QUESTION PRESENTED

Whether the trial court erred in denying Robinson's motion to suppress.

Issue preserved by motion to suppress, App. A1,* the State's objection, App. A9, a hearing, MH 3-124, and the trial court's ruling. App. A26.

*Citations to the record are as follows:
"T1" - "T4" refer to the transcript of the jury trial;
"TS" refers to the June 11, 2007 transcript of the hearing on motion to suppress;
"App." refers to the appendix to this brief.

STATEMENT OF THE CASE

A Hillsborough County Grand Jury indicted Scott Robinson for robbery and first degree assault, alleged to have occurred on or about March 18, 2006 at the Cross Town Variety store in Manchester. T1 5. The robbery indictment alleged that Robinson, "in an effort to obtain cash from the ... cash register, used physical force on Imtiaz Saeed... by stabbing [Saeed] several times with a knife. . . ." T1 6. The first degree assault indictment alleged that Robinson "repeatedly stabb[ed] Saeed with a knife, a deadly weapon, thereby causing a laceration. . . ." T1 6. At trial, Robinson contended his prosecution was the result of a mistaken identification. E.g., T1 19-24 (opening statement).

After a three-day jury trial, the jury deliberated into a fourth day, T3 135; T4 2, and then found Robinson guilty as charged. T4 2-4. The court (Barry, J.) sentenced Robinson to consecutive terms totaling twenty-seven to seventy-four years in prison. NOA 2, 7-8.

STATEMENT OF THE FACTS

Imtiaz Saeed, the owner and operator of Cross Town Variety, a convenience store in Manchester, testified that a man in a hooded jacket robbed him at knife point on March 18, 2006. T1 57-60. While Saeed was working in the store, the man approached Saeed and, in a low voice, told Saeed he was sorry, but he needed some money. T1 59. Saeed turned around, felt a sharp-edged instrument pressing into his back, and began walking towards the cash register. T1 60.

When Saeed felt the knife puncture his skin, he told the man to stop, and pushed him away with his elbow. T1 60, 94. The man then starting "poking" Saeed in his torso with the knife, inflicting multiple wounds. T1 61-62. At the counter, Saeed fell to the floor, and the man stopped stabbing him. T1 68.

The man again demanded money, and Saeed pulled the cash register off the counter so he could open its drawer. T1 69. The man took cash out of the drawer and walked out. T1 69. Saeed told the police that the man stole $160, along with two cartons of cigarettes. T1 99.

At trial, Saeed identified Robinson as the man who robbed and stabbed him. T1 71. At the time of the robbery, however, Saeed had not been able to provide many details about the perpetrator's appearance. T1 62, 88, 106-108. Robinson's picture had been shown on television and in the Union Leader the day after the crime. T3 39. Saeed acknowledged that, while in the hospital, he had seen

a newspaper picture of Robinson depicting him as the robbery suspect or arrestee. T1 113. The police never conducted a pretrial identification procedure with Saeed. T1 111.

A. The Civilian Witnesses

Several customers testified against Robinson at trial. Frank Robitaille testified that he saw a man with a knife stabbing the store owner. T1 118. Robitaille told Saeed's son who was in the back freezer to call 911. T1 118. Robitaille then chased the man out the door and up Amory Street to the corner of Bartlett and Amory. T1 118-19, 126-28, 144. Robitaille stopped chasing the man when he crossed the street and ran into an alley. T1 144.

Robitaille described the robber as being about 6'1, 200-215 pounds, wearing a green "hoodie" sweatshirt under a red and blue New England Patriots jacket. T1 120. Officer Christopher Sanders testified at the suppression hearing and at trial that Robitaille, in describing the perpetrator immediately after the robbery, also said that the perpetrator appeared to be a twenty-five to thirty year old white male. T1 198-99; TS 8-10. Robinson was then forty-four years old. T2 71. At trial, however, Robitaille testified that he had not been able to see the man's face, and denied telling Sanders that the robber was a twenty-five to thirty year old white male. T1 136-37. Rather, Robitaille claimed, he did not know the man's race and could not estimate his age. T1 136-37.

Robitaille did not make an in-court identification.

