

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2009-0110

The State Of New Hampshire

v.

Paul Kimball

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE
SOUTHERN CARROLL COUNTY DISTRICT COURT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

Michael A. Delaney
Attorney General

James C. Vara
N.H. Bar ID No. 16507
Attorney
Criminal Justice Bureau
33 Capitol Street
Concord, N.H. 03301-6397
(603) 271-3671

(5 Minutes 3JX Panel Oral Argument)

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

ISSUES PRESENTED.....1

STATEMENT OF THE CASE.....2

STATEMENT OF THE FACTS.....3

 A. The State’s Case.....3

 B. Relevant Trial Events.....7

SUMMARY OF THE ARGUMENT.....9

ARGUMENT.....11

 I. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT’S
 MOTION TO SUPPRESS, AS OFFICER HENSEL’S
 OBSERVATIONS AND THE DEFENDANT’S ACTIONS GAVE
 OFFICER HENSEL PROBABLE CAUSE AND EXIGENT
 CIRCUMSTANCES TO ENTER THE FISH
 HOUSE.....11

 A. Probable Cause.....13

 B. Exigent Circumstances.....16

II. THE TRIAL COURT PROPERLY GAVE THE DEFENDANT AMPLE TIME TO PRESENT HIS CASE AND PROPERLY REVIEWED THE PHOTOGRAPHS OF THE FISH HOUSE TAKEN AT THE TIME OF THE VIOLATION IN LIEU OF VIEWING THE FISH HOUSE BROUGHT TO THE COURTHOUSE.....	20
III. THE TRIAL COURT PROPERLY RULED ON THE DEFENDANT'S MOTION TO SUPPRESS AT THE APPROPRIATE TIME.....	24
CONCLUSION.....	26
APPENDIX TABLE OF CONTENTS.....	27

TABLE OF AUTHORITIES

CASES

<i>Illinois v. McArthur</i> , 531 U.S. 326, 332 (2001)	19
<i>Katz v. United States</i> , 389 U.S. 347, 353 (1967)	12
<i>Smith v. Maryland</i> , 442 U.S. 753, 740 (1979)	12
<i>State v. Adams</i> , 133 N.H. 818 (1991)	22
<i>State v. Blackmer</i> , 149 N.H. 47, 48 (2003)	20, 24
<i>State v. Cannuli</i> , 143 N.H. 149, 151 (1998)	13
<i>State v. DiNapoli</i> , 149 N.H. 514, 518 (2003)	21, 22
<i>State v. Goss</i> , 150 N.H. 46, 48-49 (2003)	12
<i>State v. Hall</i> , 148 N.H. 671, 675 (2002)	21
<i>State v. King</i> , 146 N.H. 717 (2001)	22
<i>State v. Matos</i> , 135 N.H. 410, 410-11 (1992)	17, 18
<i>State v. MacDonald</i> , 129 N.H. 13, 21 (1986)	19
<i>State v. McMinn</i> , 141 N.H. 636, 642 (1997)	20, 24
<i>State v. Pseudae</i> , 154 N.H. 196, 199 (2006)	11, 16
<i>State v. Reid</i> , 135 N.H. 376, 379-80 (1992)	13, 14
<i>State v. Santana</i> , 133 N.H. 798, 804 (1991)	18
<i>State v. Seavey</i> , 147 N.H. 304, 307 (2001)	16, 17, 19
<i>State v. St. Germain</i> , 114 N.H. 608, 612 (1967)	18, 19
<i>State v. Stearns</i> , 130 N.H. 475, 486 (1988)	16

State v. Sterns, 150 N.H. 705, 709 (2004)21
State v. Thorp, 116 N.H. 303, 306 (1976)13

RULES

N.H. Dist. Ct. R. 2.8, C.....10, 25
N.H. R. Ev. 40121

STATUTES

RSA 206:26, VI13, 15, 16
RSA 211:2-e2, 11, 12
RSA 211:17-a12
RSA 214:112, 13

ISSUES PRESENTED

I. Whether the trial court properly denied the defendant's motion to suppress where Officer Hensel entered the defendant's fish house after seeing a fishing net coming out of the water in an area where smelt were, when the occupants would not open the door, and where Hensel heard water falling back into the defendant's fishing hole.

II. Whether the trial court gave the defendant ample time to present his case and properly reviewed the photographs of the fish house taken at the time of the violation in lieu of viewing the fish house itself.

III. Whether the trial court properly ruled on, and allowed argument on, the defendant's motion to suppress at the appropriate time during trial.

STATEMENT OF THE CASE

The defendant, Paul Kimball, was tried on May 13, 2009 in the Southern Carroll County District Court (Cappiello, J.) on one count of taking smelt by a method other than angling. *See* RSA 211:2-e (2000). The court issued its findings and verdict on May 19, 2009. DB 26¹. The trial court found the defendant guilty and sentenced him to a fine of \$200.00. DB 26. This appeal followed.

¹ References to the record are as following: “DB” is the defendant’s brief; “T” is the transcript of the trial; “APP” is the State’s appendix.

STATEMENT OF THE FACTS

A. The State's Case

On March 8, 2009, Mark Hensel, a conservation officer with the New Hampshire Fish and Game Department since 2000, was assigned to District 2. T 8. District 2 included the southern Carroll County towns including Lake Winnepesaukee. *Id.* On the morning of March 8th, Hensel patrolled Lake Winnepesaukee, specifically Brewster Beach on Wolfeboro Bay. T 8, 34. Hensel noticed a red fish house used for ice fishing, positioned 100 feet offshore on Lake Winnepesaukee. T 8-9.

Hensel noted three trucks outside the fish house and two people standing outside the fish house talking with the occupants. T 9, 36. Hensel did not know who was in the fish house. T 37. The fish house door was open. *Id.* Hensel approached on foot. *Id.* The two occupants outside the fish house left in a truck. *Id.* As Hensel walked closer to the fish house, he noted no fishing tip-ups indicating someone was fishing outside the fish house. *Id.* Hensel was able to see underneath the fish house because it was approximately six to eight inches off the ice. T 9, 36. There was no snow or anything else pushed beneath it. T 9, 54, 77. Hensel had an unobstructed view underneath the fish house. T 54.

