IN THE SUPREME COURT OF THE STATE OF VERMONT

STATE OF VERMONT, APPELLEE

V.

PHILLIP WALKER-BRAZIE & BRANDI LENA-BUTTERFIELD, APPELLANTS

SUPREME COURT DOCKET NO. 2019-388

APPEAL FROM THE

SUPERIOR OF VERMONT – CRIMINAL DIVISION
ORLEANS COUNTY
DOCKET NO. 555-9-18 OSCR & 558-9-18 OSCR

OFFICE OF THE DEFENDER GENERAL
VERMONT ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
BRIEF OF AMICI CURIAE

Matthew Valerio, Esq.
Defender General

Dawn Seibert, Esq.
Appellate Defender

Office of the Defender General
6 Baldwin St., 4th Floor
Montpelier, VT 05633-3301
(802) 828-3168

Attorneys for Amici Curiae

STATEMENT OF THE ISSUES

I. This Court's precedent does not support warrantless searches done by federal officers in the interior of the state because that infringes on the core protections of Article 11 guaranteed to all Vermont citizens, without furthering any federal interests. 9

A. The "border area," as interpreted by the United States Department of Homeland Security, includes a one-hundred mile swath from the actual border and covers nearly the entire state.. 10

B. This case is a cogent example of the harm that will befall Vermont citizens if the exclusionary rule is not applied to Vermonters traveling in the interior of the state who are stopped by border patrol.. 11

C. The federal government's interest in roving patrols in the "border area" is less than in the actual border or border checkpoints. 15

D. Suppressing evidence gathered in violation of the Vermont Constitution in a state criminal case does not interfere with any federal border interest. 16

E. Allowing evidence obtained in contravention of Article 11 does great damage to the privacy, security, and liberty interests protected by the state exclusionary rule. 16

F. Coburn and Rennis, which were decided narrowly, do not apply broadly to interior searches; such application would be directly contrary to the state constitution. 26

TABLE OF CONTENTS

Statement of the Issues 2

Table of Contents 3

Table of Authorities 4

Statement of Interest and Introduction 6

Argument 9

I. This Court's precedent does not support warrantless searches done by federal officers in the interior of the state because that infringes on the core protections of Article 11 guaranteed to all Vermont citizens, without furthering any federal interests. 9

A. The "border area," as interpreted by the United States Department of Homeland Security, includes a one-hundred mile swath from the actual border and covers nearly the entire state. 10

B. This case is a cogent example of the harm that will befall Vermont citizens if the exclusionary rule is not applied to Vermonters traveling in the interior of the state who are stopped by border patrol. 11

C. The federal government's interest in roving patrols in the "border area" is less than in the actual border or border checkpoints. 15

D. Suppressing evidence gathered in violation of the Vermont Constitution in a state criminal case does not interfere with any federal border interest. 16

E. Allowing evidence obtained in contravention of Article 11 does great damage to the privacy, security, and liberty interests protected by the state exclusionary rule. 16

i. Article 11 provides far more protection to Vermont citizens than the Fourth Amendment. 17

ii. Within the 100-mile "border area," border patrol agents conduct searches of homes, personal vehicles, public transportation, open land, and even garbage. 23

iii. Permitting border patrol agents to operate more freely within the "border area" will disproportionately harm people of color. 24

F. Coburn and Rennis, which were decided narrowly, do not apply broadly to interior searches; such application would be directly contrary to the state constitution. 26

i. Coburn and Rennis conflict with this Court's Article 11 precedent. 28

ii. Coburn and Rennis do not explain or even acknowledge the conflict. 29

iii. The Court decided Rennis without the benefit of argument and briefing on the conflict with Article 11 precedent. 30

Conclusion 30

Certificate of Compliance 31

Appendix A 33

TABLE OF AUTHORITIES

Cases

Almeida-Sanchez v. United States, 413 U.S. 266 (1973) 15, 16
Arizona v. Gant, 556 U.S. 332 (2009) 20
California v. Greenwood, 486 U.S. 35 (1988) 20
Hudson v. Palmer, 468 U.S. 517 (1984) 22
In re Stoddard, 144 Vt. 6, 470 A.2d 1185 (1983) 22
Maryland v. King, 569 U.S. 435 (2013) 20
Maryland v. Wilson, 519 U.S. 408 (1997) 19
Oliver v. United States, 466 U.S. 170 (1984) 21
Pennsylvania v. Mimms, 434 U.S. 106 (1977) 19
People v. Griminger, 524 N.E.2d 409 (N.Y. 1988) 9
Rakas v. Illinois, 439 U.S. 128 (1978) 21
State v. Badger, 141 Vt. 430, 450 A.2d 336 (1982) 9, 29
State v. Bauder, 2007 VT 16, 181 Vt. 392, 924 A.2d 38 .... 18, 22, 23
State v. Berard, 154 Vt. 306, 576 A.2d 118 (1990) 22
State v. Birchard, 2010 VT 57, 188 Vt. 172, 5 A.3d 879 17
State v. Blow, 157 Vt. 513, 602 A.2d 552 (1991) 21, 27
State v. Cardenas-Alvarez, 25 P.3d 225 (N.M. 2001) 9
State v. Clinton-Aimable, 2020 VT 30 n.4, __ Vt. __, __ A.3d __ 11, 12, 24
State v. Coburn, 165 Vt. 318, 683 A.2d 1343 (1996) 8, 29
State v. Cunningham, 2008 VT 43, 183 Vt. 401, 954 A.2d 1290 11
State v. Kirchoff, 156 Vt. 1, 587 A.2d 988 (1991) .... passim
State v. Lussier, 171 Vt. 19, 757 A.2d 1017 (2000) 17, 29, 30
State v. Medina, 2014 VT 69, 197 Vt. 63, 102 A.3d 661 .... 19, 20
State v. Morris, 165 Vt. 111, 680 A.2d 90 (1996) .... passim
State v. Neil, 2008 VT 79, 184 Vt. 243, 958 A.2d 1173 20
State v. Oakes, 157 Vt. 171, 598 A.2d 119 (1991) 17
State v. Paro, 2012 VT 53, 192 Vt. 619, 54 A.3d 516 12
State v. Rennis, 2014 VT 8, 195 Vt. 492, 90 A.3d 906 .... passim
State v. Rodriguez, 854 P.2d 399 (Or. 1993) 9
State v. Savva, 159 Vt. 75, 616 A.2d 774 (1991) .... passim
State v. Sprague, 2003 VT 20, 175 Vt. 123, 824 A.2d 539 .... 19, 22, 25
State v. Torres, 262 P.3d 1006 (Haw. 2011) 9
State v. Wood, 148 Vt. 479, 536 A.2d 902 (1987) 21, 22, 27
Thornton v. United States, 541 U.S. 615 (2004) 20
United States v. Brignoni-Ponce, 422 U.S. 873 (1975) 15, 24
United States v. Caceres, 440 U.S. 741 (1979) 21
United States v. Edwards, 415 U.S. 800 (1974) 20
United States v. Robinson, 414 U.S. 218 (1973) 20
Zullo v. State, 2019 VT 1, 209 Vt. 298, 205 A.3d 466 15

Statutes

13 V.S.A. § 5251 6
20 V.S.A. § 2222 14
21 U.S.C. § 801 16
8 C.F.R. § 287.1 7

Other Authorities

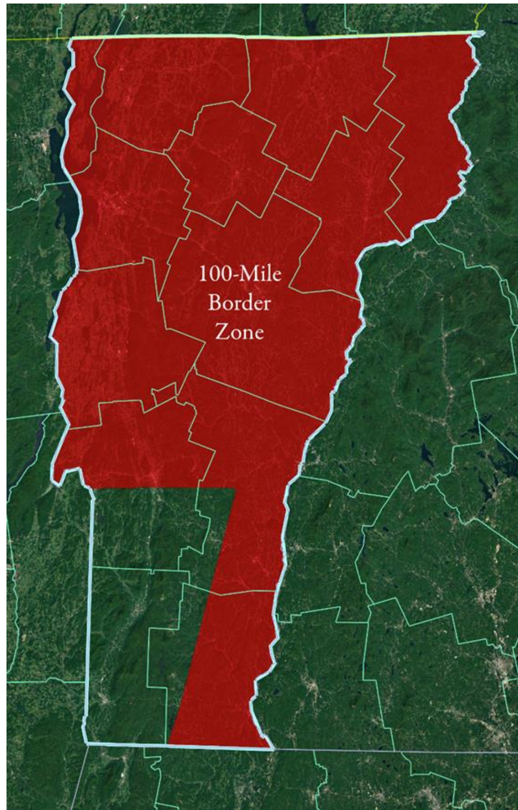
Adiel Kaplan & Vanessa Swales, *Border Patrol Searches Have Increased on Greyhound, Other Buses Far From Border*, NBCNEWS (June 5, 2019), https://www.nbcnews.com/politics/immigration/border-patrol-searches-have-increased-greyhound-other-buses-far-border-n1012596 .... 10, 24, 26
Migrant Justice Amicus Br., ACLU of Arizona, *Record of Abuse: Lawlessness and Impunity in Border Patrol's Interior Enforcement Operations* (Oct. 2015), https://www.acluaz.org/sites/default/files/documents/Record_of_Abuse_101515_0.pdf 10, 25, 26
U.S. Customs and Border Protection, CBP Enforcement Law Course (2012) https://www.documentcloud.org/documents/5673530-CBP-Enforcement-Law-Course.html 23, 24, 27

STATEMENT OF INTEREST AND INTRODUCTION

Vermont Rules of Appellate Procedure 29(a) allows the "State of Vermont or an officer or agency thereof" to "file an amicus curiae brief without the consent of the parties, and without leave of the Court." The Office of the Defender General is an agency of the State of Vermont. 13 V.S.A. § 5251. The Office of the Defender General, joined by the Vermont Association of Criminal Defense Lawyers, submit the following Amici Curiae Brief in support of Appellants.

