QUESTION PRESENTED

Whether the trial court erred in denying Craveiro's motion to suppress, because the stop of Craveiro's vehicle cannot be justified by the emergency aid exception or the community caretaking exception.

Issue preserved by Craveiro's motion to suppress, App. A3,* the State's objection, App. A6, the ensuing evidentiary hearing, T. 3-25, and the court's denial of the motion. T. 25.

*References to the record are as follows:
"App." refers to the Appendix to this brief;
"T." refers to the transcript of the district court trial, including the hearing on the motion to suppress;
"NOA" refers to the Notice of Appeal.

STATEMENT OF THE CASE

By complaint filed in the Plymouth District Court, the State charged David Craveiro with operating after suspension, second offense. App. A1. He filed a motion to suppress, asserting that the police lacked reasonable suspicion to conduct an investigatory stop of his vehicle. App. A2. The State objected. App. A5. The trial court heard the motion to suppress at the time of trial, T. 3-25, denied the motion, T. 25, and then heard the remainder of the evidence. Subsequently, the court found Craveiro guilty, T. 29,** and sentenced him to a $1,000.00 fine, T. 31, thereby recording the conviction as a class "B" misdemeanor. RSA 625:9, VIII.

**The complaint alleged that Craveiro was on bail for a criminal offense at the time. App. A1. The State introduced no evidence regarding that allegation, and the trial court disregarded the bail element of the complaint. T. 30.

STATEMENT OF THE FACTS

On October 9, 2005, because of heavy rainfall the previous day, Wentworth's acting police chief Warren Davis, along with the Wentworth highway agent, drove around checking for downed trees, flooding, or any damage to the roads. T. 4. The rainfall had stopped that morning. T. 4. They stopped for about 45 minutes in the area of 324 Roland Town Road, a crowned dirt road, because of flooding in that area. T. 4, 9. A "crowned" road is one that is higher in the middle than at its edges. T. 9.

Chief Davis parked his cruiser on the "crown" of the road, the middle, because the ditch lines on both sides of the road were flooded. T. 4-5. The water was deepest along the ditch line, and decreased in depth as the road became higher. T. 14. Along the deepest point, the ditch line itself, the water ranged from ten to eighteen inches deep. T. 5. "Coming from the ditch up into the road it varied anywhere from five inches going back towards the ditch to about a foot, foot and a half...." T. 5. No water reached the center of the road, which was dry. T. 14.

While Davis and the highway agent were inside the cruiser, discussing how to fix the problem, Craveiro slowly approached, driving an Oldsmobile four-door sedan. T. 5-6, 8-9. Davis's cruiser lights were not on at the time. T. 8. The record does

not suggest that there was a flagger, flare, or any other human or mechanical indication that Craveiro should stop before traveling past the cruiser.

Continuing at a slow rate of speed, Craveiro drove around Davis's cruiser, to Davis's left. T. 6. In doing so, Craveiro traveled through increasingly-deep water such that it almost came up to the bumper of the Oldsmobile. T. 6. The bumper is about six inches high. T. 10.

Davis testified he became concerned, because he believed an "ordinary person" would have stopped, to allow Davis to move out of the way, and thereby clear a path through the dry portion of the road. T. 7. The fact that Craveiro instead traveled through the flooded portion of the road made Davis "concerned... for the safety of the vehicle and the operator in the vehicle." T. 7. Davis allowed, however, that the Oldsmobile did not stall while driving through the standing water, did not come to a stop, and did not cast off sufficient water to splash Davis's cruiser. T. 10-11.

As Craveiro slowly drove past the cruiser, Davis rolled down his window and directed Craveiro to stop. T. 7. Craveiro then stopped. Davis agreed that prior to the stop, Craveiro had committed no motor vehicle offense whatsoever. T. 13. Davis got out of his vehicle, and asked Craveiro "what he was

attempting to do by driving around the police unit." T. 25. Craveiro, who had rolled his window down upon being stopped, replied that he was on his way to the home of Vicky Lewis, on Frescon Road. T. 25, 27. Davis knew that Craveiro had been convicted of operating under suspension in the Plymouth District Court about two months prior to the stop. T. 18. Davis asked for Craveiro's license and registration, called in the information, and learned that Craveiro's license remained under suspension. T. 26. Needing to deal with an ongoing emergency elsewhere, however, Davis told Craveiro to drive himself home, and then left. T. 27. Later, Davis obtained a warrant for Craveiro's arrest. T. 28.

