STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: August 5, 2013)

STATE OF RHODE ISLAND	:	
	:	**C.A. No. P1-2012-0915B**
v.	:	
	:	
KEVIN COLQUHOON	:	

DECISION

TAFT-CARTER, J. The Defendant, Kevin Colquhoon, brings a motion to suppress all evidence, including his identity, seized by Pawtucket Police officers from his apartment at 361 Fountain Street, Pawtucket, Rhode Island, on December 13, 2011. Mr. Colquhoon argues that the police's warrantless entry into the building and subsequent entry into his apartment violated his rights as secured by the Fourth Amendment to the United States Constitution and article I, § 6 of the Rhode Island Constitution. He contends that because no recognized exception applies to justify these illegal entries, all evidence seized as a result of the entries must be suppressed. The State of Rhode Island, by and through its Attorney General, opposes Mr. Colquhoon's motion to suppress. It argues that the police did not illegally enter any constitutionally-protected spaces at 361 Fountain Street and, even if they did, their entries were justified by several exceptions to the warrant requirement.

I

Facts and Travel

The facts underlying the instant motion to suppress are as follows. On December 10, 2011, Detective Dennis Smith (Detective Smith) of the Pawtucket Police Department's narcotics

unit and DEA Drug Task Force[1] became involved in an investigation after he was contacted by DEA Agent Mellitus (Agent Mellitus) regarding an upcoming shipment of narcotics to a Pawtucket address. Agent Mellitus informed Detective Smith that he had received a tip through a confidential informant that approximately 250 pounds of marijuana was being transported by a Cape Cod Express tractor-trailer truck to 367-369 Fountain Street sometime on December 13, 2011. Agent Mellitus told Detective Smith that the shipment originated in California and was addressed to a motorcycle shop at the Fountain Street address. Detective Smith knew that a motorcycle shop was formerly located at 367-369 Fountain Street. This fact was significant because, based on Detective Smith's experience and training, supplying a false recipient for drug shipments was common in case of interception.

Detective Smith testified that the contents of Agent Mellitus' tip and his experience investigating drug trafficking in Pawtucket led him to conclude that the actual intended recipient of the shipment was Oral Swaby. Mr. Swaby was an individual known to police as an important member of the local drug market. Detective Smith knew that Mr. Swaby had accepted packages of suspected narcotics at other locales in the past. Detective Smith testified that he had begun an investigation of Mr. Swaby prior to receiving Agent Mellitus' tip and knew that Mr. Swaby lived in the house located at 373 Fountain Street. This house was immediately adjacent to 367-369 Fountain Street. Accordingly, Detective Smith organized a covert, joint police-DEA surveillance operation to cover both 367-369 and 373 Fountain Street (collectively, the Fountain Street addresses) for December 13, 2011. He designated Mr. Swaby as the operation's principal target.

[1] Detective Smith testified that owing to his position as a long-time narcotics officer and DEA liaison officer in Pawtucket, he has extensive training and experience in the areas of drug enforcement and interdiction duty in that city. Such training includes methods for drug identification, tracking large-scale drug shipments, and investigating organized drug distribution networks.

There were fifteen police and DEA officers in the December 13, 2011 operation. Detective Smith designed a deployment plan wherein several officers were stationed at fixed locations around the Fountain Street addresses. Other officers were designated for roving surveillance. Detective Smith also had access to live-streaming aerial surveillance video footage provided by a Homeland Security helicopter.

Detective Smith testified that the December 13, 2011 operation began at approximately 8:30 am, when he and several officers took up positions around the Fountain Street addresses. Detective Smith testified that the remaining officers arrived in small groups during the next two hours and took up various stationary and roving positions throughout the neighborhood. All of the officers were in position by noon. Upon his arrival, Detective Smith testified, he remained in a parked, unmarked police van with 2 other officers. The van was located in the parking lot of an antique shop approximately two city blocks to the south of 367-369 Fountain Street. Detective Scott Sullivan (Detective Sullivan) was posted to a fixed observation post in a Dunkin' Donuts parking lot immediately north of 373 Fountain Street. There was no one observing the far side or rear of the building, however.

Detective Smith testified that, although he was aided by binoculars, his view of the property was hampered by a Subway sandwich shop and a stockade fence. The fence ran across the entire south side of 367-369 Fountain Street. He could not see the front, back, or north side of 367-369 Fountain Street. Detective Smith testified that he could only see the top 2 or 3 inches of the green door located on the south side of the building at 367-369 Fountain Street. This green door led to two second-floor apartments with the address of 361 Fountain Street. At the time, Detective Smith testified, he did not know that the green door led to apartments. Detective

Smith testified that because of his hampered view, he relied on the helicopter video feed and the observations of other officers to get a complete picture of the scene.

At approximately 1:20 pm, the Homeland Security helicopter spotted a Cape Cod Express tractor-trailer truck exiting I-95 and proceeding toward the Fountain Street addresses. The truck stopped in front of 367-369 Fountain Street at approximately 1:30 pm, and the driver unloaded a single wooden pallet containing four cardboard boxes wrapped in cellophane packaging and black plastic. A man, later identified as the Defendant, Kevin Colquhoon, was seen exiting the alleyway of 367-369 Fountain Street and meeting with the driver upon his arrival. After a brief conversation, Mr. Colquhoon and the driver pushed the pallet into the south side alleyway of 367-369 Fountain Street and placed it next to the green door.

Once the truck departed, Mr. Colquhoon took approximately 15 minutes to dismantle the pallet. He first removed the exterior wrapping, and then began carrying the boxes, one at a time, through the green door and into the building. Detective Smith testified that before Mr. Colquhoon finished unloading the boxes and carrying them into the building, Mr. Swaby arrived on the scene. Detective Smith testified that Mr. Swaby helped Mr. Colquhoon finish carrying the boxes into 361 Fountain Street, then threw the pallet and the discarded plastic wrapping behind the building, before following Mr. Colquhoon inside through the green door. Mr. Swaby closed the green door after he entered it, and Detective Smith testified that no one else was seen entering the green door once Mr. Swaby went inside.

Detective Smith testified that he witnessed this entire series of events on the Homeland Security helicopter's live video feed, and his observations were corroborated by eyewitness reports from several roving police units. He testified that upon the pallet's delivery at approximately 1:30 pm, he understood that the tip provided by the confidential informant to

Agent Mellitus was basically accurate. This was corroborated by the pallet's delivery and Detective Smith's observations of the pallet being broken down and its boxes taken inside through the green door. Thus, Detective Smith knew at that time that the suspected marijuana was in the building, although he did not know where in the building it was located. Detective Smith testified that at that time he did not think he had sufficient probable cause to obtain a search warrant, however.

Mr. Swaby remained inside 361 Fountain Street for approximately two and one-half hours. Detective Smith testified that at approximately 3:50 pm, Mr. Swaby was seen exiting the green door and carrying a gray duffel bag.[2] Detective Smith stated that Mr. Swaby walked to 373 Fountain Street and entered the house, but remained inside for only 1 or 2 minutes before exiting out of a back door and getting into his vehicle, a gold Lincoln Navigator. Detective Smith testified that Mr. Swaby was observed carrying the gray duffel bag when he entered his Navigator. Mr. Swaby's entrance into and exit from 373 Fountain Street was witnessed by Detective Sullivan from his fixed observation location in the Dunkin' Donuts parking lot adjacent to 373 Fountain Street.

Detective Smith, along with several other police units, followed Swaby as he departed 373 Fountain Street and kept him under constant surveillance. Detective Smith testified that he witnessed Mr. Swaby drive into a parking lot located at 72 East Street—a trip covering four city blocks and taking less than 5 minutes. Within seconds of Mr. Swaby's arrival at 72 East Street, Smith witnessed a man, later identified as Justin Warner, exit a green Toyota sedan already

[2] Detective Smith testified that because the Homeland Security helicopter had run low on fuel and departed the scene following Swaby's entrance into 361 Fountain Street, he had ordered Pawtucket Police Officer Medeiros (Officer Medeiros) to station himself in the second-floor stairwell of a nearby building to continue observations of the green door leading to 361 Fountain Street. Thus, Officer Medeiros was the first officer to observe Swaby exit 361 Fountain Street at 3:50 pm.

parked there. Mr. Warner entered the passenger side of Mr. Swaby's vehicle. Mr. Warner then exited Mr. Swaby's vehicle no more than 30 seconds later, carrying the gray duffel bag that Mr. Swaby had taken from 361 Fountain Street a few minutes before. Detective Smith observed Mr. Warner place the duffel bag into the green Toyota before entering the driver's side door.

Mr. Swaby and Mr. Warner then departed 72 East Street in their respective vehicles. Several police units followed Mr. Warner for a short distance after his departure before pulling him over and arresting him. Detective Smith testified that Mr. Warner's vehicle was searched and the gray duffel bag recovered. Detective Smith stated that a search of the duffel bag showed that it contained 2 to 3 pounds of a substance later identified as marijuana. Detective Smith testified that at this time he believed that he had sufficient probable cause to request a warrant to search 367-369 Fountain Street. He waited to apply for one, however, because he wanted to further observe Mr. Swaby's activities and obtain more evidence.