SUMMARY OF ARGUMENT

This appeal presents a very basic issue of state sovereignty. Does the Vermont Constitution apply to protect the rights of Vermonters in the 100-mile border zone?[1]



The resounding answer must be "Yes." It applies in conjunction, not in conflict, with federal law. The state constitution applies, as it must, to supplement the protections of the federal charter. It promises every Vermonter the right to be free from unwarranted governmental intrusion into her private life. It ensures that the liberty of all Vermont residents is fully protected. The state and federal charters, together, guarantee that Vermonters enjoy all the blessings of a free society.

[1] The authority of Customs and Border Patrol (CBP) Agents extends up to—and, in "unusual circumstances," beyond—"100 air miles from any external boundary of the United States." 8 C.F.R. § 287.1 (a) -(b); *see also State v. Rennis*, 2014 VT 8, ¶ 10, 195 Vt. 492, 90 A.3d 906 (acknowledging CBP's 100-mile reach into the interior of the country). The map was created using Google Earth to illustrate the coverage of the 100-mile zone in Vermont.

The prosecution would have this Court answer the question in the negative. It is asking this Court to render the Vermont Constitution, and specifically Article 11, void for Vermont residents who come into contact with federal officers in the red zone. But this Court has no authority to ignore the state charter, the fundamental law of the land.

Before the trial court, the prosecution argued that *State v. Coburn*, 165 Vt. 318, 683 A.2d 1343 (1996) and *State v. Rennis*, 2014 VT 8, 195 Vt. 492, 90 A.3d 906 supported its assertion that federal law controlled over the Vermont Constitution *in the entire red zone*. P.C. 139. However, *Coburn* and *Rennis* fail to extend as far as the prosecution claims.

In those cases, this Court held that evidence seized by federal officers *at a border or fixed border checkpoint* could be admitted in a state criminal prosecution even if its seizure violated Article 11 of the Vermont Constitution. *Coburn*, 165 Vt. 318, 683 A.2d 1343; *Rennis*, 2014 VT 8. The Court declined to apply the state exclusionary rule because it reasoned, briefly, that the federal interest in border security outweighed the state interest. *Coburn*, 165 Vt. at 325, 683 A.2d at 1347. While the federal government's interest in border security is of course weighty, that is not the issue here. The question presented is whether state constitutional protections apply in a state criminal prosecution after a border patrol agent seizes contraband and turns it over it to state police instead of to federal prosecutors, beyond the border or fixed border checkpoint. The obvious answer is that they do.

The federal government has little to no interest in what happens to the

evidence once it is handed over to state officials. But, the residents of Vermont have a paramount interest in the constitutional protections afforded to them by Article 11. Ultimately, the Vermont Constitution must prevail.[2]

The "core value of privacy is the quintessence of Article 11." *State v. Morris*, 165 Vt. 111, 120, 680 A.2d 90, 96 (1996). To protect the privacy rights of Vermont residents, this Court has repeatedly interpreted Article 11 as providing more protection against warrantless searches and seizures than its federal counterpart. And, the state exclusionary rule applies as a matter of course to bar evidence seized in violation of the state constitution:

> Evidence obtained in violation of the Vermont Constitution, or as the result of a violation, cannot be admitted at trial as a matter of state law. Introduction of such evidence at trial eviscerates our most sacred rights, impinges on individual privacy, perverts our judicial process, distorts any notion of fairness, and encourages official misconduct.

State v. Badger, 141 Vt. 430, 452-53, 450 A.2d 336, 349 (1982).

ARGUMENT

I. This Court's precedent does not support warrantless searches done by federal officers in the interior of the state because that infringes on the core protections of Article 11 guaranteed to all Vermont citizens, without furthering any federal interests.

---

[2] *See People v. Griminger*, 524 N.E.2d 409, 412 (N.Y. 1988) (suppressing evidence obtained by federal law enforcement: "[s]ince defendant has been tried for crimes defined by the State's Penal Law, we can discern no reason why he should not also be afforded the benefit of our State's search and seizure protections"); *State v. Rodriguez*, 854 P.2d 399, 403 (Or. 1993) (en banc) (holding that the state constitution applies to an arrest by immigration officials: "[w]e see no reason why the factual distinction between a state officer and a federal officer has any legal significance in determining whether certain evidence is admissible in an Oregon criminal prosecution"); *State v. Torres*, 262 P.3d 1006 (Haw. 2011) (same); *State v. Cardenas-Alvarez*, 25 P.3d 225 (N.M. 2001) (same).

The prosecution argued below that *Coburn* and *Rennis* controlled the outcome here. However, that is not the case. Those decisions are distinguishable as they involve very different factual and legal scenarios than the traffic stop at issue here, made by a "roving" border patrol agent in the interior of the state. Given its duty to effectuate Article 11 protections, this Court must not permit evidence seized throughout Vermont in violation of the state constitution to be used against Vermont residents in state prosecutions, solely because the officer who discovered the evidence was a federal employee.

A. *The "border area," as interpreted by the United States Department of Homeland Security, includes a one-hundred mile swath from the actual border and covers nearly the entire state.*

The "functional equivalent" of the border stretches south from the border with Canada and west from the New Hampshire Coast. *See supra* n. 1. As a result, the area in which these roving patrols operate covers nearly the entire state. *Rennis*, 2014 VT 8, ¶ 10.

This is not merely a theoretical reach. Border patrol agents have been active in Vermont far from the border. *See* Migrant Justice Amicus Br., p. 8 nn.2&3 (describing unmarked border patrol vehicle stopping and detaining individuals in White River Junction; checkpoints in Colchester); *see also Rennis*, 2014 VT 8, ¶ 2 (Hartford checkpoint). Border patrol agents have also boarded Greyhound buses in Vermont to question passengers about their citizenship.[3]

[3] Adiel Kaplan & Vanessa Swales, *Border Patrol Searches Have Increased on Greyhound, Other Buses Far From Border*, NBCNEWS (June 5, 2019), https://www.nbcnews.com/politics/immigration/border-patrol-searches-have-increased-greyhound-other-buses-far-border-n1012596 [https://perma.cc/6L33-3T5C].

B. This case is a cogent example of the harm that will befall Vermont citizens if the exclusionary rule is not applied to Vermonters traveling in the interior of the state who are stopped by border patrol.

Mr. Walker-Brazie and Ms. Butterfield suffered multiple unwarranted intrusions on their liberty and privacy in the course of this traffic stop. The border patrol agent stopped them on a hunch, far less than the reasonable suspicion of drug smuggling that was required.[4] Then, based on a weak allegation of an odor of marijuana, the border patrol officers ordered the couple out of the vehicle and searched it, opening and rummaging through several bags in the back seat.

The federal agent stopped the car because the driver, who appeared to be driving fast, had slowed down when she saw the police car and then watched the officer nervously in her rear-view mirror after he pulled out to follow them. P.C. 18-19. That commonplace behavior, plus a vague report from dispatch that the owner of the vehicle had "encounters involving narcotics" in the past, P.C. 23, was border patrol's reason for stopping the vehicle on suspicion of smuggling drugs across the border. *But see State v. Clinton-Aimable*, 2020 VT 30, ¶ 21 n.4, __ Vt. __, __ A.3d __ (citing *State v. Cunningham*, 2008 VT 43, ¶ 22, 183 Vt. 401, 954 A.2d 1290) (nonspecific information about prior drug involvement fails to provide reasonable suspicion of current criminal activity under either the state or federal constitution).

The agent did not elaborate further on what was meant by "encounters

[4] The trial court denied suppression on the ground that the stop was not supported by reasonable suspicion but did not certify that issue for interlocutory appeal so the constitutionality of the initial stop is not currently before this Court.

involving narcotics."[5] And although the agent asserted that the location and the time of day supported reasonable suspicion for drug smuggling, P.C. 12-13, those innocent facts are barely relevant because they would support stopping any vehicle driving home to Richford on that stretch of Route 105. *See, e.g., State v. Paro,* 2012 VT 53, ¶ 11, 192 Vt. 619, 54 A.3d 516 (presence in an area that had "previously experienced criminal activity" does not establish reasonable suspicion); *Clinton-Aimable*, 2020 VT 30, ¶¶ 28-29 (even extreme nervousness has minimal relevance because "[i]t is not uncommon for citizens to be nervous when confronted by law enforcement"). The officer knew that Ms. Butterfield lived in Richford. P.C. 19. And, he knew that her car had not crossed the border that day. P.C. 38.

The officer claimed that his warrantless search was justified because he smelled a "strong odor" of green marijuana even before he got to the car. P.C. 24 ("I hadn't even reached the driver's door and I could smell it coming from inside"). This would seem implausible where the marijuana in the vehicle was sealed in smaller containers that were then concealed within larger articles. P.C. 30, 136 (marijuana contained in plastic baggies and a glass jar).

But even if true, that allegation would not defeat the need for a warrant under state law to search the closed containers located within the back seat of the vehicle. *See State v. Savva,* 159 Vt. 75, 85, 616 A.2d 774, 779 (1991). Had the federal agent applied for a warrant, one would not have issued as there was insufficient probable cause or particularity to support the agent's mere hunch that the driver was engaged

---

[5] A search of state and federal criminal databases revealed no drug arrests, much less convictions, for Ms. Butterfield.

in drug trafficking:

> This court has concluded in other contested cases … that absent expert proof establishing the human olfactory system as capable of determining the presence of unburned marijuana with any degree of accuracy and reliability—which over several years and many invitations has yet to be presented—that such averments by law enforcement officers will generally be insufficient to support probable cause for a search warrant, especially when that fresh marijuana is triple-packaged (in individual sealed plastic bags, in a larger plastic trash bag, in a closed Rubbermaid plastic tote). Whereas trained canines may well be capable of doing so without interjection of any motive, calculation or thoughts of secondary gain (except perhaps the dog cookies given during training), the overriding human element in such situations makes this court skeptical of accepting such statements, without some independent corroboration, as sufficient to overcome important constitutional rights.

State v. Greenfield, Findings and Conclusions on Motion to Suppress, No. 8-1-15 Lecr, p. 2 n.1 (Dec. 14, 2015, Pearson, J.) (unpub.)