SUMMARY OF THE ARGUMENT

It was undisputed that Davis had no reasonable suspicion to support his stop of Craveiro's vehicle. Accordingly, the State relied on the emergency aid exception, a subcategory of the community caretaking exception. The record did not, however, support reliance on either exception.

This Court has never upheld a stop of a moving motor vehicle based upon the community caretaking exception. Given the increased protection afforded by the state constitution to people traveling in automobiles, the level of intrusion in this case requires application of the emergency aid exception. The record fails to establish the first prong of that exception's three-prong test, that there was a true emergency requiring assistance of the police to protect life or property.

Alternatively, this stop cannot be justified by the community caretaking exception. Balancing the government's interest in effectuating the stop against the extent of the intrusion on protected interests, Craveiro must prevail, because the government's interest was slight, while the stop constituted a significant intrusion upon his right to privacy. Accordingly, this Court must reverse.

I. THE TRIAL COURT ERRED IN DENYING CRAVEIRO'S MOTION TO SUPPRESS, BECAUSE THE STOP OF HIS VEHICLE CANNOT BE SUSTAINED UNDER THE EMERGENCY AID EXCEPTION OR THE COMMUNITY CARETAKING EXCEPTION.

When Davis stopped Craveiro's vehicle, he had no reasonable suspicion that Craveiro had committed, was committing, or was about to commit any crime or violation of the motor vehicle code. T. 13. Accordingly, Craveiro filed a motion to suppress. App. A3. The State's objection analyzed the validity of the stop under the emergency aid doctrine. App. A7 (applying the three-prong standard of State v. MacElman, 149 N.H. 795 (2003)). Specifically, the State argued that when Craveiro drove through the standing water, this gave Davis "reasonable grounds to believe there was an emergency at hand," T. 22, the emergency required stopping Craveiro's vehicle, and Davis was not "motivated by an attempt to arrest and seize evidence." T. 23. The State's objection also cited State v. Psomiades, 139 N.H. 480 (1995), the decision in which this Court adopted the more general community caretaking exception. App. A7.

The trial court denied the motion to suppress. T. 25. In doing so, the court appears to have relied on the latter exception, finding that the stop was "a good-faith attempt to safeguard the defendant's own property under the circumstances." T. 25; see Psomiades, 139 N.H. at 482 (setting forth community

caretaking standard which resembles that used by trial court). The record does not demonstrate, however, that Craveiro's choice to drive his car through standing water posed any risk of harm to people or property. Accordingly, neither the community caretaking exception nor the more narrow emergency aid exception justifies this stop, and this Court must reverse.

The state constitution guarantees that every citizen has "a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions." N.H. Const., Pt. I, Art. 19. The fundamental principle undergirding this right is that warrantless searches or seizures are per se unreasonable unless they fall within the narrow confines of a judicially crafted exception. State v. Boyle, 148 N.H. 306, 307 (2002)(quotations omitted). The State bears the burden of demonstrating that a specific exception to the warrant requirement justifies the search or seizure at issue. Id. On appeal, the standard of review is "de novo, except as to any controlling facts determined at the superior court level in the first instance." Id.

At issue here is a seizure, the stop of a moving vehicle. "[W]here the search or seizure of a motor vehicle is involved, article 19 provides significantly greater protection than the fourth amendment against intrusion by the State." State v.

Koppel, 127 N.H. 286, 291 (1985). Accordingly, this brief analyzes the stop of Craveiro's vehicle solely under the state constitution.

This Court first recognized the community caretaking exception under the state constitution in Psomiades, 139 N.H. at 482, and traced its origins to an opinion of the United States Supreme Court. Id. at 481 (citing Cady v. Dombrowski, 413 U.S. 433, 441 (1973)). In both cases, the police had removed personal property from automobiles for the non-investigative purpose of protecting the public or preventing theft, under circumstances where the automobile owner was disabled from safeguarding his own property. Psomiades, 139 N.H. at 481; Dombrowski, 413 U.S. at 436-37. In such circumstances, the Psomiades Court held, "seizure of property by the police is justified by the community caretaking exception when it constitutes no more than a routine and good faith attempt, in the exercise of reasonable caution, to safeguard the defendant's own property." 139 N.H. at 482 (quotations omitted). The good faith element of Psomiades requires that the seizure must be "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." Id. (quoting Dombrowski, 413 U.S. at 441); see State v. D'Amour, 150 N.H. 122, 126 (2003)(the "divorce" is one

relating to the officer's purpose, not the temporal or spatial context of the seizure).