In the meantime, Mr. Swaby returned to 361 Fountain Street and parked his Navigator in the rear alleyway next to the green door. Mr. Swaby was observed entering the green door before reappearing a few minutes later carrying a large, black plastic trash bag. The black plastic trash bag was larger than the bag Mr. Swaby delivered to Mr. Warner. Mr. Swaby placed the plastic bag into his Navigator and proceeded back to 72 East Street. Detective Smith, maintaining constant surveillance of Mr. Swaby, followed him to 72 East Street. The trip took less than 1 minute. Detective Smith testified that upon Mr. Swaby's arrival at 72 East Street, he observed Mr. Swaby park next to a Jeep Cherokee. Detective Smith witnessed the Jeep's driver—later identified as Kirk Thompson—exit the Jeep, open the Jeep's rear hatch, and unfold the rug. Detective Smith then observed Mr. Thompson approach Mr. Swaby's vehicle and take the black plastic trash bag from inside. Detective Smith testified that as Mr. Thompson began

placing the bag into the back of his Jeep, he and several officers closed in to arrest Mr. Thompson and Mr. Swaby. According to Detective Smith, Mr. Thompson dropped the bag upon seeing the officers, which split open and spilled a substance consistent with what was later confirmed as marijuana onto the ground. The bag, in fact, contained approximately 20 pounds of marijuana. Detective Smith testified that he then proceeded to the driver's side of Mr. Swaby's Navigator, ordered him out, searched his person, and seized a set of keys. Detective Smith testified that he retained Mr. Swaby's keys because he thought that they might be useful to secure the marijuana at 361 Fountain Street. Thus, Detective Smith testified that even before he left the East Street parking lot, he was going to take steps to secure the marijuana in the building at 367-369 Fountain Street. Detective Smith testified that "secure" meant: make sure the marijuana was not destroyed or cleared from the building. Following his arrest, Mr. Swaby was transported to the Pawtucket Police Station. These events occurred at approximately 4:00 pm.

Detective Smith and 4 to 5 officers returned to 361 Fountain Street at approximately 4:15 pm, ten to fifteen minutes after Mr. Swaby and Mr. Thompson were arrested. Detective Smith testified that at this time he was firmly convinced that the Cape Cod Express shipment, as Agent Mellitus had warned, contained a significant quantity of marijuana. He testified that he did not believe that his officers' cover had been detected between the delivery of the pallet and Mr. Swaby's first exchange at 72 East Street two and one-half hours later. Detective Smith testified that he did not think that the arrestees had alerted Mr. Colquhoon because their cell phones were seized immediately upon their arrests. Nonetheless, Detective Smith testified, he believed that Mr. Swaby's failure to promptly return from his latest drug exchange tipped Mr. Colquhoon to the police presence outside of 361 Fountain Street. Detective Smith testified that this belief was

based on past experiences wherein drug dealers regularly destroyed drugs when their couriers did not promptly return from drug sales.

Owing to his belief that evidence was being destroyed, Detective Smith testified, he decided to enter 361 Fountain Street and secure the marijuana located within, despite lacking a search warrant. Detective Smith testified that, despite his fears, he did not take any steps to ascertain what was needed to secure the building and the outside perimeter before deciding to enter the building.

Accordingly, at approximately 4:30 pm, Detective Smith and 4 to 5 officers approached the green door leading to 361 Fountain Street, knocked on the door, and verbally announced their presence. When no response came, Detective Smith used the keys seized from Mr. Swaby to unlock the green door and enter the building. Detective Smith testified that a stairwell containing a set of stairs leading up to 361 Fountain Street was located immediately behind the door. Detective Smith testified that he could detect a strong odor of fresh marijuana coming from the stairwell when he opened the door.

Immediately after opening the green door, Detective Smith and the officers ascended the stairs and entered a hallway at the top containing two numbered doors. The doors were 3 to 4 feet apart. At this time, Detective Smith realized that he had entered an area containing apartments. He knew that he and his officers were in a locked common stairway to the 2 apartments. There was no doubt that he was in a residential space.

Detective Smith testified that he could not determine from which apartment the strong smell of marijuana emanated. Thus, Detective Smith testified, he had an officer knock on the door numbered "1." Zaira Jaffrey answered. Ms. Jaffrey testified that she and her family had lived in the apartment since May 2011. She stated that the ground-floor door was always kept

locked and neither she nor Mr. Colquhoon had many visitors. She testified that mailmen and package delivery services never entered the stairwell or used the hallway because the apartments' mailboxes were located on the front of the building. Ms. Jaffrey testified that only she, Mr. Colquhoon, and the landlord had keys to the ground-floor door. Ms. Jaffrey testified that, in fact, she stored her child's stroller in the hallway outside of her apartment door because she felt that the hallway was a private space. Thus, Ms. Jaffrey testified, she was surprised to see the officers in the hallway on December 13, 2011.

After ascertaining that the apartment numbered "1" was of no interest to his operation, Detective Smith turned his attention to apartment "2." He first knocked on the apartment door and announced his presence. There was no response. Detective Smith testified that he put his nose to the door to confirm the odor of marijuana. He then put his ear to the door and heard voices and footsteps. Detective Smith noted that he did not hear a toilet flush, the dragging of large containers, or words of alarm. In fact, Detective Smith admitted that to destroy 250 pounds of marijuana would take quite a bit of time. Nonetheless, believing that such noise signified the destruction of evidence, Detective Smith opened the door with the keys taken from Mr. Swaby and entered the apartment with his officers.

Detective Smith testified that upon entry, he believed he was in an emergency situation. He and his officers immediately conducted a protective sweep of the apartment to ascertain and neutralize any potential dangers. Because the apartment contained only three rooms—a kitchen, attached living room, and rear bedroom—Detective Smith sent two officers into each room during the sweep. Mr. Colquhoon, the only person in the apartment, was apprehended by Detective Smith in the rear bedroom. Detective Smith testified that while arresting Mr. Colquhoon in the rear bedroom, he saw in plain view large quantities of marijuana, two digital

scales, packaging material, and other drug paraphernalia. Detective Smith ordered his officers to secure 361 Fountain Street, but not to search Mr. Colquhoon's apartment until he obtained a warrant. Detective Smith also ordered his officers to secure 373 Fountain Street at that time. He had Mr. Colquhoon sign a "consent to search" form and a "waiver of rights" form before escorting him to the Pawtucket Police Station. The "waiver of rights" form was time-stamped 5:17 pm.

Upon remitting Mr. Colquhoon into custody at the Pawtucket Police Station, Detective Smith drafted two affidavits to obtain search warrants for Mr. Colquhoon's apartment at 361 Fountain Street and the house located at 373 Fountain Street, respectively. Detective Smith spent approximately 45 minutes to one hour drafting the affidavits. Both affidavits contained information that Detective Smith and his officers had compiled throughout the December 13, 2011 operation, including the confidential informant's tip regarding the incoming shipment of marijuana on a Cape Cod Express tractor-trailer truck, the delivery of the pallet by a Cape Cod Express truck to 367-369 Fountain Street, Mr. Colquhoon's and Mr. Swaby's dismantling of the pallet, their movement of the boxes into 361 Fountain Street, Swaby's marijuana exchanges at 72 East Street, and Detective Smith's observations of marijuana in plain view in Mr. Colquhoon's apartment. Based upon this information, Detective Smith obtained the search warrants for the Fountain Street addresses from Magistrate Joseph Ippolito at approximately 8:00 pm. The warrants authorized law enforcement agents to search for, and seize, any marijuana, related drug paraphernalia, and U.S. currency found at the Fountain Street addresses.

Once the search warrant for Mr. Colquhoon's apartment at 361 Fountain Street was obtained, Detective Sullivan—designated as the "seizing" officer—conducted a thorough search

of the apartment. Throughout his search, Detective Sullivan took numerous photographs of the rooms before seizing any items.

Detective Sullivan testified that he began his search in the apartment's kitchen. He seized a number of items, including a bill of lading, a prescription medication bottle, U.S. currency, and a bottle of a chemical used to grow marijuana plants. Detective Sullivan stated that these items were all in plain view.

Detective Sullivan testified that he then searched the attached living room, which had been converted into a bedroom. He seized such items as dismembered cardboard boxes, Western Union money transfer slips, empty plastic bags, and a self-contained marijuana growing device from this room. Detective Sullivan testified that many of these items were in plain view.

Finally, Detective Sullivan testified that he searched the rear bedroom. He stated that the bedroom contained several large, black trash bags filled with marijuana, numerous gallon-sized plastic bags of marijuana, a whole "bale" or "pillow" of marijuana, a number of empty large, black plastic trash bags, empty gallon-sized plastic bags, 2 digital scales, and other drug-related paraphernalia, all in plain view. Detective Sullivan also discovered two 50-gallon plastic drums containing marijuana in the bedroom's open closet. He seized all of this evidence and conducted field tests of the marijuana to confirm its authenticity.

After bagging the evidence, Detective Sullivan testified, he conducted it to the Pawtucket Police Station for cataloguing and safekeeping in the station's evidence room. Detective Sullivan testified that he sent samples of all of the seized marijuana to the state's forensic laboratory for analysis. According to Detective Sullivan, all of the evidence seized from 361 Fountain Street still resides in the Pawtucket Police Station's evidence room.

Based on these facts, a grand jury indicted Mr. Colquhoon on twelve criminal counts. At this time, only four counts are pending against Mr. Colquhoon: (1) possession, manufacture, sale, or delivery of greater than five kilograms of marijuana, in violation of G.L. 1956 § 21-28-4.01.2(a)(5);[3] (2) manufacture, delivery, or possession, with intent to manufacture or deliver, a controlled substance enumerated in schedules I and II, in violation of G.L. 1956 § 21-28-4.01(a)(4)(i);[4] and (3) two counts of conspiracy to violate Rhode Island's Uniform Controlled Substances Act, in violation of G.L. 1956 § 21-28-4.08.[5]

II

Issues Presented

Mr. Colquhoon seeks to suppress all evidence—including his identity—seized by police from his apartment at 361 Fountain Street. He argues that their initial warrantless entry through the green door and into the common hallway of the building, and their subsequent warrantless entry into his apartment, violated his constitutional rights because he had a reasonable expectation of privacy in those places. Mr. Colquhoon contends these illegal entries are not justified by either the exigent circumstances or inevitable discovery exceptions to the warrant requirement.

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[3] Section 21-28-4.01.2(a)(5) provides in pertinent part that "it shall be unlawful for any person to possess, manufacture, sell, or deliver . . . more than five kilograms (5 kgs.) of a mixture containing a detectable amount of marijuana."