Another customer, Laurie Manseau, testified that she saw Saeed lying on the floor, realized that something had happened to him, and saw a man walking away from the counter. T1 148-49. Manseau described the man, who she believed to be the robber, as being at least six feet tall, "in his forties," medium build, white, and unshaven, wearing a blue hood and a blue jacket. T1 150-51, 172, 185. Although Manseau only saw the robber's face "for a second," from a diagonal angle, she made an in-court identification of Robinson as the perpetrator. T1 149, 155, 164. As with the other trial witnesses, the police did not conduct any pretrial identification procedure with Manseau. T1 173, 194. Like Saeed, Manseau acknowledged she could not be one hundred percent certain about her identification of the defendant. T1 115, 174. Manseau also acknowledged that she, like Saeed, had seen Robinson's picture in the media prior to trial. T1 172.

The State contended that Robinson had a financial motive to commit the robbery. T1 8-9 (opening statement). Robinson lived in an apartment at 25 Laval Street in Manchester. T1 49-50. Dennis Proulx, Robinson's landlord, testified that he served a demand for rent and notice to quit on Robinson on March 17, 2006. T1 49-50.

B. The Police Investigation.

Except where otherwise noted, facts discussed in this section

of the Statement of Facts were established both at trial and during the suppression hearing.

At 9:50 p.m., Manchester Police Officers Christopher Sanders and Robert Gravelle were dispatched to the store, where they spoke with witnesses, including Robitaille and Manseau. T1 178, 198; TS 6, 75. Sergeant Steven Olson arrived shortly after Sanders and Gravelle, and observed that Saeed had been stabbed at least three times. T1 207-208; TS 15-16. Robitaille provided a description of the perpetrator, and told the police he chased the perpetrator as discussed above. T1 199-200; TS 8-9, 17. Another witness, Jason Charpentier, provided information to the police consistent with that provided by Robitaille. T1 208; TS 9-10. Charpentier did not testify during any of the proceedings.

Behind the counter, in the non-public area where the store clerk would be, Olson noticed a set of keys, including a key that had "Kia" written on it. T1 209-11; TS 18. Other officers testified that the keys were found behind or beside the counter. T1 180, T2 20, 77. Robitaille, however, testified that he found the keys, in front of the counter. T1 138-39. Police confirmed that the Kia key did not belong to a store employee. T1 211; TS 18.

After Olson reported his findings over dispatch, Officer William Davies found a Kia parked on Amory Street, in the direction that Robitaille had said the suspect fled. T1 212-15; T2 8; TS 18-20. Police estimates of the distance between the store and the Kia ranged

from 150 to 500 feet. T1 215; T2 11, 20. The Kia was registered to Scott Robinson at his apartment on Laval Street, approximately eight blocks from the store. T2 9; TS 21; App. A27.

At the suppression hearing, but not at trial, the State introduced the following additional evidence about the Kia's registration information. Dispatch provided a description of Robinson's race, height and weight, which was consistent with the descriptions given by witnesses. TS 21, 25, 42. A record check showed that Robinson had a conviction for robbery. TS 21. The Kia was parked two houses away from the alley, such that the suspect would have run by or near Robinson's car. TS 18-20.

After dispatch identified Robinson as the owner of the Kia, based on its registration plate, several officers went to Robinson's apartment building, including John Cunningham, Andrew Fleming, Nathan Linstad, and another officer named Bujnowski.[**] T1 40; T2 40, 50, 52, 58; TS 42, 45. Officers noticed fresh, wet footprints leading up to the door of Robinson's apartment. T2 41, 58, 66; TS 83. At the suppression hearing, an officer testified that a Spanish-speaking neighbor confirmed that Robinson lived in the apartment. TS 87.

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[**] Of these officers, only Fleming testified both at the suppression hearing and at trial. Cunningham testified only at trial, while Linstad testified only at the suppression hearing. Bujnowski did not testify during any of the proceedings, but Willard discussed Bujnowski's version as recorded in his police report during the suppression hearing. TS 58.

After the officers went to Robinson's apartment building, Detective Enoch "Nick" Willard brought the keys to the Kia. T2 20, 79; TS 43. Willard tried the key in the passenger door lock, locked the unlocked door without opening the door, and reported to dispatch that the key fit the Kia. T2 12, 79-80; TS 21, 44-45. The officers at Robinson's building were notified of Willard's discovery that the key fit the Kia before they entered the residence. T2 39, 57, 80; TS 21, 45-46, 58-59.

