

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

No. 2009-0402

State of New Hampshire

v.

Soiluis Nieves

**Appeal Pursuant to Rule 7 from Judgment
of the Hillsborough County Superior Court -
Southern Judicial District**

BRIEF FOR THE DEFENDANT

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(15 Minutes Oral Argument)**

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities.....	ii
Question Presented.....	1
Statement of the Case and Statement of Facts.....	2
Statement of Facts.....	3
Summary of Argument.....	3
Argument	
I. THIS COURT SHOULD NOT ABOLISH THE INADVERTENT DISCOVERY REQUIREMENT OF THE PLAIN VIEW EXCEPTION UNDER PART I, ARTICLE 19.....	4
Conclusion.....	24

TABLE OF AUTHORITIES

	<u>Page</u>
CASES:	
<u>Arizona v. Hicks</u> , 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987).....	17
<u>California v. Greenwood</u> , 486 U.S. 35, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988).....	6
<u>California v. Hodari D.</u> , 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991).....	6
<u>Claremont School Dist. v. Governor</u> , 138 N.H. 183, 635 A.2d 1375 (1993).....	19
<u>Commonwealth v. Balicki</u> , 436 Mass. 1, 762 N.E.2d 290 (2002).....	<u>passim</u>
<u>Coolidge v. New Hampshire</u> , 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).....	<u>passim</u>
<u>Green v. State</u> , 866 S.W.2d 701 (Tex. Ap. 1993).....	16
<u>Horton v. California</u> , 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990).....	<u>passim</u>
<u>Johnson v. U.S.</u> , 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948).....	20
<u>People v. Cooke</u> , 194 Mich.App. 534, 487 N.W.2d 497 (1992)..	16
<u>Sirrell v. State</u> , 146 N.H. 364, 780 A.2d 494 (2001).....	19
<u>State v. Ball</u> , 124 N.H. 226, 471 A.2d 347 (1983).....	3, 5, 7, 8
<u>State v. Beauchesne</u> , 151 N.H. 803, 868 A.2d 972 (2005).....	5, 6, 19
<u>State v. Bradberry</u> , 129 N.H. 68, 522 A.2d 1380 (1986).....	5
<u>State v. Canelo</u> , 139 N.H. 376, 653 A.2d 1097 (1995).....	<u>passim</u>
<u>State v. Couture</u> , 194 Conn. 530, 482 A.2d 300 (1984).....	11
<u>State v. Cote</u> , 126 N.H. 514, 493 A.2d 501 (1985).....	14, 15

TABLE OF AUTHORITIES

	<u>Page</u>
<u>State v. Davis</u> , 149 N.H. 698, 828 A.2d 293 (2003).....	3, 4, 12
<u>State v. Goodin</u> , 67 Wash.App. 623, 838 P.2d 135 (1992).....	16
<u>State v. Goss</u> , 150 N.H. 46, 834 A.2d 316 (2003).....	6
<u>State v. Hammell</u> , 147 N.H. 313, 787 A.2d 850 (2001).....	3, 13
<u>State v. Loh</u> , 275 Mont. 460, 914 P.2d 592 (1996).....	16, 17
<u>State v. MacElman</u> , 149 N.H. 795, 834 A.2d 322 (2003).....	3, 12, 13
<u>State v. Martin</u> , 145 N.H. 362, 761 A.2d 516 (2000).....	6-7
<u>State v. Peterson</u> , 114 Or.App. 126, 834 P.2d 488 (1992).....	16
<u>State v. Pinkham</u> , 141 N.H. 188, 679 A.2d 589 (1996).....	5, 18-19
<u>State v. Santana</u> , 133 N.H. 798, 586 A.2d 77 (1991).....	23
<u>State v. Settle</u> , 122 N.H. 214, 447 A.2d 1284 (1982).....	6
<u>State v. Sidebotham</u> , 124 N.H. 682, 474 A.2d 1377 (1984).....	5-6
<u>State v. Slade</u> , 116 N.H. 436, 362 A.2d 194 (1976).....	13, 14, 15
<u>State v. Sterndale</u> , 139 N.H. 445, 656 A.2d 409 (1995).....	6
<u>State v. Webber</u> , 141 N.H. 817, 694 A.2d 970 (1997).....	22-23
<u>Texas v. Brown</u> , 460 U.S. 730, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983).....	7, 8, 21
<u>United States v. Cutts</u> , 535 F.2d 1083 (8th Cir. 1976).....	11
<u>United States v. Leon</u> , 468 U.S. 897, 104 S.Ct. 3430, 82 L.Ed.2d 677 (1984).....	6
<u>United States v. United States District Court</u> , 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972).....	20