Hensel saw a very large square cut hole through the ice underneath the fish house. T 12; APP 2. It was not an ice hole typically used for fishing. *Id.* An ice

hole used for a tip-up, which is a wooden device and a spool on the end with a flag that is set when the bait is dropped in the water, would have been a smaller round hole. *Id*

Hensel proceeded to the fish house and waited outside for about twenty seconds before he knocked. T 13. Hensel could hear people inside. *Id*. Hensel also knew one of the trucks was owned by the defendant. Hensel knocked on the door and identified himself as a game warden. *Id*. Hensel asked that the door be opened so he could check the occupants' fishing licenses. *Id*. There was no response. *Id*. After knocking, Hensel took a step back from the fish house and kept an eye on the hole underneath. *Id*. Hensel immediately saw a net get pulled from the hole with water falling off it. T 13, 66, 77; APP 5. Hensel identified himself again as a game warden and asked that the door be opened so he could check for a fishing license. T 13, 66. Hensel heard a voice from inside telling him to hold on a second. *Id*. An occupant said he was getting his license. T 14. There was a lot of shaking and commotion in the fish house. *Id*. Hensel heard water falling back in the hole. *Id*. Because it was illegal to fish for smelt by use of a dip net, it was immediately apparent to Hensel that the net coming up out of the hole was an illegal means of attempting to take fish. *Id*.

Hensel again tried to get the occupants to open the door. *Id*. Hensel told them to stop what they were doing and to open the door. *Id*. Hensel attempted to pry the door open, but it was held shut by a rope. *Id*. Hensel was able to open the

door about two inches. T 14, 48. Hensel identified one of the occupants as John Hutchins, who was seated in the left side corner of the fish house. T 14-15. Hensel could not see to the right side of the fish house. T 15. Hutchins was looking at Hensel through the small opening in the door. *Id.* They would not open the door, and eventually Hensel cut the rope with his knife. T 16, 50; APP 3.

Upon entering the fish house, Hensel saw the defendant directly over the fishing hole. *Id.*; APP 2. A trap door in the fish house was also being shut. T 17, 19; APP 2. There was water all over the inside of the fish house from the net being pulled up. *Id.* Between the defendant's legs was a pink square tub and net. *Id.* Inside the tub was ground bait. T 18. Hensel was unable to determine what else was in the net as he was initially unable to enter. *Id.* Hensel positively identified the defendant and Hutchins as the occupants of the fish house. *Id.*

Inside the fish house was a five-gallon pail with water and live smelt in it. *Id.*; APP 1. The majority of the smelt were alive, but some were dead. T 21. The smelt were seized. T 18. The defendant wanted the 214 smelt counted in front of him. T 23, 56-57. Hensel did not know if he used the aforementioned net when he counted the smelt. T 58. The defendant refused to sign the receipt of evidence. T 33. Hensel gave the defendant a summons for the illegal taking of smelt. T 18, 56. The defendant denied using a net to catch smelt. T 28.

When speaking with Hensel, the defendant did not dispute that he had smelt. T 57. The defendant said he was net fishing for shiners. T 28. There

were no shiners in the fish house, and shiners would not be in that area of the lake during that part of the season, as they would be dormant during the winter. T 28, 67-68. Hensel also told the defendant that he had been taking smelt illegally forever. T 56.

The fish house was located over six to eight feet of water. T 26. The bottom of the lake was gravelly and sandy. T 27, 87. It was a prime spot for smelt because they would gather in the area during spawning season. *Id.* The common shiners would not have spawned because they do in June. T 96. The smelt thrive in cold water. T 86.

The defendant could have purchased legally obtained smelt at Wolfeboro Bay Outfitters, which is located at the Mount Washington docks in Ossipee. T 79. The smelt sold as bait fish are put into a grader that allows the small smelt to pass through and only the larger smelt are sold. T 29, 87-88. Smelt are highly regulated and are an important fish because they are the food for other fish in the lake. T 28, 85, 87-88. The smelt population drives the lake. T 29.

Donald Miller, a fisheries biologist for the New Hampshire Fish and Game Department for the last thirty-two years, examined the defendant's net. T 82. The net appeared to be a homemade rectangular net with layers of netting. T 83. Miller examined the net with a dissecting microscope. *Id.* The net contained smelt scales. *Id.* Miller concluded that the smelt were young; year old smelt. T 83, 91. In coming to his conclusion, Miller reviewed slides from Winnepesaukee

smelt. T-83-84. The Winnepesaukee smelt scales were identical to scales removed from the net. *Id.* There were no other fish scales on the net, including shiners. T 87.

B. Relevant Trial Events

Prior to trial, the defendant filed a motion to suppress. DB 43. The defendant sought to have the seized evidence deemed inadmissible it was obtained without a search warrant and without probable cause or exigent circumstances. *Id.* The defendant's motion to suppress was denied at the conclusion of the State's case during trial on May 13, 2009. T 99. The defendant did not object to having it heard at the conclusion of the State's case. T 4, 81.

During the trial, the defendant took the stand. T 102. The defendant called no other witnesses. T 102-07. The defendant only testified concerning the fish house itself. T 1-3-04. The defendant felt the fish house was an abode, though located on Lake Winnepesaukee. T 104. Although the defendant offered photographs as exhibits, the defendant still asked the court to look at the fish house, which he had brought to the courthouse. DB 27-32, T 50, 53, 98, 103, 104. The court made note of the photographs and the testimony concerning the fish house. T 103, 104. The defendant did not object.