Those officers knocked or "banged" on Robinson's door loudly for a time, with firearms drawn, announcing themselves as Manchester Police, but no one came to the door. T2 42, 53, 59; TS 68, 85. They heard an excited female voice inside the apartment speaking to another party. T2 43, 54. At the suppression hearing, evidence was introduced that they heard the female say something like, "Scott, you're an idiot." TS 59.

Finally, Robinson's girlfriend Kimberly Dunn came to the door. T2 43-44, 59-60; TS 60. Lindstadt testified at the suppression hearing that Dunn opened the door at 10:50 p.m. TS 75. The police officers "secured her," T2 44, 60, a process described in the suppression hearing as taking her to the ground at gunpoint. TS 60. At the suppression hearing, evidence was introduced that Dunn told an officer that "he" was inside with a knife to his chest. TS 69.

Cunningham, Bujnowski and Fleming then entered the apartment

without a warrant. T2 44; TS 61. Inside, they opened a sliding closet door to make sure no one was inside, and observed a Patriots jacket and green hooded sweatshirt on hangers. T2 45, 60-61, 69; TS 61, 89. They proceeded through the apartment, found Robinson lying on a bed in a bedroom, and took him into custody at 10:51 p.m. T2 47, 61-62; TS 77. At the police station, officers observed that Robinson had a stab wound on his chest. T2 82. Willard asked Robinson about it, and Robinson said it was a self-inflicted six inch deep stab wound. T2 83-84.

The next day, the police searched Robinson's residence pursuant to a warrant. T2 85. They seized a green hooded sweatshirt, the New England Patriots jacket seen in the closet, a dark-colored left glove, and a wooden-handled butterfly knife. T2 88-90; T3 10, 13. Tests at the lab showed DNA from Robinson, but not from Saeed, on that knife. T2 36. They found no cartons of cigarettes, and only ninety dollars in cash, less than Saeed had reported stolen. T1 99; T2 90; T3 10, 25, 29. The Patriots jacket had a stain on the lower left sleeve, but it was never sent to the state lab for testing. T3 12, 33.

A store surveillance video, depicting a quadrant with four different perspectives, captured images of the robbery on a grainy VHS tape. T1 27-29, 124-25, 226-27; TS 24. The State showed the video to the jury, and had Saeed and Robitaille narrate its contents. T1 77-82, 123-26. The witnesses generally described the video as

being of poor quality. T1 113-15, 226-27. Nevertheless, two police officers who saw Robinson the night he was arrested testified that they viewed the video, and believed Robinson was the person depicted therein. T1 220; T2 13.

## SUMMARY OF THE ARGUMENT

The probable cause plus exigent circumstances exception to the warrant requirement did not justify the warrantless entry into Robinson's home. The trial court's determination that the officers did not rely on the match between the Kia key and Robinson's car in entering the apartment was clearly erroneous. The court was correct not to consider that fact, however, because the test of the key itself constituted an unconstitutional search. Absent the fact of the key match, the police lacked probable cause that Robinson was the robber. Even assuming probable cause, the situation did not present exigent circumstances sufficient to justify a warrantless entry into a private home. The police were not in 'hot pursuit' of Robinson, and to the extent the situation presented a threat of imminent danger to life or public safety, the police themselves created that exigency. Accordingly, the trial court erred in denying the motion to suppress.

Argument

I. THE TRIAL COURT ERRED IN DENYING ROBINSON'S MOTION TO SUPPRESS, BECAUSE THE WARRANTLESS ENTRY INTO ROBINSON'S HOME WAS NOT SUPPORTED BY THE EXIGENT CIRCUMSTANCES EXCEPTION TO THE WARRANT REQUIREMENT.

The trial court erred in denying Robinson's motion to suppress, because the probable cause plus exigent circumstances exception to the warrant requirement did not justify the forcible, warrantless entry into Robinson's home by Manchester police officers. In his motion to suppress, Robinson argued that the police 1) illegally seized the Kia key at the scene, App. A6, 2) conducted an illegal search or seizure of his vehicle by placing the key in the lock of his vehicle, id., and 3) made an unconstitutional warrantless entry into his home, App. A4-A5. Further, Robinson contended that the "fruit of the poisonous tree" of these constitutional violations included all evidence gathered during a second entry into his home pursuant to a search warrant, because the warrant application asserted facts learned as a result of the constitutional violations. App. A6-A7.[***]

The State objected to the motion to suppress. App. A9. The State contended that "[p]lacing the key into the Kia door is not constitutionally protected" under the State or Federal

[***] Robinson also litigated the issue of whether the police made misleading factual allegations in the application for a search warrant, App. A22, a claim not pursued on appeal because the trial court's finding that these allegations were not material is not clearly erroneous.