TABLE OF AUTHORITIES

Page

CONSTITUTION:

New Hampshire Constitution, Part I, Article 19..... passim

OTHER:

Black's Law Dictionary at 322 (6th ed. 1990)..... 11-12

QUESTION PRESENTED

Whether the Court correctly found that part I, article 19 requires that any discovery under the plain view exception be inadvertent.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Soiluis Nieves accepts the State's statement of the case and statement of facts for purposes of this appeal.

SUMMARY OF THE ARGUMENT

The trial court correctly held that under New Hampshire law the discovery of certain evidence under the plain view exception to the warrant requirement must be inadvertent. See, e.g., State v. MacElman, 149 N.H. 795 (2003); State v. Davis, 149 N.H. 698 (2003); State v. Hammell, 147 N.H. 313, 317-18 (2001); State v. Ball, 124 N.H. 226 (1983). As this Court noted in Davis, “[t]he Federal Constitution affords the defendant less protection in this area than does the State Constitution.” Davis, 149 N.H. at 701-02 (referencing Horton v. California, 496 U.S. 128 (1990)).

Abolishing the inadvertence requirement as the State urges this Court to do ignores the protections part I, article 19 provides to possessory interests, which protections are provided through the requirement of a warrant absent certain narrowly drawn exceptions. See Horton, 496 U.S. at 142-48 (1990) (Brennan, J., dissenting); Commonwealth v. Balicki, 762 N.E. 2d 290 (2002).

I. THIS COURT SHOULD NOT ABOLISH THE INADVERTENT DISCOVERY REQUIREMENT OF THE PLAIN VIEW EXCEPTION UNDER PART I, ARTICLE 19.

The State urges this Court to abolish the inadvertent discovery requirement of the plain view exception where the item seized is contraband, stolen or dangerous, based on a clause taken from the plurality opinion in Coolidge v. New Hampshire, 403 U.S. 443 (1971), and Horton v. California, 496 U.S. 128 (1990). Alternatively, the State suggests this Court follow Horton and abolish the inadvertence requirement altogether. The State misconstrues the intent of clause from Coolidge particularly, as applied under part I, article 19. Moreover, Horton rests on a narrow interpretation of the Fourth Amendment that is inconsistent with the greater protections afforded possessory interests under part I, article 19. The State's arguments must be rejected. See State v. Davis, 149 N.H. 698, 701-02 (203) (citing Horton and noting the State constitution provides greater protection in this area than the federal constitution).

This Court has consistently recognized "the importance of undertaking an independent interpretation of our State constitutional guarantees." State v. Canelo, 139 N.H. 376, 385 (1995). "While the role of the Federal Constitution is to provide the minimum level of national protection of fundamental rights, our court has stated that it has the power to interpret

the New Hampshire Constitution as more protective of individual rights than the parallel provisions of the United States Constitution." State v. Ball, 124 N.H. 226, 232 (1983). As Justice Souter observed in State v. Bradberry, 129 N.H. 68, 83, (1986), "[i]f we place too much reliance on federal precedent we will render the State rules a mere row of shadows; if we place too little, we will render State practice incoherent." Bradberry, 129 N.H. at 83 (Souter, J., concurring).

Regarding part 1, article 19, this Court has resisted attempts to encroach on the guarantees it provides notwithstanding the United States Supreme Court's willingness to narrow the scope and substance of the protections afforded under the Fourth Amendment. See Canelo, 139 N.H. at 385 (citations omitted). As this Court stated in State v. Beauchesne, it has long "recognized that our State Constitution incorporates a strong right of privacy and provides greater protection for individual rights than the Federal Constitution." Beauchesne, 151 N.H. 803, 812 (2005). See also State v. Pinkham, 141 N.H. 188, 195 (1996) (Broderick, J., dissenting) ("[w]e consistently have interpreted our State Constitution independently of the United States Constitution, often concluding that it provides greater protection than its federal counterpart"); State v. Sidebotham, 124 N.H. 682, 686 (1984) (part I, article 19 often

provides greater protection than the Fourth Amendment); State v. Settle, 122 N.H. 214, 217 (1982) (same).