The court issued its decision on May 19, 2009. DB 26. The court further addressed the defendant's motion to suppress. DB 25. In denying the defendant's motion and finding the defendant guilty, the court held that Hensel did not need a

warrant to enter the defendant's fish house, pursuant to RSA 206:26, VI *Id.*

Further, the court held that Hensel had reasonable cause to believe that the defendant had illegal wildlife in the fish house. *Id.* "In other words, he [Hensel] was justified under the law to search the fish house and seize all evidence without defendant's permission and without the need of a search warrant." *Id.*

SUMMARY OF THE ARGUMENT

1. Hensel had probable cause to enter the defendant's fish house without a warrant. Hensel came upon the defendant's fish camp and noted no fishing tip-ups. T 37. The fish house was located in a prime spot for smelt. T 27, 87. Smelt cannot be legally caught through the use of a net. T 14. The defendant's fish house was six to eight inches off the ice. T 9, 36. Hensel had an unobstructed view underneath the defendant's fish house. T 54. Hensel, while waiting for the occupants to procure their respective fishing licenses, saw a net being pulled from the hole underneath the defendant's fish house. T 13, 14, 66. Hensel identified himself as a game warden numerous times with no response. T 13. Hensel heard water falling back in the fishing hole. T 14. It was immediately apparent that illegal fishing was occurring and that potential evidence was being discarded. *Id.* Hensel, who was the lone conversation officer at the scene, was left with no option, but to enter the fish house without a warrant.
2. The trial court properly reviewed all relevant evidence in this matter. The court reviewed numerous photographs, including photographs of the fish house from the date of the violation. The court was not required to review the actual fish house on the day of trial. A review would not have produced more relevant evidence. The fish house was not on the lake or as it had been on the date of the violation. It was on a trailer at the courthouse. T 103. The defendant sought review of the fish house to show the court that there were no windows. T 98. The

State agreed that there were no windows. T 104. In any event, the defendant did not preserve this issue for appeal.

3. The trial court correctly considered the defendant's motion to suppress at the appropriate time. The court had the discretion to hear the motion in advance of trial or when the evidence was offered during trial. *See Dist. Ct. R. 2.8 C*. Here, the court heard Hensel testify and allowed the defendant to argue his motion to suppress. T 34. The State had not yet called Miller. T 34. At the conclusion of the State's case, the defendant's motion to suppress was denied. T 99. Also, the defendant did not preserve this issue for appeal. The defendant did not object at any point. *Id.*

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS, AS OFFICER HENSEL'S OBSERVATIONS AND THE DEFENDANT'S ACTIONS GAVE OFFICER HENSEL PROBABLE CAUSE AND EXIGENT CIRCUMSTANCES TO ENTER THE FISH HOUSE WITHOUT A WARRANT.

The crux of the defendant's argument is that Hensel did not have probable cause to enter the fish house without a warrant. The defendant's argument should not be persuasive. Hensel had probable cause to enter the fish house. Further, the destruction of evidence created exigent circumstances requiring the search without a warrant. As outlined above, the evidence presented during trial clearly showed that Hensel had probable cause and exigent circumstances to conduct the search without a warrant.

When reviewing a trial court's ruling on the defendant's motion to suppress, this Court will accept the trial court's findings unless they are clearly erroneous or unsupported by the record or. *State v. Pseudae*, 154 N.H. 196, 199 (2006). This Court will review the trial court's legal conclusions de novo. *Id.*

The defendant was charged with using a net to fish for smelt on Lake Winnepesaukee. RSA 211:2-e (2000) provides in part,

- I. Notwithstanding any other law or rule to the contrary, no person shall take smelt (*Osmerus mordax*) from the fresh waters of this state by any method other than by angling, unless the executive director determines that other methods of taking smelt would not be detrimental to the smelt resources of the state.

....

III. Any person who violates the provisions of this section shall be guilty of a violation.

The defendant was not angling. Instead, the defendant was using a dip net to capture the smelt. T 14.

Like the Fourth Amendment to the United States Constitution, Part I, Article 19 of the New Hampshire Constitution protects against unreasonable searches and seizures. When deciding whether a search or seizure is unreasonable, both this Court and the federal courts will analyze whether the person from whom the evidence was seized had a reasonable expectation of privacy. *Katz v. United States*, 389 U.S. 347, 353 (1967); *State v. Goss*, 150 N.H. 46, 48-49 (2003). An expectation of privacy is reasonable if “first, . . . a person ha[s] exhibited an actual (subjective) expectation of privacy and, second, . . . the expectation [is] . . . one that society is prepared to recognize as reasonable.” *Goss*, 150 N.H. at 49. (quotation omitted); *See also Smith v. Maryland*, 442 U.S. 735, 740 (1979) (applying the same standard under the federal constitution).

Any expectation of privacy of a fish house should be limited. The use of a fish house is regulated. The fish house was located on public land, and it can only be on public land for short periods of time. *See RSA 211:17-a (2000)* (A bob-house can only remain on public property or waters until April 1. It is a violation if longer than April 1). Fishing requires a license. *RSA 214:1 (2000)* (amended

2009). It is a privilege and not a right to fish in the waters of New Hampshire. When doing so, a person must abide by the guidelines. In this matter, this Court does not need to address the defendant's expectation of privacy of his fish house. The defendant is strictly making a factual argument in claiming that there was no probable cause or exigent circumstances for Hensel to search the fish house without a warrant.

A. Probable Cause

In denying the defendant's motion, the trial court held that Hensel did not need a warrant to enter the defendant's fish house pursuant to RSA 206:26, VI (Supp. 2009). DB 25. "In other words, he [Hensel] was justified under the law to search the fish house and seize all evidence without [the] defendant's permission and without the need of a search warrant." *Id.*

The probable cause needed to perform a warrantless search is at least as great as that required to justify a search warrant. *State v. Thorp*, 116 N.H. 303, 306 (1976). "Probable cause exists if a person of ordinary caution would justifiably believe that what is sought will be found through the search and will aid in a particular apprehension or conviction." *State v. Cannuli*, 143 N.H. 149, 151 (1998) (quotation omitted). The facts and circumstances must be such as to create a substantial likelihood that what is sought will be found in the place to be searched. *Id.* at 151-52. "[T]he trial court's decision [on probable cause to arrest] will not be reversed unless the decision when viewed in the light most favorable to

the State is contrary to the manifest weight of the evidence.” *State v. Reid*, 135 N.H. 376, 379-80 (1992).