Constitutions. App. A16. The State justified the warrantless entry into Robinson's home based on the exigent circumstances exception to the warrant requirement. App. A13. Finally, the State made a number of arguments with respect to whether various items of evidence constituted fruits of the claimed illegal searches and seizures. App. A17-A19.

The trial court denied the motion to suppress. App. A26. The court did not reach the issue of whether the police violated Robinson's constitutional rights by testing the Kia key in the lock of his car. App. A31. The court viewed this as irrelevant on the basis of its finding that "the police did not rely upon the key actually fitting the vehicle, but rather, acted upon information obtained through the vehicle's registration." App. A31. The court ruled that even without consideration of the discovery that the key belonged to Robinson's car, the probable cause plus exigent circumstances doctrine justified the warrantless entry into Robinson's home. App. A31-A33. On the basis of its ruling, the court generally did not address Robinson's claims with respect to derivative evidence.[****] App. A35-A37. The court erred.

"When reviewing a trial court's ruling on a motion to suppress, [the Court] accept[s] the trial court's factual findings unless they lack support in the record or are clearly erroneous." State v.

[****] The court did determine that Robinson consented to a buccal swab of his cheek for a DNA sample. App. A36.

Rodriguez, 157 N.H. 100, 103 (2008). However, the Court reviews the trial court's legal conclusions *de novo*. Id. Because Part I, Article 19 provides at least as much protection in this area as does the Fourth Amendment, this brief analyzes the issue under the State Constitution, referring to cases decided under the Federal Constitution as interpretative aids. Pseudae, 154 N.H. at 199. Robinson also refers to such cases in furtherance of his intention to separately preserve a federal claim.

"Under Part I, Article 19 of our State Constitution, warrantless entries are *per se* unreasonable and illegal unless they fall within the narrow confines of a judicially crafted exception to the warrant requirement." Rodriguez, 157 N.H. at 103 (emphasis in original); State v. Pseudae, 154 N.H. 196, 199 (2006). The State bears the burden of proving by a preponderance of the evidence that such an entry falls within one of these exceptions. Rodriguez, 157 N.H. at 103. Here, the court relied on the probable cause plus exigent circumstances exception.

"Exigent circumstances exist where the police face a compelling need for immediate official action and a risk that the delay caused by obtaining a search warrant would create a substantial threat of imminent danger to life or public safety or likelihood that evidence will be destroyed." Pseudae, 154 N.H. at 200; State v. Stern, 150 N.H. 705, 709 (2004); Theodosopoulos, 119 N.H. at 580. "Whether exigent circumstances exist is judged by the totality of the

circumstances." Stern, 150 N.H. at 709.

The State bears a particularly heavy burden here because the police entered a private home. "The search of a home is subject to a particularly stringent warrant requirement because the occupant has a high expectation of privacy." Pseudae, 154 N.H. at 199; State v. Seavey, 147 N.H. 304, 306 (2001); State v. Santana, 133 N.H. 798, 803 (1991); State v. Theodosopoulos, 119 N.H. 573, 580 (1979), *cert. denied*, 446 U.S. 983 (1980). "To have it otherwise would be to obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law." Santana, 133 N.H. at 803 (quotations omitted). Further, the exigent circumstances exception "can very easily swallow the rule unless applied in only restricted circumstances." Santana, 133 N.H. at 804 (quotations omitted).

### A. The Trial Court Clearly Erred in its Finding that the police did not Rely on the Key Match when Entering Robinson's Home.