Judges have become increasingly suspicious of a bald assertion that an officer smelled marijuana during a traffic stop.[6] Their suspicion is not unfounded. A Burlington police officer was recently caught on camera telling a colleague, in response to a question whether he smelled marijuana at a traffic stop, "No. I mean I can if I need to, but I don't like going that way if I can't back it up."[7] The officer was fired after an investigation revealed that he had written in the warrant affidavit that he had smelled marijuana in the car. If not for the video, the officer would have gotten

---

[6] *See, e.g.,* Joseph Goldstein, *Officers Said They Smelled Pot. The Judge Called Them Liars*, N.Y. Times (Sept. 13, 2019), https://www.nytimes.com/2019/09/12/nyregion/police-searches-smelling-marijuana.html, [https://perma.cc/6KZK-LBXA].

[7] Morgan True, *VIDEO: Body camera footage shows Burlington officer contradicting his sworn statement*, VTDigger (Feb. 24, 2017), https://vtdigger.org/2017/02/24/video-body-camera-footage-shows-burlington-officer-contradicting-sworn-statement/ [https://perma.cc/DWH7-KKS4].

away with violating the defendant's constitutional rights.[8]

The border patrol agent involved in this case had been made aware of search and seizure requirements, and specifically the need for a warrant, under Vermont law. The agent was certified by the Vermont Criminal Justice Training Council. P.C. 9-10. This certification includes a course in state criminal procedure. 20 V.S.A. § 2222 (describing procedure for certification of federal officers, including border patrol agents). It also requires that the officer take "an oath administered by the commissioner of the department of public safety . . . to uphold the constitution of the state of Vermont." *Id.* Despite this certification, the officer maintained that he did not know whether Vermont law required a warrant to search a vehicle. P.C. 41. He admitted that he could have sought a warrant, although that was not his practice. *Id.*

Without a warrant or consent to conduct a warrantless search, the officer searched the car, also opening several closed bags and a cooler in the rear of the vehicle. PC 25-27, 30, 52-53. He found several ounces of marijuana and a sandwich bag of mushrooms and, predictably, no evidence of smuggling. P.C. 119-20. The federal authorities declined to prosecute, instead handing the evidence to the state police. P.C. 30-31.

During this incident, the Article 11 rights of these individuals were violated in several ways. First, the stop was not supported by reasonable suspicion as required

[8] Based on the record in this appeal, it is the practice of border patrol agents not to audiotape or videotape their traffic stops. The agent testified: "I don't have video equipment at all. It doesn't exist." P.C. 38-39. This makes it more difficult for the judiciary to review the lawfulness of border patrol stops, and militates in favor of permitting defendants the full exercise of their constitutional rights.

under the state (and federal) constitution. *Zullo v. State*, 2019 VT 1, ¶ 59, 209 Vt. 298, 205 A.3d 466. Second, the officer searched the vehicle without a warrant, in violation of *Savva*, 159 Vt. 75, 616 A.2d 774. Finally, he examined the contents of closed bags that were in the vehicle, in which Mr. Walker-Brazie and Ms. Butterfield had a separate and elevated privacy interest. *Id.*

For the federal agent, this was a routine border patrol traffic stop. For Mr. Walker-Brazie and Ms. Butterfield, it was a nightmare of constitutional dimension. These sorts of violations will become more commonplace, unaddressed by the judicial system, unless the Court upholds the right of Vermont residents to enforce their Article 11 rights in state criminal proceedings after a border patrol stop.

C. The federal government's interest in roving patrols in the "border area" is less than in the actual border or border checkpoints.

There is an important distinction between searches conducted at the border or its "functional equivalent" and those conducted in the interior by roving patrols. The former were at issue in *Coburn* and *Rennis*, the latter at issue here.

The federal interest in securing the border outweighs a traveler's privacy interest and for that reason the federal government may conduct a suspicionless search at the border. *See Almeida-Sanchez v. United States*, 413 U.S. 266 (1973). However, when a roving patrol is operating on interior roadways, the balance of interests shifts such that any stop must be supported by reasonable suspicion. *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975). That is because Americans using the roads near, but not at, the border have a "right to free passage" to their destinations. *Almeida-Sanchez*, 413 U.S. at 274-75. Law enforcement may not

interfere with this right absent reasonable suspicion that the vehicle is carrying contraband. *Id.*

In any event, the federal government is free to pursue its interest relative to evidence seized by border patrol agents. The U.S. Attorney's Office has jurisdiction over all drug offenses, no matter the amount. *See, e.g.,* 21 U.S.C. § 801 et seq. If the federal government wished to use the evidence obtained by border patrol agents to prosecute, it could do so. In cases like this, where the evidence is handed off to state police, the federal government has declined an interest. There is no legitimate rationale for elevating a nonexistent federal interest over the state constitution.

D. Suppressing evidence gathered in violation of the Vermont Constitution in a state criminal case does not interfere with any federal border interest.

In the end, any federal interest in either law enforcement or border security is immaterial, because suppression in this instance interferes with neither of those interests. Mr. Walker-Brazie and Ms. Lena-Butterfield are charged with simple possession of controlled substances. P.C. 110-13. Whether these prosecutions proceed in state court, or not, will have no impact on border security. There was no evidence to support a smuggling allegation. To the extent that there is a federal interest in enforcement of the criminal laws, the federal government declined to pursue that interest when it handed the evidence over to the state police.

E. Allowing evidence obtained in contravention of Article 11 does great damage to the privacy, security, and liberty interests protected by the state exclusionary rule.

The state exclusionary rule is separate from and independent of the federal exclusionary rule. Like Article 11 itself, the state exclusionary rule is more protective

than the federal version. *See State v. Oakes*, 157 Vt. 171, 598 A.2d 119 (1991) (refusing to permit the federal "good faith exception" to erode the state exclusionary rule). The Court declined to adopt the "good faith exception" because it was based on an unpersuasive cost-benefit analysis, and "the focus of any cost-benefit analysis concerning application of the [state] exclusionary rule should be on the individual constitutional rights at stake." *State v. Lussier*, 171 Vt. 19, 34, 757 A.2d 1017, 1027 (2000). This Court has even extended the state exclusionary rule beyond the criminal arena to civil proceedings, "to protect the core value of privacy embraced by Chapter I, Article 11 of the Vermont Constitution." *Id*. at 21, 757 A.2d at 1018.

In *Lussier*, the state interest in not applying the exclusionary rule was substantial, removing drunk drivers from the roads. Yet still, that interest did not outweigh Article 11's protections, and could "not be satisfied at the expense of our constitutional right to be free from unbridled government interference in our lives." *Id*. at 32, 757 A.2d at 1026.

This Court has repeatedly rejected invitations to develop exceptions to the state exclusionary rule, reiterating that the exclusionary rule "protect[s] the core value of privacy embraced in Article 11, ... promote[s] the public's trust in the judicial system, and ... assure[s] that unlawful police conduct is not encouraged"." *State v. Birchard*, 2010 VT 57, ¶ 9, 188 Vt. 172, 5 A.3d 879. Refusing to suppress in light of an Article 11 violation "would allow police to invade citizens' privacy with impunity." *Id.*

i. Article 11 provides far more protection to Vermont citizens than the Fourth Amendment.

Article 11 accords to Vermont citizens greater protection than its federal counterpart in several areas and for good reason. Vermont is a sovereign state. *Morris*, 165 Vt. at 126, 680 A.2d at 101. Its constitution differs from the federal document in important ways, one of which is Article 11's focus on the protection of privacy and individual liberties. *See State v. Bauder*, 2007 VT 16, ¶ 10, 181 Vt. 392, 924 A.2d 38 (Although "the Fourth Amendment and Article 11 both seek to protect our freedom from unreasonable government intrusions into ... legitimate expectations of privacy, we have also long held that our traditional Vermont values of privacy and individual freedom—embodied in Article 11—may require greater protection than that afforded by the federal Constitution") (internal citations and quotations omitted). In keeping with its duty to enforce the state constitution, this Court has taken great pains to "discover and protect the core value of privacy embraced by Chapter 1, Article 11 of the Vermont Constitution." *Id.* at 115, 680 A.2d at 93 (citing *State v. Savva,* 159 Vt. 75, 85, 616 A.2d 774, 779 (1991); *State v. Kirchoff,* 156 Vt. 1, 6–7, 587 A.2d 988, 992 (1991).

Perhaps most importantly in this context, Article 11 accords to Vermonters a high level of privacy in their vehicles and in the contents of those vehicles. Thus, the state constitution forbids warrantless searches of automobiles absent exigent circumstances. *Savva*, 159 Vt. at 91, 616 A.2d at 783. Even where the driver is arrested, Article 11 still does not permit law enforcement to search without a warrant. *Bauder*, 2007 VT 16, ¶ 20. And when law enforcement has the authority to search a vehicle, that authority is closely circumscribed. Closed containers merit a

separate and higher level of privacy protection than the vehicle itself. *Savva*, 159 Vt. at 88, 616 A.2d at 781.

Also, the state constitutional protections extend not just to the car and its contents, but to the people within. Article 11 protects the right to be free from "governmental intrusion upon personal liberties" and therefore occupants of vehicles may not be ordered to exit unless the officer has "a reasonable basis to believe that the officer's safety, or the safety of others, is at risk or that a crime has been committed." *State v. Sprague*, 2003 VT 20, ¶¶ 1, 16, 175 Vt. 123, 824 A.2d 539.

In contrast, the "automobile exception" under the Fourth Amendment is so broad it has virtually "swallowed the rule." *Savva*, 159 Vt. at 83, 616 A.2d at 778. Pursuant to the federal constitution, subsequent to a mere traffic violation, the police may order all occupants out of the car as a matter of course. *Pennsylvania v. Mimms,* 434 U.S. 106 (1977); *Maryland v. Wilson,* 519 U.S. 408 (1997). Law enforcement may then conduct a warrantless search of the vehicle including all containers within, subject only to a post-hoc determination of whether there was probable cause that the vehicle contained evidence of a crime.