Here, Hensel had probable cause to conduct a search of the fish house without a warrant, based on the totality of circumstances. Hensel, a conversation officer since 2000, noticed a red fish house used for ice fishing offshore on Lake Winnepesaukee. T 8-9. The door was initially open. *Id.* Hensel approached on foot and as he walked closer to the fish house, he noted no fishing tip-ups indicating somebody was fishing outside the fish house. *Id.* Hensel was able to see underneath the fish house because it was approximately six to eight inches off the ice. T 9, 36. Hensel had an unobstructed view underneath the fish house. T 54. Hensel saw a very large square cut hole, not typically used for ice fishing, through the ice underneath the fish house. T 12; APP 2.

Hensel proceeded to the fish house and heard people inside. T 13. Hensel waited outside for about twenty seconds, then knocked on the door and identified himself as a game warden. *Id.* There was no response when Hensel asked the occupants to open the fish house. *Id.* Hensel took a step back from the fish house and kept an eye on the hole underneath. *Id.* Hensel immediately saw a net get pulled from the hole with water falling off it. T 13, 66, 77; APP 5. Hensel identified himself again as a game warden and asked that the door be opened so he could check for a fishing license. T 13, 66. An occupant told Hensel to hold on a

second. T 14. There was a lot of shaking and commotion in the fish house. *Id.*
Hensel heard water falling back in the hole. *Id.*

When Hensel saw the net coming up out of the hole, it was apparent that fish were being taken illegally. *Id.* Hensel knew the area was a prime spot for smelt because they would gather in the area during spawning season. T 27. Hensel again tried to get the occupants to open the door. *Id.* Hensel told them to stop what they were doing and to open the door. *Id.* The fish house door was held shut by a rope. *Id.* Hensel attempted to pry the door open, but was only able to open the door about two inches. T 14, 48. John Hutchins was looking at Hensel through the small opening in the door and did not open the door. *Id.* The defendant did not open the door and eventually Hensel had to cut the rope with his knife. T 16, 50; APP 3.

The facts and circumstances created a substantial likelihood that the defendant was illegally netting fish in a area where smelt were located. As such, Hensel had probable cause to enter the fish house without a warrant.

The lower court found that Hensel was authorized to enter the fish house pursuant to RSA 206:26, VI (Supp. 2009). RSA 206:26, VI, gives the power to conservation officers, "To stop and to search without a warrant and to examine in the field, in the highway, at an airbase or on the stream, any person, or any boat, conveyance, aircraft, vehicle, gamebag, game coat, creel, crate, box, locker or other receptacle, in the presence of the owner if reasonably possible, or any so-

called fish house or bob-house, in the presence of the occupant, for all wildlife, when there is reasonable cause to believe that any wildlife, or any illegal apparatus subject to forfeiture, is concealed thereon or therein.” RSA 206:26, VI (Supp. 2009). Because, as demonstrated above, Officer Hensel had probable cause to enter the fish house, he similarly had “reasonable cause” to enter under RSA 206:26, VI (Supp. 2009).

B. Exigent Circumstances

“Under Part I, Article 19 [of the New Hampshire Constitution], warrantless entries are *per se* unreasonable and illegal unless they fall within one of the exceptions to the warrant requirement.” *Pseudaie*, 154 N.H. at 199. The State has the burden to show that the search was validly executed under one of the exceptions to the warrant requirement. *Id.* One exception to the warrant requirement exists when the police have probable cause and are faced with exigent circumstances. *Id.* at 200.

“Exigent circumstances exist when 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.” *State v. Stern*, 150 N.H. 705, 709 (2004). In determining whether exigent circumstances exist, the court considers “the totality of the circumstances, including the overall reasonableness

of the officer's behavior prior to the entry." *State v. Seavey*, 147 N.H. 304, 307 (2001).

In this matter, the defendant's actions created a sufficient exigency to justify the warrantless entry. Evidence was being destroyed, and there was a significant likelihood that more would follow. The defendant removed the net from the water. The smelt were being put back into the lake. Hensel was not allowed in because the violation was occurring in his presence. Hensel was the lone conversation officer at the scene. If Hensel left the scene to get a search warrant, it is more than likely that the 214 smelt would have been put back into the lake. The defendant could have also gotten into his vehicle and left with the smelt. The evidence of the violation would have been lost if Hensel had to obtain a search warrant.

With respect to the possibility that the smelt could have easily and quickly been dumped or removed, the smelt, which are a very small fish, are similar to small quantities of drugs. This Court has acknowledged the exigency associated with the significant risk that small quantities of drugs may be easily destroyed. *State v. Matos*, 135 N.H. 410, 410-11 (1992). In *Matos*, cocaine was being packaged and sold to undercover police agents in "street quantities" by a runner named Couris. *Id.* Couris received the drugs from a nearby apartment, which the police entered and searched. *Id.* In concluding that exigent circumstances excused the police from complying with the knock and announce rule, this Court

held “that exigent circumstances exist in cases where an easily disposable illegal narcotic is being packaged in small quantities and is housed in a residential dwelling with traditional plumbing.” *Id.* at 412; *see also State v. Santana*, 133 N.H. 798, 804 (1991) (the “ease of destruction of [drug] evidence sets the framework for the determination of exigent circumstances” (quotation omitted)).

Hensel did not create the exigency. Instead, the defendant’s actions created the exigency and the necessity to forgo a search warrant. “The police may not create exigency in order to justify their warrantless entry” *Santana*, 133 N.H. at 805; *accord State v. Morse*, 125 N.H. 403, 408 (1984). In *Santana*, 133 N.H. at 805-07, this Court set forth factors for evaluating whether the police brought about an exigency. For example, “the presence or absence of an ample opportunity for getting a search warrant” is one pertinent factor. *Id.* at 805 (quotation omitted). Here, there was not an ample opportunity to apply for a search warrant. The evidence was already being dumped. If Hensel waited to obtain a warrant, more or all of the smelt would have disappeared.