[4] Section 21-28-4.01(a)(4)(i) provides in pertinent part that "[a]ny person . . . who violates this subsection with respect to . . . [a] controlled substance classified in schedule I or II, is guilty of a crime and upon conviction may be imprisoned for not more than thirty (30) years, or fined not more than one hundred thousand dollars ($100,000) nor less than three thousand dollars ($3,000), or both . . . ." Schedule I and II drugs are listed in § 21-28-2.08 and include, among others, marijuana. See § 21-28-2.08(d)(10).

[5] According to § 21-28-4.08, "[a]ny person who conspires to violate any provision of this chapter is guilty of a crime and is subject to the same punishment prescribed in this chapter for the commission of the substantive offense of which there is a conspiracy to violate."

The State disagrees. It argues that Mr. Colquhoon did not have a reasonable expectation of privacy in the common hallway of 361 Fountain Street; therefore, the police's warrantless entry through the green door was not illegal. The State asserts that the police's subsequent warrantless entry into Mr. Colquhoon's apartment was justified by exigent circumstances. Alternatively, the State contends that because the police's search of the apartment following these entries was conducted pursuant to a valid search warrant grounded on information independent of the entries, the evidence seized should not be suppressed.

III

Analysis

A

Standing[6]

"The Fourth Amendment to the United States Constitution, as well as [A]rticle I, [S]ection 6, of the Rhode Island Constitution, protects 'the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'" State v. Werner, 615 A.2d 1010, 1011 (R.I. 1992); see State v. Milette, 702 A.2d 1165, 1166 (R.I. 1997) (recognizing that "[t]he Fourth Amendment protects people, not places"); see also Missouri v. McNeely, 133 S. Ct. 1552, 1558 (U.S. 2013). The text of the Fourth Amendment requires that (1) all searches and seizures be reasonable and (2) a warrant shall not issue unless probable cause is established and the scope of the authorized search is set out with particularity. Payton v. New York, 445 U.S. 573, 584 (1980). It is well established that the protections of the Fourth

[6] While this initial inquiry is "'more properly placed within the purview of substantive Fourth Amendment law than within that of standing,'" courts refer to it as a standing issue. U.S. v. Lipscomb, 539 F.3d 32, 36 (1st Cir. 2008) (quoting Minnesota v. Carter, 525 U.S. 83, 88 (1998)); see Rakas v. Illinois, 439 U.S. 128, 140 (1978); U.S. v. Romain, 393 F.3d 63, 68 (1st Cir. 2004).

Amendment are for people and not places. Katz v. U.S., 389 U.S. 347, 351 (1967). The burden is on the Defendant to demonstrate that he or she has a reasonable expectation of privacy in the area searched. See State v. Casas, 900 A.2d 1120, 1129 (R.I. 2006). A court must "examine the facts of the particular case to determine whether the defendant had a legitimate expectation of privacy in the premises searched." Id. (citing Milette, 702 A.2d at 1166).

Rhode Island courts "employ a two-step process to determine from the record whether a legitimate expectation of privacy sufficient to invoke Fourth Amendment protection exists." State v. Briggs, 756 A.2d 731, 741 (R.I. 2000) (quoting State v. Jimenez, 729 A.2d 693, 696 (R.I. 1999)) (quotation marks omitted). "First[, the court must] determine whether the defendant exhibited an actual (subjective) expectation of privacy and[,] if that expectation is established, then [the court must] consider whether, viewed objectively, the defendant's expectation was reasonable under the circumstances." Jimenez, 729 A.2d at 696 (quoting State v. Wright, 558 A.2d 946, 948 (R.I. 1989)) (quotation marks omitted); see U.S. v. Rheault, 561 F.3d 55, 59 (1st Cir. 2009).[7]

The first inquiry is "whether the individual, by his conduct, has exhibited an actual expectation of privacy; that is, whether he has shown that 'he [sought] to preserve [something] as private.'" Bond v. U.S., 529 U.S. 334, 338 (2000) (quoting Smith v. Maryland, 442 U.S. 735, 740 (1979)). The second analysis requires a court to "inquire whether the individual's expectation of privacy is 'one that society is prepared to recognize as reasonable.'" Bond, 529 U.S. at 338 (quoting Smith, 442 U.S. at 740). "This [second, objective] element is highly dependent on the particular facts involved and is determined by examining the circumstances of

[7] Our Supreme Court has noted that "[u]sually, the second part of the test, i.e., whether the asserted expectation of privacy was objectively reasonable, is the most disputed." Briggs, 756 A.2d at 741 (quoting Commonwealth v. Krisco Corp., 653 N.E.2d 579, 582 (Mass. 1995)) (quotation marks omitted).

the case in light of several factors." Briggs, 756 A.2d at 741 (quoting Krisco Corp., 653 N.E.2d at 582) (quotation marks omitted); see Casas, 900 A.2d at 1129-30 (quoting Rakas, 439 U.S. at 152 and finding that "[i]n evaluating the reasonableness of privacy expectations, 'no single factor invariably will be determinative'"). Factors a court should consider include "whether the suspect possessed or owned the area searched or the property seized; his or her prior use of the area searched or the property seized; the person's ability to control or exclude others' use of the property; and the person's legitimate presence in the area searched."[8] Casas, 900 A.2d at 1130 (quoting State v. Linde, 876 A.2d 1115, 1127 (R.I. 2005)) (quotation marks omitted); see Briggs, 756 A.2d at 741. "[T]he defendant bears the burden" of demonstrating his or her reasonable expectation of privacy in a given place. Casas, 900 A.2d at 1129; see Rheault, 561 F.3d at 58-59.

Here, the State concedes that Mr. Colquhoon had a reasonable expectation of privacy in his apartment. The relevant inquiry thus concerns whether Mr. Colquhoon had a reasonable expectation of privacy in the common hallway of 361 Fountain Street.

B

Reasonable Expectation of Privacy in the Common Hallway

The majority of United States Circuit Courts of Appeal hold that a tenant in a multi-unit apartment building generally does not have a reasonable expectation of privacy in the building's common areas. See U.S. v. Rheault, 561 F.3d 55, 59 (1st Cir. 2009); U.S. v. Garner, 338 F.3d 78, 80 (1st Cir. 2003); see also U.S. v. Correa, 653 F.3d 187, 191-92 (3rd Cir. 2011); U.S. v. Maestas, 639 F.3d 1032, 1038-40 (10th Cir. 2011); U.S. v. Miravalles, 280 F.3d 1328, 1332-33 (11th Cir. 2002); U.S. v. Nohara, 3 F.3d 1239, 1241-42 (9th Cir. 1993); U.S. v. Concepcion, 942

[8] In the context of drug seizure cases, however, our Supreme Court has determined that "[t]o challenge a search or seizure, a criminal defendant is not required to admit that he owns the drugs or contraband that were seized." Casas, 900 A.2d at 1130.

F.2d 1170, 1171-72 (7th Cir. 1991); U.S. v. Holland, 755 F.2d 253, 255-56 (2nd Cir. 1985); U.S. v. Eisler, 567 F.2d 814, 816 (8th Cir. 1977). This is not a bright-line rule. Courts are required to turn to the particular facts of each case in analyzing a tenant's reasonable expectation of privacy in the common area of a multi-unit apartment building. See Rheault, 561 F.3d at 59-60 (finding that the proper approach is to "eschew the conclusory 'common area' label and engage in what is necessarily a fact-specific inquiry, taking into consideration the nature of the searched location . . ."); Maestas, 639 F.3d at 1039 (acknowledging that the fact-specific nature of Fourth Amendment privacy inquiries disfavors the establishment of bright-line rules); U.S. v. Dillard, 438 F.3d 675, 683-84 (6th Cir. 2006) (finding that the analysis of a defendant's reasonable expectation of privacy in a common area is a fact-intensive exercise). Factors courts consider in determining whether a defendant has a reasonable expectation of privacy in a common area include: (1) whether the party has a key to the area; (2) whether the party can exclude others from the area; (3) whether the party took precautions to maintain privacy in the area; and (4) whether the party has a possessory interest in the belongings kept there, if any. See U.S. v. McCaster, 193 F.3d 930, 933 (8th Cir. 1999) (citing Rawlings v. Kentucky, 448 U.S. 98, 105 (1980)); U.S. v. Haydel, 649 F.2d 1152, 1155 (5th Cir. 1981). Other relevant considerations include whether the entrance to the common area is locked or unlocked and the number of units contained in the apartment building. See Miravalles, 280 F.3d at 1332 (acknowledging that "[w]hether the door to the building is locked is another relevant consideration"); Nohara, 3 F.3d at 1242 (noting that when a building has multiple dwelling units, residents must reasonably expect that numerous visitors, workers, and other persons will use the common spaces).

Mr. Colquhoon argues that he had a reasonable expectation of privacy in the common hallway of 361 Fountain Street on December 13, 2011. Mr. Colquhoon asserts that the hallway

is akin to his apartment's curtilage, a space that is widely accepted as a constitutionally-protected extension of the home. He contends that he sought to keep the hallway private because the green door leading to the hallway from the outside was always kept locked and only he, Ms. Jaffrey, and their landlord had keys to the green door.

The State asserts that Mr. Colquhoon did not have a reasonable expectation of privacy in the hallway. The State argues that Mr. Colquhoon was neither the only tenant in 361 Fountain Street nor the exclusive user of the hallway. It maintains that Mr. Colquhoon could not exclude the building's other tenant, Ms. Jaffrey, from using the hallway because she also had a key to the green door. The State asserts that both Mr. Colquhoon and Ms. Jaffrey also allowed guests to use the hallway, further diluting Mr. Colquhoon's claim of privacy. The State contends that the lock on the green door was only meant to provide security for the building's tenants, not to shield the common hallway from public view.