Later, this Court recognized that the community caretaking function could also encompass efforts to assist disabled motorists left stranded on the roadside. State v. Brunelle, 145 N.H. 656 (2000). To allow the police to protect their own interests in such situations, the Court allowed a police officer to request identification in such circumstances, because this "enable[d] [the officer] to maintain a record of her contact with the vehicle's owner in the event that any questions about the vehicle or her contact with the owner subsequently arose...." Id. at 659. The Court cited decisions from other jurisdictions, all of which relied in part upon the fact that the vehicles in question were already disabled or stopped, a consideration which minimizes the intrusion on the defendant's privacy interest. Id. (citing State v. Ellenbecker, 464 N.W.2d 427, 430 (Wis. Ct. App. 1990)(car already stopped, so intrusion on privacy "minimal at best"); People v. McKnight, 555 N.E.2d 1196, 1197 (Ill. Ct. App. 1990)(car parked beside the road at night with engine on, headlights off); State v. Pfannenstein, 525 N.W.2d 587, 588 (Minn. Ct. App. 1994)(man on motorcycle trying, unsuccessfully, to get it started)).

In another case involving an already-stopped motorist, this Court set forth the fundamental guiding principles underlying the community caretaking exception. Boyle, 148 N.H. 306. Specifically, the Boyle Court, for the first time, analyzed the exception by employing the same balancing test used to justify or invalidate searches and seizures upon suspicion of criminal activity. Thus, to determine the validity of a community caretaking search or seizure, this Court must "balance the governmental interest that allegedly justified it against the extent of the intrusion on protected interests." Id. at 308 (citing State v. Pellicci, 133 N.H. 523, 529 (1990)). The Court in Boyle also, for the first time, required that the officer, just as with a seizure pursuant to a criminal investigation, must "be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion." 148 N.H. at 308 (quoting Pellicci, 133 N.H. at 529). These standards applied to invalidate the seizure in Boyle, as the officer in that case claimed to be concerned about the welfare of an unknown woman, but could not point to specific and articulable facts to support his seizure and questioning of the woman's friend, the driver of a car that dropped her off at her house. Id. at 308-309.

Eventually, the Court began to describe the scope of the exception in more expansive terms, recognizing that legitimate community caretaking functions included "helping stranded motorists, returning lost children to anxious parents, [and] assisting and protecting citizens in need...." State v. Denoncourt, 149 N.H. 308, 310 (2003)(quotations omitted); see State v. Seavey, 147 N.H. 304, 311 (2001)(Duggan, J., dissenting). To preserve the distinction between community caretaking and law enforcement, however, this Court established the principle that the exception should not be employed in a manner that overlaps with other recognized exceptions to the warrant requirement. Denoncourt, 149 N.H. at 311. Accordingly, while the police could seize a wallet from an abandoned car based on the community caretaking doctrine, they could not search the wallet, because that type of search is governed by the inventory search exception, and allowing the doctrines to converge would "erode" the latter exception. Id. at 311.

The same year it decided Denoncourt, this Court recognized a related doctrine, relied upon by the State below, App. A7, T. 22, known as the emergency aid exception. State v. MacElman, 149 N.H. 795, 798 (2003). The emergency aid exception constitutes a subset of the broader community caretaking exception. Id. To invoke the emergency aid exception, the

State must show that "(1) the police have objectively reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property; (2) there is an objectively reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched; and (3) the search is not primarily motivated by intent to arrest and seize evidence." Id. (quotations omitted). The MacElman Court applied the exception to justify a police officer's warrantless entry onto private property, a residential backyard, where the officer believed a parked car was about to fall off an embankment onto Route 89. Id. at 799.