Another factor is whether the police “took action which they knew would result in a compelling need for immediate official action.” *Id.* (quotation omitted). Here, Hensel was lawfully checking for fishing licenses. Hensel was patrolling a public area. Thus, this case stands in sharp contrast to cases in which the police contrive an exigency in order to gain access to a given premises. *See, e.g., id.* at 806-07 (discussing state and federal cases where the exigency was foreseeable).

Moreover, there is no evidence that the police waited outside the room until circumstances became exigent. *See State v. St. Germain*, 114 N.H. 608, 612 (1974) (police may not deliberately delay action in order to wait for circumstances to become exigent).

Finally, Hensel did not create an exigency by simply walking up to the fish house or knocking on the door. Instead, confronted with the situation, Hensel was respectful of the defendant's privacy rights insofar as he knocked on the door repeatedly, identified himself repeatedly, waited outside, and entered only after the occupants would not open the door while evidence was presumably being destroyed. *See Illinois v. McArthur*, 531 U.S. 326, 332 (2001) (discussing how police made reasonable efforts to reconcile law enforcement needs and individual's personal privacy); *Seavey*, 147 N.H. at 307 (court considers reasonableness of officers' behavior prior to entry as part of exigent circumstances inquiry).

In sum, since Hensel did not create the exigency, "the existence of exigent circumstances must be analyzed as of the time of entry." *State v. MacDonald*, 129 N.H. 13, 21 (1986) (quotation omitted). The events that occurred prior to Hensel's entry demonstrate the exigency of the situation. As such, Hensel had probable cause and exigent circumstances to enter the defendant's fish house without a warrant. The lower court therefore correctly denied the defendant's motion to suppress.

II. THE TRIAL COURT PROPERLY GAVE THE DEFENDANT AMPLE TIME TO PRESENT HIS CASE AND PROPERLY REVIEWED THE PHOTOGRAPHS OF THE FISH HOUSE TAKEN AT THE TIME OF THE VIOLATION IN LIEU OF VIEWING THE FISH HOUSE BROUGHT TO THE COURTHOUSE.

The defendant seeks reversal of the trial court's decision to review the photographs of the defendant's fish house from the day of the violation instead of viewing the fish house outside the courthouse. DB 7, 21. As such, the defendant believes that he was not given a full opportunity to present his case. Although photographs were introduced, the defendant still asked the court to look at the fish house, which the defendant had transported to the courthouse. T 50, 53, 98, 103, 104. The court is not mandated to follow the defendant's request. The trial court properly reviewed all relevant evidence in this matter. Further, this Court should not address this issue because the defendant did not preserve this issue for appeal. Although the defendant did ask the court to look at the fish house, the defendant did not object to the court's decision not to view the fish house.

"The general rule in this jurisdiction is that a contemporaneous and specific objection is required to preserve an issue for appellate review." *State v. Blackmer*, 149 N.H. 47, 48 (2003) (quoting *State v. McMinn*, 141 N.H. 636, 642 (1997)). "This rule, which is based on common sense and judicial economy, recognizes that trial forums should have the opportunity to rule on issues and to correct errors before they are presented to the appellate court." *Id.* Therefore, because the defendant never objected to the trial court's decision not to view the

fish house, he has failed to preserve the issue for this Court's review. T 3-107.

The Court, accordingly, should not consider it.

Regardless, in any event, a view of the fish house would not have yielded greater relevant evidence. The court reviewed numerous photographs, including photographs of the fish house taken on the date of the violation. DB 27-32. The fish house was not on the lake or positioned as it had been on the date of the violation. It was on a trailer at the courthouse. T 103. The defendant sought the view of the fish house to show the court that there were no windows. T 98. The State agreed that there were no windows. T 104.

“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” *NH. R. Ev.* 401. When reviewing a trial court's ruling in this area, this Court applies the rules of logical relevance, “[v]iewing the evidence in the light most favorable to the prevailing party....” *State v. Stearns*, 130 N.H. 475, 486 (1988) (quotation omitted).

This Court “will not overturn the trial court's rulings on the admissibility of evidence pursuant to N.H. R. Ev. 401 absent an unsustainable exercise of discretion.” *State v. Hall*, 148 N.H. 671, 675 (2002). “The defendant has the burden of demonstrating that the court's ruling was clearly untenable or unreasonable to the prejudice of his case.” *State v. DiNapoli*, 149 N.H. 514, 518

(2003) (quotation omitted). The defendant here cannot meet this test for the reasons provided above. The trial court reviewed numerous photographs from the day the violation took place. The fact that there were no windows was conceded. An actual view of the fish house, which could have been modified, from a different date and not on the lake would do nothing to strengthen the defendant's case.

The defendant's reliance on *State v. King*, 146 N.H. 717 (2001), citing *State v. Adams*, 133 N.H. 818 (1991), concerning cumulative evidence is misplaced. An actual view of the fish house certainly would have been cumulative. As established above, the photographs were entered as exhibits. The photographs were taken contemporaneously to the violation. The fish house at the courthouse would have had less evidentiary value than what the trial court had already seen in the photograph.

It is also worth noting that part of the defendant's argument is that he took "significant effort" to transport the fish house to the court because he thought it was a "critical piece of evidence." DB 7. The defendant's effort does not make the evidence more relevant or less cumulative.

Finally, the defendant was given ample time to present his case. The defendant was never given time limits on proceeding with his case. T 3-107. The defendant was given a full opportunity to ask Hensel questions. T 34-80. The defendant was given a full opportunity to ask Miller questions. T 88-98. During

the trial, the defendant took the stand. T 102. The defendant had the opportunity, but decided not to call any other witnesses. T 102-107. The defendant's testimony was limited. T 103-04. The defendant was also given an opportunity to give the court a "little statement" at the conclusion of the trial. T 104-05. For the reasons provided above, the lower court gave the defendant ample time to present his case and properly reviewed all relevant evidence.