1

Mr. Colquhoon's Subjective Expectation of Privacy

In the instant case, Mr. Colquhoon presented substantial evidence to establish that he had a reasonable expectation of privacy in the common hallway. The evidence shows that 361 Fountain Street contained only two apartments. Mr. Colquhoon and Ms. Jaffrey, along with her family, rented at 361 Fountain Street. The tenants regularly utilized the common hallway. There were few guests at the apartments. In addition, the mailmen and trash collectors never entered the hallway because the mailboxes and trash cans serving the apartments at 361 Fountain Street sat outside of the building. See U.S. v. Fluker, 543 F.2d 709, 715-16 (9th Cir. 1976) (holding that a tenant in a two-unit apartment building had a reasonable expectation of privacy in the common hallway serving the apartments, in part, because "the [hallway] was one to which access

was clearly limited as a matter of right to occupants of the two . . . apartments); cf. Miravalles, 280 F.3d at 1332-33 (finding that a tenant in a large, multi-unit apartment building did not have a reasonable expectation of privacy in the building's common area because "[t]he more units in the apartment building, the larger the number of tenants and visitors, workers, delivery people and others who will have regular access to the common areas . . ."). Only Mr. Colquhoon, Ms. Jaffrey, and their landlord held keys to the green door. See McCaster, 193 F.3d at 933; Haydel, 649 F.2d at 1155. Moreover, the green door leading to the common hallway was always kept locked because the tenants wanted to keep the public from entering. See Dillard, 438 F.3d at 683 (noting that an apartment building tenant has a reasonable expectation of privacy in a locked common area because he expects only other tenants, not trespassers, to have access to such areas); State v. Verrecchia, 766 A.2d 377, 382 (R.I. 2001); see also Miravalles, 280 F.3d at 1332 (acknowledging that whether the door is locked or unlocked is an important consideration). Together, all of the facts demonstrate that Mr. Colquhoon "sought to preserve [the hallway] as private," Bond, 529 U.S. at 338, and, thus, establish his subjective expectation of privacy in the hallway. See Verrecchia, 766 A.2d at 382-83; Casas, 900 A.2d at 1129.

2

Mr. Colquhoon's Objective Expectation of Privacy

To determine Mr. Colquhoon's objective expectation of privacy, this Court must look to several factors, including "whether the suspect possessed or owned the area searched or the property seized; his or her prior use of the area searched or the property seized; the person's ability to control or exclude others' use of the property; and the person's legitimate presence in the area searched." Casas, 900 A.2d at 1130; see Briggs, 756 A.2d at 741. Mr. Colquhoon has a legitimate possessory interest in the common hallway because he was a tenant in good standing

in one of the two apartments at 361 Fountain Street on December 13, 2011. See Verrecchia, 766 A.2d at 383 (finding that a tenant in good standing had a valid possessory interest in a garage "during the life of his tenancy that gave him the right to maintain an ejectment or trespass action" against outsiders); Milette, 702 A.2d at 1167 (determining that the defendant was in legitimate possession of a vehicle searched by the police because he had the owner's permission to use the vehicle). The testimony shows that Mr. Colquhoon always kept the green door locked because he wished to keep the public out, and he had few guests. See Verrecchia, 766 A.2d at 382-84; Fluker, 543 F.2d at 716. Mr. Colquhoon possessed the ability to control others' use of the hallway because only he, Ms. Jaffrey, and the landlord had keys to the locked green door. See Casas, 900 A.2d at 1129; Dillard, 438 F.3d at 683; see also Verrecchia, 766 A.2d at 384 (quoting U.S. v. Horowitz, 806 F.2d 1222, 1226 (4th Cir. 1986) and noting that "'an individual need not maintain absolute personal control (exclusive use) over an area to support his expectation of privacy'—as long as that individual retains some ability to control or exclude others from using the area"). As a tenant, Mr. Colquhoon had a property interest in the common area of the leased premises. See Reek v. Lutz, 90 R.I. 340, 346, 158 A.2d 145, 148 (1960) (finding that "the right to use the common portions of the premises by the tenant, his family, or his invitees is an incident of the tenancy created by the contract of letting between the landlord and the tenant"); see also Verrecchia, 766 A.2d at 383 (noting that "a commercial tenant in good standing . . . enjoy[s] a possessory interest in the [premises] during the life of his tenancy . . ."). Thus, Mr. Colquhoon was a legitimate user of the hallway because of his valid tenancy. See Verrecchia, 766 A.2d at 384; Casas, 900 A.2d at 1129. Based on these facts, this Court is satisfied that Mr. Colquhoon's expectation of privacy in the common hallway of 361 Fountain Street was objectively reasonable as well. See id. Accordingly, Mr. Colquhoon has met the two

prongs of the analysis and established his reasonable expectation of privacy in the common hallway of 361 Fountain Street. See id.; Fluker, 543 F.2d at 716. This Court will now determine whether the police's warrantless entry into 361 Fountain Street was nonetheless justified by a recognized exception to the warrant requirement.

C

Exceptions to the Warrant Requirement

Once a defendant has demonstrated a reasonable expectation of privacy in a particular place, "governmental searches [of or entries into that place] conducted outside of the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few well-delineated exceptions." State v. Portes, 840 A.2d 1131, 1136 (R.I. 2004) (quoting Duquette v. Godbout, 471 A.2d 1359, 1362 (R.I. 1984)) (quotation marks omitted); see Kentucky v. King, 131 S. Ct. 1849, 1856 (U.S. 2011) (finding that the "warrant requirement is subject to certain reasonable exceptions"). Absent evidence that one or more exceptions to the warrant requirement applies in a given case, the evidence obtained by law enforcement authorities pursuant to the illegal search—both directly and indirectly— is "fruit of the poisonous tree,"[9] and must be suppressed. See Segura v. U.S., 468 U.S. 796, 804-05 (1984) (noting that both direct and indirect evidence obtained as the result of an illegal search must be suppressed absent one of the recognized exceptions); U.S. v. Camacho, 661 F.3d 718, 724 (1st Cir. 2011); State v. Pemental, 434 A.2d 932, 934-36 (R.I. 1981).

[9] The "fruit of the poisonous tree" doctrine "requires the exclusion of tangible evidence seized during an unlawful search, and derivative evidence, both tangible and testimonial, acquired as a result of the unlawful search." U.S. v. Herrold, 962 F.2d 1131, 1137 (3rd Cir. 1992); see Wong Sun v. U.S., 371 U.S. 471, 484-85 (1963).

1

Exigent Circumstances

This Court will now turn its inquiry to whether the police's warrantless entries into the green door of 361 Fountain Street and Mr. Colquhoon's apartment were justified under the exigent circumstances exception to the warrant requirement. The United States Supreme Court has long recognized that one exception to the warrant requirement is that of exigent circumstances. See King, 131 S. Ct. at 1856; see also Portes, 840 A.2d at 1136. The exigent circumstances exception "encompasses those situations in which some compelling reason for immediate action excuses law enforcement officers from pausing to obtain a warrant" before entering or searching a constitutionally-protected space. U.S. v. Martins, 413 F.3d 139, 146 (1st Cir. 2005); see King, 131 S. Ct. at 1856. This exception applies when the "'exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search [or entry] is objectively reasonable under the Fourth Amendment." State v. DeLaurier, 533 A.2d 1167, 1169 (R.I. 1987) (quoting Mincey v. Arizona, 437 U.S. 385, 393 (1978)); see Werner, 615 A.2d at 1013 (quoting State v. Benoit, 471 A.2d 895, 901 (R.I. 1980) and noting that "[o]nly if circumstances render procurement of a warrant impracticable, and if the needs of society demand swift action, does [Article I, Section 6], permit the temporary, limited infringement of an individual's right of privacy"). The search or entry must "be strictly circumscribed by the exigencies which justify its initiation," however. Terry v. Ohio, 392 U.S. 1, 25-26 (1968).

In Rhode Island, such "exigencies" include, among others, "'when evidence is likely to be lost, destroyed, or removed during the time required to obtain a warrant and when, because of the circumstances, it is difficult to secure a warrant . . . .'" DeLaurier, 533 A.2d at 1169 (quoting State v. Jennings, 461 A.2d 361, 366 (R.I. 1983)). When analyzing whether sufficient exigent

circumstances exist to justify a warrantless entry or search, a court must determine whether '"the police . . . ha[d] an objective, reasonable belief[—based on the totality of the circumstances known at that time—]that a crisis c[ould] only [have been] avoided by swift and immediate action."' State v. Gonsalves, 553 A.2d 1073, 1075 (R.I. 1989) (quoting Duquette, 471 A.2d at 1363); see State v. Taveras, 39 A.3d 638, 648 (R.I. 2012) (acknowledging that "[t]he lynchpin of any Fourth Amendment analysis is reasonableness"); Missouri v. McNeely, 133 S. Ct. 1552, 1559 (U.S. 2013). "Whether circumstances rise to the level of exigency is determined by referring to the facts known to the police at the time of the [entry]." Gonsalves, 553 A.2d at 1075; see U.S. v. Samboy, 433 F.3d 154, 158 (1st Cir. 2005) (quoting U.S. v. Hidalgo, 747 F. Supp. 818, 828 (D. Ma. 1990) and recognizing that a claim of exigency "should be supported by particularized, case-specific facts, not simply generalized suppositions about the behavior of a particular class of criminals"); McNeely, 133 S. Ct. at 1559 (quoting Go–Bart Importing Co. v. U.S., 282 U.S. 344, 357 (1931) and finding that "each case of alleged exigency [must be evaluated by a court] based 'on its own facts and circumstances'"). The State bears the burden of establishing the presence of exigency in a given case. See Samboy, 433 F.3d at 158; U.S. v. Radka, 904 F.2d 357, 362 (6th Cir. 1990). A warrantless entry to prevent the loss or destruction of evidence is justified if the State demonstrates: (1) a reasonable belief that third parties are inside the dwelling and (2) a reasonable belief that the loss or destruction of evidence is imminent. Radka, 904 F.2d at 362. The mere possibility of the loss or destruction of evidence is not sufficient. Id.; DeLaurier, 533 A.2d at 1169 (requiring a reasonable belief that evidence is "likely" being destroyed to justify a warrantless entry into a protected private area).