In addition to rejecting the federal "automobile exception," this Court has also eschewed the United States Supreme Court's expansion of the "search incident to arrest" doctrine. *State v. Medina*, 2014 VT 69, ¶ 44, 197 Vt. 63, 102 A.3d 661 ("We find a broad warrantless-search authorization, under the theory that it is a search incident to an arrest, to be inconsistent with the requirements of Article 11"). The federal constitution permits law enforcement to search without a warrant a person

being arrested, any property found on his person, and the passenger compartment of his vehicle, even if the reason for the arrest is unrelated to the vehicle, and even if the driver has already been handcuffed and secured in a police car. *United States v. Robinson*, 414 U.S. 218 (1973); *Arizona v. Gant*, 556 U.S. 332 (2009); *Thornton v. United States,* 541 U.S. 615, 623–24 (2004). The federal exception to the warrant requirement is exceedingly generous, and even covers searches that occur well after the arrest has been completed. *United States v. Edwards*, 415 U.S. 800 (1974). It also covers the taking of DNA samples from people arrested for felonies. *Maryland v. King*, 569 U.S. 435 (2013).

In stark contrast, Vermont's "search incident to arrest" exception is very narrow. Article 11 limits a search performed on an arrestee to exigent circumstances— a warrantless search may be performed only if necessary to secure the safety of the officers or to preserve evidence of a crime. *State v. Neil*, 2008 VT 79, 184 Vt. 243, 958 A.2d 1173. But outside of specific, factual exigencies that make getting a warrant impracticable, a search of an arrestee's property or vehicle or his DNA requires a warrant. *Id.* ¶ 10 (warrant needed to search closed pouch found in arrestee's pocket); *Medina*, 2014 VT 69, ¶ 63.

In addition to their vehicles, Vermont residents enjoy a right of privacy in their garbage bags, such that law enforcement may not search them without a warrant. *Morris*, 165 Vt. at 114, 680 A.2d at 93. This is not true under federal law; garbage bags are entirely outside the protection of the Fourth Amendment. *California v. Greenwood,* 486 U.S. 35 (1988) (no reasonable expectation of privacy in garbage bags

left at the curb).

Article 11 also protects the privacy rights of Vermonters in their land. *Kirchoff*, 156 Vt. 1, 587 A.2d 988. Law enforcement may not enter upon property where the owner has indicated an intent to exclude the public - by posting “no trespassing” signs, for example - without first obtaining a warrant. *Id*. In contrast, under the Fourth Amendment, land outside the curtilage receives no constitutional protection. *Oliver v. United States,* 466 U.S. 170, 179 (1984) (“[A]n expectation of privacy in “open fields” will not be deemed reasonable for Fourth Amendment purposes”).

The state constitution protects Vermonter’s privacy interest in activities within the home. Law enforcement may not surreptitiously record a conversation within a person’s home without a warrant, even if the other participant in the conversation consents. *State v. Blow*, 157 Vt. 513, 520, 602 A.2d 552, 556 (1991). The federal constitution provides no such protection. *United States v. Caceres,* 440 U.S. 741, 750–51 (1979).

The Vermont Constitution defines standing more broadly than the United States Constitution. *State v. Wood*, 148 Vt. 479, 536 A.2d 902 (1987). An individual “need only assert a possessory, proprietary or participatory interest in the item seized or the area searched to establish standing to assert an Article 11 challenge.” *Id*. at 489, 536 A.2d at 908. The federal test for standing is much narrower. *Rakas v. Illinois,* 439 U.S. 128, 143 (1978) (standing to challenge search required the defendant to establish a “legitimate expectation of privacy”).

This Court rejected *Rakas* because the federal test curtailed the role of the

judiciary by "focusing on the defendant's ability to present a challenge rather than on the challenge itself, and by unduly limiting the class of defendants who may invoke the right to be free from unlawful searches and seizures." *Wood*, 148 Vt. at 489, 536 A.2d at 908. This "frustrate[d] the design of Article 11." *Id.* The Court also noted that restricting the availability of the exclusionary rule as a remedy for an Article 11 violation would be "incompatible with Article Four of the Vermont Constitution, which provides each individual a "guaranteed right to a remedy at law" for a harm that is suffered. *Id.* at 486 n. 5, 536 A.2d at 906, citing *In re Stoddard,* 144 Vt. 6, 8, 470 A.2d 1185, 1186 (1983).

This Court has been loath to withhold Article 11's privacy protections from any Vermont residents, even prisoners. Under federal law, inmates are categorically prohibited from claiming Fourth Amendment protections. *Hudson v. Palmer*, 468 U.S. 517 (1984). However, this Court refused to follow *Hudson* because it "derogate[d] the central role of the judiciary in Article 11 jurisprudence." *State v. Berard*, 154 Vt. 306, 310, 576 A.2d 118, 120 (1990). Therefore, Vermont inmates may seek exclusion of evidence obtained in the search of a prison cell if the search violated Article 11. *Id.*

In these cases, this Court considered and rejected the parallel Fourth Amendment jurisprudence in large part because it failed to "do justice to the values underlying Article 11. *Bauder*, 2007 VT 16, ¶ 12 (citing to *Sprague, Kirchoff* and *Savva*); *see also Morris*, 165 Vt. at 127, 682 A.2d at 101 ("[W]henever we have decided to take a different path from that of the Supreme Court, our opinions have often rested largely on an analysis of the rejected federal law"). This Court has also

criticized the Supreme Court for relying on a questionable deterrence analysis, and for creating such extensive exceptions to the warrant requirement that they virtually eliminated it. *Savva,* 159 Vt. 75, 616 A.2d 774. This disagreement with the federal constitution is based on deeply held Vermont principles:

> The values illustrated by these and many other decisions of this Court rest—at their core—on the fundamental principle of limited government. Article 11's warrant requirement represents one of the essential checks on unrestrained government determined by the framers—and confirmed through hard experience—to be necessary to the preservation of individual freedom.

Bauder, 2007 VT 16, ¶ 13.

ii. Within the 100-mile "border area," border patrol agents conduct searches of homes, personal vehicles, public transportation, open land, and even garbage.

As this case demonstrates, border patrol agents routinely conduct traffic stops in the interior of the state. And, increasingly, border patrol agents can be found in public transportation terminals.[9] They board the buses and ask the passengers about their citizenship. *See* Kaplan & Swales, *supra* n.3. The passenger have no duty to respond, but the agents typically do not reveal that. *Id.* The agents are trained not to create a "Terry-stop" type of situation, where the reasonable passenger would not feel free to disengage from the conversation. *U.S. Customs and Border Protection*, CBP Enforcement Law Course (2012), p. 93, https://www.documentcloud.org/documents/5673530-CBP-Enforcement-Law-Course.html [https://perma.cc/NYP5-KHGJ].

[9] Kaplan & Swales, *supra* n. 3.

However, some border patrol practices - leaning across the seat in an intimidating fashion, or blocking the aisle, or the exit - create a situation where a reasonable person would not feel free to end the encounter. *See* Kaplan & Swales, *supra* n.3. This converts the questioning into a detention, presumably often without the requisite reasonable suspicion. *See Brignoni-Ponce*, 422 U.S. at 884 (Fourth Amendment "forbids stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens").

In addition to searches of vehicles, border patrol agents conduct searches of homes and the surrounding land, and even of garbage. They are specifically trained in conducting such searches. *U.S. Customs and Border Protection*, CBP Enforcement Law Course (2012), p. 117 ("open fields"), 118 (trash bags), 121 (homes), https://www.documentcloud.org/documents/5673530-CBP-Enforcement-Law-Course.html [https://perma.cc/NYP5-KHGJ].

iii. Permitting border patrol agents to operate more freely within the "border area" will disproportionately harm people of color.

Vermonters of color are the subject of traffic stops and searches at a disproportionately high rate. *Clinton-Aimable*, 2020 VT 30, ¶ 37 (Reiber, C.J., concurring). Subsequent to a traffic stop, a black driver in Vermont is four times as likely to be searched as a white driver. *Id.* (citing S. Seguino & N. Brooks, Driving While Black and Brown in Vermont iv (Jan. 9, 2017), http://www.uvm.edu/giee/pdfs/SeguinoBrooks_PoliceRace_2017.pdf [https://perma.cc/F5FR-W933]).

This Court has refused to adopt the federal constitution's broad "automobile

exception" under Article 11, in part because failing to force officers to justify their actions opens the door to discrimination on the basis of race or skin color. *See Sprague*, 2003 VT 20, ¶ 19 ("We believe further that dispensing entirely with the requirement that an officer provide some reasoned explanation for an exit order invites arbitrary, if not discriminatory, enforcement"). If this Court refuses to apply the state constitution to border patrol evidence used in state criminal cases, the impact will fall most heavily on people of color.

This is especially true given that border patrol agents are frequently accused of discriminatory policing tactics. There is evidence that border patrol agents use race as a basis for stops and searches here in Vermont as well as on the southern border. *See* Migrant Justice Amicus Br., p. 9, 11*;* ACLU of Arizona, *Record of Abuse: Lawlessness and Impunity in Border Patrol's Interior Enforcement Operations* (Oct. 2015),

https://www.acluaz.org/sites/default/files/documents/Record_of_Abuse_101515_0.pdf

[hereinafter ACLU: *Record of Abuse*].

Border patrol agents have been accused of boarding Greyhound buses in the north, including Vermont, and questioning only persons of color. One woman described it as blatant racial profiling:

> Mercedes Phelan was confused last April when Border Patrol agents boarded the Greyhound bus she was riding in Pennsylvania and asked her if she was a citizen. Ten months later, when she says they asked the same thing on an Amtrak train in Syracuse, N.Y., she was mad. "I was super angry because [they were] obviously profiling," said Phelan, who is black, Puerto Rican and a United States citizen. "They literally skipped over every single white

> person. She says she watched agents walk down the aisles, stopping only when they saw a person of color, to ask: "Are you from here? Do you have papers?"

Kaplan & Swales, *supra* n. 3.

The ACLU of Arizona has also documented claims of racial profiling and harassment by border patrol agents. ACLU: *Record of* Abuse, 6-7. These included a complaint filed by the City Attorney of Nogales, Arizona, detailing a pattern of using false canine alerts at interior checkpoints to justify prolonged detention and unconstitutional searches of people of color, including a Deputy City Attorney. *Id*. at 6.

F. Coburn and Rennis, which were decided narrowly, do not apply broadly to interior searches; such application would be directly contrary to the state constitution.