III. THE TRIAL COURT PROPERLY RULED ON THE DEFENDANT'S MOTION TO SUPPRESS AT THE APPROPRIATE TIME.

The defendant seeks reversal his conviction because the trial court ruled on the defendant's motion to suppress at the conclusion of the State's case. DB 10. The defendant wanted the trial court to stop and rule on his motion to suppress after Hensel testified to opening the fish house's door. DB 10. There was no violation of the defendant's right to a fair trial. The defendant was given an opportunity to argue his motion to suppress. The defendant did not object to having the motion heard at the end of the State's case. T 4. If fact, the defendant did not object at any point. *Id.* The defendant was specifically asked if it was okay if the court could settle the motion to suppress during the course of trial. T 4.

As discussed above, "The general rule in this jurisdiction is that a contemporaneous and specific objection is required to preserve an issue for appellate review." *Blackmer*, 149 N.H. at 48 , (quoting *McMinn*, 141 N.H. at 642 (1997)). "This rule, which is based on common sense and judicial economy, recognizes that trial forums should have the opportunity to rule on issues and to correct errors before they are presented to the appellate court." *Id.* Therefore, because the defendant never objected to the trial court not viewing the fish house, he has failed to preserve the issue for this Court's review. T 3-107. The Court, accordingly, should not consider it.

In any event, the trial court has great latitude on when to hear a motion. In any matter, a trial court needs to make an informed decision about the case before ruling on a motion to suppress. The trial court needs to hear evidence. The court has the discretion to hear the motion in advance of trial or when the evidence is offered during trial. *See Dist. Ct. R. 2.8 C.* Here, the court heard Hensel testify and allowed the defendant to argue his motion to suppress during his questioning of Hensel. T 34. The State had not yet called Miller. T 34. At the conclusion of the State's case the defendant's motion to suppress was denied. T 99. The defendant's rights were not violated when the trial court allowed the defendant to argue his motion during the course of the trial.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

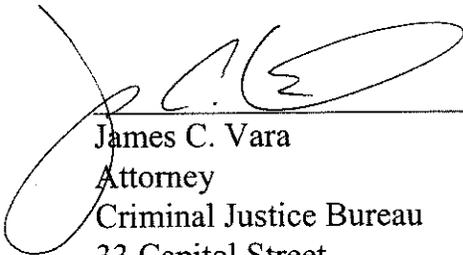
The State requests 5 minutes oral argument before a 3JX panel.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

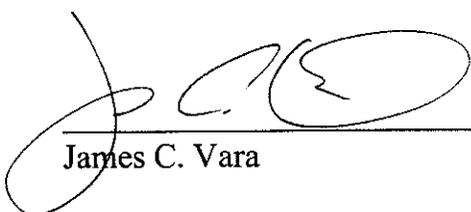
Michael A. Delaney
Attorney General



James C. Vara
Attorney
Criminal Justice Bureau
33 Capitol Street
Concord, N.H. 03301-6397
(603) 271-3671

February 12, 2010

I hereby certify that two copies of the foregoing were mailed this day, postage prepaid, to the defendant, Paul A. Kimball, P.O. Box 725, Wolfeboro, NH 03894-0725.