Mr. Colquhoon argues that there were no exigent circumstances justifying the police's initial warrantless entry into the green door of 361 Fountain Street and subsequent illegal entry

into his apartment. He contends that Detective Smith's belief that evidence was being destroyed inside 361 Fountain Street because Mr. Swaby did not promptly return from his second trip to 72 East Street is not reasonable because it is not supported by the facts known to Detective Smith at the time. Mr. Colquhoon contends that the police had ample time to obtain a search warrant before entering 361 Fountain Street, and their failure to do so "eviscerate[d] any claim of exigency." Mr. Colquhoon argues that, in fact, any exigency which may have existed on December 13, 2011 was created by the police themselves when they knocked and announced their presence outside of 361 Fountain Street.

The State disagrees. It contends that Detective Smith's belief that evidence was being destroyed was reasonable based on the facts known to him at the time. The State argues that Detective Smith reasonably believed that Mr. Colquhoon remained inside 361 Fountain Street after Mr. Swaby's arrest because his officers maintained constant surveillance of the building. The State avers that Detective Smith also reasonably believed that Mr. Swaby's continued absence following his arrest tipped off Mr. Colquhoon that police units were closing in on 361 Fountain Street. It points out that Mr. Swaby's first delivery to 72 East Street took no longer than a few minutes to complete, and his tardiness following the second, similar delivery likely indicated to Mr. Colquhoon that Mr. Swaby had been arrested.

With respect to Mr. Colquhoon's arguments regarding the availability of the exigent circumstances exception, the State argues that the issue of foreseeability—whether the police knew that entry into 361 Fountain Street would be necessary before they did so—is not part of this Court's analysis. The State maintains that, instead, this Court should only consider the reasonableness of Detective Smith's belief that evidence was being destroyed inside the building.

a

The Entry Into the Green Door of 361 Fountain Street

The facts known to the police during their surveillance of the Fountain Street addresses support the objective reasonableness of their warrantless entry into the green door of 361 Fountain Street on December 13, 2011. Following the delivery of the pallet by the Cape Cod Express truck at approximately 1:30 pm, Detective Smith witnessed Mr. Colquhoon break down the pallet and begin carrying four large boxes into the green door leading to 361 Fountain Street. He witnessed Mr. Swaby arrive and help Mr. Colquhoon finish moving the boxes before disposing of the discarded pallet and packing materials and following Mr. Colquhoon inside through the green door. Detective Smith knew that Mr. Swaby was an important figure in the local narcotics scene and had sold drugs in the past. The two men remained inside 361 Fountain Street for approximately two and one-half hours after they carried the boxes inside. No one entered or exited the building during that time. Detective Smith did not smell any burning marijuana coming from the building, increasing the likelihood that the occupants were not smoking the drug but packaging it for sale. See U.S. v. Wald, 216 F.3d 1222, 1226 (10th Cir. 2000) (noting "the common-sense proposition that the smell of burnt marijuana is indicative of drug usage, rather than drug trafficking . . ."); State v. Rodriguez, 945 A.2d 676, 678-79 (N.H. 2008) (holding that the smell of burning—not fresh or burned—marijuana is an indicator that drugs are being consumed).

Once Mr. Swaby exited the green door of 361 Fountain Street at approximately 3:50 pm, he was seen carrying a duffel bag into his gold Navigator. Detective Smith witnessed Mr. Swaby drive to 72 East Street and deliver the bag to Justin Warner. A search of the duffel bag following Mr. Warner's lawful arrest revealed it to contain several pounds of marijuana. This entire

exchange occurred over a period of less than 10 minutes. In the meantime, Mr. Swaby returned to 361 Fountain Street, entered the building through the green door, and exited less than 1 minute later carrying a large black plastic trash bag. This bag was larger than the first bag carried out by Mr. Swaby. Detective Smith witnessed Mr. Swaby place the trash bag into his Navigator before driving back to 72 East Street. Mr. Swaby exchanged the bag with Kirk Thompson. When police moved to arrest both individuals at approximately 4:00 pm, Mr. Thompson dropped the bag, which split open to reveal over 20 pounds of marijuana. Less than 15 minutes had passed since Mr. Swaby had departed 361 Fountain Street for his first trip to 72 East Street.

At this point, it was reasonable for the police to believe that Mr. Swaby and Mr. Colquhoon were intent on quickly moving marijuana out of 361 Fountain Street that day. See U.S. v. Reid, 69 F.3d 1109, 1113-14 (11th Cir. 1995) (determining that the police's observations that "the search results of two vehicles leaving the [defendant's] house, and the [subsequent] arrival of the van at the house, [gave the police] an objectively reasonable basis to believe that there was an imminent risk of losing the evidence . . . [and increased the] risk of someone fleeing with the evidence . . ."); U.S. v. Curran, 498 F.2d 30, 35-36 (9th Cir. 1974) (finding that it was reasonable for police to believe that suspects intended to quickly dispose of narcotics by sale, where the police had received a confidential tip indicating that the suspects' home contained a large quantity of marijuana ready for shipment, the police witnessed three vehicles briefly stop at the home during a short time period, and lawful searches of the vehicles revealed the presence of significant quantities of marijuana). Detective Smith testified that it would have taken him approximately 45 minutes to 1 hour to draft a search warrant affidavit, and subsequently obtaining the warrant from an impartial magistrate at that late hour of the day would have been time-consuming. See U.S. v. MacDonald, 916 F.2d 766, 770 (2nd Cir. 1990) (determining that

due to the rapidly-developing nature of the police's operation and the lateness of the day, the time it would have taken for police to obtain a search warrant unduly exacerbated the danger of losing evidence); U.S. v. Good, 780 F.2d 773, 774-75 (9th Cir. 1986). Based on the rapidity of Mr. Swaby's movements and the quantities of marijuana involved in each exchange, it was reasonable for Detective Smith to conclude that he needed to secure 361 Fountain Street to halt Mr. Swaby's disposal of the marijuana before seeking a warrant. See U.S. v. Gordils, 982 F.2d 64, 69-70 (2nd Cir. 1992) (justifying, under exigent circumstances, the police's warrantless entry into an apartment to stop the ongoing disposal of narcotics by sale); Curran, 498 F.2d at 35-36 (determining that the police's warrantless entry into a residence was justified by the likelihood that evidence would be disposed of by continuing sale while the police sought a warrant).

Moreover, it was reasonable for Detective Smith to believe that Mr. Swaby's arrest and resulting absence from 361 Fountain Street would tip Mr. Colquhoon off to the police presence closing in on his apartment. Following the pallet's delivery, Mr. Colquhoon and Mr. Swaby had remained in the apartment alone together for approximately two and one-half hours. The only person leaving the apartment was Mr. Swaby, who exited for the sole purpose of delivering marijuana to Mr. Warner at 72 East Street. Following his first trip from the apartment at 3:50 pm, Mr. Swaby immediately returned to 361 Fountain Street, exited the building with a larger bag, and drove back to 72 East Street to deliver that bag to Mr. Thompson. Thus, Mr. Swaby engaged in two significant drug transactions in a span of less than 15 minutes. Detective Smith knew that Mr. Colquhoon remained inside 361 Fountain Street during this time and had not departed. See Radka, 904 F.2d at 362; U.S. v. Campbell, 261 F.3d 628, 631-33 (6th Cir. 2001). It is not unreasonable to conclude that Mr. Colquhoon was waiting for Mr. Swaby to return to engage in subsequent exchanges. See United States v. St. Pierre, 488 F.3d 76, 79 (1st Cir. 2007);

Samboy, 433 F.3d at 158-59. Although Mr. Swaby was the alleged "kingpin" of the drug transactions and not simply a courier, his absence from the apartment for more than a few minutes deviated substantially from the travel pattern established by his earlier marijuana deliveries. This fact increased the likelihood that Mr. Colquhoon would realize that the second exchange had gone awry and begin destroying or removing evidence before police could obtain a warrant to search 361 Fountain Street. See Samboy, 433 F.3d at 158-59 (noting that the tardiness of a drug courier in returning from a delivery is "a likely indication of [the courier's] arrest," sufficient to justify a warrantless entry to halt the likely destruction of evidence); U.S. v. Sangineto-Miranda, 859 F.2d 1501, 1513 (6th Cir. 1988) (finding that the absence of a drug courier from an apartment while the dealer remained inside supported the reasonable belief that the courier's continued absence would alert the dealer to the police's presence and prompt him to destroy evidence).

The totality of the circumstances known to police at the time of Mr. Swaby's arrest at 72 East Street demonstrates that there existed more than a mere possibility that the marijuana inside 361 Fountain Street would likely be lost or destroyed during the time it would take police to obtain a search warrant. See Radka, 904 F.2d at 362; DeLaurier, 533 A.2d at 1169. Thus, "the police . . . ha[d] an objective, reasonable belief[—based on the totality of the circumstances known at that time—]that a crisis c[ould] only [have been] avoided by swift and immediate action." Gonsalves, 553 A.2d at 1075; see Taveras, 39 A.3d at 648. This Court finds that Detective Smith's belief that a warrantless entry into the green door of 361 Fountain Street was necessary to preserve evidence was reasonable, and the exigent circumstances exception justified the police's entry into the building's green door. See Samboy, 433 F.3d at 159-61; DeLaurier, 533 A.2d at 169-71.

b

The Entry Into Mr. Colquhoon's Apartment

Mr. Colquhoon argues that the police's warrantless entry into his apartment following their passage through the green door was also not justified by exigent circumstances. It is axiomatic that "[i]n terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." Payton, 445 U.S. at 590; see Kyllo v. U.S., 533 U.S. 27, 31 (2001) (quoting Silverman v. U.S., 365 U.S. 505, 511 (1961) and acknowledging that "[a]t the very core of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion'"). Thus, the police's warrantless entry into Mr. Colquhoon's apartment was per se unreasonable unless the exigent circumstances exception applies to justify the entry. See Payton, 445 U.S. at 590; Jennings, 461 A.2d at 366.