Preliminarily, the trial court erred in its conclusion that the police did not rely on the key match. Relying on that conclusion, the court sidestepped the issue of whether the test of the key in Robinson's car door constituted an unconstitutional search. App. A31. The trial court's conclusion in this regard was clearly erroneous, based on the following testimony in the record. Willard testified at the suppression hearing that the officers at Robinson's

apartment were notified of Willard's discovery that the key fit the Kia, before they entered the residence. TS 45-46, 58-59. Fleming testified at the hearing that he learned that "the keys matched the car," before he even arrived at Robinson's apartment building. TS 82, 84, 99-100. No officer testified at the hearing that the police did not rely upon the match between the Kia key and the Kia registered to Robinson, in making the decision to knock on Robinson's door repeatedly and eventually forcibly enter the home. Rather, Olson testified that the discovery of the keys, and the discovery that they fit Robinson's vehicle, constituted a "huge clue to this case." TS 31. With the State bearing the burden of proof at the hearing, and in view of the critical importance of the fact that the key discovered at the crime scene fit the defendant's vehicle, the trial court's finding of fact that the police did not rely on this fact was clearly erroneous.

While the trial court erred in determining that the police did not rely on the key match, it was nevertheless correct in declining to consider the key match, because the match was discovered as a result of a warrantless and unconstitutional search of Robinson's vehicle.

B. <u>Willard's Test of the Kia Key in Robinson's Vehicle Violated Robinson's State and Federal Constitutional Right to Privacy.</u>

The fact that the police relied on the key match constitutes an additional basis to suppress the warrantless entry into the home,

because the determination that the key matched Robinson's car itself constituted an unconstitutional search or seizure under the State and Federal Constitutions. "A keyhole contains *information* - information about who has access to the space beyond." United States v. Concepcion, 942 F.2d 1170, 1172 (7th Cir. 1991)(emphasis in original). The Fourth Amendment, and Part I, Article 19 of the State Constitution, "protect[] private information rather than formal definitions of property. . . ." Id. (citing Arizona v. Hicks, 480 U.S. 321 (1987); Katz v. United States, 389 U.S. 347 (1967)); see State v. Goss, 150 N.H. 46, 49 (2003)(adopting the reasonable expectation of privacy test under Part I, Article 19). Accordingly, a lock securing the door to a vehicle or home "is a potentially protected zone." Concepcion, 942 F.2d at 1172.

Under the Fourth Amendment, however, courts have minimized the extent to which that particular zone is constitutionally protected. E.g., United States v. Grandstaff, 813 F.2d 1353, 1358 & n.5 (9th Cir. 1987)(assuming such a test constitutes a search, although questioning that assumption in a footnote, and ruling it a "minimally invasive," "constitutionally reasonable" search under the circumstances); Commonwealth v. Alvarez, 661 N.E.2d 1293, 1302 (Mass. 1996)("We therefore conclude that, for such an unobtrusive search, the police needed only a founded or reasonable suspicion to insert the key.").

In particular, the First Circuit ruled that the test of the

lock of a storage unit with a key, if a search at all, was a "unique form of one" which did not implicate any reasonable expectation of privacy. United States v. Lyons, 898 F.2d 210, 212, 213 n.2 (1st Cir.), *cert. denied*, 498 U.S. 920 (1990). The court analogized the test of a key in a lock to the dog sniff held not to implicate a reasonable expectation of privacy in United States v. Place, 462 U.S. 696 (1983). Lyons, 898 F.2d at 212-13. Courts such as the Lyons Court reason that the information obtained as a result of a key test - who owns a car, who rents a storage unit, or who lives in a particular apartment - does not constitute private information. Lyons, 898 F.2d at 213 (By placing personal effects inside the storage unit, Lyons manifested an expectation that the *contents* would be free from public view.")(emphasis in original); see also United States v. Grandstaff, 813 F.2d 1353, 1358 n.6 (9th Cir. 1987)("There is little, if any, reasonable expectation of privacy in the identity of one's vehicle" because, in part, "motor vehicles must display license plates, which law enforcement officials can use to determine registered ownership."); United States v. Salgado, 250 F.3d 438, 455-56 (6th Cir. 2001).