A. The emergency aid exception, not the community caretaking exception, governs the constitutionality of this stop.

A fundamental question left unanswered by this Court's caretaking and emergency aid cases is where the line is drawn – under what circumstances must the State satisfy the more stringent requirements of the emergency aid exception, rather than the more flexible requirements of the community caretaking doctrine. The answer cannot hinge on whether the circumstances rise to the level of an emergency, because that would lead to an absurd result - the State would have to satisfy a higher

standard where there is an emergency, than when addressing a less pressing need. Nor can the answer hinge upon whether the search or seizure takes place on private property as in MacElman, because the police merely entered MacElman's back yard, a search described by the Court as less intrusive than a search of someone's personal effects. MacElman, 149 N.H. at 800. Again, it would not make sense to require the State to satisfy a higher standard for the lesser intrusion of an entry into someone's back yard than for the greater intrusion of a search of personal effects. Finally, the distinction cannot be based on whether the intrusion consisted of a search or a seizure, because the Court in D'Amour directed the trial court on remand to apply the community caretaking doctrine to both the seizure and search of a backpack. 150 N.H. at 128.

Instead, the distinction separating the doctrines appears to be that the community caretaking doctrine may justify very minimal intrusions into protected privacy rights, but for anything more than a minimal intrusion, the State must satisfy the three-pronged standard of the emergency aid doctrine. Although this distinction has never been articulated by this Court, it would serve to separate the cases in which the community caretaking doctrine has been applied, from the cases in which this Court has either declined to apply that doctrine

to sustain a seizure or search, or has applied the emergency aid doctrine.

The cases in which this Court has justified a seizure or search based on the community caretaking doctrine have entailed very minimal intrusions into protected privacy interests. It is debatable or even doubtful, as this Court's opinion suggested, whether the officer's approach of a disabled vehicle in Brunelle constituted a seizure at all. 145 N.H. at 658. Boyle involved only a slightly more intrusive seizure, and the Court held that the caretaking exception did not justify the seizure. Boyle, 148 N.H. at 306-307 (holding that community caretaking doctrine did not justify an officer's approach, detention by take-down lights, and brief questioning of the driver of a parked car). In Psomiades and Denoncourt, this Court allowed the community caretaking doctrine to justify only the seizure of personal property for safekeeping, not the search of that property. Denoncourt, 149 N.H. at 311; Psomiades, 139 N.H. at 481 (doctrine justified only the seizure of defendant's purse for safekeeping; subsequent search justified by inventory search exception). In D'Amour, this Court allowed for the possibility that the police may search lost property for identification so that it can be returned to its proper owner, but only if the

search is not a "mere subterfuge" for criminal investigation. 150 N.H. at 128.

Here, however, there was more than a minimal intrusion; indeed, this Court has never justified the stop of a moving vehicle, traveling lawfully upon a public way, based solely upon the state constitution's community caretaking doctrine. This Court has upheld several motor vehicle stops based on quasi-caretaking rationales under the fourth amendment. State v. Oxley, 127 N.H. 407, 411 (1985) (vehicle stop justified where officer believed that insecurely restrained furniture in back of car could "fall onto the public highways and endanger other drivers"); State v. Maynard, 114 N.H. 525, 527 (1974) (vehicle stop justified where officer believed that its driver "may be ill and physically unfit to drive"). Those cases are distinguishable because the state constitution provides substantially-greater protection to people traveling in automobiles. State v. Sterndale, 139 N.H. 445, 450 (1995)(state constitution, unlike federal constitution, has no "automobile exception"); Koppel, 127 N.H. 286. Thus, the State was correct in its assessment that this stop must be justified, if at all, under the emergency aid exception.

B. This stop cannot be justified under the emergency aid exception.

This stop cannot be justified under the emergency aid exception, because the record does not satisfy the first prong of its three-pronged test. That prong requires that the police have "objectively reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property...." MacElman, 149 N.H. at 798 (quotations omitted). This record, however, does not establish an objectively reasonable basis for Davis to believe that Craveiro's safety, the officer's safety, or the safety of any other person was jeopardized by Craveiro's attempt to drive slowly through some standing water on the roadway. The record establishes that the deepest water in the ditch-line and in the road itself reached perhaps eighteen inches; Craveiro chose to drive on a part of the road surface where the water did not even reach the bumper of his car, meaning it would have been less than six inches deep. T. 6, 10. Davis stopped Craveiro not prior to entering the standing water, but after Craveiro had traveled well into that area. See T. 6 (water almost up to bumper of Craveiro's car); T. 10 (water so shallow that Craveiro's car did not cast off any water unto Davis's cruiser). Clearly, no person was going to drown, and no vehicle was going

