IN THE SUPREME COURT
OF THE STATE OF VERMONT
DOCKET NO. 2019-388

STATE OF VERMONT, APPELLEE

V.

PHILLIP WALKER-BRAZIE & BRANDI LENA-BUTTERFIELD, APPELLANT

APPEAL FROM THE
SUPERIOR COURT OF VERMONT, CRIMINAL DIVISION
ORLEANS COUNTY
DOCKETS NO. 555-9-18 Oscr, 558-9-18 Oscr

Appellee State of Vermont's Brief

STATE OF VERMONT

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ISSUES PRESENTED

Whether this Court has already twice decided that Article 11 has no application to searches conducted by federal government officials acting under the exclusive federal authority to safeguard the borders of the United States and therefore whether the issue on appeal has been squarely decided against the defendants.

Whether those precedents should be overruled or can be distinguished.

Whether this case also concerns the reverse silver platter doctrine, or Border Patrol activity in the interior of Vermont, or disincentivizing state law enforcement officers, or Vermont officers collaborating or cooperating with the Border Patrol, or with allegations of CBP excesses in other contexts, or with the sufficiency of reasonable suspicion or probable cause here.

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STATEMENT OF THE CASE

Defendant Brandi Lena-Butterfield was charged with misdemeanor possession of marijuana and defendant Phillip Walker-Brazie was charged with felony possession of marijuana and felony possession of hallucinogenic drugs arising from a search of their vehicle during a traffic stop conducted by federal Border Patrol ("BP") agents. P.C., pp. 114, 118. Defendants filed a motion to suppress all physical evidence and statements made during the stop. Following a hearing on the motion on August 22, 2019, the trial court denied their motion. The defendants sought permission to appeal pursuant to V.R.A.P. 5(b)(3), which was granted in part on November 4, 2019.

STATEMENT OF THE FACTS

Evidence at the Hearing

On the evening of August 12, 2018, Border Patrol Agent Jeffrey Vining was on roving patrol in a semi-concealed location at the intersection of Route 105 and North Jay Road. P.C., p. 12. Agent Vining testified that the area is about one mile from the Canadian border and a frequent spot for smuggling as North Jay Road leads up to the border. P.C., p. 15. Nearing the end of his shift, Agent Vining heard a fast-approaching car begin to decelerate, so that—in Agent Vining's best approximation—it could turn onto North Jay Road. Agent Vining testified that the vehicle "slowed down greatly … like they were going to go down North Jay Road, but then they accelerated." P.C., p. 17. The driver sped up and stayed on Route 105 once Agent Vining's marked patrol vehicle came into view. Based on his ten years of

experience as a Border Patrol officer, the driver's behavior seemed "suspicious" to Agent Vining, and he began to follow the vehicle. P.C., p. 18.

Agent Vining testified that the vehicle traveled well below the speed limit and the driver continually checked the mirrors—behavior that Agent Vining interpreted as an attempt to "avoid being stopped." P.C., p. 20. He then ran the plate on the vehicle which came back registered to defendant Brandi Lena-Butterfield, who had a history with narcotics. P.C., pp. 19, 23. Given this information, combined with being in a remote area known for drug smuggling, Agent Vining executed what the trial court described as a temporary stop of the vehicle. P.C., p. 86.

Agent Vining testified that he could smell the strong odor of marijuana before he arrived at the defendants' car. P.C., p. 24. At the car, he identified himself and asked the two occupants about their citizenship. P.C., p. 27. Two things stood out to Agent Vining from the stop. First, he recognized the passenger, Phillip Walker-Brazie, from a prior search of Walker-Brazie's home. P.C., p. 25. Second, Agent Vining noticed that there were "numerous bags" and a cooler in the car. He testified that these items are frequently used in the smuggling of drugs. P.C., p. 26.

Shortly after, Supervisor BP Agent Brian Dyke arrived on the scene. Supervisor Dyke determined that there was probable cause to search the vehicle based on his history with the subjects and knowledge of their drug use, the proximity of the location to the border and known smuggling routes, the time of

night, the strong smell of marijuana, and the presence of visible baggage. P.C., p. 53.

The search of the vehicle uncovered quantities of both marijuana and hallucinogenic drugs. P.C., p. 54. Agent Vining testified that the quantity of drugs did not suggest smuggling was taking place, and he turned them over to Vermont State Police. P.C., pp. 30 31. The trial court found that at no point were state authorities involved in the stop or search of the vehicle. P.C., p. 190.

Trial Court Ruling

The trial court found that the motor vehicle stop occurred "very near the border but not at it … very near, essentially in the shadow of the border, but not at the border or a formal checkpoint." P.C., p. 192. It held that the Border Patrol agent acted under his federal authority when stopping the defendants, in that the agent had a reasonable suspicion of unlawful activity given the proximity to the border in a remote area associated with smuggling activities, and the operation of the vehicle, suggesting that it was about to make a turn towards the border until the Border Patrol vehicle was spotted. P.C., p. 85.

The trial court also found that there was probable cause to conduct a warrantless vehicle search under federal law. P.C., p. 88. Finally, the court ruled that, pursuant to this Court's ruling in Rennis and Coburn, Article 11 did not apply to the search because the Border Patrol agents were acting pursuant to their exclusive authority at the border and border equivalent. Although this was a roving patrol, unlike the case with Rennis or Coburn, the court held, the stop was

> [S]o close to the border that I find that there is a strong Federal interest in the border patrol, and Federal interest in the border patrol being able to do its work, and that outweighs essentially any State interest in this kind of situation where the stop was made essentially in the shadow of the border by Federal agents exercising Federal authority.

P.C., p. 91.

The court found that the fact that this was a roving patrol did not distinguish the matter from Rennis, which involved a check-point ninety-seven miles from the border, as this case involved a stop "within about a mile of the border," and therefore there was no "real difference in terms of the application of the same principle here…" P.C., p. 91.