The same exigency which justified entry into the green door of 361 Fountain Street—the likely loss or destruction of evidence—also justified the police's entry into Mr. Colquhoon's apartment. Detective Smith testified that at the time of his entry through the green door, he knew he would immediately encounter a set of stairs leading upward, but did not know what lay at the top of the stairs. He testified that upon opening the door, he smelled a strong odor of fresh marijuana in the stairwell. The odor intensified as he climbed the stairs to the second floor landing, corroborating his strong belief that the building contained a large quantity of marijuana. See U.S. v. Humphries, 372 F.3d 653, 658-59 (4th Cir. 2004) (finding that the smell of fresh marijuana in a particular place is an important factor supporting the reasonable belief that a quantity of marijuana is present there); U.S. v. McHugh, 769 F.2d 860, 864-66 (1st Cir. 1985).

The second floor landing contained 2 numbered doors. Detective Smith testified that it was only upon reaching the landing and seeing these doors that he realized the building contained apartments. After determining that the apartment numbered "1," Ms. Jaffrey's apartment, was of no interest to his operation, Detective Smith concluded that the other apartment, Mr. Colquhoon's apartment, must contain the marijuana. Detective Smith testified that at this point, he knew he had to enter Mr. Colquhoon's apartment to secure the marijuana. This series of events occurred in less than 10 minutes. Thus, this Court finds that the police's entry into Mr. Colquhoon's apartment was a direct continuation of their initial warrantless entry into the green door and was justified under the same set of exigent circumstances justifying that entry. See Michigan v. Tyler, 436 U.S. 499, 509-11 (1978) (holding that where an initial warrantless entry is justified by exigent circumstances, subsequent warrantless entries predicated on objective circumstances signaling an ongoing emergency are similarly justified); U.S. v. Infante, 701 F.3d 386, 392-95 (1st Cir. 2012) (finding that authorities' subsequent warrantless entry into a residence was justified by the same exigent circumstances which justified their initial entry into the residence because the emergency was ongoing); U.S. v. Echegoyen, 799 F.2d 1271, 1280 (9th Cir. 1986).

c

Availability of the Exigent Circumstances Exception

i

Probable Cause to Obtain a Warrant

Mr. Colquhoon argues that the exigent circumstances exception should not be available to justify their illegal entries because the police waited too long to obtain a search warrant for 361 Fountain Street. He contends that the police had sufficient probable cause and ample

opportunity to get the warrant following the delivery of the pallet to 367-369 Fountain Street at approximately 1:30 pm. Mr. Colquhoon asserts that the police's warrantless entries into 361 Fountain Street and his apartment were not reasonable because their failure to secure a warrant beforehand "eviscerate[d] any claim of exigency."

It is true that "the [police's] failure to seek a warrant in the face of plentiful probable cause" precludes them from asserting exigency to justify a warrantless entry or search. U.S. v. Chambers, 395 F.3d 563, 569 (6th Cir. 2005); see Samboy, 433 F.3d at 159; U.S. v. Beltran, 917 F.2d 641, 642-43 (1st Cir. 1990). In the instant case, however, the police did not have sufficient probable cause to obtain a search warrant for 361 Fountain Street until they witnessed Mr. Swaby deliver the gray duffel bag to Justin Warner at 72 East Street, arrested Mr. Warner, and confirmed that the bag contained marijuana.

"A police officer has probable cause to conduct a search when the facts available to him would warrant a person of reasonable caution in the belief that contraband or evidence of a crime is present." Florida v. Harris, 133 S. Ct. 1050, 1055 (U.S. 2013) (quoting Texas v. Brown, 460 U.S. 730, 742 (1983) (quotation marks omitted); see State v. Storey, 8 A.3d 454, 461 (R.I. 2010) (quoting Illinois v. Gates, 462 U.S. 213, 238 (1983) and noting that the question of whether probable cause exists is a "'practical, common-sense determination' that 'there is a fair probability that contraband or evidence of a crime will be found in a particular place'"). "Probable cause is determined under an objective standard." U.S. v. Sanchez, 612 F.3d 1, 5 (1st Cir. 2010) (citing Gates, 462 U.S. at 230-31). Nonetheless, "[t]he test for probable cause is not reducible to 'precise definition or qualification.'" Harris, 133 S. Ct. at 1055 (quoting Maryland v. Pringle, 540 U.S. 366, 371 (2003)); see State v. Correia, 707 A.2d 1245, 1249 (R.I. 1998) (quoting Gates, 462 U.S. at 230-31 and recognizing that the standard for probable cause is not a

rigid test but a "'commonsense, practical' question requiring examination of the 'totality-of-the-circumstances . . .'"). "The probable-cause standard requires only the probability, and not a prima facie showing, of criminal activity." State v. Pratt, 641 A.2d 732, 736 (R.I. 1994) (quoting State v. Baldoni, 609 A.2d 219, 220 (R.I. 1992)) (quotation marks omitted); see Harris, 133 S. Ct. at 1055 (quoting Gates, 462 U.S. at 235 and finding that "'[f]inely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence . . . have no place in the probable-cause decision'"). Thus, "[t]his standard . . . require[s] a showing of more than a mere suspicion that criminal activity is taking place." Pratt, 641 A.2d at 736.

When information from a confidential informant is relied upon by police, the informant's "veracity, reliability, and basis of knowledge" are important considerations when determining the existence of probable cause. State v. King, 693 A.2d 658, 661 (R.I. 1997); see State v. Ricci, 472 A.2d 291, 295 (R.I. 1984). Such factors may be demonstrated by evidence that the informant has provided helpful tips in the past. See State v. Rios, 702 A.2d 889, 890 (R.I. 1997); State v. Riccio, 551 A.2d 1183, 1186 (R.I. 1988). However, the informant's "veracity, reliability, and basis of knowledge" may also be corroborated by independent police investigation. See State v. Cosme, 57 A.3d 295, 303 (R.I. 2012); Rios, 702 A.2d at 890. On balance, then, "probable cause is the sum total of layers of information and the synthesis of what police have heard, what they know, and what they observed as trained officers." Storey, 8 A.3d at 462 (quoting State v. Schmalz, 744 N.W.2d 734, 738 (N.D. 2008)) (quotation marks omitted).

Here, Detective Smith testified that he relied upon a confidential informant's tip in organizing the December 13, 2011 surveillance operation. The informant communicated that a large shipment of marijuana would be delivered by a Cape Cod Express tractor-trailer truck to a fictitious addressee at 367-369 Fountain Street sometime on December 13, 2011. Although there

is no evidence that the informant provided police with helpful tips in the past, Detective Smith corroborated the basic reliability of the tip on December 13, 2011 when he witnessed a Cape Cod Express tractor-trailer truck deliver a pallet containing four plastic-wrapped boxes to 367-369 Fountain Street at approximately 1:30 pm, and then saw Mr. Colquhoon and Mr. Swaby—a known member of the local drug scene—break down the pallet and carry the boxes into the green door of 361 Fountain Street. See Cosme, 57 A.3d at 303; Rios, 702 A.2d at 890. He testified that, at this time, he was certain that the suspected marijuana was in the building, but he did not believe that he had sufficient probable cause to obtain a search warrant.

Indeed, other than the informant's tip, Detective Smith had no reasonable basis upon which to conclude that a crime had been committed or that the boxes in fact contained evidence of a crime. See Sanchez, 612 F.3d at 5 (establishing that probable cause does not exist unless "the police have (i) reliable information that a crime has been committed and (ii) sufficient reason to believe that they have come across evidence of it"); Storey, 8 A.3d at 461. Detective Smith testified that at the time of the delivery, he did not know Mr. Colquhoon's identity or the nature or extent of his association with Mr. Swaby. See U.S. v. Everroad, 704 F.2d 403, 407 (8th Cir. 1983) (holding that a defendant's "physical proximity to a [suspected] crime combined simply with a brief association with a suspected criminal—when there is no other unlawful or suspicious conduct by any party involved—cannot support a finding of probable cause"); see also U.S. v. Goncalves, 642 F.3d 245, 249-50 (1st Cir. 2011) (affirming the lower court's finding of probable cause, in part, on the ground that the police knew that the defendant had prior involvement with drug trafficking); Pratt, 641 A.2d at 737. Detective Smith did not witness Mr. Colquhoon engage in any suspicious activity before the pallet's delivery—such as furtive surveillance of the parking lot at 367-369 Fountain Street, repeated pacing, or agitated

behavior—suggesting that he awaited a drug shipment. See U.S. v. Moreno, 701 F.3d 64, 73-74 (2nd Cir. 2012) (finding that police officers' observations that a suspected drug trafficker was "repeatedly enter[ing] and exit[ing his apartment] and survey[ing] the parking lot . . . added to their probable cause to believe that Marin was about to engage in a drug transaction, as [the drug suspected trafficker] appeared to be awaiting the arrival of another individual, engaging in precisely the conduct one might expect of a drug courier seeking to consummate a delivery"); U.S. v. Torres-Ramos, 536 F.3d 542, 555-56 (6th Cir. 2008) (determining that the existence of probable cause was supported, in part, by police observations of the suspects "conducting counter-surveillance in the parking lot by having [a confederate] . . . investigate the van [containing police officers]"). While the informant had stated that the 4 boxes contained marijuana, and Detective Smith testified that he believed the boxes were so filled, the police lacked any objective facts supporting these statements. See Cortez v. McCauley, 478 F.3d 1108, 1116-17 (10th Cir. 2007) (finding that the police did not have sufficient probable cause to arrest the defendant because the police lacked objective facts establishing the probability that the defendant abused the victim); Cosme, 57 A.3d at 303-04 (noting that the police established probable cause, in part, when they conducted a controlled drug buy and confirmed that the defendant was carrying narcotics). In sum, the totality of the circumstances known to Detective Smith immediately following the delivery of the pallet to 367-369 Fountain Street demonstrated, at most, the possibility that drug-related activities were occurring. See Poolaw v. Marcantel, 565 F.3d 721, 733-34 (10th Cir. 2009); Pratt, 641 A.2d at 736. The existence of probable cause, by contrast, requires "more than a mere suspicion that criminal activity is taking place." Pratt, 641 A.2d at 736.