Nevertheless, under the unique circumstances of this case, the key test constituted a search under the Fourth Amendment, because the purpose of the search was not to find out public information - who owned the car, a fact already known to the police - but to determine specifically who owned the keys left in the store. In

Hicks, 480 U.S. 321, the Court found that a search arguably less invasive of ordinary conceptions of privacy - turning over a stereo turntable to read its serial number - constituted a search under the Fourth Amendment. Id. at 324-25. "The bottom of a turntable is no more a storehouse for personal secrets than are the innards of a lock, yet the Court held the fourth amendment applicable." Concepcion, 942 F.2d at 1172; but see id. at 1173 (in the Court's view, use of key to verify suspect's address less violative of privacy than inverting turntable to ascertain its serial number). This Court, in its interpretation of the Fourth Amendment, is not bound by decisions of the First Circuit such as Lyons. State v. Miller, 155 N.H. 246, 256 (2007).

In any event, this Court should interpret Part I, Article 19 to provide greater protection than the Fourth Amendment, based on three considerations that distinguish these constitutional provisions. First, this Court rejected the concept of an automobile exception to the warrant requirement. State v. Sterndale, 139 N.H. 445 (1995). Second, this Court rejected a so-called "identification exception" to the warrant requirement in State v. Webber, 141 N.H. 817, 820 (1993). In Webber, a state trooper sought to inspect Webber's identification card without his permission for the purpose of ascertaining his identity, similar to the investigative purpose asserted by the government agents in cases like Lyons and Grandstaff. The Court rejected the rationale that "denying an officer the ability

to at least ascertain the identity of an individual could have a perplexing effect on law enforcement efforts," id. at 820 (quotations omitted), stating: "Under part I, article 19 of our constitution, however, the protection from unreasonable searches is not diminished by the desire, no matter how laudable, to aid law enforcement." Id. at 821.

Finally, this Court in Goss, while adopting the same "reasonable expectation of privacy" standard employed under the Fourth Amendment, applied it to reach a different result to a given set of facts. Id. at 319-20 (declining to follow California v. Greenwood, 486 U.S. 35, 41 (1988)). In so doing, the Court considered the expectations of residents of New Hampshire, who value their privacy, and would not expect neighbors, strangers or police officers to go rummaging through their garbage. Similarly, residents of New Hampshire would be unsettled to see a private citizen or police officer testing keys in the locks of other peoples' cars. Under Sterndale, Webber and Goss, the test of the key constituted a search, for which the police should have obtained a warrant. Accordingly, the trial court, albeit for the wrong reason, correctly excluded the key match from consideration in assessing whether the police had probable cause to arrest Robinson.

### C. Absent Consideration of the Key Match, the Police Lacked Probable Cause to Enter Robinson's Home.

The trial court erred in concluding that even without

consideration of the key match, other facts supplied probable cause that Robinson robbed the store. “Probable cause for arrest has been found to exist where the facts and circumstances within the officer's knowledge, and of which he had reasonably trustworthy information, would warrant a person of reasonable caution in the belief that the person to be arrested had committed or was committing a crime.” State v. Reynolds, 122 N.H. 1161, 1163 (1982). The court explained its finding of probable cause as follows:

> Here, officers responded to the defendant’s apartment within fifteen minutes of the underlying criminal event. The officers were aware that a robbery and stabbing had occurred, a Kia key had been left at the scene, the defendant owned a Kia found in the area of the convenience store, and his general physical description matched that of the assailant. The officers confirmed through a neighbor that the defendant lived in the particular apartment. Additionally, Officer Fleming observed wet footprints leading into the defendant’s apartment, and heard noise from inside, including Ms. Dunn’s statement, ‘You’re such an idiot,’ suggesting there was another individual in the apartment. Further, officers outside of the building also saw movement indicating there was more than one individual inside. As such, the Court finds the probable cause element has been satisfied.

App. A32-A33.

While Robinson does not dispute any of these facts relied upon by the trial court, the record simply does not support a finding of probable cause. “The determination of probable cause . . . must be viewed in the light of factual and practical considerations of everyday life in which reasonable and prudent [persons], not legal

technicians, act." State v. Brown, 138 N.H. 407, 409 (1994). Although the circumstantial evidence suggested that the Kia key was left by the robber, the fact that a Kia was found parked nearby did not support the conclusion that it belonged to the culprit. According to Kia's official corporate website, "today there are more than one-million Kia vehicles on American roads." See www.kia.com/info.php (Attached as App. A38, as viewed on August 15, 2008).