The trial court also found "no claim of any kind" that state agents were involved in the search, which would have been "a completely different situation," and also saw no "outrageous conduct on behalf of the Federal agents." P.C., p. 90. Finally, as an alternative ground the court held that the law of the state of prosecution would not apply to a search made validly under Federal law or under another state's law, because the purpose of exclusionary rule is to deter illegal police conduct, which has no application in such a situation. P.C., pp. 92 – 93.

Motion for Permission to Appeal

Following the trial court's denial of defendants' motion to suppress, the defendants filed a Motion for Permission to File an Interlocutory Appeal on two issues. The first was whether the Border Patrol agent had reasonable suspicion to stop their vehicle. The second issue was whether federal law or Vermont law applies

to the question of the need for a search warrant to search the vehicle. The defendants did not seek to appeal the probable cause determination. P.C., p. 187.

The court denied the defendants' motion as to the first issue but granted the motion as to the second issue. P.C., pp. 192 – 193. The defendants did not appeal the trial court's denial of the motion for an interlocutory appeal on the reasonable suspicion grounds, pursuant to V.R.A.P. 5(b)(7).

ARGUMENT

I.

THE ISSUE ON APPEAL HAS BEEN SQUARELY DECIDED AGAINST THE DEFENDANTS IN TWO PRIOR DECISIONS OF THIS COURT.

The issue in this case is squarely controlled by two prior decisions of this Court, and in order to reverse the trial court's order, this Court must overrule its decisions in those case. The defendants have not shown adequate cause to overrule this Court's two prior precedents.

In State v. Coburn, 165 Vt. 318 (1996), the defendant's luggage was searched at John F. Kennedy International Airport by a United States Customs Inspector. The search was conducted after a narcotics dog alerted to the suitcase, which had arrived with the defendant on a direct flight from Jamaica, West Indies. The inspector found a quantity of marijuana inside the suitcase. However, federal authorities were not interested in pursuing criminal charges against the defendant, and therefore the suitcase and the marijuana were delivered to the Vermont State Police. The Vermont State Police conducted a drug analysis on the marijuana and fingerprint analysis on the suitcase. After these tests were completed, the police

made a controlled delivery to the defendant, who was immediately arrested and charged with possession of marijuana.

On appeal this Court first affirmed the legality under federal law of the routine search of the defendant's suitcase, without reasonable suspicion or probable cause or a warrant. Id., at 321. The Court then turned to the defendant's argument that the conduct of the Customs officials had to pass muster under the Vermont Constitution as well. This Court found this claim to be meritless:

> We defer to federal law where the federal interest in the conduct at issue outweighs Vermont's interest. With respect to safeguarding the United States border or its functional equivalent, the federal interest is preeminent. Control of commerce with foreign nations is an exclusively federal function under the United States Constitution, and "[t]he authority of the United States to search the baggage of arriving international travelers is based on its inherent sovereign authority to protect its territorial integrity."
>
> *We therefore hold that the Vermont Constitution does not apply to the conduct of federal government officials acting under the exclusive federal authority to safeguard the borders of the United States.*

Coburn, 165 Vt. at 325 (citations omitted) (emphasis added).

Faced with an almost identical issue as recently as 2014, this Court reaffirmed the Coburn holding. In State v. Rennis, 195 Vt. 492 (2014), two pounds of marijuana were found in the trunk of the defendant's car at a U.S. Border Patrol checkpoint on Interstate I-91 ninety-seven miles south of the Canadian border. The search of the defendant's vehicle occurred after the defendant gave inconsistent answers concerning his citizenship, and after the agent smelled burnt marijuana in

the vehicle. Federal authorities declined to prosecute the case and the drugs were sent to Vermont law enforcement authorities who initiated the case. The defendant conceded the legality of the search under the Fourth Amendment, but challenged admissibility of the evidence under Article 11 of the Vermont Constitution. This Court found no error, relying upon the Coburn decision:

> We find this case to be squarely controlled by our precedent in State v. Coburn … *The key holding of Coburn is that "the Vermont Constitution does not apply to the conduct of federal government officials acting under the exclusive federal authority to safeguard the borders of the United States."* We reached that conclusion by noting that "[w]e defer to federal law where the federal interest in the conduct at issue outweighs Vermont's interest," and that the federal interest in "safeguarding the United States border or its functional equivalent … is preeminent."
>
> We add to Coburn's holding now only to note that the "functional equivalent" of the U.S. border generally includes immigration checkpoints, such as those within the parameters listed in United State v. Martinez-Fuerte, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976).

Rennis, 195 Vt. at 495 (emphasis supplied).

The Court in Rennis continued,

> [D]efendant does not allege that the Vermont State Police did anything other than receive the evidence uncovered in the federal search, including the drugs, from the federal agents and proceed to use the evidence in this state prosecution. This is the same sequence of events as in Coburn. Like the defendant in Coburn, defendant here "fails to articulate how his already vitiated possessory interest … was revived upon transfer from [federal agents] to the Vermont police."

Likely Oral arg question on this issue

Rennis, 195 Vt. at 496 – 497.

The Court in Rennis then went on to disagree with the New Mexico case of State v. Cardenas-Alvarez, 130 N.M. 386 (2001), a case cited as authority in not only the Defendants' brief but in all three amicus briefs. The Court stated,

> In that case, our colleagues in New Mexico decided that, when proffered in a state prosecution, evidence seized lawfully by federal officers under the Fourth Amendment but in a manner that would be unlawful under that state's constitution must be suppressed.
>
> Again, our reasoning in Coburn precludes this argument. Where we have determined that Article 11 does not apply, it also does not provide the remedy of the exclusionary rule…. [T]his border search by federal officers, conducted in compliance with the Fourth Amendment as acknowledged by defendant, cannot be challenged under Article 11.

