cars on the Road*, WASH. POST (Mar. 13, 2018), <https://www.washingtonpost.com/news/wonk/wp/2018/03/13/why-the-liquor-industry-wants-to-get-self-driving-cars-on-the-road/>. "[B]rewers and distillers say autonomous vehicles could reduce drunk driving. Without the need to drive home after a night at the bar, drinkers could also consume far more. And that will boost alcohol sales, one analysis predicts, by as much as \$250 billion." *Id.*

□ Harry Surden & Mary-Anne Williams, *Technological Opacity, Predictability, and Self-Driving Cars*, 38 CARDOZO L. REV. 121, 125 (2016).

□ Melissa L. Griffin, *Steering (or not) Through the Social and Legal Implications of Autonomous Vehicles*, 11 J. BUS. ENTREPRENEURSHIP & L. 81, 96-97 (2018).

□ *Compare* Neal E. Boudette, *Tesla, Facing Setbacks and Skeptics, Tries to Get Back on Course*, N.Y. TIMES (June 10, 2019), <https://www.nytimes.com/2019/06/10/business/tesla-elon-musk-outlook.html> (noting Tesla's set-backs based partially on criticism of Tesla's autopilot feature), *with* Niraj Chokshi & Peter Eavis, *Tesla's Stock Is Up 36% in Two Days. What's Going On?*, N.Y. TIMES (Feb. 4, 2020),

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<https://www.nytimes.com/2020/02/04/business/tesla-stock-price.html>
(discussing Tesla's recent increase in stock prices despite prior losses).

□ See Surden & Williams, *supra* note 3, at 125 (stating that "[d]ue to the safety and efficiency benefits that [autonomous vehicles] are expected to bring, many experts predict that fully autonomous automobiles will be common on the road within the five-to-fifteen-year time frame").

□ Tracy Hresko Pearl, *Fast & Furious: The Misregulation of Driverless Cars*, 73 N.Y.U. ANN. SURV. AM. L. 19, 37 (2017).

□ See *infra* notes 139-97 and accompanying text.

□ See *infra* notes 139-97 and accompanying text.

□ See *infra* notes 139-97 and accompanying text.

□ See *infra* notes 64-76 and accompanying text.

□ See *infra* notes 206-19 and accompanying text.

□ See *infra* notes 206-19 and accompanying text.

□ See *infra* notes 24-54 and accompanying text.

□ See *infra* notes 55-72 and accompanying text.

□ See *infra* notes 73-76 and accompanying text.

□ See *infra* notes 77-83 and accompanying text.

□ See *infra* notes 84-131 and accompanying text.

□ See *infra* notes 139-97 and accompanying text.

□ See *infra* notes 198-201 and accompanying text.

□ See *infra* notes 202-19 and accompanying text.

□ See *infra* notes 220-24 and accompanying text.

□ See *infra* notes 225-31 and accompanying text.

□ Surden & Williams, *supra* note 3, at 131.

□ *Id.* at 125.

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□ Griffin, *supra* note 4, at 83-86.

The idea of autonomous vehicles first debuted at General Motor (GM)'s Futurama exhibit at the 1939 World Fair In 1977, a Japanese engineering lab revealed a car that could process images of the road ahead It was not until 1993 that German aerospace engineer, Ernst Dickmanns, who worked on similar projects since the 1980s, piloted a Mercedes S-Class from Munich to Denmark, with about 95% of the distance being driven fully automated In 2010, the Google Driverless Car program launched, and the fleet of sixty autonomous cars has now covered more than two million miles.

Id.

□ Surden & Williams, *supra* note 3, at 132; Griffin, *supra* note 4, at 86.

□ U.S. DEPT. OF TRANSP., AUTOMATED VEHICLES 3.0: PREPARING FOR THE FUTURE OF TRANSPORTATION iv (2018) [hereinafter AUTOMATED VEHICLES 3.0] (explaining the levels of automation adopted from the Society of Automobile Engineers International ("SAE")).

□ Griffin, *supra* note 4, at 86, 96.

□ *Id.* at 86. *See also* Surden & Williams, *supra* note 3, at 132 (stating that "there are partially or 'semi' autonomous systems, in which some important actions are decided by humans, and others by computers"); Pearl, *supra* note 7, at 24 (noting that "[s]emi-autonomous vehicles, however, only direct 'some aspects of safety-critical control function . . . without driver input,' but require supervision from a licensed driver").

□ Surden & Williams, *supra* note 3, at 133-34. Advanced Driver-Assistance Systems ("ADAS") is a technology that automatically takes control of certain driving functions. *Id.*

□ *See e.g.* TESLA, <https://www.tesla.com/autopilot> (last visited Oct. 26, 2019) (stating that Tesla's current "Autopilot enables your car to steer, accelerate and brake automatically within its lane"); Boudette, *supra* note 5 (noting that the latest version of Autopilot can "navigate to a specific destination and change lanes without prompting by a human driver").

□ *See* Griffin, *supra* note 4, at 96 (stating that Level 3 autonomy takes Level 2 technology "a step further by *making decisions* to change lanes or pass another vehicle") (emphasis added).

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□ AUTOMATED VEHICLES 3.0, *supra* note 28, at iv; Griffin, *supra* note 4, at 96.

□ Griffin, *supra* note 4, at 96; Boudette, *supra* note 5 (reporting Tesla's Autopilot can "navigate to a specific destination and change lanes without prompting by a human driver").

□ Griffin, *supra* note 4, at 86.

□ Surden & Williams, *supra* note 3, at 133.

□ *See e.g.* U.S. DEPT. OF TRANSP., AUTOMATED DRIVING SYSTEMS 2.0: A VISION FOR SAFETY, 8 (2017) [hereinafter AUTOMATED VEHICLES 2.0] (stating that vehicles should have fallback provisions in which "ADS should be able to notify the human driver of such events in a way that enables the driver to regain proper control of the vehicle or allows the ADS to return to a minimal risk condition independently"); AUTOMATED VEHICLES 3.0, *supra* note 28, at iv (noting that Level 4 vehicles are considered high automation opposed to Level 5 vehicles which are full automation performing "all aspects of the dynamic driving task under all roadway and environmental conditions that can be managed by a human driver").

□ AUTOMATED VEHICLES 2.0, *supra* note 38, at 4.

□ Griffin, *supra* note 4, at 86 (stating that, "Level 5 vehicles do not have a steering wheel or driver controls"); Pearl, *supra* note 7, at 29 (distinguishing that "[a] human being is not needed to supervise, monitor, or control the vehicle in any setting, and is not needed as a 'fallback' option in the event of system failure" in a Level 5 vehicle).

□ *See infra* notes 42-53 and accompanying text.

□ AUTOMATED VEHICLES 3.0, *supra* note 28, at 45 (defining ADS or Automated Driving System as "the hardware and software that are collectively capable of performing the entire Dynamic Driving Task on a sustained basis, regardless of whether it is limited to a specific operational design domain" used to specifically describe the automation system in Level 3, 4, and 5 vehicles); *see* Surden & Williams, *supra* note 3, at 133-34 (referring to ADS as Advanced Driver Assistance System (ADAS)); *see also* DADSS, <https://www.dadss.org/> (last visited Oct. 26, 2019) (discussing the compatibility of Driver Alcohol Detection System for Safety technology with ADS).

□ Surden & Williams, *supra* note 3, at 133-34.

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□ *Id.* at 134 (noting that ADAS or ADS features "include lane-keeping systems (that automatically correct steering to keep a driver within lane boundaries), automatic parking, and adaptive cruise control systems (that automatically accelerate, brake, and maintain a safe distance behind another vehicle on the highway by detecting distances and adjusting speed)").

□ TESLA, *supra* note 32 (stating that Tesla's current autonomy technology "enables your car to steer, accelerate and brake automatically within its lane").

□ Surden & Williams, *supra* note 3, at 131.

□ Griffin, *supra* note 4, at 96-98; Surden & Williams, *supra* note 3, at 137-43.

□ Surden & Williams, *supra* note 3, at 141-43.

□ Griffin, *supra* note 4, at 97.

□ Griffin, *supra* note 4, at 96-97; Matt McFarland, *Most Self-Driving Companies Say This Tech Is Crucial. Elon Musk Disagrees*, CNN (June 18, 2019), <https://www.cnn.com/2019/06/17/tech/lidar-self-driving-tesla/index.html> (reporting that "[c]ompanies with the most experience developing self-driving cars - including Alphabet's Waymo, Ford (F), and Amazon-backed Aurora - believe lidar is critical for safety").

□ Surden & Williams, *supra* note 3, at 141.

□ *Id.*

□ *Compare* Griffin, *supra* note 4, at 96 (noting that "the ultimate goal of Level 5 autonomous vehicle is no driver intervention required - that means no steering wheel, no pedals, and full capacity to navigate the roads to any requested destination"), *with* Pearl, *supra* note 7, at 29 (stating that in Level 5 vehicles "[a] human being is not needed to supervise, monitor, or control the vehicle in any setting, and is not needed as a 'fallback' option in the event of system failure").

□ *See infra* notes 139-97 and accompanying text.

□ KPMG INT'L, 2019 AUTONOMOUS VEHICLES READINESS INDEX: ASSESSING COUNTRIES' OPENNESS AND PREPAREDNESS FOR AUTONOMOUS VEHICLES 10 (2019), <https://assets.kpmg/content/dam/kpmg/xx/pdf/2019/02/2019-autonomous-vehicles-readiness-index.pdf> [hereinafter *Readiness Index*]

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(stating that "[t]his edition . . . assesses 25 countries on 25 different variables, organized into four pillars").

□ READINESS INDEX, *supra* note 55, at 17.

□ READINESS INDEX, *supra* note 55, at 3, 19, 21, (noting that the "[Finish] government has recently passed two new laws that enable [the use of] AVs," and in Germany the "[g]overnment passed an action plan on the report by an Ethics Commission on Automated and Connected Driving"); Sandeep Gopalan, *Legal lessons for Australia from Uber's Self-driving Car Fatality*, THE CONVERSATIONALIST (Mar. 20, 2018), <https://theconversation.com/legal-lessons-for-australia-from-ubers-self-driving-car-fatality-93649> (reporting that "[i]n Australia, the governments of New South Wales, Victoria, and South Australia have passed laws on the subject. NSW adopted legislation in 2017 - the Transport Legislation Amendment (Automated Vehicle Trials and Innovation) Act 2017"); see AUSTL. NAT'L TRANSP. COMM'N., CHANGING DRIVING LAWS TO SUPPORT AUTOMATED VEHICLES 2 (2018) (outlining policy suggestions for lawmakers); Asha Barbaschow, *Australia to Draft New Laws Allowing Autonomous Vehicles*, ZDNET (May 30, 2019), <https://www.zdnet.com/article/australia-to-draft-new-laws-allowing-autonomous-vehicles/> ("NTC chief executive Paul Retter said the legislation, to be in place by 2020, is expected to help automated vehicle manufacturers, as well as the public, understand the legal framework they are operating in, and accelerate the introduction of autonomous vehicles in Australia.").

□ *Autonomous Vehicles - Self-Driving Vehicles Enacted Legislation: Federal Action*, NAT'L CONF. OF ST. LEGISLATURES (Oct. 9, 2019), <http://www.ncsl.org/research/transportation/autonomous-vehicles-self-driving-vehicles-enacted-legislation.aspx> [hereinafter *Self-Driving Vehicles Enacted Legislation*].

□ *Automated Vehicles for Safety*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., <https://www.nhtsa.gov/technology-innovation/automated-vehicles-safety> (last visited Oct. 26, 2019).

□ *Id.* (stating that the updated guidance provides support for the automotive industry and stakeholders "as they consider and design best practices for the safe testing and deployment of ADS levels 3 through 5. It also provides technical assistance to states and best practices for policymakers regarding ADS").

□ *Id.*

□ *Self-Driving Vehicles Enacted Legislation*, *supra* note 58.

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□ SELF DRIVE Act, H.R. 3388, 115th Cong. (2017). In September 2017, the Safety Ensuring Lives Future Development and Research in Vehicle Evolution Act ("SELF DRIVE Act") passed the U.S. House of Representatives. Specifically, the Act provided that the U.S. Department of Transportation must proscribe safety assessment certifications of the development of an autonomous vehicle. In addition, the Act required manufactures to develop cybersecurity and privacy plans for autonomous vehicles available to consumers. However, the U.S. Senate did not pass the SELF DRIVE Act. *Id.*; AV START Act, S. 1885, 115th Cong. (2018). In September 2018, the American Vision for Safer Transportation Through Advancement Revolutionary Technologies Act ("AV START Act") was introduced to the U.S. Senate. The Act encouraged testing and deployment of "highly automated vehicles" by proscribing safety exemptions, the U.S. Department of Transportation's role, and the conditions under which vehicles may be introduced into interstate commerce. S. 1885.

□ *Self-Driving Vehicles Enacted Legislation*, *supra* note 58.

□ *Id.*; Pearl, *supra* note 7, at 43 (claiming laws must be amended "because they are based on the underlying assumption that human beings are operating the vehicle").

□ Pearl, *supra* note 7, at 49 (noting that Nevada, California, Florida, Oregon, Texas, New York, and the District of Columbia have passed legislation to define the operator of autonomous vehicles).