Coburn and *Rennis* considered the narrow issue of whether the state constitution applied to a search at a border crossing or border checkpoint. Though the prosecution argued that those cases supported its assertion that warrantless border patrol searches could be conducted throughout the state, that incorrect application of those decisions runs directly contrary to this Court's other precedent. *See supra* Sec. I.E. The effect would be to strip Vermonters stopped by border agents of their Article 11 rights within the vast majority of Vermont. It will leave Vermont citizens vulnerable to the federal agents' unlimited authority to conduct warrantless searches of their automobiles, effectively overruling *Savva* and *Bauder* for this category of searches.

The same is true for Vermont's narrow "search incident to arrest" exception to the warrant requirement. *Medina* and *Neil* would become null and void. People

arrested by a federal agent based on a suspected civil immigration violation would be subject to the expansive federal "search incident to arrest" doctrine, and unable to assert their Article 11 rights if contraband is found during an unnecessary warrantless search.

A decision that Article 11 does not apply to border searches in the interior of the state would mean that Vermonters would have no state constitutional protection for their homes, their land, or their garbage bags if a border patrol agent was inclined to search. *Morris*, 165 Vt. 111, 680 A.2d 90; *Kirchoff,* 156 Vt. 1, 587 A.2d 988; *Blow*, 157 Vt. 513, 602 A.2d 552. And while traffic stops probably carry the biggest risk for Vermont residents, the possibility of a border patrol agent showing up at a Vermonter's home, sneaking a peek at his garbage, or tiptoeing right past his "no trespassing" signs is far from fanciful, as border patrol agents are trained to conduct those searches. *U.S. Customs and Border Protection*, CBP Enforcement Law Course (2012), p. 117-21, https://www.documentcloud.org/documents/5673530-CBP-Enforcement-Law-Course.html [https://perma.cc/NYP5-KHGJ].

In *Wood*, this Court refused to limit the class of persons that could claim Article 11 protections because that would run afoul of Article 4, which guarantees a "remedy at law" for a constitutional harm. 148 Vt. 479, 536 A.2d 902. Refusing to permit Vermonters to assert the protections of Article 11 in state criminal proceedings, based solely on the officer's jurisdiction, would similarly violate the constitutional guarantee contained in Article Four.

This Court's task is "to honor not merely the words but the underlying

purposes of constitutional guarantees." *Savva,* 159 Vt. at 85, 616 A.2d at 779; *Kirchoff,* 156 Vt. at 6, 587 A.2d at 992. It would derogate entirely the purpose of Article 11 and the state exclusionary rule - protection of individual privacy rights - to permit the prosecution to use evidence obtained by a border patrol agent in a state criminal case where that same evidence would be excluded if the officer wore a different uniform.

A broader reading of those cases is unsupported by this Court's precedent and would run directly contrary to the Vermont Constitution. *Coburn* and *Rennis* must yield to the state charter.

i. Coburn and Rennis conflict with this Court's Article 11 precedent.

There is no way to square a broad reading of *Coburn* and *Rennis* with the protections guaranteed to all Vermonters by Article 11. *Coburn* and *Rennis,* applied any place that Department of Homeland Security considers to be the functional equivalent of the border, irrespective of formal border check points or customs lines at international airports, would directly conflict with a long line of state constitutional precedent, starting with *Badger* in 1982, followed by *Wood* (1987), *Berard* (1990), *Oakes* (1991), *Savva* (1991), *Kirchoff* (1991), *Blow* (1991), *Morris* (1996), *Lussier* (2000), *Sprague* (2003), *Bauder* (2007), *Neil* (2008), *Birchard* (2010), and *Medina* (2014).

These cases hold unequivocally that evidence obtained during search and seizures conducted within the interior of the state in violation of the Vermont Constitution may not be admitted in state criminal - or even civil - proceedings. Time after time, this Court has refused to make any exceptions to this long-standing rule.

And if the Court was inclined to make an exception, it could only do so after a thorough cost-benefit analysis that focused "*on the individual constitutional rights at stake*." *Lussier*, 171 Vt. at 34, 757 A.2d at 1027 (emphasis added).

In *Rennis*, the Court did not engage in the analysis required by *Lussier*. And If the Court had, the result would have been different. The exception carved out in Coburn and Rennis, turning on a summary assessment of federal interest in protecting international borders, cannot be reconciled with the Vermont Constitution where interpretation of international borders encompasses nearly the entire state itself. And in this conflict, the constitution must prevail. *Badger*, 141 Vt. 430, 448, 450 A.2d 336, 347 (1982) (state constitution is the "fundamental charter of our state").

ii. Coburn and Rennis do not explain or even acknowledge the conflict.

Coburn does not explain its authority to set aside Article 11 in the context of state criminal proceedings following a border search, except to state summarily that the federal interest in border security is "preeminent." 165 Vt. at 325. And in *Rennis*, this Court held that it was bound to follow *Coburn*, without revisiting the rationale for that decision. 2014 VT 8, ¶¶ 8-10.

The error is compounded by failing to explain how any federal interest is compromised by suppressing evidence obtained in violation of the state constitution in a state criminal case. No federal border protection interests were at stake here. Instead, the prosecution obtained tainted unlawful evidence based on a federal agent's flagrant disregard for the laws of this state. *See supra* n. 2 (New York, Oregon, Hawai'i and New Mexico holding such evidence inadmissible under their independent charters).

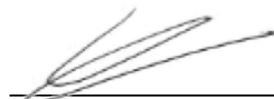
iii. The Court decided Rennis without the benefit of argument and briefing on the conflict with Article 11 precedent.

In *Rennis*, the Court was not asked to revisit *Coburn*. *See* Br. of Appellant, *State v. Rennis*, 2014 VT 8, No. 12-481, 2013 WL 3387679. The appellant did not argue that *Coburn* was in conflict with this Court's Article 11 precedent. The appellant's brief summarily distinguished and dismissed *Coburn* as being not directly on point, despite the fact that the trial court had held that *Coburn* was dispositive. And, the brief failed to point out that the conflict had deepened since *Coburn*, particularly where this Court had extended the reach of the state exclusionary rule to civil license suspension proceedings. *See Lussier*, 171 Vt. 19, 757 A.2d 1017 (2000).

CONCLUSION

For all the foregoing reasons, Amici ask this Court to reverse the trial court's determination that Article 11 did not apply to this warrantless search.

Dated at Montpelier in the County of Washington and the State of Vermont this 21st day of July, 2020.

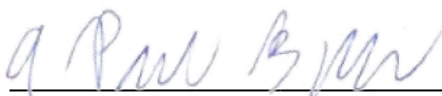


Dawn Seibert
Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

I certify that the above brief submitted under Rule 32(a)(7)(B) was typed using Microsoft Word for Office 365 and the word count is 6,623.

Dated at Montpelier, Vermont this 21st day of July, 2020.



Anthony Bambara

Cc: David Tartter, Esq.
Jay Diaz, Esq.

STATE OF VERMONT

SUPERIOR COURT | CRIMINAL DIVISION
Lamoille Unit | Docket No. 28-1-15 Leer

State of Vermont vs. Greenfield, Eric

ENTRY REGARDING MOTION

Count 1, MARIJUANA-CULTIVATION GREATER THAN 25 PLANTS (28-1-15 Leer)
Count 2, MARIJUANA-POSSESSION 10 LB OR MORE (28-1-15 Leer)

Title: Motion to Suppress (Motion # 9)
Filer: Eric Greenfield
Attorney: David C. Sleigh
Filed Date: July 7, 2015

Opposition and supplemental reply memoranda filed by Defendant and by the State; hearing held on 8/26/15; record, and briefing completed 10/23/15.

The motion is GRANTED IN PART and DENIED IN PART.
See Decision, and Findings of fact and Conclusions of Law herewith.
Count 1of the Information (for felony marijuana possession in Stowe, Vermont on 1/18/15) is dismissed, without prejudice, for lack of *prima facie* case due to suppression of corroborating evidence, pursuant to VRCrP 4(b), 5(c).
Count 2 of the Information (for felony marijuana cultivation in Irasburg, Vermont) is dismissed, without prejudice, for improper venue under 13 V.S.A. § 4631 and VRCrP 18(a), 21, and pursuant to VRCrP 48(b)(2).

IT IS SO ORDERED, at Morrisville, Vermont.
Electronically signed on December 14, 2015, pursuant to V.R.E.F. 7(d).

Dennis R. Pearson, Superior Judge

Notifications:
David C. Sleigh (ERN 4491), Attorney for Defendant Eric Greenfield
Thomas M. Kelly (ERN 3300), Attorney for Plaintiff State of Vermont

STATE OF VERMONT

VERMONT SUPERIOR COURT
LAMOILLE UNIT

CRIMINAL DIVISION
DOCKET NO.

STATE OF VERMONT

v.

ERIC GREENFIELD

FINDINGS AND CONCLUSIONS ON MOTION TO SUPPRESS

Defendant Eric Greenfield is charged with two felony counts in this case, for possession of more than 10 lbs. of marijuana, and cultivation (as part of an indoor "grow operation") of more than 25 marijuana plants, both in violation of 18 V.S.A. § 4230(a)(4). The issue presented here is whether the State has lawfully obtained the evidence necessary to prove those charges, or whether the State's conduct, acting through the law enforcement officers involved here, did not comply with basic constitutional principles under Article 11 of the Vermont Constitution. This court concludes – recognizing that its legal conclusions ultimately carry no weight and would be reviewed *de novo* by the Vermont Supreme Court- that the warrantless search of Defendant's vehicle and the Rubbermaid plastic tote in his car cannot stand under any recognized exceptions to the warrant requirement, and that his "consent" to that search (at first verbal, later in writing) was insufficient to support the actions of the police in the parking lot where he and his car were detained; and that Defendant's admission that he had 10 lbs. of marijuana in his vehicle in a Rubbermaid tote, before the officer's "exit order" and virtual custody of the Defendant, was by itself an adequate basis for the later search warrant for his home and outbuildings in Irasburg, Vermont, where the extensive grow operation (and other incriminating evidence) was discovered.