Rennis, 195 Vt. at 497. It is also significant that the New Mexico Supreme Court has declined to extend its holding in Cardenas-Alvarez to searches conducted by Customs agents at either border crossings or at the functional equivalent of border crossings. State v. Sanchez, 2015-NMSC-018, ¶ 20, 350 P.3d 1169, 1176 (declining to apply the New Mexico Constitution to searches conducted under federal border search doctrine). Cardenas-Alvarez itself concerned a search at a fixed Border Patrol checkpoint located sixty miles from the border, a factual situation bearing no similarity to that presented here. See also, State v. Allard, 313 A.2d 439, 451 (Me. 1973) (seizure by Customs officials at border and provision of evidence to local law enforcement did not violate state constitution); State v. Bradley, 719 P.2d 546, 548–49 (Wash. 1986) ("it is Congress to whom the federal constitution allocates the responsibility for policing international borders and it is federal officials who

actually enforce federal border laws…. The trial court properly concluded that [Washington State] Const. art. 1, § 7 does not require the exclusion of this evidence.") (citations omitted).

This Court also declined to apply Vermont's search and seizure laws to evidence seized at the border in State v. Dreibelbis, 147 Vt. 98, 100 (1986):

> Defendant next contends that since the state police are held to a probable cause standard in searches under the Fourth Amendment, evidence received from federal customs officials whose "border search" authority is not based on probable cause must be excluded. That contention misunderstands the applicable law. So long as the evidence seized in a permissible, routine customs border inspection meets federal standards for such searches, see 19 U.S.C. § 1582, it is no violation of the defendant's constitutional rights if the evidence is later used in a state prosecution.

There can be no serious question that this stop occurred in connection with "the conduct of federal government officials acting under the exclusive federal authority to safeguard the borders of the United States." Border Patrol agents have no authority to enforce state laws:

> *Border Patrol agents have no part in enforcing laws that regulate highway use*, and their activities have nothing to do with an inquiry whether motorists and their vehicles are entitled, by virtue of compliance with laws governing highway usage, to be upon the public highways.

United States v. Brignoni-Ponce, 422 U.S. 873, 883 n. 8 *(1975).[1] See also, United States v. Rubio-Hernandez, 39 F. Supp. 2d 808, 830 (W.D. Tex. 1999) (Border Patrol

[1] Under strictly limited circumstances, Vermont-certified BP agents are empowered by state law to make arrests in order to protect someone from the imminent infliction of serious bodily injury or to prevent the escape of a felon. 20 V.S.A. § 2222. This is obviously a

agents are not legally permitted to stop a vehicle for a traffic violation, although such a violation can be a factor in considering whether there is reasonable suspicion that the occupants are in the country illegally). See also, Ortiz v. U.S. Border Patrol, 39 F. Supp. 2d 1321, 1326 (D.N.M. 1999), aff'd, 210 F.3d 390 (10th Cir. 2000):

> Border patrol agents are not general law enforcement officers…. their authority and duties are circumscribed by statute and limited in scope. Their primary duties are to prevent illegal aliens from entering the country. 8 U.S.C.A. § 1357 (main volume and 1998 supplement). Border patrol agents' powers to search and arrest are tightly controlled by statute and regulation, and are focused on their primary mission of interdiction of alien traffic into this country…. For example, border patrol agents have the power to arrest offenders violating the laws of the United States, but only if the agent is performing duties relating to the enforcement of immigration laws at the time of the arrest *and* there is a likelihood the offender will escape before a warrant can be obtained. § 1357(a)(5).

Ortiz v. U.S. Border Patrol, 39 F. Supp. 2d 1321, 1326 (D.N.M. 1999), aff'd, 210 F.3d 390 (10th Cir. 2000).

This discussion refutes Amici Migrant Justice's claim that "federal law grants CBP officers broad law enforcement authority deep into the interior of the country."). Brief, p. 10. Oddly, Migrant Justice cites to Section 1357(a)(5), limiting Border Patrol authority to enforcement of the laws of the United States for the

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public safety measure and underscores the limited authority of the BP. The statute does not reach motor vehicles stops on reasonable suspicion of a violation of state law.

proposition that CBP "seeks to insert itself in the policing of garden-variety state law." Id., p. 14. The statute indicates the exact opposite.

The evidence at the hearing indicated that the Border Patrol was, in fact, exercising its "exclusive federal authority to safeguard the borders of the United States." Rennis, 195 Vt. at 495. The stop occurred at the intersection of Route 105 and North Jay Road, about one mile from the Canadian border, and was based upon a reasonable suspicion that the occupants of the vehicle were involved with smuggling activity at the border. North Jay Road leads up to the border (but not to a border crossing point). In the judgment of the Border Patrol officer, the vehicle was about to turn north onto North Jay Road, towards the nearby border, but continued straight when the Border Patrol vehicle came into view. Route 105 is the first east-west road south of the border with Canada and runs in close proximity to the border. Roads running north from Route 105 have little space to run before hitting the border, and once having turned onto North Jay Road there is almost nowhere to go except to the border. The trial court found that trails off North Jay Road led across the border. Anyone intending to cross the Canadian border, or who has illegitimately crossed into the United States, is likely to use Route 105.

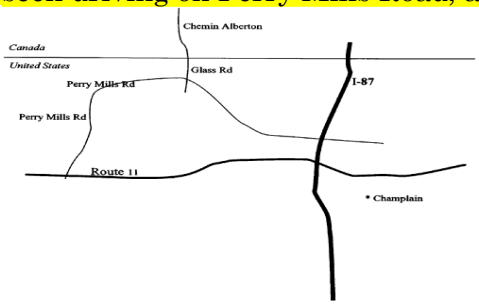
Roving patrols operate close to the border as the first line of defense against people and merchandise unlawfully entering the United States. These road patrols are necessary because the actual border may consist of wilderness or bodies of water. Under these circumstances, the Border Patrol agents here acted well within their exclusive federal authority in safeguarding the border when they stopped this

vehicle based upon a reasonable suspicion. See, United States v. Singh, 415 F.3d 288, 294 (2d Cir. 2005) (finding reasonable suspicion where, inter alia, defendant was "driving on a rural road near the U.S.-Canadian border in an area where illegal immigrants frequently attempt to enter the United States.")[2].