For example, in State v. Goss, 150 N.H. 46 (2003), this Court held that a person has a reasonable expectation of privacy in trash left for pick up by a trash collector given the expansive protection afforded by part I, article 19. Goss, 150 N.H. at 49-50. Not only was the Goss holding a departure from the limited protection afforded under the Fourth Amendment, see California v. Greenwood, 486 U.S. 35 (1988), the Goss decision was in the minority of those jurisdictions that had considered the issue since Greenwood. Id. at 50.

Similarly, in Beauchesne, the Court, rejecting California v. Hodari D., 499 U.S. 621 (1991), held that a seizure under part I, article 19 does not require physical force or submission to authority as required under the federal constitution. Beauchesne, 151 N.H. at 812-15. This Court again departed from Fourth Amendment jurisprudence in State v. Sterndale, 139 N.H. 445 (1995), by declining to adopt the automobile exception under part I, article 19. Sterndale, 139 N.H. 445, 449-50. Likewise, in Canelo, rejecting United States v. Leon, 468 U.S. 897 (1984), this Court declined to adopt under part I, article 19 the good faith exception to the warrant requirement as recognized under the Fourth Amendment. Canelo, 139 N.H. 376. See also State v. Martin, 145 N.H. 362, 366-67 (2000) (reiterating that the good

faith exception is "incompatible with and detrimental to our citizens' strong right to privacy inherent in part I, article 19.")

Not only has this Court traditionally interpreted part I, article 19 as providing greater protections than the Fourth Amendment, it has done so specifically in the context of the plain view exception. Ball involved the seizure of a hand-rolled cigarette from the defendant's car during a routine traffic stop. Ball, 124 N.H. at 230. While talking with the driver, the officer noticed "several partially smoked manufactured cigarettes, as well as a partially smoked hand-rolled cigarette, in an ashtray in the car." Id. Unable to determine the contents of the hand-rolled cigarette, the officer reached into the car, picked up the cigarette, and smelled it. Id. Based on its smell, the officer concluded it contained marijuana and arrested the defendant. Id. The State contended that the initial seizure of the cigarette fell within the plain view exception to the warrant requirement. Id. at 234. This Court disagreed and in doing so specifically declined to follow Texas v. Brown, 460 U.S. 730 (1983), which suggested a more narrow construction of the Fourth Amendment's protections in the context of the plain view exception. Id. at 235.

The particular issue in Ball concerned the "immediately apparent" element of the plain view exception, and whether the

officer had probable cause to believe the item was contraband before he seized it. Id. at 234. Although the Supreme Court exhibited a willingness in Brown to depart from the traditional probable cause requirement of the Fourth Amendment by permitting a warrantless seizure of an item based on suspicion alone, this Court refused to do so under part I, article 19. Id. at 235. The Ball Court explained that seizures based on suspicion alone are unreasonable and specifically prohibited by part I, article 19.

The State argues that where the item at issue is contraband the inadvertent discovery requirement of the plain view exception should not apply or, further, that the inadvertence requirement be abolished altogether. See State's Brief, at 10. The State's argument is flawed in three respects: first, it rests on a misreading of a clause taken from dicta in Coolidge; second, it is inconsistent with this Court's application of the plain view exception under part I, article 19; and third, the rationale applied in Horton as a basis for abolishing this requirement of the plain view exception is inconsistent with the broad protections guaranteed under part I, article 19.

A. Coolidge

Coolidge involved the search and seizure of the defendant's automobile believed to have been used in an abduction and murder. Coolidge, 403 U.S. at 445-49. Although the police obtained a

warrant for the search and seizure, the Coolidge plurality held that the warrant was invalid because it had not been issued by a neutral and detached magistrate. *Id.* at 453. Absent a valid warrant, the State argued that the search and seizure nonetheless should be upheld under one of several exceptions to the warrant requirement, including the plain view exception. *Id.* at 453-54, 465.

Against this backdrop the Coolidge plurality set forth the parameters of the plain view exception under the Fourth Amendment. *Id.* at 466-67. To constitute plain view, the plurality held that the police must lawfully be where the item to be seized is found, the discovery must be inadvertent, and the evidentiary nature of the item must be immediately apparent. *Id.* at 466-72.