□ CAL. VEH. CODE § 38750 (West 2019) (defining operator as "the person who is seated in the driver's seat, or, if there is no person in the driver's seat, causes the autonomous technology to engage").

□ CAL. VEH. CODE § 38750.

□ Pearl, *supra* note 7, at 45 (stating that "no state other than Florida has, as of yet, passed a law explicitly permitting the use of fully driverless vehicles for anything other than testing by manufacturers").

□ FLA. STAT. § 316.85(3)(a) (2019). "[T]he automated driving system, when engaged, shall be deemed to be the operator of an autonomous vehicle, regardless of whether a person is physically present in the vehicle while the vehicle is operating with the automated driving system engaged." *Id.*

□ *Id.* § 316.85(3)(b).

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□ *Self-Driving Vehicles Enacted Legislation*, *supra* note 58; *see* Pearl, *supra* note 7, at 48-55 (discussing the implications of current state statutes that presume a human is driving).

□ *See Self-Driving Vehicles Enacted Legislation*, *supra* note 58 (outlining the federal government's and states' efforts in passing legislation to promote using autonomous vehicles); *see also* AUTOMATED VEHICLES 3.0, *supra* note 28, at 1 (stating that "[a]utomated vehicles that accurately detect, recognize, anticipate, and respond to the movements of all transportation system users could lead to breakthrough gains in transportation safety").

□ AUTOMATED VEHICLES 3.0, *supra* note 28, at 3; Griffin, *supra* note 4, at 88; Surden & Williams, *supra* note 3, at 128.

□ Pearl, *supra* note 7, at 39.

Accordingly, researchers believe that if even just 10% of the motor vehicles used in the United States were autonomous, 1,100 fewer people would die in car accidents each year. At a 50% market penetration, 9,600 lives would be saved and 2 million fewer traffic accidents would occur each year. At a 90% market penetration, 21,700 lives would be saved and there would be over 4 million fewer crashes each year in the United States. One scholar theorizes that "we might plausibly imagine a reduction to hundreds of deaths per year in the United States as we achieve full deployment" of autonomous vehicles. In fact, driverless cars are predicted to reduce accidents by so much that the automobile insurance industry is preparing for its revenues to shrink considerably and premiums to "drop as much as 60 percent in 15 years as self-driving cars hit the roads."

Id.

□ Griffin, *supra* note 4, at 88 (claiming that "drunk driving is still one of the highest risks on the road; on average one person every fifty-three minutes dies due to a drunk driver. Supporters [of autonomous vehicles] argue that autonomous cars will make our roads safer by eliminating those risks").

□ *State v. Sommers*, 339 P.3d 65, 68-69 (Mont. 2014) (stating that "[t]he National Committee on Uniform Traffic Laws and Ordinances first included the language 'in actual physical control' in the 1934 version of the UVC [Uniform Vehicle Code] [M]ore than 30 states have adopted the [UVC], or a variation of its DUI statute that includes the phrase 'actual physical control'"); *see generally* Patricia C. Kussmann, Annotation, *What*

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Constitutes Driving, Operating, or Being in Control of Motor Vehicle for Purposes of Driving While Intoxicated Statute, Regulation, or Ordinance - Being in Physical Control or Actual Physical Control - General Principles, 92 A.L.R.6th 295 (2019) (collecting cases); James Pearson, Jr., Annotation, *What Constitutes Driving, Operating, or Being in Control of Motor Vehicles for Purposes of Driving While Intoxicated Statute or Ordinance*, 93 A.L.R.3d 7 (2019) (collecting cases).

□ Kussman, *supra* note 77, at 2 (stating that public policy behind adopting APC in DUI statutes is to "[enable] law enforcement to apprehend a drunken driver before he strikes, as well as serving as evidence of prior intoxicated driving").

□ *Sommers*, 339 P.3d at 68-69; UNIF. VEHICLE CODE §1-123 (NAT'L COMM'N ON UNIF. TRAFFIC LAWS & ORDINANCES 2000) (defining driving as "to operate or be in physical control of a vehicle").

□ Kussmann, *supra* note 77, at 2 (defining actual physical control as "having control of or dominion over a motor vehicle [or] having the potential to drive or operate a motor vehicle").

□ *Case v. Commonwealth*, 753 S.E.2d 860, 867 (Va. Ct. App. 2014) (determining defendant was in APC of the vehicle when the motor was running); *State v. Maletich*, 384 N.W.2d 586, 588 (Minn. Ct. App. 1986) (noting the defendant "had the present ability to drive away, even if had trouble finding the keys, as the keys were in his constructive possession"); *State v. Rivera*, 83 P.3d 69, 74 (Ariz. Ct. App. 2004) (concluding that "a passenger who grabs the steering wheel of a moving car and alters the car's movement has assumed [APC] for the purposes of the DUI statutes").

□ *See generally* Kussmann, *supra* note 77 (collecting cases on states interpreting APC in regard to DUI statutes).

□ *See generally* Kussmann, *supra* note 77 (examining cases discussing the totality of the circumstances approach and jurisdictions that have rejected that approach for bright-line tests).

□ *State v. Sommers*, 339 P.3d 65, 72 (Mont. 2014) (noting that a majority of states use the totality of the circumstances approach to determine APC); *State v. Love*, 897 P.2d 626 (Ariz. 1995); *Atkinson v. State*, 627 A.2d 1019 (Md. 1993).

□ *Atkinson*, 627 A.2d at 1027.

□ *Id.* at 1027-28; *Love*, 897 P.2d at 628; *Sommers*, 339 P.3d at 72.

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□ *Sommers*, 339 P.3d at 72 (reasoning that operability is a factor to consider and, notably, although an intoxicated person cannot have control over a vehicle that is inoperable, in certain circumstances, the vehicle's disability can be easily cured); *Wells v. Commonwealth*, 709 S.W.2d 847, 850 (Ky. Ct. App. 1986) (noting that, in examining intent as a factor under the totality approach, there was no evidence that the defendant had planned or intended to operate the vehicle, because the inference of intent was negated by the undisputed facts that the transmission was in neutral and the parking brake was engaged in addition to the fact that the defendant was sleeping in the vehicle); *Love*, 897 P.2d at 628 (examining factors to consider in determining APC).

□ *Atkinson*, 627 A.2d at 1028 (stating that "[n]o one factor alone will necessarily be dispositive of whether the defendant was in 'actual physical control' of the vehicle . . . Courts must in each case examine what the evidence showed the defendant was doing or had done, and whether these actions posed an imminent threat to the public"); see *Kusmann*, *supra* note 77 (collecting and comparing cases determining APC).

□ 897 P.2d 626 (Ariz. 1995).

□ *State v. Love*, 897 P.2d 626, 629 (Ariz. 1995).

□ *Love*, 897 P.2d at 627.

□ *Id.*

□ *Id.*

□ *Id.*

□ *Id.* at 628.

□ *Id.*

□ *Id.* at 630 (determining that "whether a driver had actual physical control is a question for the fact finder and should be based upon consideration of all the circumstances," therefore, the court "vacate[d] the memorandum decision of the court of appeals, reverse[d] appellant's conviction, and remand[ed] the case for a new trial").

□ 274 P.2d 338 (Ariz. 1954).

□ 666 P.2d 456 (Ariz. 1983).

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□ *Love*, 897 P.2d at 628 (commenting on the appellate court's finding "that unless a motorist pulls completely off the travelled portion of the roadway *and* turns off the ignition he or she cannot escape a presumption of actual physical control" and "such a rigid, mechanistic analysis that is neither appropriate nor in keeping with the rest of our criminal jurisprudence").

□ *Id.* at 629.

□ *Id.* at 628.

□ *Id.* at 629.

□ *Id.* at 628. The non-exhaustive list of factors includes:

[W]hether the vehicle was running or the ignition was on; where the key was located; where and in what position the driver was found in the vehicle; whether the person was awake or asleep; if the vehicle's headlights were on; where the vehicle was stopped (in the road or legally parked); whether the driver had voluntarily pulled off the road; time of day and weather conditions; if the heater or air conditioner was on; whether the windows were up or down; and any explanation of the circumstances advanced by the defense. *Id.*

□ *Id.* at 629-30.

□ LEGAL INFO. INST., *Bright-Line Rule*, CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/bright-line_rule (last visited Oct. 31, 2019).

□ *State v. Sommers*, 339 P.3d 65, 73 (Mont. 2014) (rejecting a bright-line test for the totality approach as it allows the jury to consider hard-to-predict situations); *Atkinson v. State*, 627 A.2d 1019, 1028 (Md. 1993) (determining that "[n]o one factor alone will necessarily be dispositive of whether the defendant was in 'actual physical control' of the vehicle"); *State v. Love*, 897 P.2d 626, 628 (Ariz. 1995) (noting that bright-line tests result in "a rigid, mechanistic analysis is neither appropriate nor in keeping with the rest of our criminal jurisprudence" and there is no reason "why DUI cases should be accorded unique treatment").

□ *See Rogers v. State*, 224 S.W.3d 564, 566 (Ark. Ct. App. 2006). Arkansas, using the bright-line test, recognized that "[t]he purpose of Arkansas laws against driving while intoxicated is to prevent accidents and protect persons from injury." *Id.*

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□ 224 S.W.3d 564 (Ark. Ct. App. 2006).

□ *Rogers v. State*, 224 S.W.3d 564, 566 (Ark. Ct. App. 2006) (determining that "[t]he case law developed in this area makes clear that if a person does not place keys in the ignition, then this scenario falls short of the proof necessary to establish [APC] of the vehicle for purposes of DWI [driving while intoxicated]").

□ *Rogers*, 224 S.W.3d at 564.

□ *Id.*

□ *Id.*

□ *Id.* at 565.

□ *Id.*

□ *Id.*

□ *Id.*

□ *Id.* at 565-66.

□ *Id.*

□ *Id.* at 566 (noting that "the case law developed in this area makes clear that if a person does not place keys in the ignition, then this scenario falls short of the proof necessary to establish actual physical control of the vehicle for purposes of DWI").

□ *Id.* at 566-67 (citing *Stephenson v. City of Fort Smith*, 36 S.W.3d 754 (Ark. Ct. App. 2000); *Wiyott v. State*, 683 S.W.2d 220 (Ark. 1985); *Dowell v. State*, 671 S.W.2d 740 (Ark. 1984)).

□ *Id.* at 567.

□ *Id.*

□ 99 Va. Cir. 362 (Va. Cir. Ct. 2018).

□ *Commonwealth v. Reid*, 99 Va. Cir. 362, 370 (Va. Cir. Ct. 2018) (citing *Enriquez v. Commonwealth*, 722 S.E.2d 252, 255 (Va. 2012)).

□ *Reid*, 99 Va. Cir. at 362-63.

□ *Id.* at 363.

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□ *Id.*

□ *Id.* at 371.

□ *Id.* at 370 (citing *Enriquez*, 722 S.E.2d 252; *Sarafin v. Commonwealth*, 764 S.E.2d 71 (Va. 2014)) (noting that the court determined APC under the bright-line test in *Enriquez* and further expanded the test in *Sarafin* to include not only public highways and parking lots, but also private driveways).

□ *Reid*, 99 Va. Cir. at 371.

□ See *infra* notes 139-97 and accompanying text.

□ See *infra* notes 139-97 and accompanying text.

□ See *infra* notes 198-201 and accompanying text.

□ See *infra* notes 202-19 and accompanying text.

□ See *infra* notes 220-24 and accompanying text.

□ See *infra* notes 220-24 and accompanying text.

□ See *infra* notes 225-31 and accompanying text.

□ See e.g. Surden & Williams, *supra* note 3, at 128 (stating that "[m]ost experts predict that autonomous cars will be much safer than human drivers"); *Self-Driving Vehicles Enacted Legislation*, *supra* note 58 (reporting that twenty-nine states enacted legislation and governors from eleven states have issued executive orders to regulate safe development and production of autonomous vehicles); Dewey, *supra* note 2 (reporting that "Wine and Spirits Wholesalers of America, a group representing nearly 400 U.S. alcohol brokers, officially joined the Coalition for Future Mobility, which has lobbied in favor of self-driving cars").

□ See Surden & Williams, *supra* note 3, at 125 (noting that fully autonomous vehicles will be available to consumers within the next ten to fifteen years); see also Griffin, *supra* note 4, at 85 (stating that fully autonomous vehicles are not yet available to consumers and "[t]he race to bring a fully autonomous vehicle to the consumer's market appears to exist primarily between Google and Tesla").

□ *Atkinson v. State*, 627 A.2d 1019, 1022 (Md. 1993) (defining "drive" as "steering and controlling a vehicle while in motion"); Pearson, *supra* note 77, at 3 (stating that "[t]he courts which have defined 'driving,' as used in

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statutes prohibiting driving while intoxicated, have ordinarily held that the term requires motion. Thus, many courts have stated that driving requires that the vehicle be in motion in order for the offense of drunk driving to be committed"); *see* Surden & Williams, *supra* note 3, at 131 (noting that fully autonomous vehicles operate absent human intervention).

□ *See* Kussmann, *supra* note 77, at 2 (explaining that states' definitions for actual physical control are diverse).