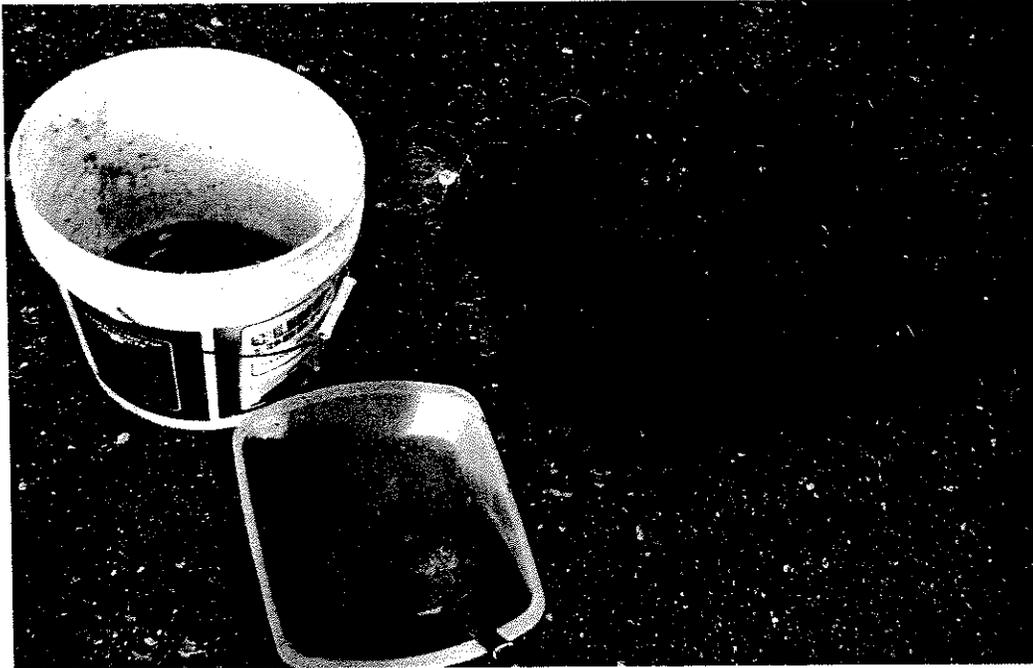


James C. Vara

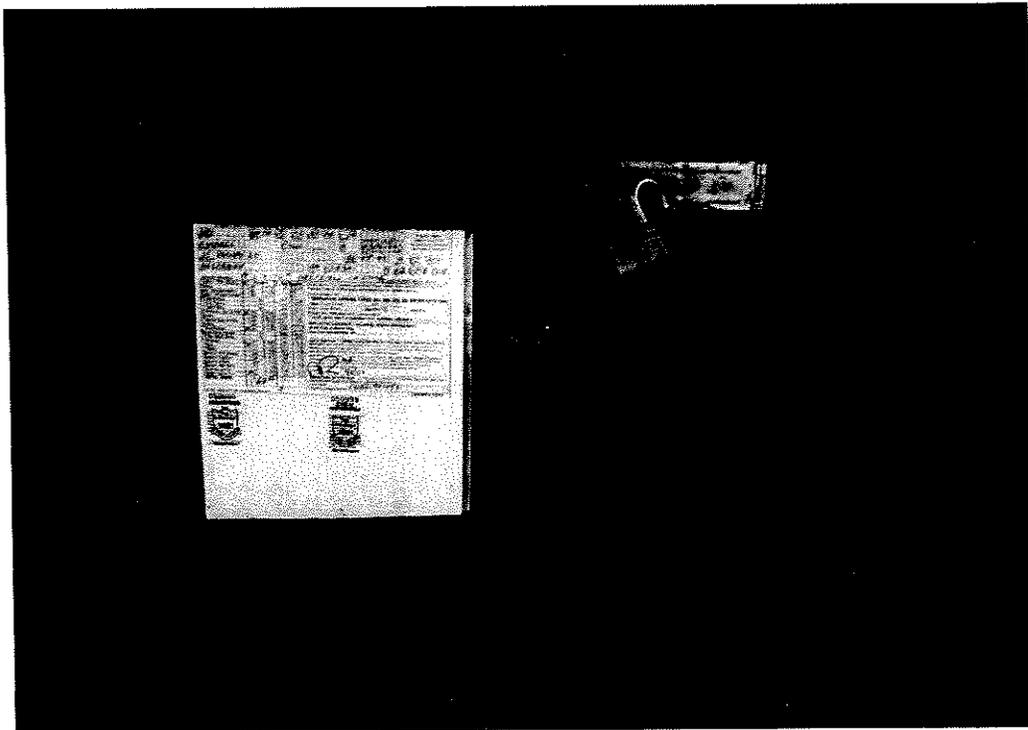
APPENDIX TABLE OF CONTENTS

1.	Net Bucket of Smelt Chum and Door	1
2.	Trap Door in Fish House.....	2
3.	Fish House and Rope.....	3
4.	Spools of Fishing Line and Mesh Net.....	4
5.	Smelt That Were in Mesh Net Along with Chum.....	5

Pictures taken in illegal taking of Smelt on March 8, 2009
Paul Kimball, DOB: 6/8/1941
Wolfeboro Bay, Lake Winnepesaukee

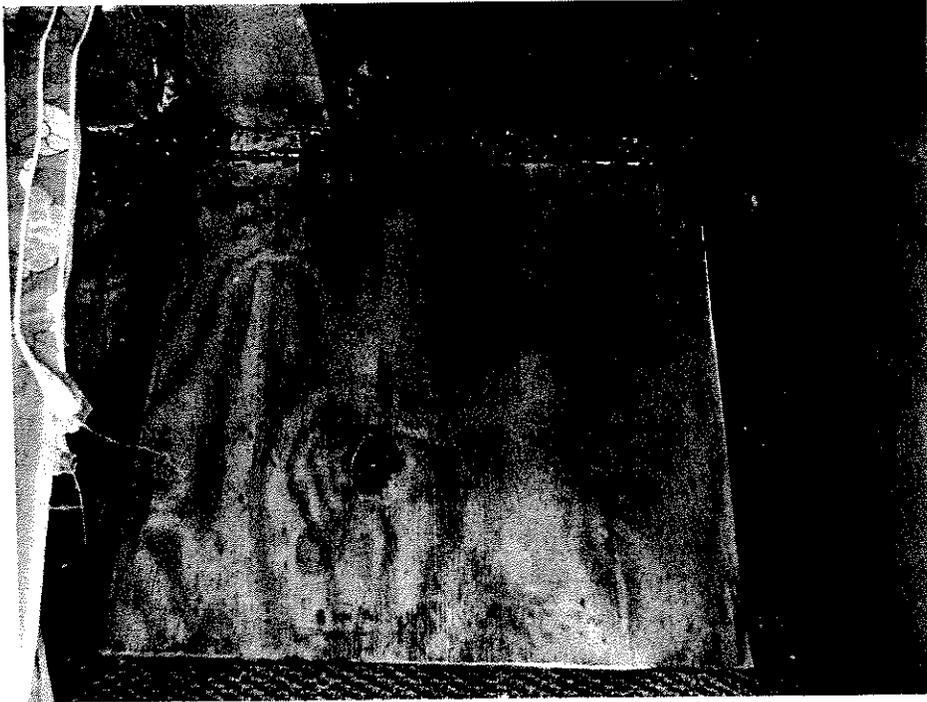


Net, Bucket of Smelt, Chum seized from Paul Kimball



Door to Kimball's bobhouse

Pictures taken in illegal taking of Smelt on March 8, 2009
Paul Kimball, DOB: 6/8/1941
Wolfeboro Bay, Lake Winnepesaukee