The defendants claim that the trial court found that this search "did not occur at the border or its functional equivalent." Appellant's brief, p. 29. No one is arguing that it did. But the trial court did find that it occurred "very near the border … essentially in the shadow of the border." P.C., p. 192. The court also found that the area was "very remote," about one aerial mile from the border, and in an area where smuggling occurred through the forest. P.C., p. 189.[3] In addition, it was an area in which there has been a significant degree of smuggling and transport across illegal crossings of the Canadian border. P.C., pp. 82, 85. The court concluded,

> It's so close to the border that I find that there is a strong Federal interest in the border patrol, and Federal interest in the border being able to do its work, and that that outweighs essentially any State interest in this kind of situation where the stop was made essentially in the

[2] The map in Singh is remarkably similar to the situation here. The defendant there was seen driving on Perry Mills Road, and was stopped after he turned onto Route 11:



[3] Agent Dyke testified that there are "a lot of trails that are serviced by [North Jay Road] that leads to the border and into Canada." P.C., p. 49.

> shadow of the border by Federal agents exercising Federal authority.

P.C., p. 91.

This case should end here. Any challenges to the legality of the stop or to the existence of probable cause can be fully litigated at the trial level. This case only concerns the use in state court of evidence presumably lawfully seized based upon probable cause, following a stop based upon reasonable suspicion, in "the shadow of the border," by Border Patrol agents "acting under the exclusive federal authority to safeguard the borders of the United States." That issue has twice been decided by this Court and should not be revisited.

II.

THIS COURT'S PRECEDENTS SHOULD NOT BE OVERRULED AND CANNOT BE DISTINGUISHED.

The defendants asks that this Court reverse its prior ruling that "… the Vermont Constitution does not apply to the conduct of federal government officials acting under the exclusive federal authority to safeguard the borders of the United States." They make a variety of arguments in support of suppression here, but the arguments all amount to the same thing: Article 11 creates an "all or nothing" proposition, in which nothing can be admitted in state court prosecutions other than evidence which would have been admissible if seized by Vermont law enforcement officers, without consideration of any other factors. Nothing in Vermont Constitutional jurisprudence supports this view of Article 11, and much undermines it. This Court applies a balancing test in determining whether evidence is

admissible pursuant to Article 11, and the balancing here strongly favors admission of this evidence.

A. The Court Employs A Balancing Test To Determine If Article 11 Applies To A Particular Situation.

Chapter I, Article Eleven of the Vermont Constitution "does not contemplate an absolute prohibition on warrantless searches or seizures." State v. Jewett, 148 Vt. 324, 328 (1987). See, e.g., State v. Welch, 160 Vt. 70, 83 (1992) (upholding warrantless inspection of pharmacy records under Article 11 challenge); State v. Martin, 184 Vt. 23, 37–38 (2008) (DNA sampling with neither warrant nor probable cause permissible under Article 11 where, inter alia, the practice "is not, as a general matter, concerned with 'ordinary law enforcement,' but with "goals [that] are beyond the normal goals of law enforcement"); State v. Koenig, 202 Vt. 243, 252 (2016) (knock-and-talk "is also an exception to the protections against warrantless searches" under both federal and state constitutions).

This Court has often employed a balancing test in determining the reach of Article 11, and whether Article 11 reaches the conduct of federal government officials acting under the exclusive federal authority to safeguard the borders of the United States should be no different. For example, in State v. Bogert, 197 Vt. 610, 619 (2014), this Court balanced "the competing public and private interests at stake" in order to determine that Article 11 does not require reasonable individualized suspicion as a prerequisite to warrantless searches of convicted sex offenders' homes when such searches are a condition of a furlough agreement.

Similarly, a search warrant is not required under Article 11 where a probation term provides for such searches, and the terms of probation are narrowly tailored to fit the circumstances of the individual probationer, as this "strikes the proper balance between probationer privacy rights and public protection concerns." State v. Lockwood, 160 Vt. 547, 559 (1993). In determining whether the administration of a preliminary breath test is reasonable under Article 11 this Court has recognized the need to balance the intrusion into a suspect's privacy with "the important public-safety need to identify and remove drunk drivers from the roads." State v. McGuigan, 184 Vt. 441, 449 (2008). The constitutionality of DUI checkpoints under Article 11 is "determined by balancing 'the public interest in the seizure against the degree of intrusion into personal privacy.'" State v. Williams, 182 Vt. 578 (2007). See also, State v. Record, 150 Vt. 84, 85 - 87 (1988) ("Article Eleven does not mandate an absolute prohibition against searches and seizures undertaken without a proper warrant … this Court has balanced and limited the Article Eleven interest to be free from warrantless arrest where the public welfare is at stake.").

Likely oral arg ?'s re: public interest in CBP's activities as akin to DUI checkpoints and/or breathalyzers, see McGuigan

B. The Public Interests At Stake Outweigh The Competing Private Interests.

In this case, the public interests at stake outweigh the competing private interests. In State v. Savva, 159 Vt. 75 (1991), this Court outlined the private interests in requiring a search warrant before the police conduct a search of an automobile based on probable cause. First, while acknowledging that criminal defendants may seek review of searches and seizures, the Court held that "these

Oral arg ?: how is this an unreasonable search?

"Our analysis must be grounded on defendant's expectation of privacy in the packages contained in the *88 hatchback of his vehicle."State v. Savva, 616 A.2d 774, 781 (Vt. 1991)

after-the-fact challenges do not serve Article 11's purpose of protecting the rights of everyone—law-abiding as well as criminal—by involving judicial oversight before would-be invasions of privacy." Second, the warrant requirement means that "[p]eople will be spared ill-considered searches or at least given an impartial objective assessment before a search is carried out." Third, the warrant requirement "brings a significant check on law enforcement conduct, because not just fruitful searches will be on the record, and searches on doubtful grounds may not be attempted at all if authorities know they must first go before a judicial officer." Fourth, without the warrant requirement "police behavior would be subjected to judicial scrutiny only in rare cases, while '[d]ay by day mischief may be done and precedents built up in practice long before the judiciary has an opportunity to intervene.'" And finally, "prior review prevents "'hindsight from coloring the evaluation of the reasonableness of a search or seizure.'"" State v. Savva, 159 Vt. at 86–88 (citations omitted).