□ Kussmann, *supra* note 77, at 2 (defining actual physical control as "having control of or dominion over a motor vehicle [or] having the potential to drive or operate a motor vehicle"); *State v. Love*, 897 P.2d 626, 628 (Ariz. 1995) (noting that APC "may, under some circumstances, apply to persons who are not at the time driving or otherwise putting a vehicle in motion"); *State v. Sommers*, 339 P.3d 65, 69 (Mont. 2014) (determining that APC "is meant to 'enable the drunken driver to be apprehended before he strikes'"); *Atkinson*, 627 A.2d at 1028 (stating that "once an individual has started the vehicle, he or she has come as close as possible to actually driving without doing so and will generally be in 'actual physical control' of the vehicle").

□ *See generally* Kussmann, *supra* note 77 (collecting cases on what constitutes APC in regards to DUI).

□ *See infra* notes 147-97 and accompanying text (applying modern APC interpretations to Level 4 and Level 5 autonomous vehicles).

□ *See* Griffin, *supra* note 4, at 86 (explaining that "Levels 4 and 5 are both fully automated and do not require driver interaction; however, Level 5 vehicles do not have a steering wheel or driver controls"); *see also* AUTOMATED VEHICLES 3.0, *supra* note 28, at vi (noting that in Level 4 vehicles are considered high automation opposed to Level 5 vehicles which are full automation performing "all aspects of the dynamic driving task under all roadway and environmental conditions that can be managed by a human driver").

□ *See infra* notes 148-64 and accompanying text.

□ AUTOMATED VEHICLES 2.0, *supra* note 38, at 4.

□ *Id.*

□ *State v. Love*, 897 P.2d 626, 628 (Ariz. 1995) (determining that APC "depends on weighing of the particular facts presented rather than the application of a boilerplate formula"); *State v. Sommers*, 339 P.3d 65, 72 (Mont. 2014) (stating that "whether an individual had actual physical

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control of a vehicle is a fact-intensive inquiry which may require consideration of a wide variety of circumstances").

□ *See* *Atkinson v. State*, 627 A.2d 1019, 1027 (Md. 1993). The general factors to consider are:

Whether or not the vehicle's engine is running, or the ignition is on; where and in what position the person is found in the vehicle; whether the person is awake or asleep; where the vehicle's ignition key is located; whether the vehicle's headlights are on; whether the vehicle is located in the road way or is legally parked.

Id.

□ *Atkinson*, 627 A.2d at 1027.

□ *Id.*

□ *See generally* Kussmann, *supra* note 77 (collecting cases on states interpreting APC in regards to DUI statutes and the various factors considered by courts under the totality approach).

□ *See Sommers*, 339 P.3d at 70-72 (Mont. 2014) (noting that "it is axiomatic that in order to relinquish control over something, you must first have control," but "the disability of the vehicle will not defeat a person's actual physical control because the conditions making the vehicle immovable or inoperable can be quickly and easily remedied").

□ *Id.*

□ *See id.* at 72 (determining that inoperability as a factor "is consistent with the widely accepted premise that 'physical control is meant to include situations where an intoxicated individual is found in a parked car under circumstances where the car, without too much difficulty, might again be started and become a source of danger'"); *see also* AUTOMATED VEHICLES 2.0, *supra* note 38, at 4 (explaining capabilities of Level 4 vehicles).

□ *Compare* *Wells v. Commonwealth*, 709 S.W.2d 847, 850 (Ky. Ct. App. 1986) (noting that Wells had not planned or intended to operate his vehicle based on evidence revealing that Wells was asleep), *with* Griffin, *supra* note 4, at 96 (explaining Level 4 vehicles can operate without interference as long as the vehicle is geographically programmed to reach a requested destination).

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□ *See Wells*, 709 S.W.2d at 849 (stating that the intent of the person behind the wheel is a factor to consider).

□ *Compare* Griffin, *supra* note 4, at 96 (explaining Level 4 vehicles may operate without human interference), *and* Pearl, *supra* note 7, at 28-29 (noting that Level 4 vehicles include fallback measures allowing an operator to gain control over driving functions), *with Wells*, 709 S.W.2d at 850 (determining that there was no evidence the Defendant had planned or intended to operate the vehicle, because the inference of intent was negated by the undisputed facts that the transmission was in neutral and the parking brake was engaged in addition to the fact that the defendant was sleeping in the vehicle).

□ *See Love*, 897 P.2d at 629 (noting that "even where a defendant is determined to have relinquished [APC], if it can be shown that such person drove while intoxicated to reach the place where he or she was found, the evidence will support a judgment of guilt").

□ *Id.*

□ Griffin, *supra* note 4, at 86; Pearl, *supra* note 7, at 28-29.

□ *Compare Love*, 897 P.2d at 629 (stating "the suggestion that an impaired motorist, stopped off the roadway, should be able to gain immunity by the simple act of turning off the engine (perhaps even as the police car approaches) best illustrates the absurdity of an inflexible rule"), *with* Griffin, *supra* note 4, at 86 (explaining that Level 4 vehicles are considered *fully* autonomous, but do contain fallback technology and driving controls such as a steering wheel and brakes in order to allow the operator the ability to manually drive the vehicle).

□ *Compare* Griffin, *supra* note 4, at 86, 96-97 (noting that Level 5 vehicles do not require any human intervention and, therefore, do not include driving functions required in manual vehicles), *with* Kussmann, *supra* note 77, at 2 (defining actual physical control as "having control of or dominion over a motor vehicle [or] having the potential to drive or operate a motor vehicle").

□ Kussmann, *supra* note 77, at 2 (defining actual physical control as "having control of or dominion over a motor vehicle [or] having the potential to drive or operate a motor vehicle").

□ Griffin, *supra* note 4, at 96 (explaining that no driver intervention "means no steering wheel, no pedals, and full capacity to navigate the roads to any requested destination").

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□ *See* AUTOMATED VEHICLES 3.0, *supra* note 28, at iv (noting that Level 5 vehicles perform "all aspects of the dynamic driving task under all roadway and environmental conditions that can be managed by a human driver").

□ *Compare* Griffin, *supra* note 4, at 96 (noting that Level 5 vehicles will require no driver intervention "that means no steering wheel, no pedals, and full capacity to navigate the roads to any requested destination"), *with* AUTOMATED VEHICLES 2.0, *supra* note 38, at 4 (stating that "[t]he vehicle is capable of performing all driving functions under *certain* conditions") (emphasis added).

□ *Compare* State v. Sommers, 339 P.3d 65, 69-72 (Mont. 2014) (determining that "if a person cannot put a vehicle into motion, that person is not in [APC] of that vehicle To hold otherwise would mean that a person in a vehicle up on blocks, with no wheels could be found guilty of DUI"), *with* Griffin, *supra* note 4, at 86, 96 (noting that Level 5 vehicles do not include driver functions and only require the input of a destination).

□ Griffin, *supra* note 4, at 86, 96.

□ *Compare* Sommers, 339 P.3d at 70 (explaining that if a vehicle cannot be put into motion or a disability easily cured to put the vehicle into motion then an intoxicated person is not in APC over a vehicle), *with* Griffin, *supra* note 4, at 86 (stating that Level 5 vehicles virtually require no human intervention).

□ *Compare* Wells v. Commonwealth, 709 S.W.2d 847, 850 (Ky. Ct. App. 1986) (considering the intent of the driver as a factor to consider under the totality approach), *with* Griffin, *supra* note 4, at 98 (reiterating that there is no further operation required for Level 5 autonomous vehicles beyond inputting a destination).

□ *See* Griffin, *supra* note 4, at 98 (describing that all a person would need to do is input a desired destination into the vehicle's system to initiate operation).

□ *Compare* AUTOMATED VEHICLES 2.0, *supra* note 38, at 4 (stating in Level 4 vehicles that "[t]he driver may have the option to control the vehicle"), *with* Sommers, 339 P.3d at 72-73 (determining that an intoxicated person is not in APC when the intoxicated person is not in a position to control driving functions).

□ *See* Sommers, 339 P.3d at 72-73 (Mont. 2014) (stating "[a]n individual is in [APC] of a vehicle when the individual is not a passenger, and is in a

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position to cause the vehicle to move, or control the vehicle's movement in some manner or direction") (internal quotation marks omitted).

¶ *See* State v. Love, 897 P.2d 626, 629-30 (Ariz. 1995) (noting that if there is evidence that the defendant drove while intoxicated to reach the place where the defendant was apprehended, then the circumstantial evidence will support a judgment of driving under the influence).

¶ *Compare* Griffin, *supra* note 4, at 96-97 (providing that the operator does not retain the ability to control driving functions other than the input of a geographic destination), *with* Sommers, 339 P.3d at 70 (explaining that "[i]t is axiomatic that in order to *relinquish* control over something, you must first have control").

¶ *Compare* State v. Love, 897 P.2d 626, 628 (Ariz. 1995) (believing "that such a rigid, mechanistic analysis is neither appropriate nor in keeping with the rest of our criminal jurisprudence"), *with* Commonwealth v. Reid, 99 Va. Cir. 362, 371 (Va. Cir. Ct. 2018) (noting that APC in Virginia has developed into a bright-line rule only requiring the key to be in the ignition and the driver seated in the driver seat); *see generally* Kussmann, *supra* note 77 (compiling cases that interpret APC).

¶ 99 Va. Cir. 362 (Va. Cir. Ct. 2018).

¶ 224 S.W.3d 564 (Ark. Ct. App. 2006).

¶ *See infra* notes 183-88 and accompanying text.

¶ Rogers v. State, 224 S.W.3d 564, 567 (Ark. Ct. App. 2006) (stating that the Supreme Court of Arkansas "set out a bright-line rule that actual physical control begins when the keys are located in the ignition").

¶ *Compare* Rogers, 224 S.W.3d at 567 (determining that APC occurs when the keys are in the ignition), *with* AUTONOMOUS VEHICLES 3.0, *supra* note 28, at vi (stating that "[t]he driving mode-specific performance by an automated driving system of all aspects of the dynamic driving task" under certain circumstances).

¶ *Compare* Reid, 99 Va. Cir. at 370 (requiring a key to be in the ignition and the intoxicated person to be seated behind the steering wheel), *with* AUTONOMOUS VEHICLES 3.0, *supra* note 28, at vi (providing that a Level 4 vehicle can operate without human intervention under certain circumstances).

¶ Reid, 99 Va. Cir. at 370.

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□ See Pearl, *supra* note 7, at 28-29 (comparing the technological differences between Level 4 and Level 5 vehicles).

□ Compare Reid, 99 Va. Cir. at 370 (determining the bright-line test requires an intoxicated person to be located in the driver's seat with a key in the ignition to be in APC of the vehicle under the DUI statute), *with* Pearl, *supra* note 7, at 28-29 (noting that Level 4 vehicles only operate at full automation under certain circumstances and that Level 5 vehicles do not include fallback capabilities which allows a person to gain control of driver functions if the vehicle malfunctions).

□ See *infra* notes 191-97 and accompanying text.

□ 224 S.W.3d 564 (Ark. Ct. App. 2006).

□ Compare Rogers v. State, 224 S.W.3d 564, 566 (Ark. Ct. App. 2006) (stating that "[t]he case law developed in this area makes clear that if a person does not place keys in the ignition, then this scenario falls short of the proof necessary to establish actual physical control for the purpose of DWI"), *with* AUTONOMOUS VEHICLES 3.0, *supra* note 28, at vi (providing that Level 5 vehicles operate "under all roadway and environmental conditions that can be managed by a human driver").

□ Compare Griffin, *supra* note 4, at 86 (explaining that Level 5 autonomous vehicles do not contain driving functions necessary to manually operate or maintain control over a vehicle), *with* Rogers, 224 S.W.3d at 566 (requiring the keys to be located in the ignition for an intoxicated person to be in APC of a vehicle).

□ 99 Va. Cir. 362 (Va. Cir. Ct. 2018).

□ Compare Commonwealth v. Reid, 99 Va. Cir. 362, 370 (Va. Cir. Ct. 2018) (requiring both the key to be in the ignition and the driver to seated behind the steering wheel), *with* Rogers, 224 S.W.3d at 566 (considering the sole requirement that the key must be in the ignition for APC).

□ Reid, 99 Va. Cir. at 370.

□ Griffin, *supra* note 4, at 96.

□ Compare Reid, 99 Va. Cir. at 370 (determining the defendant was guilty of DUI because she admitted she was seated behind the steering wheel with the key in the ignition while she was intoxicated), *with* Griffin, *supra* note 4, at 96 (noting that Level 5 vehicles will not have driving functions available to the operator such as a steering wheel or brakes), *and* Pearl, *supra* note 7, at

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28-29 (stating that "[a] human being is not needed to supervise, monitor, or control the vehicle in any setting, and is not needed as a "fallback" option in the event of system failure" in a Level 5 vehicle).

□ *See supra* notes 139-97 and accompanying text.

□ *See supra* notes 139-97 and accompanying text.

□ *See* Pearl, *supra* note 7, at 43 (stating that "there is already a robust body of laws pertaining to automotive and highway safety, there also seems to be a consensus that those laws must be amended because they are based on the underlying assumption that human beings are operating the vehicle").