Such necessary evidence was furnished, however, following the police's arrest of Mr. Warner after Mr. Swaby's first delivery to 72 East Street. At that point, Detective Smith had witnessed Mr. Swaby carry a gray duffel bag from the green door of 361 Fountain Street into his gold Navigator, drive in the Navigator to 72 East Street, and exchange the bag with Mr. Warner. These activities are consistent with drug dealing. See U.S. v. Knox, 888 F.2d 585, 586-87 (8th Cir. 1989) (upholding the determination of probable cause to search a suspected drug house, in part, because a police officer with knowledge of drug activities witnessed the house's owner exchange a small object for cash); State v. Castro, 891 A.2d 848, 854-55 (R.I. 2006) (finding that probable cause was established when an experienced police officer witnessed "a suspected drug transaction . . . tak[e] place between defendant and [another]. He observed a very brief transaction involving what he believed to be an exchange of possible drugs for currency"). Upon Mr. Warner's lawful arrest, the bag was seized and its contents—several pounds of marijuana—confirmed. These facts, along with the informant's tip and Detective Smith's observations of the pallet's delivery, support the existence of probable cause to search 361 Fountain Street. See U.S. v. Gil, 58 F.3d 1414, 1418-19 (9th Cir. 1995) (finding that probable cause to search the defendants' residences existed where police made "observations of counter-surveillance driving, car switches, the use of pagers and public telephones, suspicious deliveries, the use of a truck that bore the characteristics of a 'load vehicle,' and the recovery of two kilograms of cocaine from a woman who had just been in [one of the defendants'] car[s]"); U.S. v. Goldman, 41 F.3d 785, 787 (1st Cir. 1994) (determining that the police's search of the defendant's car was supported by sufficient probable cause, where police witnessed the defendant engage in a controlled drug transaction involving a package which was confirmed to contain cocaine).

The police were precluded from obtaining a warrant at this time, however, due to the contemporaneous circumstances surrounding their ongoing investigation. Detective Smith testified that Mr. Swaby's trip from 361 Fountain Street to 72 East Street, marijuana exchange with Mr. Warner, and return to 361 Fountain Street took only a few minutes to complete. While the police confirmed that the gray duffel bag that Mr. Swaby had given to Mr. Warner contained marijuana, Mr. Swaby began a return trip to 72 East Street in his Navigator—this time transporting a larger, black plastic bag he had carried out of the green door. Detective Smith then witnessed Mr. Swaby exchange this plastic bag with Mr. Thompson in the parking lot of 72 East Street. Both trips took less than 10 total minutes to complete. Based on these circumstances, it was reasonable for Detective Smith to believe that Mr. Swaby was intent on moving large quantities of marijuana that day, and the marijuana contained inside 361 Fountain Street could be lost during the time it would take him to obtain a warrant. See Gordils, 982 F.2d at 69-70; Curran, 498 F.2d at 35-36. Mr. Swaby was making large deliveries in a set amount of time. One could reasonably conclude that the sales were prearranged, and Mr. Swaby was operating on a timetable. See id. Thus, the emergency situation necessitating immediate police action arose concomitantly with facts supporting probable cause to search 361 Fountain Street, and precluded the police from seeking a warrant at that time. See Cardwell v. Lewis, 417 U.S. 583, 596 (1974) (noting that an "exigency may arise at any time, and the fact that the police might have obtained a warrant earlier does not negate the possibility of a current situation's necessitating prompt police action"); U.S. v. Rodea, 102 F.3d 1401, 1407-08 (5th Cir. 1997) (finding that the police were justified in waiting to obtain a warrant before searching the defendant's home, where exigent circumstances arose concurrently with probable cause supporting the search warrant); cf. Beltran, 917 F.2d at 642-44 (holding that where probable

cause to obtain a warrant arose the day before a controlled drug buy, the police's failure to secure a warrant before searching the defendant's apartment violated the Fourth Amendment despite the existence of exigent circumstances).

Furthermore, in the recent case of Kentucky v. King, 131 S. Ct. 1849 (U.S. 2011), the United States Supreme Court rejected placing a duty on police to obtain a warrant as soon as they have sufficient probable cause. The Court found that imposing such a duty "unjustifiably interferes with legitimate law enforcement strategies." King, 131 S. Ct. at 1860. The Court reasoned that "[t]here are many entirely proper reasons why police may not want to seek a search warrant as soon as the bare minimum of evidence needed to establish probable cause is required." Id. Among others, the Court noted that law enforcement officials may wish to gather more evidence for search warrant and criminal charging purposes. See id. It concluded that "[f]aulting the police for failing to apply for a search warrant at the earliest possible time after obtaining probable cause imposes a duty that is nowhere to be found in the Constitution." Id. at 1861.

Detective Smith testified that he did not think that he had obtained sufficient probable cause to justify applying for a warrant to search 361 Fountain Street until he witnessed Mr. Swaby's first delivery trip to 72 East Street. He testified that he did not attempt to apply for a warrant at that time, however, because Mr. Swaby was engaged in his second trip to 72 East Street and he wished to obtain further evidence of Mr. Swaby's illegal activities. Such intention is one of the "entirely proper reasons" for waiting to secure a warrant identified by the United States Supreme Court in King. See King, 131 S. Ct. at 1860; see also U.S. v. Hultgren, 713 F.2d 79, 87 (5th Cir. 1983) (finding that, rather than securing a warrant at the earliest possible moment, "the government may await that move in the hope of ferreting out any hitherto

unknown individuals involved in the illicit undertakings, gathering additional evidence substantiating the crimes believed to have been committed, or discovering any other offenses in which the suspects are involved"). Accordingly, the police will not be faulted for failing to apply for a warrant the moment they believed they had acquired sufficient probable cause. See King, 131 S. Ct. at 1860-61; see also Hoffa v. U.S., 385 U.S. 293, 310 (1966) (noting that "[l]aw enforcement officers are under no constitutional duty to call a halt to criminal investigation the moment they have the minimum evidence to establish probable cause").

ii

Police-Created Exigency

Mr. Colquhoon argues that the exigent circumstances exception should also not be available because any exigency which may have existed inside 361 Fountain Street on December 13, 2011 was wholly the product of police conduct. Mr. Colquhoon contends that the police created an emergency situation inside his apartment when they knocked on the green door of 361 Fountain Street, announced their presence, and entered the building using Mr. Swaby's keys. He asserts that until the police forced entry into the building, Mr. Colquhoon was unaware of their presence because they had successfully concealed their surveillance operation.

This Court disagrees. Under the so-called "police-created exigency" doctrine, "police may not rely on the need to prevent destruction of evidence when the exigency was 'created' or 'manufactured' by the conduct of the police." King, 131 S. Ct. at 1857; see Rodea, 102 F.3d at 1409 (acknowledging that "the exigent circumstances exception does not apply if the Government created or 'manufactured' the exigency"). In determining whether police have impermissibly created an emergency to justify entry into a constitutionally-protected space, a court should consider whether the police "engag[ed] or threaten[ed] to engage in conduct that

violates the Fourth Amendment" before entering the protected space. King, 131 S. Ct. at 1858; see U.S. v. Ramirez, 676 F.3d 755, 760-62 (8th Cir. 2012).

Mr. Colquhoon maintains that the police created the danger that evidence was being destroyed inside 361 Fountain Street by knocking and announcing their presence outside the green door and entering the building. However, such conduct does not violate the Fourth Amendment. See King, 131 S. Ct. at 1861 (noting that police officers are encouraged to loudly announce their presence to citizens); DeLaurier, 533 A.2d at 1169-70 (finding that a warrantless entry into a constitutionally-protected space is reasonable under the Fourth Amendment when there exists a danger that evidence will be lost while the police obtain a search warrant). The police knocking and announcing their presence outside a door is an accepted and encouraged law enforcement tool consistent with constitutional mandates. See King, 131 S. Ct. at 1862 (recognizing that "[w]hen law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do"); U.S. v. Drayton, 536 U.S. 194, 204 (2002). "[W]hether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door and speak." King 131 S. Ct. at 1862. Accordingly, "[o]ccupants who choose not to stand on their constitutional rights but instead elect to attempt to destroy evidence have only themselves to blame for the warrantless exigent-circumstances search that may ensue." Id.