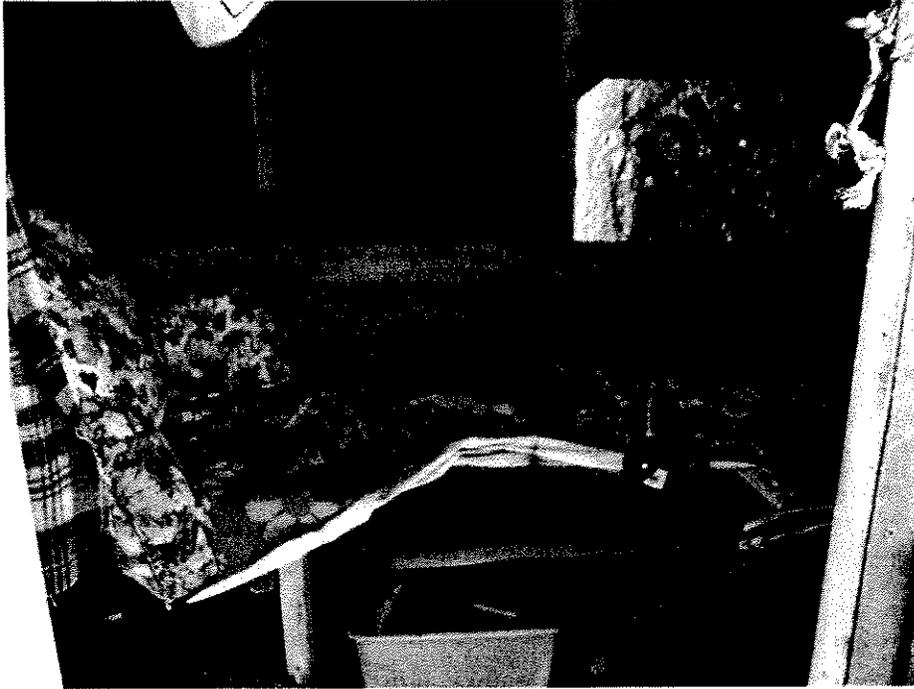


Trap door to bobhouse to square hole and lake



Looking through trap door to the lake bottom with chum

Pictures taken in illegal taking of Smelt on March 8, 2009
Paul Kimball, DOB: 6/8/1941
Wolfeboro Bay, Lake Winnepesaukee

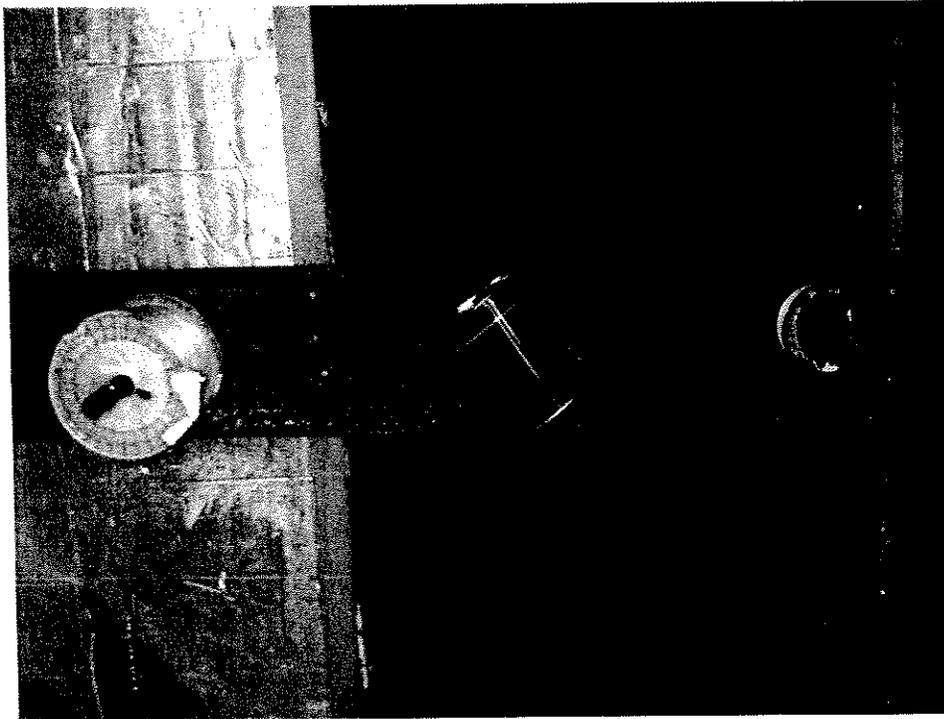


Looking in through the bobhouse door



Rope that was cut entering the bobhouse

Pictures taken in illegal taking of Smelt on March 8, 2009
Paul Kimball, DOB: 6/8/1941
Wolfeboro Bay, Lake Winnepesaukee

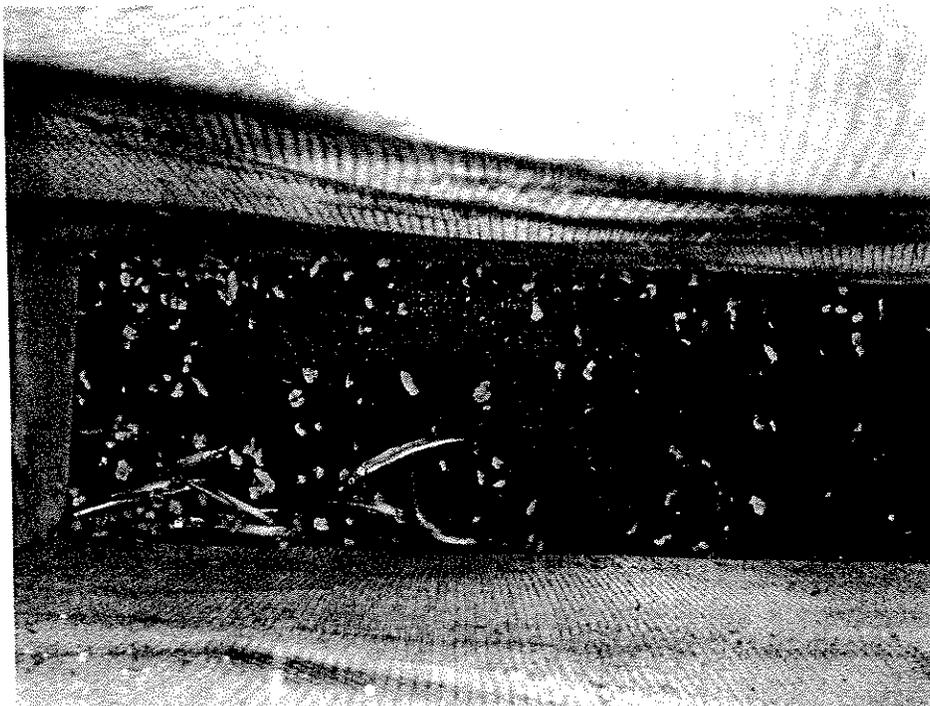


Spools of fishing line that was secured and not used



Wire mesh net that was leaning outside the bobhouse

Pictures taken in illegal taking of Smelt on March 8, 2009
Paul Kimball, DOB: 6/8/1941
Wolfeboro Bay, Lake Winnepesaukee



Smelt that were in the wire mesh trap along with chum