□ *See* AUTONOMOUS VEHICLES 3.0, *supra* note 28, at 18 (encouraging states to "[r]eview laws and regulations that may create barriers to testing and deploying automated vehicles"); *see also* AUSTL. NAT'L TRANSP. COMM'N., *supra* note 57, at 4 (urging Australian states and territories to adopt separate laws for autonomous vehicles that do not presume a human is driving).

□ *See* AUSTL. NAT'L TRANSP. COMM'N., *supra* note 57, at 17. The National Transport Commission stated:

The key reason given in support of reform was a need for clarity and legal certainty. This legal certainty and clarity is twofold. First, to clearly allow an ADS to perform the dynamic driving task. Second, submissions identified a need for legal reform to ensure that a legal entity is responsible for the actions of the ADS when it is engaged and to clearly identify this entity. Both insurers and police emphasised this need for enforcement and insurance purposes.

Id.

□ *See generally id.* at 17-18 (releasing information addressing the need for policy change in response to the use autonomous vehicles).

□ *Id.* at 4 (stating that "[s]tate and territory legislation should clarify that a person who starts, or is a passenger in, a dedicated automated vehicle is not subject to drink- and drug-driving offences concerning starting a vehicle or being in charge of a vehicle").

□ Barbaschow, *supra* note 57. "NTC chief executive Paul Retter said the legislation, to be in place by 2020, is expected to help automated vehicle manufacturers, as well as the public, understand the legal framework they

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are operating in, and accelerate the introduction of autonomous vehicles in Australia." *Id.*

□ *See* Pearl, *supra* note 7, at 50 (noting that autonomous vehicle provisions "raise two questions: (1) can human beings be held legally responsible - either civilly or criminally - for actions of autonomous vehicles . . . and (2) if so, is this form of liability fair? With regard to the first question, under current laws, the answer seems to be 'yes'").

□ *See* FLA. STAT. § 316.85(3)(a) (2019)) (stating that "the automated driving system, when engaged, shall be deemed to be the operator of an autonomous vehicle, regardless of whether a person is physically present in the vehicle while the vehicle is operating with the automated driving system engaged"); *see also* CAL. VEH. CODE § 38750 (West 2019) (defining operator as "the person who is seated in the driver's seat, or, if there is no person in the driver's seat, causes the autonomous technology to engage"); Pearl, *supra* note 7, at 48-49 (listing states that have recently passed legislation defining "operator" of an autonomous vehicle including Florida, Nevada, D.C., California, New York, Oregon, and Texas).

□ *See* Pearl, *supra* note 7, at 67 (stating that "one of the most significant problems with existing driverless car laws is that they treat all autonomous vehicles exactly the same despite the fact that variations in semi-autonomous and fully autonomous cars pose unique sets of challenges and strengths").

□ CAL. VEH. CODE § 38750.

□ *Compare id.* § 38750(a) (determining the operator to be the person in the driver's seat or the person who causes the vehicles automated system to engage), *with* Pearl, *supra* note 7, at 48, 53 (claiming that "[t]raditional motor vehicle laws defined the term 'operator' to mean the individual actively controlling the vehicle - typically from the driver's seat" which is not compatible with vehicles that "may entirely lack the means by which a human could control, influence, or override the vehicle's operations).

□ *Compare* CAL. VEH. CODE § 38750(a) (deeming the person who engages the technology - despite lacking control of driving functions - the operator), *with* Pearl, *supra* note 7, at 54-55 (noting that "[t]he operator does not cause, nor has any opportunity to prevent [violations of the law]" and, moreover, "holding human operators strictly liable for the actions of their autonomous vehicles may strongly deter people from using autonomous cars at all" as they may be concerned with criminal and civil liability).

□ FLA. STAT. § 316.85(3)(a) (2019).

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□ *Compare* FLA. STAT. § 316.85(3)-(4) (stating that when the ADS is engaged it is the operator), *with* CAL. VEH. CODE § 38750(4) (stating that the person in the driver's seat or the person causing the technology to engage is the operator).

□ *See* Pearl, *supra* note 7, at 54-55 (stating that failing to enact legislation that does not presume a human driver "would be a net loss for society because we would lose the extraordinary benefits that can come from greater use of autonomous vehicles").

□ *See* Pearl, *supra* note 7, at 39 (noting that "[a]t a 50% market penetration, 9,600 lives would be saved and 2 million fewer traffic accidents would occur each year. At a 90% market penetration, 21,700 lives would be saved and there would be over 4 million fewer crashes each year in the United States").

□ *See* AUTONOMOUS DRIVING SYSTEMS 2.0., *supra* note 38, at viii (stating that "[t]he right approach to achieving safety improvements begins with a focus on removing unnecessary barriers and issuing voluntary guidance, rather than regulations that could stifle innovation"); *see also* AUTONOMOUS VEHICLES 3.0, *supra* note 28, at 18 (encouraging states to "[r]eview laws and regulations that may create barriers to testing and deploying automated vehicles"); Pearl, *supra* note 7, at 55 (stating that not amending laws to address the presumption of a human driver and subsequent criminal and civil liability placed on the operator of an autonomous vehicle despite not having control of driving functions would "be a net loss for society because we would lose the extraordinary benefits that can come from greater use of autonomous vehicles").

□ *See supra* notes 139-97 and accompanying text (examining the ambiguities of the operation of Level 4 and 5 autonomous vehicles under current tests determining actual physical control); *see also* Pearl, *supra* note 7, at 54-55 (explaining that current laws are obstacles toward achieving safety benefits from autonomous vehicles, because current laws presume a human is driving); Kussman, *supra* note 77, at 2 (stating that public policy behind adopting APC in DUI statutes is to "[enable] law enforcement to apprehend a drunken driver before he strikes").

□ *See* Griffin, *supra* note 4, at 88 (stating that "[t]he Eno Center for Transportation found that if ninety percent of vehicles on the road were autonomous, the number of accidents would fall from 6 million a year to 1.3 million, eliminating up to two-thirds of driving-related deaths"); *see also* Surden & Williams, *supra* note 3, at 128 (concluding that "[m]ost experts predict that autonomous cars will be much safer than human drivers").

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□ See Barbaschow, *supra* note 57, at 1 (explaining that "[t]he Australian community cannot gain the benefits of automated vehicles, including safety, productivity, environmental and mobility benefits, unless barriers in transport legislation applying to automated vehicles are removed"); see also Pearl, *supra* note 7, at 43 (claiming "given that autonomous technology innovations are 'severely outpacing legislation designed to allow for [their] use,' lawmakers appear to be feeling some urgency to make those amendments or at least pass some semblance of a framework of laws pertaining to driverless cars").

□ Compare *Atkinson v. State*, 627 A.2d 1019, 1027 (Md. 1993) (determining that actual physical control ("APC") was intended by the legislature to "differentiate between those inebriated people who represent no threat to the public because they are only using their vehicles as shelters until they are sober enough to drive and those people who represent an imminent threat to the public by reason of their control of a vehicle"), with Griffin, *supra* note 4, at 86 (stating that Level 4 vehicles are distinguishable from Level 5 based on the presence of driver controls).

□ See *State v. Sommers*, 339 P.3d 65, 69 (Mont. 2014) (describing "[APC] as a prophylactic measure that is intended to discourage intoxicated persons from entering into motor vehicles except as passengers") (quoting *State v. Adams*, 127 P.3d 208, 210-11 (Idaho Ct. App. 2005)); see generally Kussmann, *supra* note 77 (collecting cases outlining policy rationale for APC).

□ Compare *Atkinson v. State*, 627 A.2d 1019, 1027 (Md. 1993) (defining APC as when an intoxicated person is imminently likely to exercise control over a motor vehicle), with Griffin, *supra* note 4, at 86, 95-96 (discussing the difference between Level 4 and 5 autonomous vehicles and the ability for a person to retain control of driving functions in Level 4 vehicles).

□ AUSTL. NAT'L TRANSP. COMM'N., *supra* note 57, at 57 (suggesting that "[a]ll drink and drug driving offences including those concerning starting or being in charge of a vehicle should apply to a person who starts or turns off an automated vehicle with manual controls").

□ See *id.* ("Requiring occupants who are not driving to comply with drink and drug driving laws is a potential barrier to receiving the full benefits of automated vehicles. Legislative amendments to provide exemptions from these laws could be made for people who set a vehicle operating at high or full automation into motion."); compare Pearl, *supra* note 7, at 54 (finding humans criminally and civilly liable for the actions of autonomous vehicles when the human did not have control of driving functions is inconsistent

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with the conception of criminal law and deters persons from using autonomous vehicles), *with* AUTOMATED VEHICLES 3.0, *supra* note 28, at iv (noting that Level 4 vehicles are considered high automation opposed to Level 5 vehicles which are full automation performing "all aspects of the dynamic driving task under all roadway and environmental conditions that can be managed by a human driver").

□ *See infra* notes 226-30 and accompanying text.

□ DADSS, *supra* note 42.

□ *Id.*

□ DADSS, *supra* note 42 (noting that "[DADSS] will be voluntarily offered as an option in new vehicles - like automatic braking, lane departure warning and other advanced driver assist vehicle technologies"); *see* Surden & Williams, *supra* note 3, at 134 (noting that ADS features include lane-keeping technology, automatic parking abilities, and adaptive cruise control).

□ *Compare* AUTOMATED VEHICLES 2.0, *supra* note 38, at 8 (stating that vehicles with fallback abilities "should be able to notify the human driver of such events in a way that enables the driver to regain proper control of the vehicle or allows the ADS to return to a minimal risk condition independently"), *with* DADSS, *supra* note 42 (explaining that DADSS systems prevent a person from operating a motor vehicle unless the person passes an alcohol measuring system).

□ *Compare* Griffin, *supra* note 4, at 86, 96-97 (explaining that Level 5 vehicles do not have driving functions available for human input or intervention beyond inputting the desired destination unlike Level 4 vehicles which are fully autonomous under certain conditions), *and* DADSS, *supra* note 42 (explaining technology that will prevent the operation of driving functions by an intoxicated person), *with* Kussman, *supra* note 77, at 2 (noting that APC is included in DUI statutes to prevent the harm caused by drunk driving by apprehending the intoxicated person before he or she exercises control of the vehicle).

□ *See supra* notes 220-30 and accompanying text.

□ Boudette, *supra* note 5 (noting that Tesla aims to release fully autonomous vehicles in 2020); Griffin, *supra* note 4, at 85 (stating that Google's approximate release date for autonomous vehicles is 2021).

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□ Pearl, *supra* note 7, at 43. "While there is already a robust body of laws pertaining to automotive and highway safety, there also seems to be a consensus that those laws must be amended because they are based on the underlying assumption that human beings are operating the vehicle." *Id.*

□ *See supra* notes 139-97 and accompanying text.

□ *See supra* notes 208-11 and accompanying text.

□ *See supra* notes 139-97 and accompanying text.

□ *See supra* notes 198-219 and accompanying text.

□ *See supra* notes 220-24 and accompanying text.

□ *See supra* notes 225-31 and accompanying text.

□ *See* Griffin, *supra* note 4, at 85 (noting the race between Google and Tesla to produce the first fully autonomous vehicle to consumers).

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1 THE COURT: We have a suppression hearing, right?

2 MR. FRANSEN: Correct.

3 THE COURT: Let's do it. We might be cleaning up
4 shop while I do this.

5 MR. RUSSELL: Do you have any objection as to
6 stipulating to the video, putting it into evidence, as
7 State's Exhibit A?

8 MR. FRANSEN: No, I -- I -- no, I don't.

9 MR. RUSSELL: The Judge can just take it with him? .

10 MR. FRANSEN: Yeah, I thought about it, given the
11 time and everything, I'm -- I don't think that we need
12 to play the video today --

13 THE COURT: Okay.

14 MR. FRANSEN: -- but I do want it part of your review
15 following today's hearing.

16 THE COURT: Okay. Yep.

17 MR. RUSSELL: So at this time I move State's Exhibit
18 A, which is a copy of the video of the body cam of
19 Deputy Belt.

20 MR. FRANSEN: It's just -- it's the body cam; there
21 is no dash cam video, correct?

22 MR. RUSSELL: I don't believe so.

23 THE COURT: I didn't bring my lap today. We'll
24 figure it out. I'll make a copy of it. How long is
25 it?

1 MR. RUSSELL: Oh, I think it's 45 minutes to an hour.

2 THE COURT: Okay.

3 MR. FRANSEN: Which is why --

4 THE COURT: Yeah.

5 MR. FRANSEN: And just so you know, I've reviewed it.

6 THE COURT: Well, I'm just saying, I might, depending
7 on how much I have here, I might try to look at -- once
8 I learn more about what the issues are, if there are
9 some opp -- I might look at some it today so I don't
10 forget and then I'll watch the whole thing next week.