Accordingly, Defendant's motion to suppress (filed July 6, 2015) is granted in part and denied in part, as follows: (1) all physical evidence seized during the stop of Defendant and his vehicle on January 18, 2015 is suppressed and excluded, as well as any statements he made after exiting the car; but (2) all physical evidence obtained during the search of his home in Irasburg was obtained pursuant to execution of a valid search warrant, and is not suppressed. Thus, although Defendant has not separately moved for dismissal of these charges under VRCrP 12(d), the State would have more than sufficient evidence to proceed on the charge of indoor marijuana cultivation, if it were properly brought in this Unit, in this county. But that offense occurred in Orleans County, in a different Unit, and prosecution and trial "shall" take place in that county and Unit. *See* 13 V.S.A. § 4601. There being no grounds for change of venue under 13 V.S.A. § 4631 and VRCrP 18(a) or 21, Count 2 for felony marijuana cultivation is dismissed, without prejudice, pursuant to VRCrP 48(b)(2).

With regard to Count 1for felony possession of marijuana, Defendant's oral admission that he had 10lbs. of marijuana in his constructive possession, in the Rubbermaid tote in his vehicle, is insufficient by itself without at least some corroborating evidence (physical or otherwise)- all of which is now suppressed- to support his "confession." After excising all ofthe remainder of the description of what occurred at the traffic stop from the affidavit of probable cause, the court must withdraw its earlier finding that probable cause has been established as to possession of 10lbs. of marijuana in Stowe, Vermont on January 18, 2015. Thus Count 1is also dismissed, without prejudice, pursuant to VRCrP 4(b), 5(c).

I. Findings of Fact

On Sunday, January 18, 2015 – the day before the Martin Luther King Holiday, on which the courts would also have been officially closed – Officer Kyle Walker of the Stowe Police Department was on regular traffic patrol near the Weeks Hill and Mayo Farm Roads in Stowe. At approximately 12:04 pm (just after noon) he observed a 2003 black Jeep Liberty with an expired inspection sticker. Walker pulled out and activated his blue flashing lights. The vehicle turned into the parking lot of the Swimming Hole athletic facility, and stopped. The officer approached the vehicle and the driver's side window; Walker states – under oath, in both the various affidavits here, and his deposition on May 5, 2015 – that he could immediately smell the distinctive odor of marijuana, both recently burned, and unburned, fresh, or "harvested" marijuana.[1] Walker has since variously described the smell as "extremely strong," and/or "overwhelming."[2]

Officer Walker's "priorities shifted" immediately at that point, from the traffic stop for the expired inspection sticker -he told the driver (who was identified as the Defendant Eric Greenfield) that was the basis for the stop, but there was never any further discussion about it, and no traffic violation ticket was ever issued – to his suspicion that marijuana was present, or at least implicated. Walker asked Defendant if he "had smoked" any or there was some marijuana in the car. Greenfield first said no,

---

[1]This court has concluded in other contested cases in this Unit that absent expert proof establishing the human olfactory system as capable of determining the presence of unburned marijuana with any degree of accuracy and reliability – which over several years and many invitations has yet to be presented – that such averments by law enforcement officers will generally be insufficient to support probable cause for a search warrant, especially when that fresh marijuana is triple-packaged (in individual sealed plastic bags, in a larger plastic trash bag, in a closed Rubbermaid plastic tote). Whereas trained canines may well be capable of doing so without interjection of any motive, calculation or thoughts of secondary gain (except perhaps the dog cookies given during training), the overriding human element in such situations makes this court skeptical of accepting such statements, without some independent corroboration, as sufficient to overcome important constitutional rights. Burnt marijuana, however, is entirely different, and here the officer stated under oath that he smelled both. There is no basis here to dispute the officer's inherently subjective recollection as to what he thought he smelled.

[2] "Overwhelming" seems to be a popular choice of descriptor in this type of case; another officer in one of those prior actions in this Unit used the same term to describe his level of certainty that he had smelled unburned marijuana (there another "grow operation" in the basement of a house some 25 yards from the vehicle in which the officer was slowly driving by). The court noted then that, at least according to the dictionary, if it was truly "overwhelming" the officer would have been rendered insensate.

that he had not smoked and that "didn't have any weed in the car." Walker then stated his observation that he had smelled it, and that he thought marijuana was present. Defendant did not respond. Walker then asked him directly "how much weed is in the vehicle?" Defendant hesitated, then replied "several pounds." Walker repeated that statement back to the Defendant, who confirmed it and said "yes." Officer Walker could also see a Rubbermaid tote in plain view in the back of the Jeep, and asked Defendant if he would "grab it" for him. Greenfield said "yes" again. The officer asked Defendant "how much was several pounds?" and the Defendant replied "ten." This was only a few minutes after the traffic stop.

At that point Walker "asked" Greenfield to exit the Jeep, but just having admitted to possessing 10 lbs. of marijuana in a Rubbermaid tote in the back cargo area of his car, it is academic whether this was actually a command, or a request.[3] Defendant was subjected to a brief pat-down search. Defendant was effectively in police custody at that point, whether or not a formal arrest was actually effected right at that moment. No *Miranda* rights were read or given to the Defendant after stepping out of the vehicle, or before the extended discussion which then subsequently occurred between Officer Walker and the Defendant as to whether consent would be given for a search of the Rubbermaid tote as well as the entire vehicle.

By that time another Stowe police officer had arrived on scene, and had pulled into the Swimming Hole parking lot, near where Defendant's car and Walker's cruiser were parked. It is not clear, but apparently standard practice that at least the flashing blue lights on Walker's cruiser were still on; there is no indication the second police vehicle had its lights flashing. The second officer remained in his cruiser while Defendant and Walker continued to stand around outside Defendant's car, in the cold, and discuss what to do about the Rubbermaid tote.

Officer Walker then engaged Defendant in a somewhat extended discussion with the obvious intent of trying to get Defendant to consent to a search of the vehicle and the Rubbermaid tote. Walker initially tried to get Defendant to sign the "Consent Form" right away, but Defendant wanted to "call his wife" first. Walker said "this parking lot is not the place for that" and read him the form, which included an acknowledgment that there was "probable cause" for the search. Defendant hesitated, threw up his hands, and declined to execute the preprinted card. Walker then told Defendant he was going to seize the vehicle and its contents, get a search warrant, and it would probably "take a day or two" for that process to be completed and for Defendant to get his car back. Or, as

[3] The entirety of the initial interaction between Officer Walker and the Defendant, through and including the point where Defendant exited the Jeep, cannot be independently confirmed by, or compared to any audio recording. Officer Walker forgot to wear his body mic when he first approached the Defendant's car; he did have it on later, for the second time he went back to talk to Defendant. (It is unclear on this record, but not material, exactly when Walker went back to his cruiser where he attached the mic to his belt.) There is also an alleged discrepancy in the timing of the cruiser video vs. the timing that Defendant's attorney has purportedly conducted with his own stopwatch. The court does not consider or rely on any such difference, as Defendant concedes the time lapse in any event was not long between the stop and the "exit order," and it is largely immaterial. The incriminating statement by Defendant that he had in his possession 10 lbs. of marijuana was made within several minutes of the initial stop (which itself is not challenged here).

Officer Walker helpfully explained, Defendant could consent "right now" and they would just "go through everything we need to go through."

Defendant continued to ask Walker about "what's going to happen?" and whether his car would really "be locked up for two days" to which Walker said "yes." Defendant complained he was "not really sure of his rights," at which point the officer reminded Defendant he had already admitted to possession of "several pounds of weed" which was "obviously a crime." Defendant then wondered whether he would "be able to like go about my day" if he just consented to the search, and Walker said "I think we can work on that, yes." But Defendant remained uncertain and hesitant, and Walker then said "we're going to deal with [this] problem," and explicitly told Defendant that if he did find 10 lbs. of marijuana that Defendant would be formally arrested and then "it would be up to the court clerk" as to when he might be released.

Defendant continued to be reluctant to provide consent for the search, and to sign the form. Officer Walker then suggested that Defendant could just "give him the tub with the weed in it." Defendant balked at that and just threw up his hands again. Walker told him again that he "could just reach in [to the car] and grab the tub." Defendant wanted to know "what's that going to do for me?" and whether he could do that without signing the form. Defendant continued to hesitate and they continued to talk about Walker seizing the car instead, with Walker stating that "if you give me consent to verify there's nothing left in the car then your car will go on the way."

Defendant then stated that "I don't feel like I understand the situation well enough to sign the card." Officer Walker was, however, insistent: "Why don't we get the weed out of the car? ...Why don't you pull the weed out and set it on the ground?" Greenfield did not verbally respond, but threw up his hands again, then finally just opened the back of the vehicle and removed the plastic Rubbernaid tote (or bin), which was still closed and the contents were not visible. Walker "asked" Defendant to open the tote. Defendant hesitated, and threw up his hands again, saying "It's out of the car, can't you just ...." Walker interrupted him, and stated forcefully "You want to open that."

Around that same time, the second Stowe officer exited his cruiser and carne up to where Walker and Greenfield were standing around the tote, with Walker trying to get Defendant to open it, although the second officer did not say anything. There was, and had been no overt show of any force by the officers. Greenfield eventually gave up, and opened the lid of the tote. Defendant was then asked several questions about the marijuana inside, e.g., whether it was processed, how it was packaged, etc. However, the marijuana itself was still not visible or in plain view, as inside the tote was a black plastic garbage bag that was closed. Officer Walker again "asked" Greenfield to open the black plastic bag, and Defendant complied. Inside the garbage bag were clear plastic bags containing what appeared to be harvested, processed marijuana.

Officer Walker then returned to his effort to try and get Defendant to sign the Consent Form to search the vehicle, and asked Defendant again to sign the card. Defendant again hesitated, and asked if "there was any chance he could get out of here today with my car if I sign that?" Walker replied "yes." However, Greenfield did not

actually sign the form, but instead told Walker verbally that he could search the vehicle. However, Walker persisted in trying to get a signed consent form, and asked Defendant again to sign the card. Defendant responded that he thought the officer was "trying to trick him," and Walker agreed that Greenfield "seemed very confused." Defendant then wanted to know when he could make a phone call, and whether he would be placed in handcuffs. Walker told Defendant he would not be placed in handcuffs, although he would be charged with (actually, cited for; officers do not decide what charges will actually be filed) marijuana possession. As to making a phone call, Walker "didn't know" when that might happen.