to float away, because of the standing water on that road. Nor did the record supply an objectively reasonable basis for Davis to believe that Craveiro, if allowed to continue through the water, would strike Davis's cruiser. Accordingly, Davis did not render emergency aid. See State v. Pseudae, ___ N.H. ___, No. 2005-628 (Sep. 27, 2006)(neither exigent circumstances exception, nor emergency aid exception, justified warrantless entry into residence to retrieve firearm); MacElman, 149 N.H. at 798-99 (officer's fear that car would fall off embankment unto Route 89, a "potentially life-threatening emergency," justified entry into residential backyard under emergency aid exception); cf. Seavey, 147 N.H. at 307 (although driver injured in automobile accident, exigent circumstances did not justify warrantless entry into residence by police and paramedics because circumstances "strongly suggest[ed] a lack of life-threatening injury that would have required immediate medical attention.").

C. The stop cannot be justified under the community caretaking exception.

Alternatively, assuming arguendo that the emergency aid exception does not govern this case, the stop cannot be justified under the general community caretaking exception. As

discussed above, the exception requires that this Court apply a constitutional balancing test.

> In determining whether the grounds for a particular seizure meet constitutional requirements, we balance the governmental interest that allegedly justified it against the extent of the intrusion on protected interests. 'Whether the seizure of a person by a police officer acting in his or her noninvestigatory capacity is reasonable . . . requires a reviewing court to balance the governmental interest in the police officer's exercise of his or her community caretaking function and the individual's interest in being free from arbitrary government interference.'

Boyle, 148 N.H. at 308 (quoting United States v. King, 990 F.2d 1552, 1560 (10th Cir. 1993)).

Here, the government's interest simply cannot override Craveiro's right to be left alone. That interest, as expressed by Davis, constituted "concern[]... for the safety of the vehicle and the operator in the vehicle," T. 7, and concern for his own cruiser. T. 8. Davis never articulated during the hearing, however, what he believed might happen if he were to allow Craveiro to continue to drive past his cruiser through the standing water. Absent "specific and articulable" facts objectively supporting a real risk of harm to people or property damage, Davis's concerns functioned as the community caretaking equivalent of a mere "hunch" that falls short of reasonable

suspicion. State v. McKinnon-Andrews, 151 N.H. 19, 26 (2004)("A reasonable suspicion must be more than a hunch.").

Drawing every inference in the light most favorable to the trial court's ruling, Davis's testimony established, at best, the possibility that Craveiro's vehicle may have stalled while traveling through the water. This possibility, however, only underscores the unreasonableness of this stop: Davis's decision to stop the car as it traveled through the standing water could have only increased the possibility of Craveiro getting stuck and needing further assistance. If Craveiro wanted assistance, he would have stopped his car when he reached the police cruiser sitting in the middle of the road, rather than trying to slowly drive around it. This Court has historically safeguarded the right of such people to be left alone, by generally applying the non-emergency portion of the caretaking doctrine to preclude more than *de minimus* intrusions into privacy, and should continue to do so in this case.

In conclusion, the community caretaking exception is analogous to the "catch-all" or residual exception to the hearsay rule; while both are important and necessary exceptions, such generalized exceptions have the inevitable tendency to expand, and eventually to swallow the underlying rule, if unchecked. See N.H.R. Ev. 803(24); State v. Johnson, 145 N.H.

647, 649-50 (2001)(reversing trial court's admission of victim's videotaped statement under "residual" hearsay exception). This Court should continue to resist such expansion, by rejecting the trial court's application of the doctrine to the stop of a moving vehicle traveling lawfully upon a public way under circumstances manifesting no significant present danger to people or property. Accordingly, Craveiro requests that this Court reverse his conviction.

CONCLUSION

WHEREFORE, Mr. Craveiro respectfully requests that this Court reverse.

Theodore Lothstein will represent Mr. Craveiro at oral argument and requests 15 minutes oral argument.

Respectfully submitted,

By_____
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CERTIFICATE OF SERVICE

I, hereby certify that two copies of the foregoing Brief have been mailed, postage prepaid, to the Office of the Attorney General, 33 Capitol Street, Concord, New Hampshire 03301, this 20th day of November, 2006.

_____
Theodore Lothstein

DATED: November 20, 2006