11 MR. FRANSEN: Fair enough.

12 THE COURT: But I'm receiving Exhibit A.

13 And this, of course -- this is Simunek, right?

14 MR. FRANSEN: Yes.

15 THE COURT: Okay. I'm learning. Tina Simunek is
16 here and this 22-28. She's here out of custody with
17 Mr. Fransen.

18 I take it you have -- Officer Belt is going to be
19 your witness?

20 MR. RUSSELL: I do, Your Honor.

21 THE COURT: Okay.

22 MR. FRANSEN: And -- and, Mr. Russell, should we
23 also, as an exhibit, have the -- the preliminary
24 hearing transcript --

25 MR. RUSSELL: Yes.

1 MR. FRANSEN: -- Exhibit B?

2 MR. RUSSELL: Yes. And so I would move the admission
3 of the preliminary hearing transcript; that you take
4 judicial notice of it in your file, Your Honor, as
5 State's Exhibit B.

6 MR. FRANSEN: Is that -- and that is a part of - it's
7 in the file --

8 THE COURT: It's in the file.

9 MR. FRANSEN: -- so it was -- it was a year ago
10 today, actually --

11 MR. RUSSELL: All right.

12 MR. FRANSEN: -- before Judge Morrison exactly.

13 THE COURT: I have the transcript. It says -- I have
14 the transcript here. It's part of the record. But, I
15 guess, you're -- you want to make it an exhibit to this
16 hearing, so, I guess, I'll just acknowledge it's
17 Exhibit B. I'll receive it as Exhibit B, but I don't
18 know if we need to print it, mark it, we can.

19 MR. RUSSELL: I don't believe so, Your Honor. If you
20 just take judicial notice of it.

21 THE COURT: I will.

22 Okay. You may call your first witness.

23 MR. RUSSELL: The State would call Deputy Belt.

24 (Witness sworn.)

25 THE WITNESS: Yes, Your Honor.

1 DEPUTY ISNALAWICA BELT,
2 called as a witness, being first duly sworn,
3 testified as follows:

4 DIRECT EXAMINATION BY MR. RUSSELL:

5 Q Please state your full name and spell your last name
6 for the record.

7 A Isnalawica Belt, B-E-L-T.

8 Q And, Deputy Belt, you're the chief deputy with the Fall
9 River County Sheriff's Office; is that correct?

10 A Yes, sir.

11 Q And how long have you held that position?

12 A I took over as chief deputy at the beginning of this
13 year, so six months how.

14 Q And you have how many years of law enforcement
15 experience?

16 A Four years and one month.

17 Q And you've also been a -- a certified law enforcement
18 officer by both the State of South Dakota and through
19 the Federal Academy in Artesian, New Mexico; is that
20 correct?

21 A Yes, sir.

22 Q Calling your attention to the 16th day of January of
23 2022, were you working at approximately 11 p.m.?

24 A Yes, sir.

25 Q What happens at that time?

1 A I was working patrol. I received a call from my
2 dispatch center of a report of a suspicious vehicle out
3 at the Coffee Cup.

4 Q Particularly, the call was a little bit particular --

5 A Right.

6 Q -- about the vehicle and the vehicle's near it; is that
7 correct?

8 A Right. So I believe I asked for clarification as to,
9 you know, why someone thought it was suspicious. What
10 was told to me by my dispatch center was that they
11 observed a woman occupant in the driver seat who
12 appeared to be asleep or unconscious and the vehicle
13 was running and there was a blinker that was still
14 activated.

15 Q And there was also some particular information as to
16 the color of the vehicle and the color of the other
17 vehicles around it; is that correct?

18 A Yeah. I believe, it was parked on the north end of
19 building and it was described as a white SUV from what
20 I recall.

21 Q And so you proceeded in that direction; is that
22 correct?

23 A Yes, sir.

24 Q And that's here in Fall River County?

25 A Yes, sir.

1 Q And when you arrived on scene, approximately how long
2 did it take you to get to that location?

3 A I was at the office, I believe, when I took that call.
4 10, 15 minutes maybe, something of that nature.

5 Q Upon your arrival, what did you observe?

6 A I saw the white SUV on the north end of the Coffee Cup
7 parking lot parked next to the building. I noticed
8 that it was a white Ford SUV or Ford Edge or Ford --
9 whatever the SUV is, a Ford. The blinker is still
10 activated, still blinking on and off, and it was parked
11 in between two other vehicles. At that point I parked
12 my own patrol vehicle, activated my emergency lights,
13 and started walking up to see what was going on.

14 Q Was the vehicle running?

15 A Yes, it was.

16 Q Okay. And as you approached the vehicle, what do you
17 observe about the occupants of the vehicle?

18 A Upon looking in the car, I see that there is only one
19 person in the vehicle and it's a female in the driver
20 seat. I stood there for just a moment looking at her.
21 I saw that her chest was going up and down which
22 indicated to me that she was breathing, and then I
23 decided to take a make picture of her because I thought
24 it was kind of odd. So I took a photo of her and then
25 I immediately knocked on the window to try to get her

1 wake up.

2 Q Was she able to be awoken from knocking on the window?

3 A Yeah. From what I recall, she -- I was able to get her
4 to step out of the vehicle.

5 Q When she stepped out of the vehicle, what observations
6 did you make of her at the time?

7 A Just asking her some general questions. What she was
8 doing. Why she was sleeping in the parking lot. That
9 kind of stuff. As I'm talking to her, I noticed that
10 she had some really red, bloodshot eyes. Her speech
11 sounded a little slurred to me. She was kind of giving
12 some confusing answers so I was just trying to clarify
13 what she was talking about because I didn't understand
14 her.

15 Q And there was quite a little bit of back and forth
16 there, wasn't there?

17 A Yeah.

18 Q And eventually you asked her to perform some field
19 sobriety tests; is that correct?

20 A Yes, sir.

21 Q And why was that?

22 A So just everything that was going on with the initial
23 report of her being asleep at the Coffee Cup. The
24 amount of time it took me to get out there. I found
25 her still asleep or not awake. The vehicle was running

1 and the blinker was still on. Then when I started
2 talking to her, I noticed that her eyes were red and
3 bloodshot and she had slurred speech and she was just
4 speaking confused.

5 So during that initial conversation, I asked her what
6 she was doing, and she told me she was just sleeping
7 because she'd been driving all day. I asked her where
8 she came from, and she said, Well, I wasn't driving,
9 and then I said, You just said you were driving. Oh,
10 yeah, I was driving. I came from Scottsbluff, or
11 something of that nature. I said, Okay. So, you know,
12 Are you just tired? Well, Yeah, I was driving all day
13 so I'm just getting some sleep.

14 Was like -- okay. It just appeared odd to me. Like
15 it just -- it wasn't -- the conversation wasn't smooth.
16 It just -- she seemed, like, confused to me.

17 Q So based upon your training and experience as a law
18 enforcement officer, you suspected that she was under
19 the influence at that time?

20 A Yes, sir.

21 Q Okay. Once you started to administer the -- the test,
22 how many tests or which tests do you remember that you
23 had asked her to complete?

24 A So any time I do a DUI investigation, I always refer to
25 the three standardized tests which are the horizontal

1 gaze nystagmus test, the one-leg stand test, and the
2 walk and turn. I also perform an additional test that
3 I learned through additional training that I took,
4 called lack of convergence test. That was a test I
5 learned when I took the Advanced Roadside Impaired
6 Driving Enforcement Program through NHTSA, the National
7 Highway Traffic Safety Administration.

8 Q And so at the conclusion of those tests, what did you
9 decide?

10 A Based on everything I was seeing, her performance of
11 those tests, I made the determination that she was
12 impaired. Specifically, I -- you know, she just -- one
13 that I remember right off the top of my head was the
14 lack of convergence test, and then on the walk and
15 turn, I believe she -- she just wasn't able to follow
16 the directions as they were described which in itself
17 is indicative of impairment.

18 Q And one of the tests, she just said that she couldn't
19 complete; is that correct?

20 A Yes, sir.

21 Q Okay. But based upon your training and experience, you
22 decided to arrest her for driving under the influence;
23 is that correct?

24 A Yes, sir.

25 Q Okay. Upon the arrest, did you also do an inventory of

1 the vehicle?

2 A Yes, sir.

3 Q Is that pursuant to your policy with the sheriff's
4 office?

5 A Yes, sir.

6 Q Okay. On your inventory, what did you find?

7 A So upon opening the door, one of the first things I
8 remember seeing is a butane canister like for filling
9 up lighters. It was on the seat directly where the
10 driver's seat is, and then I remember her purse was on
11 the center console or somewhere in this area, and I
12 just turned on a flashlight, looked inside, and there
13 was a meth pipe sitting in it.

14 Q And you believe that it was a meth pipe based upon your
15 training and experience?

16 A Yes, sir.

17 Q Approximately how many drug related arrests have you
18 made during the course of your career?

19 A I don't know the exact number. It would be a lot.

20 Q Ball park?

21 A More than 50, if I had to say.

22 Q Okay. And you said that it tested presumptively
23 positive?

24 A Yes, sir.

25 Q That was based upon what kind of a test?

1 A At that time I only conducted a field test.

2 Q And the type of field test --

3 MR. FRANSEN: For purposes of this hearing, I would
4 stipulate it was methamphetamine found in the
5 vehicle --

6 MR. RUSSELL: Okay.

7 MR. FRANSEN: -- according to the inventory search.

8 MR. RUSSELL: Very good. And I would move the
9 admission of the affidavit from Pierre then.

10 MR. FRANSEN: No objection.

11 THE COURT: It's received.

12 MR. RUSSELL: Okay. I don't have any further
13 questions.

14 THE COURT: Okay. Mr. Fransen.

15 MR. FRANSEN: Thank you.

16 One moment.

17 THE COURT: I just want to be sure I understand, I
18 just received this without objection. What -- is this
19 a test of her blood or is this a test of something
20 found in the pipe?

21 MR. RUSSELL: That's the bodily fluid, Your Honor,
22 but he stipulated to the fact that it was
23 methamphetamine in the -- in the pipe.

24 THE COURT: Okay.

25 MR. FRANSEN: She's charged with ingestion, not

1 possession, so --

2 THE COURT: Gotcha. The issue is suppression?

3 MR. FRANSEN: Yep.

4 THE COURT: You may proceed.

5 MR. FRANSEN: May I approach?

6 THE COURT: You may.

7 MR. FRANSEN: Just hold on to that for a second.

8 THE WITNESS: Yes, sir.

9 MR. FRANSEN: That will be Exhibit C.

10 THE COURT: I just called this C.

11 MR. FRANSEN: Oh, well, then D.

12 THE COURT: Works for me. It's a picture, I take it?

13 MR. FRANSEN: Yes.

14 THE COURT: A photograph.

15 CROSS-EXAMINATION BY MR. FRANSEN:

16 Q And then -- excuse me, officer, I failed art, but let's
17 just say that's the Coffee Cup --

18 A Okay.

19 Q -- and the Subway is there?

20 A Sure.

21 Q And that's north?

22 A Yes, sir.

23 Q Okay. And just get those two things out of the way.

24 A Okay.

25 Q Good afternoon, officer, thank you for being here. We

1 will try to get this done in due course.

2 You mentioned your training, but you really didn't --
3 strike that. You got the call from -- from -- from a
4 person advising -- or dispatch that there --

5 Ms. Simunek was there at the Coffee Cup in her car
6 sleeping?

7 A Yes, sir.

8 Q And it took you about six minutes to get out there?

9 A Well, I was at -- I believe, I was at -- I was here at
10 the sheriff's office when I responded to that call
11 writing a report, something of that nature.

12 Q So you said you got the call at 2300 hours. That's
13 11 o'clock at night, correct?

14 A Yes.

15 Q And then in your report you said you arrived at 2306?

16 A Okay.

17 Q So that's about five, six minutes to get out to the
18 Coffee Cup?

19 A Sure. Yeah.

20 Q So when you said 10, 15 minutes earlier, that's not
21 correct?

22 A Correct. Yes.

23 Q Okay. And the report was a person sleeping in a car;
24 car running with the blinker on?

25 A Yes, sir.

1 Q The left-turn blinker or right-turn blinker?

2 A I don't remember which one it was.

3 Q What -- what -- could it have been the right-turn
4 blinker then?

5 A I suppose so.

6 Q Okay. And you got out there at 2306. It was July 22nd
7 -- or no, I'm sorry, January 22nd, correct?

8 A Yes, sir.

9 Q So a winter evening?

10 A Yes, sir.

11 Q Cold?

12 A Yes, sir.

13 Q Below freezing?

14 A I don't remember exactly, but --

15 Q I believe in your report you indicated that it was --
16 one moment -- 30 degrees fahrenheit?

17 A Okay.

18 Q Okay. So is that accurate?

19 A Sure. Yes.

20 Q So if 30 degrees is accurate in January, it could be --
21 it could be with windchill and whatnot a lot colder
22 than that, correct?

23 A Sure.

24 Q Now, previously, I gave you a piece of legal paper with
25 some chicken scratch from me kind of laying out the

1 Coffee Cup?

2 A Sure.

3 Q Okay. So she was parked on the north end of the Coffee
4 Cup, right?

5 A Yes, sir.

6 Q Which is right by the Subway?

7 A Yes, sir.

8 Q So as you go into those doors, there is the Subway
9 Restaurant?

10 A Yes, sir.

11 Q Can you, on that piece of paper, draw how the parking
12 lanes are situated. They're at an angle, correct?

13 A Yes, sir.

14 Q So if I get out of here today and I go to the Coffee
15 Cup and I want a Subway sandwich, I'm going to park at
16 an angle, correct, where my car -- the front end of my
17 car would be facing the Subway, but it would be to the
18 west where the tail of my car would be, correct?