Greenfield was still reluctant to sign the consent form, and asked whether "it would help him." Walker did not really answer the question, but instead responded that if there was no additional "contraband" in the vehicle "he had nothing left to hide." Defendant finally relented and signed the consent form. Greenfield then went and sat in the second cruiser; there is no assertion that Defendant made any statements during that time, and none are at issue here.

Walker then searched the Jeep in the Swimming Hole parking lot, and found an invoice from the Vermont Electric Co-Op ("VELCO") for electrical usage at Defendant's horne in Irasburg, plus money order receipts used to pay VELCO. The officer also found, and seized a cell phone and a Kindle tablet.[4] Given the indicated payments to VELCO exceeding $1000 each, and the bill which indicated 8287 KwH electrical usage at Defendant's horne in a single month, and Greenfield's possession of 10 lbs. of marijuana in a Rubberrnaid tote in his car, Walker immediately suspected that Defendant had a possible marijuana "grow operation" at his residence in Irasburg.

Walker then went to the other cruiser, and began to question Greenfield about the suspected grow operation, and whether there would be additional marijuana at his horne in Irasburg. However, Greenfield did not respond to any of those questions, and made no statements and provided no further information. Defendant also declined to respond to Walker's request that the police now be allowed to search his horne as well. As noted, Defendant was never given any *Miranda* rights at any time during the encounter between him and Officer Walker at the Swimming Hole parking lot. Defendant was arrested and taken to the Stowe PD, where he was lodged, and a $5o,ooo bail requirement imposed. Greenfield was detained, and held in custody until his initial appearance on the two felony charges in this case on January 20, 2015, at which his bail was reduced to a $25,000 unsecured appearance bond (plus other conditions of release).

Meanwhile, the vehicle was seized and transported to the Stowe PD as well. A further search of the car, pursuant to the consent form and a subsequent warrant (see below), did not discover any further incriminating items or evidence. In the black plastic garbage bag from inside the Rubberrnaid tote were 11 clear "turkey basting" bags full of

---

[4] A warrant was eventually issued (on January 26, 2015) for an electronic search of the cell phone and tablet, but no evidence from those items relevant or material to these charges was apparently discovered, and thus the search of those two items is not contested here. Of course, the cell phone and tablet were also unconstitutionally seized along with the 10 lbs. of marijuana from the car, as discussed herein.

harvested marijuana, with approximately 1lb. in each of 10 bags, and 10 oz. in the nth bag. Nothing else of importance was found in the tote or the garbage bag.

With everything that law enforcement now had from Defendant, the police obtained a search warrant at around 8:oopm that evening of January 18, 2015, for Defendant's house and outbuildings in Irasburg, as well as the Jeep vehicle. There were already officers in place at the residence, parked in the driveway – Defendant had told Walker that his wife was not home, and no one else was likely at the home; Greenfield himself was, of course, detained and in custody – awaiting authorization to begin the search. However, even before the warrant actually issued, there was entry into the home to perform a preliminary "security sweep," but the State does not assert or rely on any information obtained during that initial entry into the house, nor were any items seized.[5]

The search warrant was based on Officer Walker's affidavit which *inter alia* related the information developed, and items seized from Defendant at the earlier stop and seizure that afternoon in the Swimming Hole parking lot – i.e., the VELCO bill and money orders, and the packaged marijuana itself (which by that evening had been field-tested at the Stowe PD)- including the initial admission right after the stop that he did have 10lbs. of marijuana in the Rubbermaid tote in the back of his Jeep.[6] Upon official execution of the warrant at Defendant's home at 646 Currier Road in Irasburg, law enforcement discovered "an extensive and very sophisticated marijuana growing operation ...in the basement of the home." There were two separate "grow rooms," 106 juvenile plants and 3 mature plants. There was another large black plastic garbage bag with 4 more clear "turkey basting" bags filled with harvested marijuana, ultimately weighed at a little more than 4lbs. The usual "grow operation" equipment was discovered, including lamps, C02 generators, emergency power supply, watering and ventilation systems, and other such items. They found $8960 in cash in a kitchen cabinet, and in a second floor bedroom in a hidden compartment under the floor they located a safe that was secured to the floor and locked. However, they were able to open the safe, and inside it found 4 sapphires and 5 raw uncut diamonds, wrapped in tissue paper in a small plastic baggie.[7] There were multiple small bags and jars of processed marijuana scattered throughout the home.

II. Conclusions of Law

The controlling jurisprudence under Article 11 of the Vermont Constitution is summarized in *State v. Birchard,* 2010 VT 57, '1!s 11-13, 188 Vt. 172, 178-180, as follows: "Vermont law ordinarily requires suppression of evidence obtained as a result of an

---

[5] Defendant here does not specifically challenge that initial entry, or preliminary "security sweep" into his home before the warrant actually issued. The court therefore does not address whether that tactic here, or even generally complies with constitutional requirements.

[6] There was also the typical opening boilerplate about how "drug dealers" operate, etc.

[7] Police also found a small container of what they suspected to be LSD in the safe, but no charge related to that discovery has been brought against Defendant.

illegal search....While federal law has developed some exceptions removing impediments to expedient law enforcement operations, [Vermont] has been more conservative in its adherence to the values underlying Article 11....As a result, Vermont law resolutely maintains that law enforcement must seek, and a magistrate must grant, a search warrant prior to investigating the contents of a person's home, vehicle, or personal effects.... [W]arrantless searches are per se unreasonable except in a few jealously and carefully drawn exceptional circumstances....Under the Vermont Constitution, unlike the federal constitution, protection against warrantless searches extends to automobiles....To search a vehicle without a warrant, [the Vermont Supreme Court has] so far held there must be probable cause and exigency....Law enforcement officers may not search a vehicle without a warrant once the occupant has been put into police custody, absent a need to protect officers or preserve evidence of a crime.... [T]he latter requirement also requires some showing of exceptional circumstances....The mobility of a car or its contents is not per se an exigent circumstance.... Similarly, the fact that a container for which the police have probable cause is found in a vehicle does not, in and of itself, constitute an exigency or other exception sufficient to dispense with the warrant requirement and invade an otherwise legitimate and reasonable expectation of privacy in that container." *Id.* (cits. omitted; emphasis added).

Also in *Birchard:* "[P]olice cannot open and search a closed container when there is ample opportunity to obtain a warrant prior to doing so....Even where probable cause exists to seize a closed container, that does not override the requirement for a warrant: police must proceed in the least intrusive manner with respect to a Defendant's expectations of privacy in that container, obtaining a Defendant's permission to search or seeking the oversight of a magistrate." *Id.,* 13, 188 Vt. at 179 (cits. omitted). "[T]he container may be either opened pursuant to a warrant or under an exception to the requirements of Article 11...[but our Court has] declined to approve of administrative efficiency as an adequate grounds for such an exception, ...choosing instead to preserve, whenever possible, the essential checks on unrestrained executive power by enduring review by an impartial magistrate prior to a governmental invasion of privacy." *Id.,* at 180 (cits. omitted).

Birchard again: "[P]robable cause to arrest ...does not create an exception to the warrant requirement for a closed container search. For, as already stated, probable cause to arrest does not alone make a warrantless search lawful. ...Where Defendant had an expectation of privacy- as here in the closed [Rubbermaid tote] -the burden then shifts to the State to show a warrantless search is not prohibited under Article 11.... There must be a 'well-recognized exception' ...that the warrantless search was justified because of a threat to officer safety, to preserve evidence, or another exception 'factually and narrowly tied to exigent circumstances and reasonable expectations of privacy'." *Id.,* 188 Vt. at 181-82 (cits. omitted).

Greenfield was effectively in police custody when Officer Walker "asked" him to exit his vehicle, after admitting to the officer that he had 10 lbs. of marijuana in the car, and tacitly acknowledging that it was in the Rubbermaid tote in the back of his jeep. No reasonable person would believe that he or she would have been free to leave at that

point; it is immaterial that the officer did not formally pronounce him to be under arrest, or display any other indicia of custody, such as placing Defendant in handcuffs. The fact that a person cooperates, and acquiesces to virtual police detention at that point, especially during what was effectively a roadside traffic stop (although actually in a more secure parking lot) with its inherent risks, and does not require escalation into a more aggressive arrest with force, should not then be counted against him in the determination whether it was in fact a virtual arrest. *Cf, e.g., State v Sole,* 2009 VT 24, s 16-19, 185 Vt. 504, 511-12 (when a person is deemed to be "in custody"). Thus, under *Birchard, supra,* from that point forward Officer Walker was required to obtain a warrant to search both the vehicle and the Rubbermaid tote,[8] unless there was either consent to the search, or some other exigent and extraordinary circumstances.

The State in this case does not posit any exigent circumstances. Although it was a Sunday afternoon, there is no reason why Walker could not have simply seized the vehicle and its contents (including the Rubbermaid container) and eventually have obtained a search warrant for both- he did after all obtain a warrant by 8:oopm that evening- as Defendant's admission alone would have been sufficient for probable cause to search the car and contents.9 The car and the tote were not going to disappear right there in the parking lot, like Marty McFly in the Delorean. There was no risk or threat to Officer Walker. What the State ultimately relies on here is the primary argument that Greenfield's consent to search, first orally and then later by signing the consent card, was voluntary and thus adequate to support the intrusion, and seizure of evidence from the car and the Rubbermaid tote. The determination of voluntariness in turn depends on application of the standards announced in cases such as *State v Sole, supra.*

First, *Sole* reiterates that the discussion surrounding the request for consent to search, and Defendant's statements made in that connection, are not subject to *Miranda;* little time need be spent on Defendant's arguments in that regard. *Id.,* 2009 VT at 22, 185 Vt. at 514. Second, "[f]or consent [to search] to be valid, it need only be volitional, not a 'knowing and intelligent waiver of constitutional rights'....Relevant circumstances include the Defendant's age, intelligence, and emotional state, as well as the actions oflaw enforcement officials .... '[C]ustody alone has never been enough in itself to demonstrate a coerced ... consent to search'...." *Id.,* s 23-24, 185 Vt. at 514-15 (cits. omitted). Third, the "State bears the burden, in such an inquiry, of demonstrating that the consent was freely given and not 'coerced by threats or force, or granted only in submission to a claim oflawful authority'." *Id.,* 23 (cits. omitted).