The State's argument in this case is based on a clause from a sentence in the plurality opinion that reads, "But to extend the scope of such an intrusion to the seizure of objects -- *not contraband nor stolen nor dangerous in themselves* -- which the police know in advance they will find in plain view and intend to seize, would fly in the face of the basic rule that no amount of probable cause can justify a warrantless seizure." State's Brief, at 9 (quoting with emphasis Coolidge, 403 U.S. at 469-71). The State suggests that the clause, "not contraband nor stolen nor dangerous in themselves," means the inadvertence requirement

does not apply where the item seized is contraband, stolen, or dangerous. The State, however, attributes a meaning to this clause that is not consistent with the context in which it was stated, and that would virtually swallow the rule.

Read in conjunction with the plurality's discussion of the inadvertence element, its purposes and limitations, the clause more logically refers to situations where the initial intrusion is legitimated by an exception to the warrant requirement such as hot pursuit, search incident to arrest, or exigent circumstances. This is evident by reference to the discussion in which the clause is found, which discussion is quoted in the State's brief.

It is only when the initial intrusion is based on an exception to the warrant requirement that the plurality references any exception for items that are contraband, stolen or dangerous, stating that

[t]he initial intrusion may, of course, be legitimated not by a warrant but by one of the exceptions to the warrant requirement, such as hot pursuit or search incident to lawful arrest. But to extend the scope of such an intrusion to the seizure of objects -- not contraband nor stolen nor dangerous in themselves -- which the police know in advance they will find in plain view and intend to seize, would fly in the face of the basic rule that no amount of probable cause can justify a warrantless seizure.

Id. at 469-70 (emphasis added). Indeed, the reference to "contraband, stolen or dangerous" items is a reference to those items that are seized during "such intrusions," being intrusions

"legitimated not by a warrant but by one of the exceptions to the warrant requirement." Id. at 470.

By contrast, as the Court earlier noted,

[i]f the initial intrusion is bottomed upon a warrant that fails to mention a particular object, though the police know its location and intend to seize it, then there is a violation of the express constitutional requirement of "Warrants . . . particularly describing . . . [the] things to be seized."

Id. at 469-70. This distinction is appropriate given that, as explained in Coolidge, it is the exigency that drives the plain view exception to the warrant requirement. Id. at 468 ("no amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances'"). But see State v. Couture, 482 A.2d 300 (Conn. 1984) (seizure of money during execution of warrant was permitted although discovery was not inadvertent citing, without discussion, Coolidge); United States v. Cutts, 535 F.2d 1083 (8th Cir. 1976) (same).

Apart from the distinction between whether the initial intrusion was based on a warrant or an exception to the warrant requirement, it does not appear that the emphasized language was intended to cut such a wide swath through the warrant requirement as urged by the State. Items that are contraband, stolen, or dangerous represent nearly all of the types of evidence that might be seized. Contraband itself encompasses "[i]n general, any property that is unlawful to produce or possess." Black's

Law Dictionary at 322 (6th ed. 1990). It is not logical that the Coolidge plurality would undertake to craft the plain view doctrine, including the inadvertence element, only to create an exception that nearly swallows the rule.

B. Inadvertence Under Part I, Article 19

That this was not the intent under part I, article 19 is evident from the New Hampshire cases since Coolidge applying the plain view exception. For example, Davis, 149 N.H. 698, involved the seizure of illegal guns while the police were canvassing a flea market believed to be used to sell unspecified weapons. 149 N.H. at 699-700. Although the items were guns, the Court did not ignore the inadvertence requirement because the items might be dangerous. Id. at 700-01. On the contrary, a primary issue in Davis was whether the discovery was inadvertent. Id. at 701-02. Notably, referencing Horton, the Davis Court stated, "[t]he Federal Constitution affords the defendant less protection in this area than does the State Constitution." Id.

Likewise, in State v. MacElman, 149 N.H. 795 (2003), this Court considered the application of the plain view exception to the seizure of marijuana. 149 N.H. at 796. Although marijuana is contraband, the Court did not modify the plain view doctrine in the way the State seeks here. Id. at 801. Indeed, the MacElman Court held that "[a] police officer may seize contraband in his plain view so long as: (1) the initial intrusion which

afforded the view was lawful; (2) the discovery of the evidence was inadvertent; and (3) the incriminating nature of the evidence was immediately apparent." Id. See also State v. Hammell, 147 N.H. 313, 317-18 (2001) (holding that the discovery of knives was inadvertent and the seizure was permitted under the plain view exception notwithstanding that knives might be construed as "dangerous").