19 A Yes, sir.

20 Q Okay. So can I approach and just maybe illustrate what
21 I was talking about?

22 A Sure.

23 Q Yeah. So the parking angle is kind of like this,
24 right?

25 A Yes.

1 Q There might be like six or seven?

2 A Yep.

3 Q Okay. Do you know which one of those slots she was
4 parked in?

5 A It was closer towards the east end. I don't know
6 exactly -- I want to say -- if I had to say right now
7 it would probably be this one here because there was a
8 vehicle on her left and on her right.

9 Q Okay. So right there --

10 A Yeah.

11 Q -- okay?

12 And she -- you indicated that she would have had her
13 right blinker operating, or it was possible?

14 A It was possible. I don't remember what --

15 Q So if it was her right blinker, that would be
16 consistent with somebody turning on her blinker to turn
17 into that parking station?

18 A Sure.

19 Q And since it is a private parking lot, there was
20 nothing illegal about how she was parked when you came
21 upon her at 2306, correct?

22 A No.

23 Q Okay. She wasn't parked cockadoodle or anything? She
24 was consistent with the other cars parked in those
25 parking stalls?

- 1 A From what I recall, yes.
- 2 Q Okay. And then you -- you came upon her and eventually
3 took a picture, which is before you right there?
- 4 A Yes.
- 5 Q Is that an accurate picture of what you -- of the photo
6 you took of my client?
- 7 A Yes, sir.
- 8 Q Did you knock on the window before you took that photo?
- 9 A I don't believe so.
- 10 Q Okay.
- 11 A Not before.
- 12 Q So describe -- can you take a look at that photo which
13 I believe will be marked as Exhibit 10.
- 14 A Okay.
- 15 Q Can you describe for us what you see there?
- 16 A Oh, sure. So I see a female, blond hair, wearing a
17 plaid red shirt seemingly asleep.
- 18 Q Asleep. And there is a couple of things in the console
19 that I want to draw your attention to. What are they?
20 What do they appear to be?
- 21 A They're drinks of some sort. Clear plastic cups with
22 a green liquid.
- 23 Q Probably Mountain Dew --
- 24 A Yeah.
- 25 Q -- Mellow Yellow, something like that?

1 A Sure.

2 Q You didn't see any indication of open containers of an
3 alcohol variety?

4 A No, not -- not at that point, no.

5 Q Well, in fact, you never -- you never found any
6 alcohol?

7 A No, no alcohol.

8 Q No open containers?

9 A No.

10 Q So after you took that photo, what did you do then?

11 A I knocked on the window.

12 Q And eventually Ms. Simunek woke up?

13 A Yes, sir.

14 Q And you indicated that she was confused?

15 A Yes, sir.

16 Q But you've been a law enforcement officer for some time
17 now, right?

18 A Yes, sir.

19 Q Was she confused or was she just nervous?

20 A She seemed confused to me at that time.

21 Q Would you -- but is it fair to say that most of the
22 people you pull over or interact with are nervous?

23 A I guess, it depends. I've seen people that are
24 completely calm, other people that are overly nervous,
25 and there is no standard.

1 Q Was it possible that her confusion was her actually
2 being nervous?

3 A I don't know.

4 Q Okay.

5 A I don't know.

6 Q And you had her step out of vehicle?

7 A Yes, sir.

8 Q Did you notice, did you smell any alcohol?

9 A No, not at that time, sir.

10 Q Well, her -- you know, her blood came back clean for
11 alcohol; there was literally zero alcohol in her
12 system?

13 A Yeah, I remember that from the last hearing.

14 Q Okay. And you didn't take a PBT?

15 A No.

16 Q And it's pretty standard from my experience talking to
17 law enforcement about DUIs, that before they do the
18 field sobriety tests, they give that person a PBT --

19 A Okay.

20 Q -- but you didn't?

21 A Correct.

22 Q Okay. I find that highly unusual --

23 A Okay.

24 Q -- and not kind of a classic protocol for a standard
25 DUI investigation?

1 A Okay.

2 Q Then you ask her to do some field sobriety tests?

3 A Yes, sir.

4 Q But, again, this is where I find it unusual that you
5 didn't ask her if she had any physical ailments?

6 A I don't recall. I remember you brought that up last
7 time, and I don't remember, but if you say that I
8 didn't, then I'll take your word for it.

9 Q Well, yeah, that's what you said at the preliminary
10 hearing that you didn't ask her if she had any physical
11 ailments?

12 A Okay.

13 Q But yet you just plowed ahead with those -- those field
14 sobriety tests?

15 A Yes, sir.

16 Q You didn't know if she had a bad back, bad knee?

17 A No, sir, not at that time.

18 Q What kind of shoes was she wearing?

19 A I don't remember.

20 Q That can make a big difference too, correct?

21 A It's possible, I suppose. If they're wearing high
22 heels or something of that nature, I would -- I would
23 suspect so, yeah.

24 Q And you indicated -- and I'll kind of put this in
25 shorthand, you're basically claiming that you're

1 certified as being a drug recognition expert, correct?

2 A No, sir.

3 Q No, you're not?

4 A No, I'm not.

5 Q So you -- you did the -- what were the tests that you
6 completed with her?

7 A So I administered the HGN test --

8 Q Ah-huh.

9 A -- the walk-and-turn, one-leg stand, and one test
10 called the lack of convergence test.

11 Q Okay. The HGN test and the lack of convergence test,
12 are you aware that there are certain jurisdictions and
13 certain judges that don't allow that kind of evidence
14 into -- into a criminal proceeding?

15 A I'm not aware of that, sir.

16 Q Would you take my word for it that that's the case?

17 A Sure.

18 Q Because some judges in certain jurisdictions think
19 that's junk science?

20 A Okay.

21 Q It's -- it has the reliability of, say, a lie detector
22 test or a PBT?

23 A Okay.

24 Q And you indicated -- is it fair to say that she didn't
25 -- it wasn't that she didn't pass the physical tests,

1 she just couldn't complete them?

2 A I believe that's what she said whenever we did one of
3 the tests, yes, sir.

4 Q And that could very well be the case that she was
5 physically unable to perform those tests?

6 A Sure.

7 Q Okay. And -- but you never asked her about any
8 physical limitations that she might have?

9 A No.

10 Q The other thing -- I want to be clear about this. I
11 think in your police report, you indicated that you
12 found her purse in the center console of her vehicle?

13 A Yeah, it was in that area.

14 Q So you had to open the lid?

15 A I don't think so.

16 Q Well, take a look at that picture. Do you see where
17 her purse was?

18 A Um, it looks like it's right there on the gear shifter.

19 Q Do you have a pen where you can maybe mark where --

20 A Sure.

21 Q Thank you.

22 A (Marking document.)

23 Q Let me just take a look.

24 A It's brown leather.

25 Q I'll give this picture back to you, deputy. I don't

1 see a purse there but we'll move on.

2 A Okay.

3 Q You know -- you know people have different sleeping
4 patterns, correct?

5 A Sure.

6 Q And you're -- you're aware that people wake up
7 differently than others, correct?

8 A Sure.

9 Q Sometimes when I take a nap, it takes me a while to
10 figure out of the heck I am and what time it is and why
11 the TV channel has changed, and it's because I rolled
12 over and hit the remote, right?

13 A Sure.

14 MR. RUSSELL: Your Honor, I would object. If -- if
15 he would ask a question rather than testifying here
16 today, I would appreciate it.

17 THE COURT: Well, I think it's close enough to --
18 leading. I mean, if --

19 MR. FRANSEN: I'll -- I'll --

20 THE COURT: You're getting close.

21 MR. FRANSEN: I know. I'll -- I'll try not to --

22 THE COURT: Overruled, but --

23 MR. FRANSEN: I'll walk it back, Judge.

24 THE COURT: Yeah.

25 Q (By Mr. Fransen) And you didn't ask my client if she

1 suffered from any sleep disorder or anything like that?

2 A No, I don't remember asking that.

3 Q Sleep apnea?

4 A No.

5 Q Narcolepsy?

6 A No.

7 Q And she may have been just confused and nervous because
8 she had a long day on the road --

9 A I suppose so.

10 Q -- and got abruptly woken up by law enforcement?

11 A Sure.

12 Q There is nothing illegal about sleeping in your car?

13 A No.

14 Q Nothing illegal about sleeping in your car with it
15 running?

16 A No.

17 Q Nothing -- well, unless you're driving.

18 A Right.

19 Q But it's -- it's stationary.

20 There is nothing illegal about having the blinker on?

21 A No.

22 Q In fact -- well, I guess, that's going to be my
23 argument to the Judge. I don't know where you even had
24 reasonable suspicion to do anything, to have any
25 interaction with her.

1 A Okay.

2 Q Did you consider calling 911?

3 A No.

4 Q Or, I'm sorry, the ambulance?

5 A No.

6 Q So you weren't really that concerned about her -- her
7 well-being?

8 A Well, I was figuring it out as I was on-scene.

9 Q Okay. And just to be clear, nowhere in your report,
10 nowhere in your testimony at the preliminary hearing,
11 and nowhere in your direct or your testimony here
12 today, did you see indications of -- or have any
13 indications that -- of alcohol use by her?

14 A No.

15 Q Didn't smell marijuana?

16 A Not that I recall.

17 Q Didn't smell methamphetamine?

18 A No.

19 MR. FRANSEN: One moment. I don't have any other
20 questions. Thank you.

21 THE COURT: Mr. Russell.

22 MR. RUSSELL: Just a couple follow-ups.

23 REDIRECT EXAMINATION BY MR. RUSSELL:

24 Q Deputy Belt, the four tests that you administered, the
25 lack of convergence, the HGN, the walk and turn, and

1 the one-legged stand, were you trained at either the
2 Academy in Pierre or the Academy in Artesian, New
3 Mexico, and the other training that you had mentioned
4 but that I can't remember right now, to utilize these
5 particular tests?

6 A Yes, sir. So the initial standardized field sobriety
7 testing is conducted, administered, under NHTSA
8 certified instructors. So it's the National Highway
9 Traffic Safety Administration. They develop and curate
10 all the curriculum for FSTs which include the HGN,
11 one-leg stand, and the walk-and-turn. Those are the
12 standardized independently validated studied tests that
13 most officers are trained in during their Academy.
14 The lack of convergence test is not a standardized
15 test, but it is another test that we are taught when we
16 attend ARIDE which is also another NHTSA sponsored
17 course, and that one I attended under the purview of
18 the South Dakota Highway Patrol. And the lack of
19 convergence test is one of many tests in -- in a series
20 that they teach you at ARIDE.

21 Q Okay. And when you said NHTSA, what -- what does that
22 acronym stand for?

23 A The National Highway Traffic Safety Administration.

24 Q And you -- you participated in those -- what -- what --
25 what was the name of the -- of the event that you

1 participated in and was taught that particular test?

2 A So it's -- the acronym is ARIDE. It stands for
3 Advanced Roadside Impaired Driving Enforcement.

4 Q And when did you attend that generally?

5 A I think it was that January. January of 2022 is when I
6 took that course.

7 Q Okay. And just so that we are clear, based upon your
8 training -- your formal training and your -- your
9 experience, you did believe at the conclusion of those
10 tests that she was under the influence; is that
11 correct?

12 A Yes, sir.

13 Q Okay.

14 MR. RUSSELL: I have nothing further.

15 THE COURT: Anything else, Mr. Fransen?

16 CROSS-EXAMINATION BY MR. FRANSEN:

17 Q Isn't part of the training though before you do the
18 field sobriety tests you ask them if they want to take
19 a PBT?

20 A So --

21 Q No, that's kind of a yes or no answer.

22 A No.

23 Q No?

24 A No, that's not the way I was taught.

25 Q All right. And you didn't ask to do a PBT in this

1 case?

2 A No, sir.

3 Q And you just simply asked to do the field sobriety
4 tests?

5 A Yes, sir.

6 Q Is the reason why you didn't administer the PBT is
7 because you didn't detect any alcohol on her breath?

8 A As a general practice I don't administer a PBT during
9 my DUI investigations, even for alcohol. Even if I
10 suspect alcohol, I find open containers of alcohol, I
11 still don't do a PBT. PBT is inadmissible as evidence,
12 so even if -- even if it registered a really high
13 number, and if I did that at the beginning of my
14 investigation, that kind of skews my perception of
15 everything. So instead of taking an unbiased
16 independent look at the entire situation without using
17 the PBT, then I just do FSTs. That way it gives me a
18 clear picture of what I'm looking at as opposed to
19 giving a PBT and saying there was alcohol in the
20 system, I'm going to do these tests and conclude what
21 the PBT says.

22 Q Or there is another way to look at it, that if -- if
23 you don't administer a PBT and yet they failed to
24 complete the FSTs, you create probable cause by not
25 asking for a PBT for a DUI arrest?