Thus, factual and practical considerations lead to the inference that Robinson's Kia was not the only Kia parked or traveling within the area of a convenience store located in New Hampshire's largest city. Just as a link drawn between a footprint at the burglary scene of a "popular brand of running shoe" and the Jox sneakers found on the accused were insufficient to supply probable cause to arrest in Reynolds, 122 N.H. at 1164, the link here based on the robber's association with a popular entry level automobile was not sufficient to supply probable cause that the parked Kia's registered owner robbed the store.

The additional link between the description of the registered owner and the eyewitness's descriptions does not supply probable cause because the alleged similarity is limited to very general facts: race, height and weight. TS 21, 25, 42. The Court can reasonably infer that those general facts - a white male, over six feet tall, perhaps around 190 pounds, TS 27, 33 - describe a sizable proportion

of Manchester's population. While probable cause, unlike proof beyond a reasonable doubt, deals only with "reasonable probabilities," id. at 1163, here the vehicle make and general description fit too many of Manchester's residents and visitors to constitute probable cause to arrest Robinson.

### D. The Warrantless Entry into Robinson's Home was Not Supported by Exigent Circumstances.

Even assuming the information known to the police constituted probable cause, the police lacked exigent circumstances and should have obtained a warrant to enter Robinson's home. The trial court pointed to two different considerations in support of a finding of exigent circumstances: hot pursuit, and a threat of imminent danger to the public. App. A33-A35. The State also contended that the risk of destruction of evidence supported a finding of exigent circumstances, App. A15, a claim the trial court did not pass on in its order. See App. A32-A35. The record does not support a finding of exigent circumstances based on any of these theories.

First, this was not "hot pursuit" as properly construed under the State and Federal Constitutions. See State v. Ricci, 144 N.H. 241 (1999). In Ricci, police pursued a drunk driver, with blue lights flashing, but the driver kept going, exceeded the speed limit, and did not stop until he entered his own driveway. Id. at 242. There, Ricci tricked an officer into letting him sneak into his home based on the pretext that he needed to let his dog in. Id. The officer

made a warrantless entry to arrest Ricci for driving while intoxicated, but also had probable cause to arrest him for a misdemeanor offense, disobeying a police officer. Id. at 244. This Court affirmed the trial court's denial of Ricci's motion to suppress, finding that hot pursuit justified the warrantless entry. Id. at 245.

In accepting the State's "hot pursuit" theory, the Ricci Court defined the concept thusly: "Hot pursuit, the exigent circumstance offered by the State to justify the conduct of the police, requires immediate and continuous pursuit of a defendant from the scene of a crime." Id. at 244. The facts of this case, however, do not fit that definition and do not resemble those of Ricci. The police arrested Robinson just over an hour after the robbery. During that time, no police officer ever saw, much less pursued, a robbery suspect. The perpetrator fled from the store, but he did not flee from the police. See T3 72 (during discussion of State's proposed flight instruction, trial court states: "He didn't flee from the police. The police weren't present. He was fleeing well ahead of the police.").

Accordingly, there was neither "immediate" nor "continuous" pursuit of a suspect from the scene of a crime. Ricci, 144 N.H. at 244. At best, the police followed a circumstantial trail of leads that suggested the possibility the robber could be found within 25 Laval Street. While this may or may not have constituted sound police

investigative work, it certainly did not amount to a "hot pursuit," and this Court must reject the trial court's reasoning in that regard.

Second, this Court must reject the State's contention that the risk of destruction of evidence justified the warrantless entry into Robinson's home. This was not a drug case, where indoor plumbing might serve as a conveyance to cause the disappearance of critical evidence or contraband. Rodriguez, 157 N.H. at 107; see Santana, 133 N.H. at 804 ("[w]hile the Fourth Amendment and Part I, Article 19 are not relaxed for drug investigations, the ease of destruction of that evidence sets the framework for the determination of exigent circumstances.") (quotations omitted). Indeed, Willard acknowledged in his testimony that he had no specific information that any evidence was being destroyed in the apartment. TS 63; see State v. Morse, 125 N.H. 403, 409 (1984)("Mere speculation about the possibility of destruction of evidence is insufficient to support a claim of exigency. . . ."). Accordingly, the trial court correctly declined to rely on the State's destruction of evidence theory.

Finally, the record does not support the primary justification relied upon by the trial court, "a substantial threat of imminent danger to life or public safety." App. A34 (quoting Pseudae, 154 N.H. at 200). In advancing this argument, Robinson concedes that when the police induced Dunn to open the door and then took her to the ground at gunpoint, and she said Robinson had a knife to his chest, an exigent circumstance arose justifying a protective sweep.