Although warrantless searches are sometimes permitted under Article 11, these exceptions must be " 'jealously and carefully drawn.' " State v. Jewett, 148 Vt. 324, 328, 532 A.2d 958, 960 (1986) (quoting State v. Meunier, 137 Vt. 586, 588, 409 A.2d 583, 584 (1979)).

State v. Savva, 616 A.2d 774, 779 (Vt. 1991)

More generally, this Court has justified the state exclusionary rule on the grounds that "[i]ntroduction of [illegally obtained] evidence at trial eviscerates our most sacred rights, impinges on individual privacy, perverts our judicial process, distorts any notion of fairness, and encourages official misconduct." State v. Oakes, 157 Vt. 171, 173 (1991) (citation omitted). This Court has also cited to the promotion of the public's trust in the judicial system in applying the exclusionary rule. State v. Lussier, 171 Vt. 19, 33 (2000).

The unique posture of border-area searches by federal border control officers means that virtually *none* of these factors will be served by importing Article 11 requirements into these searches. Imposing Vermont's warrant requirement on automobile searches conducted on probable cause in the shadow of the United States border by Border Patrol agents while engaged in their exclusive authority to safeguard the border will not result in even one fewer automobile search. The work of Border Patrol agents is not affected by the Vermont Constitution, and no Border Patrol agent, having stopped a car based on reasonable suspicion in the immediate vicinity of the border, and having probable cause to believe that the car contains evidence of a federal crime, will seek a search warrant. Not a single Vermonter will avoid an automobile search that he or she would otherwise have undergone. The possessory interest has been "already vitiated." Rennis, 195 Vt. at 497. This means that criminals and law-abiding people will be in the exact same position as under current Vermont law. No one will be "spared [an] ill-considered search[]," and no one will receive "an impartial objective assessment before a search is carried out." There will be no effect on "law enforcement conduct." The only arguably relevant factor is that judicial review by Vermont judges may be colored by hindsight in evaluating the reasonableness of a search or seizure, but it is difficult to justify a constitutional doctrine on the grounds that the Vermont judicial system, including review on appeal before this Court, is unable to overcome the effects of hindsight in evaluating the existence of probable cause.

WHY?

For the same reasons, use of this evidence does not impinge on individual privacy, pervert the judicial process, distort any notion of fairness, or encourage official misconduct. Individual privacy will be entirely unaffected by permitting the use of the evidence. Official misconduct is not encouraged because there has been none. Nor is it "unfair" to use evidence lawfully gathered – any other outcome is simply a windfall for the defendant. Finally, the public's trust in the judicial system is unlikely to be furthered by the exclusion of evidence of serious and dangerous offenses gathered in a completely legal fashion. See, Commonwealth v. Brown, 925 N.E.2d 845, 851 (Mass. 2010) (citations omitted):

> One of the purposes justifying [the exclusionary rule] is the deterrence of police conduct that unlawfully intrudes on the rights of privacy and security guaranteed our citizens under art. 14, through the preclusion of the fruits of that conduct. Another is the protection of judicial integrity through the dissociation of the courts from unlawful conduct. Where those purposes are not furthered, rigid adherence to a rule of exclusion can only frustrate the public interest in the admission of evidence of criminal activity. In the present case, there is no unlawful conduct to deter…. To the extent that the conduct of State officials is the object of deterrence, our rulings excluding similar evidence obtained through investigations that are essentially State investigations operating under a Federal moniker are sufficient. Judicial integrity, in turn, is hardly threatened when evidence properly obtained under Federal law, in a federally run investigation, is admitted as evidence in State courts. To apply the exclusionary rule in these circumstances as the defendant urges would plainly frustrate the public interest disproportionately to any incremental protection it might afford.

These points also answer Migrant Justice's argument that exclusion of this evidence "preserves individual constitutional rights, protects individual privacy,

promotes fairness, and guards the judicial process against the taint of official misconduct." Brief, p. 18. No one will experience greater privacy as a result of excluding such evidence; not one fewer search will occur. And there has been no "taint of official misconduct." The Border Patrol agents followed the law and the state law enforcement officers had no involvement at all in their activities.

this is probably their strongest argument; we respond, this is about deterrence - A11 is about personal rights; and the public and state is in no different position than under A11

On the other hand, the public interests served by this Court's precedents on the subject are great – no less than the safety of the public. Under the defendants' proposed interpretation, *no* evidence, no matter how serious the crime involved and no matter whether there is any federal law that could be applied, could be used in a Vermont court even though the evidence was obtained through a completely legal search based upon probable cause, without any law enforcement misconduct.

To use a hypothetical, imagine that a person is stopped based on reasonable suspicion, and his automobile is searched based upon probable cause. The Border Patrol agents discover these newly purchased items: an axe, a crowbar, a baseball bat, a tarp, heavy duty rubber cleaning gloves, a poncho, a weighted vest and night-vision goggles, along with rope, a compound bow with hunting tipped arrows, a homemade black mask with the eyes/mouth cut out, dish soap, and three bottles of lighter fluid.[4] Inquiry determines that the individual had been denied a pistol permit a week earlier, and since then had purchased a police radio and a faraday bag, and had printed his last will and testament within the last two days. Inquiry also determines that the individual had a restraining order taken out against him

[4] This hypothetical is based upon an incident that occurred at the Highgate Springs Port of Entry, Highgate, Vermont, on July 14, 2019.

by his ex-fiancé. The United States Attorney's Office is contacted and indicates that there does not appear to be a violation of any federal law.

Under the defendants' proposed interpretation of the Vermont Constitution, this individual will be sent on his way with his new purchases. Nor could any of this information be used in a criminal investigation. The results of the search themselves could not be used, and any information derived therefrom would be suppressed as fruits of an illegal seizure. "Evidence obtained in violation of the Fourth Amendment and Article 11, or by exploitation of a violation, is inadmissible against a criminal defendant." State v. Clinton-Aimable, 2020 VT 30, ¶ 36 (citation omitted).