1 A That's not the way I was trained, sir.

2 Q Well, hear me out on this. Let's say in this case,
3 hypothetically, you would have given her a PBT --

4 A Okay.

5 Q -- and it came back zeros --

6 A Okay.

7 Q -- which you have no indication that it wouldn't have,
8 correct?

9 A Yes.

10 Q Would you have arrested her for a DUI?

11 A Yes, sir.

12 Q I don't believe that, but thank you.

13 MR. FRANSEN: No other questions.

14 MR. RUSSELL: Nothing further, Your Honor.

15 THE COURT: Okay. You may step down.

16 Do you have any other witnesses, Mr. Russell?

17 MR. RUSSELL: No. State would rest.

18 THE COURT: Do you have any witnesses? Do you have
19 any witnesses, Mr. Fransen?

20 MR. FRANSEN: No.

21 THE COURT: How do you want to do this one? Do want
22 to get a transcript? Do you want to brief it? Do you
23 want to --

24 MR. FRANSEN: I defer to you, Judge.

25 THE COURT: I mean, I -- I'm already behind on one

1 that I said I would just do and I didn't get it done,
2 so -- but it has only been a few weeks.

3 Do you want me to brief -- I mean, I can watch the
4 video.

5 MR. FRANSEN: Why don't we do this, watch the video,
6 and then if you want briefing on it, that would be
7 appropriate.

8 MR. RUSSELL: Or if you just want to issue a
9 memorandum opinion after --

10 THE COURT: Yeah. Just let me understand so I'm not
11 totally barking down the wrong tree. Your -- you
12 didn't think he had reasonable suspicion of any
13 interaction with her is what you're --

14 MR. FRANSEN: No. Yes -- yes, you're correct, that's
15 my contention.

16 THE COURT: Okay. I think I can remember that's the
17 issue. I mean, it's obvious from what I understand is
18 going on here and what the issues are here, so --

19 Okay. Well, that's what I will do. I'm already --
20 when it rains it pours. I've -- I've got a bunch of
21 five page -- you know, five-ish page memorandum
22 opinions to deal with. So I will endeavor to get it
23 done. Usually I get it all done at once, but I don't
24 know how long it will take.

25 MR. FRANSEN: Like I said, if you want -- if you want

1 briefing -- I say watch the video and then I defer to
2 you about whether you want briefing on it or not.

3 THE COURT: If I take this back to Rapid City with me
4 instead of leaving it with the clerk -- this is Exhibit
5 A. I'll bring it back.

6 In the unlikely event I lose it or forget it in Rapid
7 City or something, there is other copies of this that
8 you -- we can supplement the record with a new copy? I
9 don't need the -- because, otherwise, I'm going to
10 leave it here and then the next time I'm here I'll put
11 it on a laptop or I'll copy it on another flash drive,
12 but if you can tell me we can replace it in the
13 unlikely event that I lose it, I'll just take this --
14 this Exhibit A with me. Exhibit B is the transcript.
15 I have that in the file and then I'll just probably --
16 those can go in the file and I can view those in
17 Odyssey.

18 THE CLERK: What do you want these to be called?
19 Exhibit what?

20 MR. FRANSEN: The picture was C. The --

21 THE COURT: No, I already did C. We'll call it D --

22 MR. FRANSEN: D. And then the -- the --

23 THE COURT: D is 10?

24 MR. FRANSEN: E.

25 THE CLERK: E.

1 THE COURT: Oh, yeah.

2 MR. FRANSEN: The Coffee Cup, I didn't draw it to
3 scale.

4 MR. RUSSELL: To make the record correspond, I think
5 it was 10, Your Honor.

6 THE COURT: You did say 10.

7 MR. FRANSEN: Okay. I -- I didn't -- well --

8 THE COURT: Can we just agree that it's now E?

9 MR. FRANSEN: Yeah.

10 MR. RUSSELL: That will be fine, Your Honor.

11 THE COURT: Okay.

12 MR. FRANSEN: Are we off the record?

13 MR. RUSSELL: If you just want to set a status, that
14 will probably working for -- for --

15 THE COURT: Yeah.

16 MR. RUSSELL: -- for your motion.

17 THE COURT: Yeah, so here's the deal, she's out of
18 custody, I could set it the last week in July which is
19 about a month which is realistic that I might get it
20 done, but I probably want a little bit longer --
21 extra --

22 MR. FRANSEN: I'm not here July 21st myself.

23 THE COURT: You're not here. I'm not going to be
24 here the 4th. So it doesn't do any good to set a
25 status hearing with Judge Gusinsky for him to not know

1 what is going on.

2 MR. FRANSEN: And I won't be here on the 18th so we
3 are looking at September.

4 THE COURT: Okay. But here's the deal, I think it's
5 very, very likely, almost guaranteed, I'm going to have
6 something to you well before that, so --

7 MR. RUSSELL: Okay.

8 THE COURT: -- we'll just set a status -- what did we
9 set it -- it is not the 25th. It's the week before,
10 the 18th?

11 THE CLERK: I think, Mr. Fransen, you are unavailable
12 the 18th?

13 MR. FRANSEN: I'm not available the 18th. Hopefully,
14 I got -- I got --

15 THE COURT: So that's like September.

16 MR. FRANSEN: Yeah, I know.

17 THE COURT: Here's the thing, if I get it done, are
18 you here the 4th of August? Can you be?

19 MR. FRANSEN: I got something set today on the 4th of
20 August, but that's Judge Gusinsky's date. So --

21 THE COURT: Yeah, but if I issue --

22 MR. FRANSEN: Oh, I see.

23 THE COURT: I guess, what I'm saying, if you get
24 something for me in July and you want to move it up to
25 the -- I don't know, it still doesn't make any sense,

1 because you want -- I guess, if I denied the motion,
2 you're going to be wanting a trial date or something
3 and he's not going to be able to do that either.

4 So why don't we just set it for September 8th, or
5 whatever, and if issue a decision which I -- I can't
6 imagine it is going to take me anywhere near that long
7 to -- and if something clears up or if your schedule
8 clears up or I add a date or you want to come back down
9 here on August 4th, we can move it up, but let's just
10 set it then.

11 MR. FRANSEN: Okay. If you watch the video and want
12 briefing on it, we can do that, too. So --

13 THE COURT: All right.

14 MR. FRANSEN: And, Judge, thank you for making it
15 before 5:00 because, Judge, I have a complicating
16 case with --

17 THE COURT REPORTER: Can I go off the record?

18 THE COURT: Off the record.

19 MR. FRANSEN: Off the record. Sorry.

20 (Off-the-record discussion.)

21 (No further proceedings.)

22 *****

COURT REPORTER'S CERTIFICATE

I, Valarie M. O'Day, an Official Court Reporter and Notary Public in the State of South Dakota, Seventh Judicial Circuit, do hereby certify that I reported in machine shorthand the proceedings of the above-entitled matter and that the foregoing pages 1 through 36, inclusive, are a true and correct copy, to the best of my ability, of said proceedings made and taken.

Dated this 11th day of March, 2024, at Rapid City, South Dakota.

/s/ Valarie M. O'Day

Valarie M. O'Day
Official Court Reporter
My Commission Expires: 9/26/26

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30895

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

TINA MARIE SIMUNEK,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
FALL RIVER COUNTY, SOUTH DAKOTA

THE HONORABLE Jeffrey R. Connolly
Circuit Court Judge

APPELLEE'S BRIEF

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Notice of Appeal filed November 11, 2024

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30895

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

TINA MARIE SIMUNEK,

Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, Plaintiff/Appellee, State of South Dakota, is referred to as “State.” Defendant/Appellant, Tina Marie Simunek is referred to as “Simunek.” The settled record in the underlying case is denoted as “SR,” followed by the e-record pagination. The suppression hearing transcript is cited as “SH.” The court trial transcript is cited as “CT.” The exhibits are cited as “EX” followed by the exhibit number. Simunek’s brief is cited as “AB” followed by the page number.

JURISDICTIONAL STATEMENT

On October 22, 2024, the Honorable Jeffrey R. Connolly, Circuit Court Judge, Seventh Judicial Circuit, entered a Judgment of Conviction in *State of South Dakota v. Tina Marie Simunek*, Fall River County Criminal File Number 22-28. SR 295-98. Simunek filed her Notice of

Appeal on November 11, 2024. SR 337. This Court has jurisdiction under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUE AND AUTHORITIES

WHETHER THE CIRCUIT COURT ERRED WHEN IT DENIED SIMUNEK'S MOTION TO SUPPRESS?

Simunek filed a motion to suppress claiming law enforcement did not have reasonable suspicion to initiate a stop nor was there probable cause to support her arrest. The circuit court denied the motion finding the encounter was consensual and that law enforcement had probable cause to effectuate an arrest.

State v. Haar, 2009 S.D. 79, 772 N.W.2d 157

State v. Iversen, 2009 S.D. 48, 768 N.W.2d 534

State v. Rosa, 2022 S.D. 76, 983 N.W.2d 562

State v. Sharpfish, 2019 S.D. 49, 33 N.W.2d 1

STATEMENT OF THE CASE

The Fall River State's Attorney charged Simunek with the following:

- Count 1: Ingestion of a Controlled Substance, contrary to SDCL 22-42-5.1, a Class 5 felony;
- Count 2: Driving Under the Influence, contrary to SDCL 32-23-1(2), a Class 1 misdemeanor; or in the alternative
- Count 2: Driving Under the Influence, contrary to SDCL 32-23-1(5), a Class 1 misdemeanor; and
- Count 3: Possession of Paraphernalia, contrary to SDCL 22-42A-3, a Class 2 misdemeanor.

SR 45-46. The magistrate court held a preliminary hearing, where it found probable cause to support the felony charge of ingesting a controlled substance. SR 81. It bound the case over to circuit court. SR 82.

Simunek moved to suppress the State's evidence, arguing law enforcement did not have a reasonable suspicion to stop Simunek nor did law enforcement have probable cause to arrest her for driving under the influence. SR 60-62. After a hearing on the matter, the circuit court issued its memorandum order denying Simunek's motion. SR 100-04. The court found that the initial encounter between law enforcement and Simunek was consensual, therefore a seizure did not occur. SR 100-04. It further found that law enforcement had probable cause to arrest Simunek for driving under the influence. SR 100-04.

After that decision Simunek opted for a court trial. The parties asked the court to rely on the preliminary hearing, the suppression hearing, and any other evidence in the record. CT 12. The State also presented testimony from Chief Deputy Belt and State Health Lab Chemist Jeremy Kroon. CT 12-50. The court, in a memorandum decision, found Simunek guilty of ingestion and possession of paraphernalia. SR 217-18. But the court found Simunek not guilty of driving under the influence. SR 217-18. The circuit court sentenced Simunek to five years in prison, suspended on the condition she successfully complete a three-year probation term. SR 296.

STATEMENT OF FACTS

On January 16, 2022, around 11:00 p.m., Chief Deputy Isnalwaica Belt was dispatched to the Coffee Cup gas station in Fall River. SH 6. He was notified of a suspicious vehicle that was parked with the driver

appearing to be asleep or unconscious, and the vehicle was running and the blinker on. SH 7. Dispatch informed him the vehicle was a white SUV parked on the north side of the building. SH 7. When Chief Deputy Belt arrived at the Coffee Cup, he found the vehicle in question with its blinker still activated. SH 8. He parked his patrol car, activated the emergency lights, and approached the SUV on foot. SH 8.

When he got to the driver's side of the vehicle, Chief Deputy Belt saw the driver, later identified as Simunek, slumped over. SH 8, EX A. He noticed her chest moving up and down, indicating she was breathing. SH 8. He took a picture of her and then knocked on the window to get her attention. SH 8-9. Chief Deputy Belt asked Simunek if everything was okay and what was going on. EX A. Simunek stated she was resting after just getting back from being out of town. EX A. She told Chief Deputy Belt she had been in Scottsbluff, Nebraska. EX A. When he asked Simunek how long she had been driving, she told Chief Deputy Belt she hadn't been driving, she was resting. EX A. When he tried to clarify, stating she told him she was tired from driving, Simunek told him she had been out of town for a while. SH 10, EX A.

While speaking to Simunek, Chief Deputy Belt noticed her eyes were "really red, bloodshot[,] and she was slurring her speech. SH 9. He asked her if she would be willing to perform some field sobriety tests, which she agreed. SH 9. Chief Deputy Belt administered three standardized tests: horizontal gaze nystagmus, one-leg stand, and walk

and turn. SH 10-11. He also had Simunek perform the lack of convergence test he learned during the Advanced Roadside Impaired Driving Enforcement Program (ARIDE). SH 11. Based on her performance during the tests, Chief Deputy Belt determined Simunek was impaired and arrested her for driving under the influence. SH 11.

Incident to that arrest, Chief Deputy Belt searched Simunek's vehicle and found a butane canister, typically used for filling lighters, and a meth pipe. SH 12. A blood sample later taken from Simunek showed she had methamphetamine in her system. SH 12, EX C.

ARGUMENT

THE CIRCUIT COURT PROPERLY DENIED SIMUNEK'S MOTION TO SUPPRESS.

A. Background.

Simunek argues there was no reasonable suspicion for Chief Deputy Belt to stop her. AB 6-8, 15-16. She further argues he lacked probable cause to arrest her for driving under the influence. AB 17-18. But the record shows that Chief Deputy Belt did not effectuate a seizure of Simunek as it was a consensual encounter. And during that encounter he developed probable cause to arrest Simunek for driving under the influence. Therefore, this Court should affirm the denial of Simunek's motion to suppress.