Contrary to the State's assertion, State v. Slade does not "strongly suggest" that this Court "would also hold inadvertence to be unnecessary where contraband or stolen items are involved." State's Brief, at 12. Slade involved a warrantless search after the defendant fired a gun in his trailer while the police were outside. 116 N.H. at 437. The police entered the trailer to search for possible victims. Id. In the course of the search, they located and seized, among other things, several guns. Id. Regarding the guns, the Court summarily stated, "[t]hey came into view while the officer was looking for a victim, and although [the officer] expected to find a gun, he could properly seize the guns under the plain view doctrine since they are dangerous in themselves." Id. at 439 (citing Coolidge, 403 U.S. 443).

As an initial matter, because Slade involved a warrantless search under exigent circumstances it is not inconsistent with the clause from Coolidge being limited to situations where the initial intrusion is legitimated under an exception to the

warrant requirement. In any event, Slade's brief reference to Coolidge to justify the seizure of the guns raises more questions than answers regarding this Court's intent with respect to the inadvertence requirement.

While it appears that the police would have anticipated locating the gun that the defendant had fired, there is no basis in the Slade opinion for finding that the police anticipated finding "numerous handguns and rifles." Id. at 437-39. Consequently, while the discovery of one gun may not have been inadvertent, it would appear that the discovery of the cache of guns was inadvertent and, thus, within the plain view exception as defined by this Court in the other plain view cases. Without any further explanation, under these circumstances, Slade cannot fairly be construed as "strongly suggesting" this Court intended to carve out an exception to the inadvertence requirement for any items that are contraband, stolen or dangerous.

The State, quoting the trial court's decision in this case, argues that State v. Cote, 126 N.H. 514 (1985) also suggests that this Court intended to abolish the inadvertence requirement where the item is contraband, stolen or dangerous. See State's Brief, at 9-10 (quoting Order on Defendant's Motion to Suppress II). This argument is based on an overly broad reading of Cote. Cote involved the seizure of marijuana where the initial intrusion was based on a search warrant. 126 N.H. at 517-18. The police had

obtained a warrant to search the defendant's restaurant for evidence related to a burglary. Id. at 518. This evidence included weapons used, and property stolen, during a burglary. Id. During the search, the police saw a scale and several clear plastic bags containing what appeared to be marijuana. Id.

In considering whether the plain view exception applied, this Court specifically declined to consider the interpretation advanced by the State in this case. Id. at 527. Instead the Cote Court addressed the suppression issue by applying all three elements of the plain view exception, including the requirement that the discovery of the contraband be inadvertent. Id. at 526-27. The reference in Cote to Coolidge and Slade offered no insight into whether this Court would adopt such a broad reaching exception to the inadvertence requirement. Id. at 527.

C. Horton

Horton does not provide a basis for this Court to abolish the inadvertence requirement under part I, article 19. Horton rests on the assumption that the Fourth Amendment is primarily concerned with a narrow view of the right to privacy. 496 U.S. at 146-47 (Brennan, J., dissenting). Because the inadvertence element does not independently promote any particular privacy interest, the Supreme Court determined it could be eliminated from the plain view exception to the warrant requirement. Id. at 138-40.

The holding in Horton has not been widely adopted. Moreover, those few states that have followed Horton are not persuasive authority for this Court's interpretation of part I, article 19. People v. Cooke, 487 N.W.2d 497 (Mich. Ct. App. 1992), followed Horton stating that, "the Michigan Constitution affords no greater protection than does the Fourth Amendment." Clarke, 487 N.W.2d at 499. State v. Goodin, 838 P.2d 135 (Wash. Ct. App. 1992), and Green v. State, 866 S.W.2d 701 (Tex. Ap. 1993), adopted Horton without discussion, noting that neither jurisdiction had ever explicitly adopted the inadvertence requirement under their respective state constitutions. Goodin, 838 P.2d at 627-28; Green, 866 S.W.2d at 705.

Although State v. Peterson, 834 P.2d 488 (Or. Ct. App. 1992), followed Horton it did so summarily. Moreover, the Peterson holding was limited to where, unlike here, the initial intrusion was based on an exception to the warrant requirement. Peterson, 834 P.2d at 491-92, n. 1. This limitation was based on a state statute that only "allows an officer discovering items not specified in the warrant to seize them if he did not have probable cause to expect to find them during the search." Id. State v. Loh, 914 P.2d 592 (Mont. 1996) endorsed Horton, but it appears that the suppression issue raised in that case arose under the Fourth Amendment, not the state constitution. Loh, 914 P.2d at 596 (appellant argued "that the search of her home

violated her Fourth Amendment rights"). In any event, to the extent the Montana court intended to adopt Horton in interpreting its state constitution, its not clear from Loh whether the Montana constitution, like the New Hampshire constitution, generally provides any greater protection than its federal counterpart. Id. at 596-601.