Moreover, the police's warrantless entry into the green door of 361 Fountain Street did not violate the Fourth Amendment because it was justified by the danger that evidence would be lost during the time it would take police to obtain a search warrant. See Samboy, 433 F.3d at 159-61; DeLaurier, 533 A.2d at 1169-70. This danger arose following Mr. Swaby's two earlier, rapid drug exchanges at 72 East Street. See Gordils, 982 F.2d at 69-70; Curran, 498 F.2d at 35-

36. Thus, "[g]iven that [the police's activity in front of 361 Fountain Street occurred] after the exigency arose, it could not have created the exigency." King, 131 S. Ct. at 1863 (emphasis in original). Because the officers' decision to knock and announce their presence outside 361 Fountain Street—and their subsequent entry through the green door—was reasonable under the Fourth Amendment, they did not create any exigency, and the exigent circumstances exception is available here. See id. at 1862 (holding that "the exigent circumstances rule [is available] when the police do not gain entry to premises by means of [their own] actual or threatened violation of the Fourth Amendment").

d

The Protective Sweep of Mr. Colquhoon's Apartment

Having established the lawfulness of the police's initial warrantless entry into the green door of 361 Fountain Street and subsequent warrantless entry into Mr. Colquhoon's apartment, this Court now considers the constitutionality of the "protective sweep" that Detective Smith and his officers conducted upon entering the apartment. A protective sweep "is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others."[10] Maryland v. Buie, 494 U.S. 325, 327 (1990); see Jimenez, 419 F.3d at 41. The sweep must "not [be] a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found." Buie, 494 U.S. at 335. "The sweep [must] las[t] no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises." Id. at 335-36; see State v. Hockenhull, 525

[10] The United States Court of Appeals for the First Circuit has recognized that "police who have lawfully entered a residence possess the same right to conduct a protective sweep whether an arrest warrant, a search warrant, or the existence of exigent circumstances prompts their entry." U.S. v. Martins, 413 F.3d 139, 150 (1st Cir. 2005); see U.S. v. Jimenez, 419 F.3d 34, 41 (1st Cir. 2005).

A.2d 926, 932 (R.I. 1987) (finding that "a warrantless search of premises that police officers have lawfully entered is limited to a brief sweep to ascertain whether additional victims or suspects are still on the premises"); Jennings, 461 A.2d at 367. To justify such a search, the State must demonstrate that the officers possessed a reasonable belief, based upon "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." Buie, 494 U.S. at 334.

The totality of the circumstances known to Detective Smith at the time of his entry into 361 Fountain Street supports the constitutionality of the police's protective sweep of Mr. Colquhoon's apartment. Detective Smith testified that before entering the green door of 361 Fountain Street, he knew that Mr. Colquhoon was inside the building. Based on the facts known to him at entry, he reasonably believed that Mr. Colquhoon was aware of the increasing police presence and likely destroying evidence. See Samboy, 433 F.3d at 158-59; Sangineto-Miranda, 859 F.2d at 1513. Detective Smith testified that he ordered the protective sweep of the apartment because he believed that due to the large quantities of narcotics involved in the December 13, 2011 operation, weapons were also likely present in the apartment. Although Detective Smith lacked any particular facts supporting the presence of a weapon inside the apartment, such a belief was nonetheless reasonable under the totality of the circumstances present at the time. See U.S. v. Hearn, 563 F.3d 95, 105-06 (5th Cir. 2009) (quoting U.S. v. Maldonado, 472 F.3d 388, 394 (5th Cir. 2006) recognizing that "[a]lthough the officers had no particular knowledge that weapons were located in [the apartment,] 'fear for officer safety may be reasonable during drug arrests, even in the absence of any particularized knowledge of the presence of weapons, because in drug deals it is not uncommon for traffickers to carry weapons'"); Rodea, 102 F.3d at 1408

(quoting U.S. v. Ramos, 71 F.3d 1150, 1158 n.26 and finding that "'firearms are tools of the trade of those engaged in illegal drug activities'") (internal quotation marks omitted).

The scope of the protective sweep was also proper. Detective Smith testified that he ordered his officers to search only for suspects and weapons. He sent officers into each of the three rooms of the apartment simultaneously to conduct the protective sweep as quickly and efficiently as possible. See Buie, 494 U.S. at 335. Detective Smith personally conducted the sweep of the rear bedroom, where he found Mr. Colquhoon. Mr. Colquhoon was arrested and brought into the apartment's kitchen. Cf. U.S. v. Paradis, 351 F.3d 21, 29-30 (1st Cir. 2003) (determining that a protective sweep of the defendant's apartment violated the Fourth Amendment because the defendant was already in custody before the police swept the apartment and the police knew that the defendant was the only person inside). Detective Smith testified that during his sweep of the rear bedroom, he looked around for hidden weapons. Although he did not find any weapons, Detective Smith observed in plain view large quantities of marijuana, two digital scales, packaging material, and other drug paraphernalia. None of the officers seized any of this evidence, however, until Detective Smith returned with a search warrant. See U.S. v. Soria, 959 F.2d 855, 857 (10th Cir. 1992) (noting that "[t]he fact that in their protective sweep the police may have seen certain items in 'plain view,' but which were not seized until later, does not render either the protective sweep, or the subsequent search pursuant to a warrant, unlawful"); see also U.S. v. King, 222 F.3d 1280, 1285-86 (10th Cir. 2000). In all, Detective Smith's sweep of the rear bedroom and arrest of Mr. Colquhoon took less than 1 minute to complete. See Buie, 494 U.S. at 335-36. This Court is satisfied that the protective sweep of Mr. Colquhoon's apartment did not violate the Fourth Amendment. See Martins, 413 F.3d at 149-51; cf. Hockenhull, 525 A.2d at 931-32.

D

The Inevitable Discovery Exception

The State argues that the evidence seized from Mr. Colquhoon's apartment is alternatively admissible under the inevitable discovery exception to the Fourth Amendment's exclusionary rule. The State contends that, even if Detective Smith and his officers had not entered Mr. Colquhoon's apartment without a warrant, the seized evidence would inevitably have been discovered because the search warrant later obtained for Mr. Colquhoon's apartment was supported by probable cause independent of any information gleaned from the police's warrantless entries. The State asserts that suppressing the evidence would not serve any valid purpose because this case does not present any police misconduct deserving of punishment.

Mr. Colquhoon contends that the inevitable discovery exception is inapplicable in the instant case because the police's seizure of evidence from his apartment is not supported by any source of knowledge independent from their warrantless entry. Mr. Colquhoon argues that the probable cause to search his apartment established in Detective Smith's warrant affidavit is inextricably intertwined with Detective Smith's plain-view observations of evidence in the rear bedroom during the protective sweep. Thus, Mr. Colquhoon concludes, there is no independent evidentiary foundation on which to base the resulting search warrant, and the seized evidence must be suppressed.

The inevitable discovery exception "is a judicial recognition that, if the state establishes by a preponderance of the evidence that the challenged evidence ultimately or inevitably would have been discovered by [police in] some other lawful fashion, 'then the deterrence rationale of the exclusionary rule has so little basis that the evidence should be received'" into evidence. State v. Barkmeyer, 949 A.2d 984, 998 (R.I. 2008) (quoting Nix v. Williams, 467 U.S. 431, 444

(1984)); see Murray v. U.S., 487 U.S. 533, 539 (1988) (finding that "the inevitable discovery doctrine . . . is in reality an extrapolation from the independent source doctrine: Since the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered") (emphasis in original). The exception seeks to balance "the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime" by "putting the police in the same, not a worse, position than they would have been in if no police error or misconduct had occurred." Nix, 467 U.S. at 443; see U.S. v. Herrold, 962 F.2d 1131, 1138-40 (3rd Cir. 1992).

Importantly, the inevitable discovery doctrine only applies to admit evidence seized as the result of unlawful police activity. See Nix, 467 U.S. at 444 (noting that under the inevitable discovery exception, unlawfully obtained evidence that "inevitably would have been discovered by lawful means" is admissible); U.S. v. Reilly, 224 F.3d 986, 995 (9th Cir. 2000) (recognizing that the inevitable discovery exception "applies only when the fact that makes discovery inevitable is born of circumstances other than those brought to light by the illegal search itself"); State v. Firth, 708 A.2d 526, 529 (R.I. 1998) (quoting Nix, 467 U.S. at 448 and acknowledging that the inevitable discovery exception applies to admit evidence which "would inevitably have been discovered without reference to the police error or misconduct . . ."). Because this Court has found that the police's initial warrantless entry into the green door of 361 Fountain Street and subsequent warrantless entry into Mr. Colquhoon's apartment were justified by exigent circumstances, their later seizure of evidence from the apartment using a valid search warrant was not unlawful. See U.S. v. de Soto, 885 F.2d 354, 368-69 (7th Cir. 1989) (finding that because the police's warrantless entry into the defendant's residence was justified by exigent circumstances, their subsequent search of the residence pursuant to a valid search

warrant was lawful); U.S. v. Webster, 750 F.2d 307, 328-29 (5th Cir. 1984) (determining that where the police's initial warrantless entry into the defendant's residence was justified by exigent circumstances, evidence later seized under a valid search warrant was admissible because "[h]aving lawfully entered the room, [the] agents' plain view observation of [evidence] was perfectly legal; including that in the affidavit, therefore, was entirely proper"). Thus, the inevitable discovery exception does not apply to these facts. The Court need not address it further. See Nix, 467 U.S. at 444; Reilly, 224 F.3d at 995; Firth, 708 A.2d at 529.

IV

Conclusion

After reviewing all of the evidence, this Court finds that the evidence seized from Mr. Colquhoon's apartment, including his identity, should not be suppressed. Although Mr. Colquhoon established a reasonable expectation of privacy in the common hallway of 361 Fountain Street, the danger of losing evidence brought about by Mr. Swaby's rapid marijuana exchanges justified the police's initial warrantless entry into that constitutionally-protected space. The same exigent circumstances justified the police's subsequent entry into Mr. Colquhoon's apartment. Once inside the apartment, it was reasonable for the police, under the totality of the circumstances known to them at the time, to conduct a protective sweep of the apartment to ascertain and neutralize any potential dangers. The evidence observed by Detective Smith in plain view during that protective sweep was later lawfully seized pursuant to a valid search warrant grounded on sufficient probable cause. Accordingly, Mr. Colquhoon's motion to suppress is denied.

Counsel shall submit an appropriate judgment for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: **State of Rhode Island v. Colquhoon**

CASE NO: **P1-2012-0915B**

COURT: **Providence County Superior Court**

DATE DECISION FILED: **August 5, 2013**

JUSTICE/MAGISTRATE: **Taft-Carter, J.**

ATTORNEYS:

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