This person's privacy interests have not been protected in any way by the proposed interpretation – his vehicle was still searched without a warrant. But the public welfare has been severely compromised. The balance clearly favors permitting the use of such evidence.[5]

In addition, the public welfare is served by the activities of the Border Patrol in the immediate vicinity of the border. The Border Patrol is not engaged in routine law enforcement. Agent Vining testified that its primary role is to detect illegal immigration into the United States, as well as drugs, terrorists, and terrorists' weapons. P.C., p. 9. His first question of the defendants concerned their citizenship,

[5] The Defender General's brief specifically cites the fact that the federal government is free to pursue its interest relative to evidence seized by BP agents. Brief, p. 16. This hypothetical illustrates that the public interest is not served by relying upon federal prosecution – there is no federal jurisdiction with respect to some of the most serious and dangerous offenses.

because "my first and primary goal is to determine aliens, detect illegal aliens present in the vehicle." P.C., p. 22. When he asked for permission to search the vehicle, his "concern was that narcotics had just been smuggled into the United States." P.C., p. 29. After the search, Agent Vining concluded that the drugs discovered did not appear to have crossed the border, and therefore he relinquished the matter. P.C., p. 30. As this Court noted, the Border Patrol's activities involve "safeguarding the United States border," and reflects the federal "inherent sovereign authority to protect its territorial integrity." Coburn, 165 Vt. at 325. The Border Patrol's primary mission is not to detect and investigate criminal activity as such, but rather it is "responsible for securing U.S. borders between ports of entry." https://www.cbp.gov/border-security/along-us-borders. See, United States v. Perkins, 166 F. Supp. 2d 1116, 1121 (W.D. Tex.), on reconsideration, 177 F. Supp. 2d 570 (W.D. Tex. 2001), aff'd, 352 F.3d 198 (5th Cir. 2003) ("the Border Patrol is not charged with patrolling the border for any and all criminal activity and its agents are not general law enforcement officers…. Rather, the primary duty of the Border Patrol is the enforcement of immigration laws."); Ortiz v. U.S. Border Patrol, 39 F. Supp. 2d 1321, 1326 (D.N.M. 1999), aff'd, 210 F.3d 390 (10th Cir. 2000) ("Border Patrol agents' powers … are focused on their primary mission of interdiction of alien traffic into this country… Border Patrol agents … are not general law enforcement officers."). See, State v. Martin, 184 Vt. at 38 (no warrant required where practice is concerned with "goals [that] are beyond the normal goals of law enforcement).

such a bunk argument. we push back here pretty hard.

Thus, for example, "Border Patrol agents have the power to arrest offenders violating the laws of the United States, but only if the agent is performing duties relating to the enforcement of immigration laws at the time of the arrest *and* there is a likelihood the offender will escape before a warrant can be obtained. [8 U.S.C.] § 1357(a)(5)." Ortiz, at 1326. See, US Customs and Border Protection website, https://www.cbp.gov/border-security/along-us-borders/overview: "The priority mission of the Border Patrol is preventing terrorists and terrorist weapons, including weapons of mass destruction, from entering the United States." See also, 6 U.S.C.A. § 211 (primary responsibility of Border Patrol is "interdicting persons attempting to illegally enter or exit the United States or goods being illegally imported into or exported from the United States at a place other than a designated port of entry," and "deter[ring] and prevent[ing] the illegal entry of terrorists, terrorist weapons, persons, and contraband."

As stated by the New Mexico Supreme Court,

> We also note that fighting illegal immigration and smuggling present significant problems for federal law enforcement. Differences between state and federal search and seizure rules create "very serious and, in some cases, seemingly insoluble problems for law enforcement officials."… [T]here is no need for the New Mexico Constitution to conflict with common sense.

State v. Sanchez, 350 P.3d 1169, 1178 (N.M. 2015) (citations omitted).

In light of the very strong public interest in protection of the public welfare, the very limited effect that any ruling by this Court will have on conduct of Border Patrol agents, the fact that Border Patrol agents have no local law enforcement

authority and have as a primary mission the protection of the border rather than the investigation of crime generally, and the very strong national interest in safeguarding the border, this Court should decline the defendants' invitation to overrule its prior decisions.

C. Rennis and Coburn Cannot Be Distinguished.

The Attorney General's brief, in a footnote, suggests that its approach to this issue is not incompatible with this Court's rulings in Coburn and Rennis because in those cases (despite the checkpoint in Rennis taking place 97 miles from the border) the search was conducted at the functional equivalent of the border, where no one has a reasonable expectation of privacy. But the brief does not suggest how a person can lack a reasonable expectation of privacy from a border search under Article 11 while 97 miles from the border, while having such an expectation at a point less than two miles from the border, by a road leading directly to the border. And neither of these cases relied upon a reasonable expectation of privacy analysis.

Under the Attorney General's argument, a person who crosses the border legally, is stopped without reasonable suspicion, and has his car searched without probable cause, can have any evidence thereby found used against him in a Vermont court without offending Article 11.[6] But if that person were to cross the border illegally, and were to be stopped on reasonable suspicion in the immediate vicinity of the border, and were to have his car searched on probable cause, the use

[6] Such a search is virtually limitless. See, United States v. Flores-Montano, 541 U.S. 149, 155 (2004) ("the Government's authority to conduct suspicionless inspections at the border includes the authority to remove, disassemble, and reassemble a vehicle's fuel tank.").

of any evidence thereby found would offend Article 11. This argument defies logic. And if this Court should adopt such a rule, anyone bringing contraband into the United States would be wise to cross illegally, since even if he should be apprehended soon after crossing, his murder kit, or his narcotics in an amount under the federal prosecution guidelines, will not be useable in any Vermont criminal prosecution, nor would any evidence derived therefrom.[7]

This Court has stated that "the key holding" of Coburn is that "the Vermont Constitution does not apply to the conduct of federal government officials acting under the exclusive federal authority to safeguard the borders of the United States." Rennis, 195 Vt. at 495. That is exactly what happened here, and therefore Coburn and Rennis are controlling and cannot be distinguished.