While the Horton rationale may be acceptable under the Fourth Amendment and the several states that have considered Horton, it is not consistent with the jurisprudence under part I, article 19. Part I, article 19 expressly protects a person's privacy interests in places or persons to be searched and a person's possessory interests in objects that may be seized. N.H. Const., pt I, art. 19. See also Horton, 496 U.S. at 147 (Brennan, J., dissenting); Commonwealth v. Balicki, 762 N.E.2d 290, 298 (Mass. 2002) (discussing the protections guaranteed under the Massachusetts counterpart to part I, article 19). The New Hampshire constitution makes no distinction between these rights nor does it grant one greater protection than the other. See Horton, 496 U.S. at 142-44 (Brennan, J., dissenting); Arizona v. Hicks, 480 U.S. 321, 328 (1987) (while the protections afforded searches as opposed to seizures under the Fourth Amendment are different "neither one nor the other is of inferior worth or necessarily requires only lesser protection."); Balicki, 762 N.E.2d 290.

In Balicki, the Massachusetts Supreme Judicial Court considered whether it should follow Horton and abandon the inadvertence element of the plain view exception. The Balicki Court stated

We decline to eliminate the inadvertence requirement from our art. 14 jurisprudence. The inadvertence requirement . . . lends credibility to the [plain view] doctrine by ensuring that only evidence which the police did not anticipate or know to be at the locus of a search will be seized without a warrant. The rationale behind the inadvertent discovery requirement is [] that we will not excuse officers from the general requirement of a warrant to seize if the officers know the location of evidence, have probable cause to seize it, intend to seize it, and yet do not bother to obtain a warrant particularly describing that evidence. The concerns we first expressed in the Walker case that attention must be paid also to seeing that the police, in full possession of probable cause to believe that incriminating evidence is present in a particular place, have not waited until an opportune moment to place themselves in a position to gain a plain view of the evidence, are no less important today.

Balicki, 762 N.E. 2d at 298 (citations and quotations omitted).

Thus, it held that “[a]lthough the Court in Horton may have been correct that the inadvertent discovery requirement furthers no privacy interests, we find that it continues to protect the possessory interests conferred on our citizens by art. 14 [of the Massachusetts Declaration of Rights].” Id.

The Balicki decision is persuasive authority for this Court’s interpretation of part I, article 19. See State v.

Pinkham, 141 N.H. 188, 194 (1996) (Broderick, J., dissenting) (part I, article 19 "is based upon part I, article 14 of the Massachusetts Declaration of Rights. . . . Indeed, the two provisions are virtually identical, and this court has recognized that part I, article 19, like its Massachusetts antecedent, "safeguards privacy and protection from government intrusion."). Accordingly, this Court often has looked to Massachusetts decisions in construing part I, article 19, see Beauchesne, 151 N.H. at 812-13, as well as when construing other provisions of the New Hampshire Constitution, see Sirrell v. State, 146 N.H. 364, 390 (2001) (Brock, C.J., and Broderick, J., dissenting) ("[w]e recognize that Massachusetts is an exception to our general caution not to look to other jurisdictions in interpreting our Constitution"); Claremont Sch. Dist. v. Governor, 138 N.H. 183, 186 (1993) ("[g]iven that New Hampshire shares its early history with Massachusetts, that we modeled much of our constitution on one adopted by Massachusetts four years earlier, and that the Massachusetts Constitution contains a nearly identical provision regarding education, we give weight to the interpretation given that provision by the Supreme Judicial Court").

Justice Brennan's dissent in Horton is equally persuasive. As the Balicki court emphasized, the constitutional protections against unreasonable searches and seizures protect two distinct,

equally important interests: the right to privacy and the right to possession. Horton, 496 U.S. at 143-44 (Brennan, J., dissenting). These interests are protected "by requiring a neutral and detached magistrate to evaluate, before the search, the government's showing of probable cause and its particular description of the place to be searched and the items to be seized." Id. at 143. This review is the most effective means of "effectuating Fourth Amendment rights." Id. at 144 (citing United States v. United States District Court, 407 U.S. 297, 318 (1972)). "A decision to invade a possessory interest in property is too important to be left to the discretion of zealous officers 'engaged in the often competitive enterprise of ferreting out crime.'" Id. (quoting Johnson v. U.S., 333 U.S. 10, 14 (1948)). Thus, if the police anticipate discovering an item during a search, barring an exigency, there is no justification sufficient to overcome the warrant requirement. Id. 144-45.