State v. Graca, 142 N.H. 670, 674 (1998).

"The primary focus of [the Court's] inquiry, however, is not on the *sufficiency* of the exigency but rather how the exigency came about." Santana, 133 N.H. at 805 (emphasis in original). Because the police created that exigency by repeatedly knocking on the door while announcing themselves as police officers, and then responded to Dunn's appearance at the door by taking her to the ground at gunpoint, their reliance on the exigent circumstances exception fails. Id. at 805 ("The police may not create exigency in order to justify their warrantless entry. . . ."). Rather, "any exigency arising ... was created solely by the police action in knocking on the defendant's door." Morse, 125 N.H. at 408. While "[t]he boundary between an exigency which naturally arises and an exigency which is created is unclear," id., application of the factors guiding the Court's decisions in Santana, Morse and Rodriguez leads inexorably to the conclusion that here, the police created an exigency and may not rely upon it to justify the fruits of their entry and search.

First, the officers's presence outside Robinson's home was not a matter of happenstance as in Rodriguez, where the police were present in the hotel to investigate an unrelated matter. 157 N.H. at 108; see also Morse, 125 N.H. at 408 (emphasizing that any exigency did not arise by "chance," but due to intentional police efforts to apprehend defendant by knocking on his door of his home). Here, as in Morse, the police were present to apprehend the suspect in

his home. TS 35 (Olson testifies that police sought to "catch this person before anybody else got hurt; because [officers] felt at the time that this was not a normal robbery, this was an extremely violent robbery.").

A second factor, the forseeability of the situation that gave rise to the exigency, weighs in favor of suppression of the evidence gathered here. While the officers may not have had much "time for reflection" as did the officers in Santana, they "chose to pursue a course of action which they knew at the outset [would] present a situation requiring an emergency entrance into a person's home." Santana, 133 N.H. at 807. They did so, by repeatedly knocking on the door, firearms drawn, announcing themselves as police officers, and then taking Dunn to the ground at gunpoint when she appeared at the door. TS 68, 85. Any concerns regarding destruction of evidence or a risk of harm to police officers or others were the result of this course of action taken by the officers.

Thus, "[t]he facts of the case at bar do not rise to the level of urgency demonstrated in previous cases where [the Court has] held emergency entries into private dwellings valid." Seavey, 147 N.H. at 308. Prior to inducing Dunn's appearance at the door, the police had no reason to believe there "could have been a victim in need of immediate assistance inside. . . ." Slade, 116 N.H. at 437. The police had no reason to believe Robinson continued to pose a threat to the public, unlike in Theodosopolous where the police reasonably

believed a sniper was shooting from within a building. 119 N.H. at 576-77, 580-81. Unlike in <u>Rodriguez</u>, 157 N.H. at 106-107, the police had no articulable, objective basis to believe that evidence was being destroyed on an ongoing basis. "The solicitous protection that the New Hampshire and Federal Constitutions afford to the home must be preserved because '[a]t the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" <u>Seavey</u>, 147 N.H. at 308-309 (quoting <u>State v. Chaisson</u>, 125 N.H. 810, 816-17 (1984)). Accordingly, the trial court erred in determining that exigent circumstances justified the warrantless entry into Robinson's home. All evidentiary fruits of that entry must be suppressed.

The trial court, in declining to suppress evidence obtained as a result of the search of Robinson's home pursuant to a search warrant on the day following the warrantless entry, acknowledged in its order that the warrant "reference[d]," and the "issuing judge ... consider[ed]" observations made during the warrantless entry. App. A35. The court declined to suppress the fruits of the search warrant because it held the initial entry did not violate the State or Federal Constitutions. <u>Id</u>. Because the court erred in that regard, the evidence gathered as a result of the search warrant must also be suppressed. Alternatively, this Court must remand for a hearing on the scope of the evidence that must be suppressed as a result of the unconstitutional warrantless entry into Robinson's

home.

CONCLUSION

WHEREFORE, Scott Robinson respectfully requests that this Honorable Court reverse.

Undersigned counsel requests fifteen minutes oral argument before the full Court.

Respectfully submitted,

By_________________________________
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