B. Standard of Review.

This Court reviews the denial of a motion to suppress based on an alleged constitutional violation under the de novo standard. *State v. Rosa*, 2022 S.D. 76, ¶ 12, 983 N.W.2d 562, 566 (citing *State v. Rolfe*, 2018 S.D. 86, ¶ 10, 921 N.W.2d 706, 709). But the circuit “court’s findings of fact are reviewed under the clearly erroneous standard” and this Court gives no deference to the circuit court’s conclusions of law. *State v. Grassrope*, 2022 S.D. 10, ¶ 7, 970 N.W.2d 558, 561 (quoting *State v. Fischer*, 2016 S.D. 12, ¶ 10, 875 N.W.2d 40, 44). “A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *Grassrope*, 2022 S.D. 10, ¶ 7, 970 N.W.2d at 560–61 (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746 (1948)). “As a general matter determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal.” *Rosa*, 2022 S.D. 76, ¶ 12, 983 N.W.2d at 566 (quoting *State v. Wilson*, 2004 S.D. 33, ¶ 8, 678 N.W.2d 176, 180).

C. The Circuit Court Correctly Determined Chief Deputy Belt’s Encounter with Simunek was Consensual and that He had Probable Cause to Arrest Simunek.

Both the United States and South Dakota Constitutions “guarantee a person’s right to be free from unreasonable searches and seizures.” *Grassrope*, 2022 S.D. 10, ¶ 8, 970 N.W.2d at 561. But not all

encounters between law enforcement and citizens are considered seizures. *State v. Iversen*, 2009 S.D. 48, ¶ 9, 768 N.W.2d 534, 536 (citing *Terry v. Ohio*, 392 U.S. 1, 19 n. 16, 88 S. Ct. 1868, 1879, 20 L.Ed.2d 889 (1968)). “Only when an officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may a court conclude that a ‘seizure’ has occurred.” *State v. Sharpfish*, 2019 S.D. 49, ¶ 29, 33 N.W.2d 1, 11 (quoting *Iversen*, 2009 S.D. 48, ¶ 9, 768 N.W.2d at 536). And the crucial test is whether, under the totality of the circumstances, law enforcement’s conduct would have indicated to a reasonable person that they were not free to ignore law enforcement’s presence and continue about their business. *Sharpfish*, 2019 S.D. 49, ¶ 29, 933 N.W.2d at 11 (citing *State v. Haar*, 2009 S.D. 79, ¶ 17, 772 N.W.2d 157, 165).

Things to look at when deciding whether a reasonable person felt free to end the encounter with law enforcement include:

officers positioning themselves in a way to limit the person's freedom of movement, ... the presence of several officers, the display of weapons by officers, physical touching, the use of language or intonation indicating compliance is necessary, the officer's retention of the person's property, or an officer's indication the person is the focus of a particular investigation.

Sharpfish, 2019 S.D. 49, ¶ 30, 933 N.W.2d at 11 (quoting *Haar*, 2009 S.D. 79, ¶ 17, 772 N.W.2d at 165). Other factors to consider are the time of the day and the use of emergency lights. *Sharpfish*, 2019 S.D. 49,

¶ 30, 933 N.W.2d at 11 (citing *Iversen*, 2009 S.D. 48, ¶ 17, 768 N.W.2d at 539).

In *Sharpfish*, this Court found a consensual encounter took place between Sharpfish and law enforcement, when officers received a tip of an intoxicated driver. *Sharpfish*, 2019 S.D. 49, ¶ 2, 933 N.W.2d at 5. The tipster detailed the person in question, along with a description of the vehicle. It was reported the vehicle was headed towards the Corner Pantry gas station. *Id.* When law enforcement arrived at the scene, the officer pulled in behind the vehicle, at a gas pump, in a well-lit area, approximately one car length away. *Id.* ¶ 4, 933 N.W.2d at 5. The officer activated the amber lights on his patrol vehicle and approached the defendant on foot. *Id.* The officer started a conversation with the defendant and noticed several signs of impairment including swaying, slurred speech, the smell of alcohol, and bloodshot eyes. *Id.* ¶ 5, 933 N.W.2d at 5. This Court found the initial encounter between Sharpfish and law enforcement consensual. *Id.* ¶ 33, 933 N.W.2d at 12. In coming to that conclusion, this Court looked at the totality of the circumstances that comprised of: the encounter took place in a well-lit gas station, Sharpfish was already parked, the officer parked his vehicle in a way that did not prevent Sharpfish from leaving, the officer approached Sharpfish on foot, the officer had a conversational tone in his voice, law enforcement did not prevent Sharpfish from carrying about his business,

the officer made no outward signs of authority, and he utilized his amber lights. *Id.*

Similar in *Iversen*, this Court found law enforcement did not seize Iverson when an officer approached Iversen's parked vehicle. 2009 S.D. 48, ¶ 19, 768 N.W.2d at 539. Law enforcement saw a pickup parked, with its motor running but its lights off, at 1:30 a.m., behind an old gas station. *Id.* ¶ 2, 768 N.W.2d at 535. The officer was concerned since there was a history of thefts in the area. *Id.* The officer turned on his spotlight and approached the pickup on foot. *Id.* When the driver rolled down his window, the officer immediately smelled alcohol and noticed his bloodshot and glassy eyes. *Id.* ¶ 3, 768 N.W.2d at 535. This Court found there was no show of authority, the officer did not raise his voice, he did not touch or motion towards his weapon or badge, nor did he tell the driver he was not free to leave. *Id.* ¶ 18, 768 N.W.2d at 539. And once the driver rolled down his window, the officer formed reasonable suspicion to detain the driver. *Id.*

This case is nearly identical to *Sharpfish* and *Iversen*. Chief Deputy Belt responded to a call about a person slumped in the driver's seat of their car, which was running with the blinker on, in the Coffee Cup parking lot. SH 6-5, EX A. When he got to the Coffee Cup, Chief Deputy Belt parked behind Simunek, but did not block her path of travel. EX A. He turned on his emergency lights and approached Simunke's vehicle on foot. SH 8. Chief Deputy Belt knocked on her

window once, and Simunek became alert and opened her window. SH 8-9. While speaking to her, he noticed her eyes were red and bloodshot and her speech was slurred. SH 9.

Based on the totality of the circumstances, the interaction between Chief Deputy Belt and Simunek was consensual. Chief Deputy Belt did not prohibit Simunek's path of travel, he approached on foot, he used a calm, conversational voice, he did not display or reference his weapon, and he never told Simunek she was not free to leave. EX A. Further, while the incident took place at 11:30 p.m., it was in a well-lit parking lot, at an occupied gas station. EX A.

While speaking with Simunek, Chief Deputy Belt developed reasonable suspicion to detain her to investigate whether she was under the influence. She had bloodshot eyes, slurred speech, and she could not carry on a conversation. SH 9, EX A. Indeed, Simunek told Chief Deputy Belt she pulled off at the Coffee Cup because she was tired from driving from Scottsbluff. EX A. But when asked how long she had been driving, Simunek told Chief Deputy Belt she had not been driving. EX A. And when Chief Deputy Belt inquired further about what she had been doing that day, Simunek could not answer. EX A. Based on his interaction with Simunek during the consensual encounter, Chief Deputy Belt developed reasonable suspicion to begin a driving under the influence investigation.

Simunek contends that a person resting at a rest stop does not create reasonable suspicion for a stop. AB 16. She is correct. But Chief Deputy Belt did not conduct his investigation because she was resting. He made contact with her because someone from the gas station called law enforcement, concerned about her well-being. The initial contact was consensual. But once he spoke with Simunek, he developed reasonable suspicion to conduct an investigation.

During the investigation, Chief Deputy Belt had Simunek participate in several field sobriety tests, including horizontal gaze nystagmus, walk and turn, and one-legged stand. SH 10-11, EX A. He also administered lack of convergence test, while not standard, it was a test he learned during his training at ARIDE. SH 11. Simunek failed those sobriety tests. SH 11. Based on the investigation, Chief Deputy Belt had probable cause to arrest Simunek for driving under the influence.

Simunek challenges this by arguing she did not give any indication of intoxication. AB 18. But that is not true. She was slumped over in the driver's seat, with her blinker on and her vehicle running. SH 10-11, EX A. She had bloodshot eyes, slurred speech, and had difficulties carrying on a conversation. SH 10-11, EX A. Not to mention, she failed the field sobriety tests. SH 10-11, EX A.

Simunek also argues there was not sufficient evidence that she was in physical control of the vehicle. AB 17. But this Court found a

person sleeping in the driver's seat, while parked at a convenience store parking lot, with the keys in the driver's pocket, was enough to show the driver was in physical control of the vehicle. *State v. Kitchens*, 498 N.W.2d 649, 652 (S.D. 1993). If that fact pattern amounted to actual physical control, then Simunek's keys in the ignition and the vehicle is running, must be actual physical control, too. In fact she was in a position to drive off much easier than Kitchens could have.

In that same vein, Simunek argues this Court should adopt dicta in *State v. Kitchens*, 498 N.W.2d 649 (S.D. 1993). AB 10-16. In *Kitchens*, this Court noted the dangers of a person being charged with driving under the influence, as someone being in actual, physical control of a vehicle, when they were merely sleeping in the car. *Kitchens*, 498 N.W.2d at 653-54. However, like *Kitchens*, this is not a case where a defendant was "voluntarily sleeping off the effects of alcohol with no intention of moving the vehicle." *Id.* Simunek was in the driver's seat, the vehicle running, and the blinker on. At any moment she could have awoken and drove off. So the dicta in *Kitchens* is not applicable in this case.

Based on the totality of the circumstances, the interaction between Simunek and Chief Deputy Belt was consensual. Upon speaking with her, Chief Deputy Belt developed reasonable suspicion to conduct an investigation to determine whether Simunek was under the influence.

That investigation then led to probable cause for her arrest. Therefore, this Court should affirm the denial of Simunek's motion to suppress.

D. Chief Deputy Belt was acting as his role of community caretaker when he approached Simunek.

If this Court disagrees and finds the encounter between Chief Deputy Belt and Simunek was not consensual, the community caretaker exception applies.

One of the few exceptions to a warrantless seizure is the community caretaker exception. This exception is implicated when law enforcement officers are not acting as criminal investigators, but "acting within their roles as 'community caretakers' and are able to 'articulate specific facts that, taken with rational inferences, reasonably warrant the intrusion.'" *State v. Short Bull*, 2019 S.D. 28, ¶ 13, 928 N.W.2d 473, 476 (quoting *State v. Klevin*, 2016 S.D. 80, ¶ 10, 887 N.W.2d 740, 743).

This Court has cautioned the use of the community caretaker exception, noting that law enforcement may happen "upon evidence of criminal activity while acting as community caretakers," and therefore the exception should be "cautiously and narrowly applied in order to minimize the risk that it will be abused or used as a pretext for conducting an investigatory search for criminal evidence." *Short Bull*, 2019 S.D. 28, ¶ 15, 928 N.W.2d at 477 (quoting *State v. Rinehart*, 2000 S.D. 135, ¶ 10, 617 N.W.2d 842, 844). Examples of when the community caretaker exception as applied to vehicles include stopping a vehicle driving at an "excessively slow speed," justifying concerns about a

medical emergency or a vehicle malfunction. *See Rinehart*, 2000 S.D. 135, ¶¶ 8-9, 617 N.W.2d at 844. Another example is when a man was in the driver's seat, parked, with his vehicle running at 1:00 a.m. *Kleven*, 2016 S.D. 80, ¶¶ 2-5, 887 N.W.2d at 741. Officers noticed him a couple more times, with the last being at 2:00 a.m. *Id.* The vehicle was still running, and the man appeared asleep or passed out. *Id.* Law enforcement stopped to check on his health and safety. *Id.* This Court also upheld a traffic stop under the community caretaker exception when law enforcement was alerted to a disturbance at a hotel. *Kleven*, 2016 S.D. 80, ¶¶ 2-5, 887 N.W.2d at 741. Upon arrival, officers learned a female involved in the disturbance left the hotel but was still in the parking lot. *Id.* There were no pedestrians in the parking lot, but a vehicle was leaving the area. *Id.* This Court found it was reasonable for the officer to think the driver of the vehicle has been part of the disturbance and she may need help. *Id.*

Here, Chief Deputy Belt was told of a woman slumped over in the driver's seat, with her vehicle running and blinker on. He did not know why Simunek was slumped over. It was in Chief Deputy Belt's scope as a community caretaker to approach Simunek to make sure she was fine and did not need medical assistance. Once he spoke with Simunek, he developed reasonable suspicion to detain her for an investigation. Therefore, because Chief Deputy Belt was acting as a community

caretaker, not a criminal investigator, he did not need reasonable suspicion to approach Simunek in her vehicle.

CONCLUSION

Based upon the foregoing arguments and authorities, the State respectfully requests that Simunek's conviction and sentence be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 3,252 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2016.

Dated this 3rd day of April 2025.

/s/ Erin E. Handke
Erin E. Handke
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 3, 2025, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Tina Marie Simunek* was served via Odyssey File & Serve upon J. Scott James at southernhillslaw@gmail.com.

/s/ Erin E. Handke
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