[7] Getting across the border is not that difficult. Although the Migrant Justice amicus brief characterizes the northern border as "highly militarized," in fact the opposite is true. According to the General Accounting Office, an independent, nonpartisan agency that works for Congress, "The United States and Canada share the longest common non-militarized border between two countries, spanning nearly 4,000 miles." June 2019 GAO Report, Northern Border Security, p. 32. According to a report by the Canadian Senate, there are more than 100 unguarded roads that lead from the United States into Canada, most of them in Quebec. Globe and Mail, 12/7/2011, Senate probe reveals serious gaps in Canada-U.S. border security. Although many who enter in this way are apprehended thanks to sensors and cameras, that wouldn't make a difference here. As long as they make it any distance at all into the United States, according to the Attorney General's brief, anything at all found during a search must be suppressed.

III.

THIS CASE DOES NOT CONCERN THE MANY OTHER ISSUES RAISED IN THE DEFENDANTS' AND AMICI'S BRIEFS.

The defendants and amici make several arguments on issues that are not presented by this case.

A. This Case Does Not Concern The Reverse Silver Platter Doctrine.

The underlying concept of the reverse silver-platter doctrine is that protections afforded by the constitution of a sovereign entity control the actions only of the agents of that sovereign entity. State v. Toone, 823 S.W.2d 744, 748 (Tex. App. 1992), aff'd, 872 S.W.2d 750 (Tex. Crim. App. 1994). Thus, pursuant to the reverse silver platter doctrine, for example, Vermont courts would admit evidence obtained lawfully in the jurisdiction where it was found, but under circumstances which would have rendered it inadmissible under Vermont law. Whatever the merits or lack of merit of this doctrine, it has no connection with this case.[8] This Court did not rely upon anything resembling the reverse silver platter doctrine in deciding either Coburn or Rennis, and need not do so here. As the Court recognized

[8] Although the State need not, and does not, argue for adoption of the reverse silver platter doctrine here, it is worth noting that the cases cited by the appellant as suggesting that the doctrine does not apply in Vermont do not support that contention. In State v. Platt, 154 Vt. 179 (1990), the seizure at issue occurred in Massachusetts, and was analyzed under Article 11, but the Massachusetts officers were acting on the request of the Vermont State Police. In State v. Muhammad, 182 Vt. 556, 558 (2007), the challenged evidence wasn't used at trial, so the Article 11 analysis was moot, and the Court declined to dismiss the case based on an Article 11 violation: "Nothing in our case law leads us to the conclusion that electronic monitoring in violation of Article 11 compels dismissal, and the trial court's denial of defendant's motion to dismiss was therefore appropriate."

in Coburn, federal border protection involves "an exclusively federal function under the United States Constitution," and concerns the federal government's "inherent sovereign authority to protect its territorial integrity." 165 Vt. at 318.

The typical reverse silver platter case involves activity by law enforcement officers in their own state, acting under that state's constitutional and statutory procedures, with respect to core law enforcement activiti[illegible] Whether those legal standards should be recognized when such evidence is offered in Vermont courts is a different question than that presented here – where a government with concurrent jurisdiction within Vermont, and exclusive jurisdiction over international borders, is exercising its constitutional obligation to secure the borders of the United States, an activity which is not primarily concerned with criminal activity, and not at all concerned with criminal activity other than in connection with border security. As the New Mexico Supreme Court held, "[t]he border search doctrine thus acknowledges the "'exigencies present and the vital national interest demanding the regulation of who and what traverse our borders.'" State v. Sanchez, 350 P.3d at 1176 (citation omitted).

Notably, the defendants do not cite *any* state court decision excluding evidence obtained as the result of the Border Patrol exercising their primary duty to protect the borders other than Cardenas-Alvarez, which not only concerns a completely different factual situation (a search at a fixed Border Patrol checkpoint located sixty miles from the border) but has been limited in its scope in State v. Sanchez, which noted the serious problems the federal government deals with at the

border, and that "there is no need for the New Mexico Constitution to conflict with common sense." And a number of courts which do explicitly allow such evidence make no mention of the reverse silver platter doctrine. People v. Mitchell, 275 Cal. App. 2d 351, 355 (Ct. App. 1969) ("A border search by a United States Customs Officer is lawful; does not depend upon probable cause; and is not governed by state laws."); State v. Smith, 399 So. 2d 22, 24 (Fla. Dist. Ct. App. 1981) (holding that "a valid United States warrantless border search is a reasonable search within the dictates of the Florida Constitution…. We note that Florida as well as the United States is a sovereign with a right to self-protection against persons and property entering its borders illegally.") (citations omitted); Rowe v. State, 352 S.E.2d 813, 815 (Ga. 1987) (evidence found during border search without probable cause or warrant was admissible; the silver platter doctrine "is inapplicable"); State v. Bradley, 719 P.2d 546, 548–49 (Wash. 1986) ("it is Congress to whom the federal constitution allocates the responsibility for policing international borders and it is federal officials who actually enforce federal border laws. Neither state law nor the state constitution can control federal officers' conduct.") (citations omitted). Washington State, in particular, does recognize the silver platter doctrine, State v. Vance, 444 P.3d 1214, 1219 (Wash. App.), review denied, 455 P.3d 135 (Wash. 2020), but saw no need to resort to it to justify the use of evidence found at the border.

B. This Case Does Not Concern Border Patrol Activity In The Interior Of Vermont.

The appellant and amici raise the specter of roving Border Patrol agents operating many miles inland from the border, stopping and searching Vermonters, and even peeking in their garbage, far from any nexus with the border. Amici Defender General in particular cites to a federal regulation which extends Border Patrol authority up to 100 air miles from any external border of the United States.

This case has nothing to do with Border Patrol activity outside the immediate vicinity of the border. It concerns roving patrols in the shadow of the border. This Court, in determining the reach of Article 11, is not bound by federal regulations concerning the authority of the Border Patrol. See, Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973) (rejecting the 100 mile administrative limit, and the federal statute on which it is based, as supporting a search without probable cause conducted at least twenty miles from the border). The map below shows the portion of Route 105 in which the roving patrol took place. It is only this area that is at issue, not the 100-mile administrative zone.[9]

[9] The State asks that the Court take judicial notice of the map of Vermont and the layout of Route 105. See, State v. Ford, 188 Vt. 17, 26 (2010) ("We take judicial notice that Williamstown is at least forty miles away from the part of the Hartford–Quechee Road closest to Williamstown.").