Regarding the "flaws" the Horton majority identified in Coolidge as a basis for abolishing the inadvertence requirement under the Fourth Amendment, Justice Brennan found them "illusory." Id. at 145-46. Although there may be no reason why the police might deliberately omit an item from a warrant application if they were aware of it, Justice Stewart explained that this is not a reason to abolish the inadvertence requirement.

[T]o the individual whose possessory interest has been invaded, it matters not why the police officer decided to omit a particular item from his application for a search warrant. When an officer with probable cause to seize an item fails to mention that item in his application for a search warrant - for whatever reason - and then seizes the item anyway, his conduct is per se unreasonable. Suppression will encourage officers to be more precise and complete in future warrant applications.

Id. at 146 (Brennan, J., dissenting). In any event, contrary to the majority's assertion, there are circumstances under which an officer might deliberately omit an item. One circumstance discussed by Justice Brennan is where the officer might desire to save time in securing the warrant. Id. at 146. Another circumstance, albeit not at issue in Horton, might be where a warrant is obtained for the search and seizure for some items as a pretext for searching seizing others. Id. at 147-48. See also Brown, 460 U.S. at 743 ("the Coolidge plurality also stated that the police must discover the incriminating evidence 'inadvertently,' which is to say, they may not 'know in advance the location of [certain] evidence and intend to seize it, 'relying on the plain-view doctrine only as a pretense.'") (quoting Coolidge, 430 U.S. at 470)). In either circumstance, the inadvertence requirement serves to reenforce the warrant requirement and ferret out such conduct in favor of a person's privacy and possessory interests. Id. at 146-48.

Moreover, while the Horton majority may be correct that the inadvertence requirement does not necessarily further any privacy interest, "[the majority] asked the wrong question. It is true that the inadvertent discovery requirement furthers no privacy interests. . . . But it does protect possessory interests. . . . The inadvertent discovery requirement is essential if we are to take seriously the Fourth Amendment's protection of possessory interests as well as privacy interests." Id. at 147 (Brennan, J., dissenting).

This reasoning is consistent with the principles in New Hampshire that part I, article 19 does not turn on "the level of law enforcement efficiency which could be achieved if police were permitted to search without probable cause or judicial authorization," Canelo, 139 N.H. at 386, nor on any amount of good intention. Id. As this Court has stated,

The framers did not intend the safeguards of the warrant requirement to be circumvented merely by allowing law enforcement officials to act reasonably under the circumstances. [Quotes and citation omitted]. We are simply unable to sanction a practice in which the validity of search warrants might be determined under a standard of 'close enough is good enough' instead of under the 'probable cause' standard mandated by [part I, article 19] of our state constitution.'

Id. at 387-88 (quotations and citations omitted). See also State v. Webber, 141 N.H. 817, 821 (1997) ("[u]nder part I, article 19 of our constitution . . . the protection from unreasonable

searches is not diminished by the desire, no matter how laudable, to aid law enforcement"); State v. Santana, 133 N.H. 798, 803 (1991) (police cannot rely on an "expected exigency" when they have ample opportunity to obtain a warrant and "[t]o 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") (citation and quotation omitted).

Part I, article 19 provides greater protections for possessory interests than the Fourth Amendment. These protections include requiring that any discovery under the plain view exception be inadvertent. As stated in Balicki, the inadvertent discovery requirement "lends credibility to the [plain view] doctrine by ensuring that only evidence which the police did not anticipate or know to be at the locus of a search will be seized without a warrant." Balicki, 762 N.E. 2d at 298 (citations and quotations omitted). There is no basis under part I, article 19 jurisprudence for abolishing the inadvertent discovery requirement either specifically in this case or generally.

CONCLUSION

WHEREFORE, Soiluis Nieves respectfully requests that this Court affirm the decision issued below suppressing the evidence.

Undersigned counsel requests 15 minutes of oral argument.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that two copies of the following brief were sent by first-class mail to:

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Dated: January 19, 2010