---

s There is no real dispute, and it is obvious, that before it was removed from the car by Defendant and opened up by him that the Rubbermaid container was closed, and its contents were not visible or in plain view, and thus still subject to Greenfield's protected expectation of privacy, which in turn triggers the application of Article 11. *Birchard, supra; State v Bauder,* 2007 VT 16, 181 Vt. 392; *State v. Savva,* 159 Vt. 75, 85 (1991).

9 Greenfield also does not mount a specific challenge to his statements during the first few minutes of his encounter with Officer Walker. Until he made the statement about how much marijuana he had in the car, he was not in virtual custody and thus *Miranda* warnings were not yet required. However, after Defendant exited his car, any substantive statements made by him (e.g., describing the packaged marijuana in the Rubbermaid bin) must be suppressed for lack of the required *Miranda* warnings.

Greenfield's interaction with Officer Walker in the Swimming Hole parking lot bears several similarities to the encounter in *Sole:* Walker's explanation that there could be delay if he had to seize the vehicle and obtain a warrant, but that the car and its contents would eventually be searched, was "neither inaccurate nor disingenuous." *Id.,* 26, 185 Vt. at 516. Greenfield's repeated hesitation, and "extreme reluctance to consent reflects that he was not simply cowed by the circumstances of his involuntary detention, interrogation, incrimination, ...and the repeated requests for consent." *Id.* Indeed, on this record, one might conclude that Defendant was also intentionally attempting to "game" the officer and disrupt, and deflect Walker's efforts to obtain consent. But there are important differences with *Sole* as well.

Here, Officer Walker was not quite as effusive, or unambiguous in repeatedly informing Greenfield that it was "totally his choice" whether or not to give consent, as was the trooper in *Sole.* The overall tenor of Walker's statements to Defendant in this case strongly, and repeatedly suggested that Defendant should just give in and allow the search. Whereas the trooper in *Sole* had merely said that the warrant process "takes a little bit of time," *id.,* 6, 185 Vt. at 508, here Walker was more emphatic that it could take up to 2 days, but if Defendant agreed to the search, his car (but probably not him) would be "on its way" as soon as the search was completed if "nothing else" (other than the marijuana in the Rubbermaid tote) was found in the car.[10] Unlike the defendant in *Sole,* who had at the time of his consent to search only admitted to possession of a minor amount of marijuana in his jacket pocket, here Greenfield had already admitted the felony offense of possession of 10lbs. of marijuana in the Rubbermaid tote.

In that context, Officer Walker's instructions to Defendant were much more blunt, with a clear expectation that Greenfield would submit, and comply: he emphasized to Defendant that what he had already admitted was "obviously a crime," and that despite Greenfield's repeated hesitation and resistance to allow the search, "we're going to deal with [this] problem." With regard to the Rubbermaid tote, Walker told Defendant repeatedly that he "could just reach in [to the car] and grab the tub," and "Why don't we get the weed out of the car? Why don't you pull the weed out and set it on the ground?" When Defendant complied and pulled the still-closed tote out of the back of the Jeep and set it on the ground, Walker requested that Greenfield simply open it, and when Defendant did not respond, Walker stated: "You want to open that." Greenfield again complied, and only then did the packaged marijuana become visible. In this case this court concludes that the officer's "clear and unambiguous statements were [an] assertion of colorable authority [intended] to coerce Defendant's permission." *Sole,* 29, 185 Vt. at 517 (cit. omitted; emphasis added). Defendant's verbal consent to search, and his cooperation in that search by actually opening the Rubbermaid tote and the black plastic bag inside it, were not voluntary or volitional in this instance.[11]

---

[10] In fact, that statement did turn out be untrue, as the vehicle was still seized and taken to the Stowe PD, despite both oral and written consent and a search of the vehicle in the parking lot, and even though no other contraband, or anything inherently illegal in and of itself, was found in the Jeep.

[11] The later written consent to search by signing the consent card is really academic here, since (as noted) nothing else inherently incriminating was found in the vehicle, and there is nothing from the later search of the cellphone and Kindle tablet seized from the vehicle that is pertinent here.

The State alternatively argues that the 10 lbs. of marijuana in the Rubbermaid tote should not be subject to suppression, and should not be excluded as evidence, because it would have been "inevitably discovered" during a subsequent lawful search of the vehicle according to the warrant which was obtained later that day, at around 8:oo pm. On this point the State is probably correct that the Vermont Supreme Court has not entirely foreclosed that argument under Article 11, while noting that the "inevitable discovery" doctrine necessarily involves a fair degree of speculation. *See, e.g., Birchard, supra,* at s 21-23, 27, 31, 188 Vt. at 183-84, 186, 187. And, in *Birchard* the Court ultimately declined to use that doctrine to save the search of the closed container (there, a backpack) despite spending some time analyzing its possible application. This court will not attempt to predict what the Court might do on these facts. It is sufficient for this court to conclude on this record, given the jealous protection of the warrant requirement consistently illustrated by cases such as *Birchard,* that this is an inappropriate case to apply the "inevitable discovery" exception to an otherwise unlawful search.

Again, the actual evidence seized from Defendant and his Jeep – the Rubbermaid tote with the 10 lbs. of marijuana, the cellphone, the Kindle tablet, and the VELCO bill and money orders – is suppressed and excluded. Accordingly, the court turns next to the claim that the subsequent search of Defendant's home in Irasburg, resulting in the tangible evidence of the extensive marijuana grow operation Greenfield had at his home, was also unlawful, even though conducted under the auspices of a search warrant, because the information presented to the judge – minus the evidence now suppressed, as illegal "fruits"[12] - would have been inadequate to establish probable cause and justify issuance of the warrant. The State is left with the Defendant's own admission that he was in possession of 10 lbs. of marijuana in the Rubbermaid tote in the back of his car. Would that alone be enough to support probable cause and issuance of the warrant for the search of his home, where the 4th Amendment and Article 11 are at their strongest?

First, it must be emphasized that the existence of the VELCO bill and money orders, purportedly showing extraordinary electrical usage at Defendant's home, is probably irrelevant under any approach. Without more – i.e., "information to put the power records in context" – that type of evidence is insufficient to establish probable cause for a warrant suspecting a marijuana grow operation. *See State v McManis,* 2010 VT 63, 18, 188 Vt. 187, 196. But in any event, it is this court's conclusion that the VELCO bill and money orders should never have been available to buttress the search warrant request for Greenfield's home.

Accordingly, the court returns to the controlling question just phrased. Defendant argues that the mere admission to possession of 10 lbs. of marijuana in a Rubbermaid tote in the back of one's car is insufficient to establish probable cause to search one's home, absent further information to establish some "necessary nexus" between that act of possession alone, and the home. *Cf State v. Weiss,* 155 Vt. 558, 563 (1991). But Defendant also candidly acknowledges that this question has been answered

---

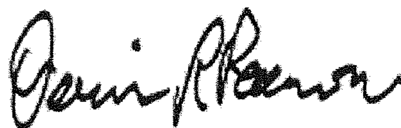
[12] *Cf, e.g., State v. Sole, supra,* '11 20-22, 185 Vt. at 513-14; *State v. Peterson,* 2007 VT 24, '1fs 22-28, 181 Vt. 436, 444-47·

affirmatively by some other states, and that such evidence alone is enough to support probable cause for a search of the horne. *See, e.g., State v. Keefe,* 141 P.3d 1147, 1157 (noting other jurisdictions have allowed the search of a horne, although in some instances there did appear to be additional corroborating information). Again, this court declines to predict what the Vermont Supreme Court may say on this issue.

For this court, however, the salient fact is that Defendant admitted to transporting 10 lbs. of marijuana in a Rubberrnaid bin, or container. To this court, that fact alone makes it more likely than not to believe that further evidence related to marijuana possession would be found in Defendant's horne. Ten pounds is a lot of marijuana, and taking the trouble to carry it around in a closed Rubberrnaid container certainly suggests a degree of planning and foresight which in turn supports the likelihood it is not just for personal consumption. It is to this court a logical inference that further evidence as to that level of marijuana possession would more likely than not be found in Greenfield's horne, and thus on that basis alone there was sufficient probable cause for the warrant to issue at 8:oo prn on January 18th. Finally, the search for further evidence of marijuana possession is precisely what the warrant application, and warrant itself referenced; it is unnecessary, and irrelevant whether what they really suspected Defendant of was marijuana dealing and/or cultivation, but failed to present any information to support that conjecture (i.e., that Greenfield was a "known drug trafficker"). And, once properly inside the horne pursuant to the warrant, all of the cultivation and "grow operation" evidence was in plain view and lawfully seized. That evidence will not be suppressed here, because the warrant for the search of Defendant's horne was proper, and based on adequate probable cause. *See McManis, supra,* s 5-7, 188 Vt. at 191-92, *citing, e.g., State v. Goldberg,* 2005 VT 41, 8, 178 Vt. 96 (further cites omitted); *State v. Weiss, supra.*

What to do with these charges pending in this Unit must still be decided. As noted, the marijuana cultivation charge must be brought in Orleans County, in that Unit, and Count 2 of the Information is dismissed, without prejudice, on that basis. As for the felony possession charge, as noted Count 1 cannot be sustained on this record, without at least some corroborating evidence beyond Defendant's oral statement, or "confession" in the Swimming Hole parking lot, that he was in possession of the 10 lbs. of marijuana. *See State v. Weller,* 162 Vt. 79, 82-83 (1994). All otherwise-available corroborating evidence, including the 10 lbs. of marijuana itself, is now suppressed and excluded from consideration in this case. Count 1 will therefore also be dismissed, without prejudice.

IT IS SO ORDERED, at Morrisville, Vermont, this _14th_ day of December, 2015, pursuant to VREF 7(d).



Dennis R. Pearson, Superior Judge