In any event, motor vehicle stops in the interior of Vermont by Border Patrol will very rarely, if ever, involve "federal government officials acting under the exclusive federal authority to safeguard the borders of the United States." In order to conduct a motor vehicle stop anywhere other than at the functional equivalent of the border, Border Patrol agents must be "aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country." United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975). It would be an extremely

rare case in which such a suspicion would arise concerning a vehicle any appreciable distance from the border. See, e.g., United States v. Jones,149 F.3d 364, 368 (5th Cir.1998) ("a car traveling more than fifty (50) miles from the border is usually viewed as being too far from the border to support an inference that it originated its journey there" for purposes of reasonable suspicion analysis). This is especially true where the stop does not occur in the sparsely populated areas of the Southwest. United States v. Cardona, 955 F.2d 976, 980 (5th Cir. 1992) (factors relevant to the analysis include the number of towns along the road and the number of intersecting roads).

Article 11 would justifiably be applied to searches by Border Patrol agents that do not take place in the immediate vicinity of the border or, as the trial court put it, in the shadow of the border. The shadow of the border is all that this case concerns. The Defender General Brief's extended focus on the "red zone" is misplaced.

C. This Case Does Not Concern Disincentivizing State Law Enforcement Officers.

The defendants argue that excluding the evidence in this case will encourage institutional compliance with State constitutional rights, by incentivizing training Vermont law enforcement to "avoid evading state law through explicitly or implicitly encouraging federal officers to do something state law prohibits for local police." Defendant's brief, pp. 27 – 28. It goes without saying that admission of evidence obtained by the Border Patrol through implicit or explicit encouragement of local law enforcement officers is governed by the Vermont Constitution.

The defendants also argue that admission of such evidence would encourage CBP and other federal officers to "conduct pretextual searches throughout Vermont that Vermont officers otherwise could not." Id., p. 28. The State does not argue for the admission of evidence seized during searches conducted by the Border Patrol "throughout Vermont," but only in the limited circumstances of a stop conducted at the shadow of the border, based upon reasonable suspicion of a violation of federal law. Both the existence of reasonable suspicion and the existence of probable cause could be challenged by the persons searched and the fruits of pretextual searches would be excluded.

D. This Case Does Not Concern Vermont Collaborating Or Cooperating With CBP, Nor With Allegations Of CBP Excesses.

The amicus brief of Migrant Justice raises a litany of issues, the vast majority of which have nothing to do with this case. In its summary of argument, Migrant Justice states that "it is critical that Vermont authorities that collaborate or coordinate with a growing CBP remain subject to the Vermont Constitution." Brief, p. 7. The State agrees. Any CBP activity that is conducted in collaboration or coordination with Vermont law enforcement is subject to Article 11. This case concerns CBP activity which occurred entirely independently of any state law enforcement involvement.

The brief also raises alarm about Border Patrol activity entirely unrelated to motor vehicle stops based on reasonable suspicion in the shadow of the border, and subsequent warrantless searches based upon probable cause of federal law violations, such as boarding buses, arresting protesters in Portland, Oregon, drone

surveillance and nationwide databases, use of facial recognition technology, searches of electronic devices at the border, the use of pretexts by local law enforcement to search a suspect based on tips from federal authorities, and so on. These are all legitimate areas of concern but have nothing to do with this case. If and when these issues should arise in a case before this Court, the Court can decide whether Article 11 applies based upon the specific facts presented in the case. State v. Patnaude, 140 Vt. 361, 368 (1981) ("even though constitutional issues have been argued and briefed, they will not be considered by this Court unless disposition of the case requires it"); State v. Clarke, 145 Vt. 547, 551 (1985) ("This Court will not decide constitutional questions unnecessarily").

The Border Patrol's activity in the immediate border area is clearly justified. More than half of all Present Without Admission from Canada apprehensions for the entire northern border occurred in the Swanton sector alone,[10] even though its agent staffing is less than 15 percent of the northern border total. And the northern border total staffing itself is only an eighth of that for the southwest border.[11] These facts belie Migrant Justice's claim that CBP has "ramped up its operations and undergone efforts to drastically enlarge its work force," expanding its operation "deep into the country," or that CBP is "to a remarkable extent, enforcing state, rather than federal, law." Brief, pp. 10, 14.

[10] The Swanton sector covers 300 miles of border, including all of the Vermont and New Hampshire and part of the New York border with Canada. The Vermont portion is 90 miles long.

[11] https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Fiscal%20Year%202019%20Sector%20Profile_0.pdf

E. This Case Does Not Concern The Sufficiency Of Reasonable Suspicion For The Stop Or Probable Cause For The Search.

Although acknowledging that neither the reasonable suspicion nor the probable cause issues are before this Court, Brief at p. 11, n. 4, Amicus Defendant General nonetheless spends several pages arguing that neither reasonable suspicion nor probable cause were present, including an extended attack on the officer's credibility and attaching a trial court decision on the point. Brief, p. 12. The defendants did not seek to appeal the issue of probable cause and did not seek to appeal the denial of their motion to appeal the issue of reasonable suspicion. Neither of these issues is before the Court, and the Court should disregard the Defender General's argument on these points as irrelevant. The Defendants will have an opportunity to fully appeal these issues, should this decision be affirmed, either following a trial or in connection with a conditional guilty plea.

CONCLUSION

For these reasons the trial court's ruling should be affirmed.

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CERTIFICATE OF COMPLIANCE

David Tartter, Deputy State's Attorney and Counsel of Record for the Appellee, State of Vermont, certifies that this brief complies with the word count limit in V.R.A.P. 32(a)(7)(A). According to the word count of the Microsoft Word processing software used to prepare this brief, the text of this brief contains 8792 words.

by: 

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